OSB FUTURES TASK FORCE
REGULATORY COMMITTEE | REPORT AND RECOMMENDATIONS

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PARAPROFESSIONAL WORKGROUP REPORT & RECOMMENDATIONS

Introduction

Twenty-five years ago, a task force of the Oregon State Bar developed a proposal for licensing nonlawyers to provide limited legal services to the public in civil cases.[1] The task force cited a report noting that a significant number of people of modest and lower incomes lacked access to legal services. For lack of consensus, however, the task force declined to make any recommendation for or against the proposal, and the OSB's Board of Governors took no further action.

At the time of that 1992 report, seven other states had considered or were considering similar proposals.[2] A commission of the State Bar of California undertook the most comprehensive study and recommended the adoption of a rule authorizing nonlawyers to provide limited legal services in bankruptcy, family-law, and landlord-tenant proceedings.[3] As one member of the state bar's Board of Governors explained at the time, supporters of the proposed rule argued that legal technicians could fill an access-to-justice gap because "[a] lot of people need legal assistance and have no place to go."[4] The state bar's Board of Governors voted down the recommendation. The resistance from California's lawyers was typical of responses in other states. But things began to change. By 2003, both California and Arizona were authorizing qualified nonlawyers to prepare, file, and serve legal documents without attorney supervision.

Washington joined the conversation in 2012, when that state's supreme court, citing the need to address the "wide and ever-growing gap in necessary legal and law related services for low and moderate income persons," approved by rule a new, limited form of legal practitioner known as a "limited license legal technician" (LLLT).[5] Several states took note, appointing committees or task forces to evaluate the Washington model and to make recommendations. The Oregon State Bar (OSB) appointed such a task force, which submitted a final report in 2015 that discussed the merits of a licensing scheme like Washington's but declined to make a recommendation.[6] No further action was taken, until the OSB's Board of Governors convened the present Task Force.

We now present the latest effort to address whether Oregon should license nonlawyers to provide a limited and defined scope of legal services. In early 2017, the Regulatory Committee of this Legal Futures Task Force formed a Paraprofessional Workgroup "to explore the licensing of paraprofessionals including LLLTs, paralegals and document preparers." The workgroup's members and advisors include people who participated in the 2015 task force as well as others new to the subject. Members met regularly from January through April to discuss this issue. The full Regulatory Committee

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[1] OSB LEGAL TECH. TASK FORCE, REPORT TO THE BOARD OF GOVERNORS (1992).
[2] *Id*. at 3.
[3] *Id*.
[4] *David Weintraub, "Calif. Dreaming: Expanded role for non-lawyer specialists considered," ABA Journal* (June 1989) (quoting Frank Winston, a then-member of the California bar's Board of Governors).
[5] Order No. 25700-A-1005, In the Matter of the Adoption of New APR 28—Limited Practice Rule for License Limited Legal Technicians (Wash. 2012) ("LLLT Order"), *available at* http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf.
[6] OSB LEGAL TECHNICIAN TASK FORCE, FINAL REPORT TO THE BOARD OF GOVERNORS (2015).

heard presentations on paraprofessional licensing programs from officials in Utah, Washington, and Canada.

The workgroup reviewed and discussed developments in other jurisdictions, particularly Arizona, California, Colorado, Nevada, New York, Utah, Washington, and Ontario, Canada. We reviewed a wide variety of materials on the regulation of paralegals and the challenges facing self-represented litigants, and engaged in detailed discussions about the arguments for and against licensing paraprofessionals and the elements of a licensing program that would be appropriate for Oregon. We present our recommendations below, followed by an explanation of those recommendations.

GENERAL RECOMMENDATION 1:
IMPLEMENT PARAPROFESSIONAL LICENSING PROGRAM

After careful consideration, the workgroup recommends that the OSB's Board of Governors:

- **Appoint a committee to develop a detailed implementation plan for licensing paraprofessionals consistent with the recommendations in this report**. The implementation plan would include draft rules of admission, practice, and professional conduct for approval by the Supreme Court and adoption by the Board of Governors.

- **Propose amendments to ORS chapter 9 to provide for licensure of paraprofessionals who would be authorized to provide limited legal services, without attorney supervision, to self-represented litigants.** We recommend that the subject areas of such a license be limited, initially, to (1) family law and (2) landlord-tenant proceedings, where the number of self-represented litigants is high and the need for more providers of legal services is acute. We recommend further consideration of other subject areas, specifically including debt-collection. The amendments should authorize the evaluation of applicants, the regulation of licensees, and the assessment of fees.

- **Enact measures to protect consumers who rely on newly licensed paraprofessionals.** Require that applicants be 18 years old and of good moral character and meet minimum education and experience requirements. Require that licensees carry malpractice insurance, meet continuing legal education requirements, and comply with professional rules of conduct like those applicable to lawyers.

Why License Paraprofessionals?

The large number of self-represented litigants is not a new crisis but is a continuing one. Seventeen years ago, the OSB commissioned a detailed study on the state of access to justice in Oregon.[7] The study found "a great need for civil legal services for low and moderate income people"

[7] D. MICHAEL DALE, THE STATE OF ACCESS TO JUSTICE IN OREGON, PART I: ASSESSMENT OF LEGAL NEEDS i (2000).

that was not adequately met.[8] Then, as now, the greatest needs were in family-law and housing advocacy.

The 2000 study on legal needs in civil proceedings found that "[p]art of that need can be met by providing advice and other limited services short of full representation."[9] Judges reported that there was "great unmet need for advice, review of documents, and drafting decrees without the lawyer necessarily appearing for the client in court."[10] Judges also expressed frustration with self-represented litigants' "poorly drafted pleadings," "situations in which a party is obviously unaware of important rights," and challenges that arise when self-represented parties try to present evidence in court.[11] In eviction actions, "judges thought that tenants in most cases can represent themselves reasonably well in court, but often need advice about possible defenses to eviction, how to enter an appearance, and how to present evidence at trial."[12]

The bench and the bar have long promoted pro bono work by attorneys, but the 2000 study found that pro bono services addressed less than five percent of the need.[13] Around the same time, the Family Law Legal Services Commission recommended promoting unbundled legal services—also known as limited-scope representation—as an affordable option for low-income litigants.[14] By 2007, however, little had changed. The State Family Law Advisory Committee acknowledged that self-representation in family-law cases would continue "because no other alternative exists."[15] That Committee concluded that, "rather than bemoaning the loss of a traditional model of justice that involved two attorneys who case-managed the litigation," the model itself must be redesigned to meet the needs of self-represented litigants.[16] The Oregon Judicial Department's 2016 data on self-represented litigants in the Oregon Circuit Courts reinforces the fact that the number of self-represented litigants have only increased.[17]

Other states struggling with the same problem have agreed. In New York, more than 2.3 million self-represented litigants "must navigate the complexities of the state's civil-justice system without the assistance of counsel in disputes over the most basic necessities of life."[18] A task force concluded that self-representation leads to higher costs of litigation, reduced likelihood of settlement, and a drain on court resources at the expense of the system as a whole.[19] Dissatisfied with this state of affairs, the

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[8] *Id*.
[9] The study was not advocating for limited licensing of paraprofessionals. Like other states, Oregon has focused on trying to increase pro bono representation and unbundled services, advocating for legal-aid funding, and developing self-help resources available online and through the courts.
[10] *Id.* at 9.
[11] *Id*. at 9-10.
[12] *Id*. at 10.
[13] *Id*. at ii.
[14] OJD STATE FAMILY LAW ADVISORY COMMITTEE, SELF-REPRESENTATION IN OREGON'S FAMILY LAW CASES 2 (2007).
[15] *Id*. at 5.
[16] *Id*.
[17] *See* Oregon Circuit Court Data on *Pro Se* and Self-Represented Litigants (2016), at APPENDIX B.
[18] TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2012).
[19] *Id*.

Court's Chief Judge, Jonathon Lippman, has proposed using nonlawyers to bridge "the gaping hole."[20] He has argued that qualified nonlawyer specialists in a limited area of practice can be at least as effective as generalist lawyers.[21]

In 2013, the New York City Bar Association reached the same conclusion.[22] After studying the provision of legal services by nonlawyers in other states and countries, the Association's task force questioned the traditional view that all "legal tasks are inherently too complicated for performance by nonlawyers."[23] The following year, New York City launched three pilot programs to test the use of nonlawyer "navigators" in eviction and debt-collection proceedings. In two of the pilot programs, nonlawyer volunteers receive training and supervision to provide "for-the-day" assistance at the courthouse. The third pilot program uses trained caseworkers employed by a nonprofit organization to provide "for-the-duration" assistance in eviction proceedings. A recent study by the National Center for the State Courts shows promising results. In one of the pilot programs, tenants who received nonlawyer assistance were 87 percent more likely to have their affirmative defenses recognized by the court.[24] In the "for-the-duration" pilot program, no tenant who received help was evicted.[25]

While New York is testing its volunteer program, Washington has begun licensing paraprofessionals committed to a long-term legal career. In 2012, the Washington Supreme Court authorized the limited practice of law by licensed legal technicians. The court observed that thousands of self-represented litigants struggle every day to navigate Washington's complex, overburdened, and underfunded legal system. The problem has expanded beyond the very low-income population that legal aid is designed to help, to include a growing number of moderate-income people who cannot afford or choose not to hire lawyers and search instead "for alternatives in the unregulated marketplace."[26] Like Oregon, Washington long ago implemented innovative programs, including self-help centers, court facilitators, and a statewide legal self-help website. But the "significant limitations" of these programs and the "large gaps" in available services result in a substantial unmet need.[27] The Washington court worried that the public will increasingly "fall prey to the perils" of unregulated and untrained nonlawyers.[28] Citing the state bar's failure to address the problem, Chief Justice Barbara Madsen said that the Washington State Supreme Court "had to take a leadership role and say the

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[20] Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, ABA JOURNAL, Jan. 1, 2015, available at: http://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the.

[21] *Id*.

[22] NEW YORK CITY BAR ASSOC., NARROWING THE JUSTICE GAP: ROLES FOR NONLAWYER PRACTITIONERS 30 (2013) ("NEW YORK REPORT").

[23] *Id*. at 4.

[24] REBECCA L. SANDEFUR AND THOMAS M. CLARKE, ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS AND RESEARCH REPORT 4 (2016).

[25] *Id*. at 5.

[26] LLLT Order at 5.

[27] *Id*.

[28] *Id*.

incredible unmet need is more than we can tolerate."[29] Despite initial opposition, Justice Madsen noted that the Washington State Bar Association is now "wholly on board" with working to ensure the success of the program, which is now in its third year of issuing licenses.[30]

Despite the support of the Washington Supreme Court and the Washington State Bar Association, some Washington attorneys remain skeptical about licensing paraprofessionals.[31] Three objections seem to predominate. The first (voiced often in Washington) is that licensing paraprofessionals will take jobs away from lawyers. One obvious response is that the essence of the problem is the large number of litigants who either *cannot or will not* hire a lawyer.[32] The number of such litigants has been ballooning for a quarter century; underemployed lawyers have made no dent in the demand for legal services. A second response, which we embrace, is that the licensure of paraprofessionals should be limited to specific subjects and types of proceedings. Clients who need other legal help, have complex cases, or desire representation in court will still need lawyers. In Washington, once the licensing program was implemented, lawyers stopped objecting when they realized "that clients going to an LLLT are not the ones who will come to lawyers for services."[33]

A second objection to licensing paraprofessionals is that state bars should, instead, try to increase the availability of unbundled legal services, pro bono and reduced-fee services, and self-help materials. In Oregon, one of the reasons for the resistance to paraprofessional licensure in 1992 was the hope that those other approaches could meaningfully reduce the growing number of self-represented litigants. Twenty-five years later, we must admit that that hope was misplaced. The problem is growing worse. The OSB's 2000 study on legal needs in civil proceedings found that our continuing failure to provide access to justice is the failure of a core American value that has caused low- and moderate-income families to lose faith in Oregon's legal system.[34] Survey respondents who sought but were unable to obtain legal assistance were left with "extremely negative" views of our system

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[29] Ralph Schaefer, *Not Every Problem Needs a Lawyer According to Chief Justice*, TULSA LEGAL & BUSINESS NEWS, Sept. 8, 2015.

[30] *Id*.

[31] Lawyers in Utah provided similar feedback – 60 percent of attorneys surveyed by the Utah futures commission disagreed or strongly disagreed with licensing paraprofessionals to provide limited legal services.

[32] For example, in Ontario, Canada, where licensed paralegals have been licensed since 2007 and exist in large numbers (over 7,000 at last count), there has continued to be a steady rise in the number of attorneys licensed to practice law, even as the number of licensed paralegals continues to increase. *Compare* The Law Society of Upper Canada, *2008 Annual Report Performance Highlights* at 7, *available at* http://www.lsuc.on.ca/media/arep_full_08.pdf, and The Law Society of Upper Canada, *2016 Annual Report*, *available at* http://annualreport.lsuc.on.ca/2016/en/the-professions/membership-statistics.html. Moreover, average attorney fees have continued to increase even as large numbers of licensed paralegals entered the legal market. *Compare* Canadian Lawyer Magazine, *The Going Rate* (June 2016), available at http://www.canadianlawyermag.com/images/stories/pdfs/2016/CL_June_16-Survey.pdf, and Canadian Lawyer Magazine, *The Going Rate* (2008), *available at* *http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2008/03CL_legal%20fees%20survey.pdf*. Moreover, studies show that the thousands licensed paralegals in Ontario have had a meaningful impact on improving access to justice. *See generally* LAW SOCIETY OF UPPER CANADA, REPORT TO THE ATTORNEY GENERAL OF ONTARIO PURSUANT TO SECTION 63.1 OF THE LAW SOCIETY ACT 26 (2012).

[33] Schaefer, *supra* note 27, at 1.

[34] DALE, *supra* note 6, at 10.

(significantly worse than the opinions of those who received at least some help).[35] After more than two decades, new innovations are required. Public attention to the problem has sharpened. If the state bar does not act, the legislature might.

A third objection, or at least note of caution, is that the limited-scope license may not be attractive to enough people to justify the regulatory effort. We find reasons, however, to believe that licensed paraprofessionals will be drawn to this new market opportunity and that low- and moderate-income Oregonians will benefit from it. [36]

First, to be successful, licensees will have to package their services at prices that low- and moderate-income litigants can afford. Current market conditions suggest that attorneys have little incentive to offer low flat fees and unbundled services when there is enough full-service work at market rates. When there is not enough high-paying work in one area, attorneys can and do change practice areas, something licensed paraprofessionals would not be able to do. Furthermore, because licensees will be able to provide only limited services, they will not be able to compete if they attempt to charge the same rates as full-service attorneys. Even an unsophisticated litigant will prefer to hire an attorney over a limited-license practitioner if the cost is the same. Unlike attorneys, licensees will be highly incentivized to provide lower cost, unbundled services.

Second, licensees should be able to provide services at a lower cost. Unbundling has long been promoted by the bench and the bar as a way for attorneys to provide affordable services to low- and moderate-income litigants. Licensed paraprofessionals, almost by definition, provide unbundled services. Unlike attorneys (who bill by the hour for the detailed research, analysis, drafting, and court preparation necessary for more complex cases), licensed paraprofessionals will be assisting in routine matters requiring less time and often involving simple, repetitive tasks. Also, a traditional paralegal who gets licensed and sets up a solo practice will not have the same earnings expectations as an attorney who sets up a solo practice. Even if the overhead were the same, the net income that each must earn to find the practice economically viable will be different.

Neither of these predictions is wishful thinking. The third and best reason to think that a limited-scope practice will be economically viable in Oregon is that the model *has* been working in other jurisdictions for many years. Licensed document preparers have been successfully operating businesses in California and Arizona for more than 14 years and in Nevada for 3 years. Ontario, Canada has been licensing paralegals to independently represent clients in a wide range of routine proceedings since 2007.

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[35] *Id*. at 38.

[36] To measure sentiment for the program among future and current paralegals, we sent surveys to paralegal students at Portland Community College and to members of the Oregon Paralegal Association. Most respondents favored licensing paraprofessionals, and a majority of students said they were likely or somewhat likely to apply for a license. By contrast, three-quarters of the paralegals said they were not likely to apply, many saying they were not interested in family law or landlord-tenant law or do not work at a firm that does either. The vast majority of respondents agreed that licensees should meet minimum education and experience requirements and be required to carry malpractice insurance, comply with rules of professional conduct, and take continuing legal education.

Models for Licensing Paraprofessionals

Four states and Ontario, Canada currently allow licensed or registered paraprofessionals to offer limited legal services without attorney supervision. A fifth state, Utah, is expected to begin licensing paraprofessionals as early as 2017. Although each jurisdiction is somewhat unique from the others, generalizations can be made.

In each jurisdiction, the scope of practice is limited, and licensees are subject to regulatory requirements like those for attorneys. All but one program require an applicant to meet minimum education and experience requirements. Most programs require graduation from an accredited paralegal studies program, substantive law-related work experience, or both. Most programs require applicants to carry a bond or malpractice insurance, to comply with rules of professional conduct, and to meet continuing education requirements.

In all jurisdictions but Ontario, there is an emphasis on preparing documents. At a minimum, in each jurisdiction a licensed paraprofessional can complete, file, and serve forms and provide general legal information. While some programs allow licensed paraprofessionals to give limited legal advice or to assist with negotiation, only one jurisdiction authorizes a paraprofessional to represent a client in court.

What follows is a more detailed description of the program in each jurisdiction. For convenience, a side-by-side comparison of the general features is attached as Appendix A.

Arizona

Arizona has been licensing paraprofessionals, called "legal document preparers," since 2003, when the Arizona Supreme Court exempted certified legal-document preparers from the prohibition on the unauthorized practice of law. Individuals and entities that provide document-preparation services may be certified.[37] The Board of Legal Document Preparers issues certificates and performs essential regulatory functions.[38] Fees and assessments are paid into a special fund.[39]

Legal-document preparers can prepare, file, record, and serve legal documents for any self-represented person in any legal matter and may provide general information about legal rights, procedures, or legal options.[40] Legal-document preparers may not provide any "specific advice, opinion, or recommendation" about legal rights, remedies, defenses, options, or strategies, and they are not authorized to negotiate on behalf of clients or to appear in court proceedings.[41] To become a legal-document preparer, applicants must meet minimum education and experience requirements. Generally, applicants must have a high school diploma or a GED plus two years of law-related work experience, a bachelor's degree plus one year of experience, or a paralegal certificate from an accredited program.[42]

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[37] ARIZ. CODE OF JUD. ADMIN. § 7-208(B).
[38] ARIZ. CODE OF JUD. ADMIN. §§ 7-208(D)(4), § 7-201(D)(5)(c).
[39] ARIZ. CODE OF JUD. ADMIN. § 7-208(D)(2).
[40] ARIZ. CODE OF JUD. ADMIN. § 7-208(F)(1).
[41] ARIZ. CODE OF JUD. ADMIN. § 7-208(F)(1).
[42] ARIZ. CODE OF JUD. ADMIN. § 7-208(E)(3)(b)(6).

They also must pass an examination and a background check.[43] Once certified, legal-document preparers are subject to a code of conduct and must complete 10 hours of continuing education each year.[44]

California

In 2000, California enacted a law creating two categories of licensed paraprofessionals: (1) legal document assistants (LDAs) and (2) unlawful detainer assistants (UDAs). LDAs are authorized to prepare a wide variety of legal documents. UDAs provide "advice and assistance" to landlords and tenants in eviction proceedings.[45]

Both LDAs and UDAs must meet education and experience requirements like those in Arizona, but no examination or background check is required.[46] An LDA or UDA simply registers in the county where the principal place of business is located,[47] files a $25,000 bond,[48] and thereafter completes 15 hours of continuing education every two years.[49] LDAs are authorized to complete in a ministerial manner, file, and serve any legal document selected by a client.[50] They also may provide "general published factual information" about "legal procedures, rights, or obligations" if the information is written or approved by an attorney.[51] LDAs and UDAs may not provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, or strategies.[52] Both must use an approved written agreement that includes mandatory disclosures about the limited scope of practice.[53] If a client requires assistance beyond that scope of practice, the LDA or UDA must inform the client that the client requires the services of an attorney.[54]

In 2015, a California task force on civil-justice strategies recommended that the state bar consider adopting a more expansive program, like Washington's.[55] To date, the state bar has not acted on that recommendation.

Nevada

[43] ARIZ. CODE OF JUD. ADMIN. § 7-208(E)(3).
[44] ARIZ. CODE OF JUD. ADMIN. §§ 7-208(F)(2), (G)(2).
[45] CAL. BUS. & PROF. CODE § 6400(a); *see also* CAL.CODE REGS. tit. 16, § 3850, *et seq*.
[46] CAL. BUS. & PROF. CODE § 6402.1.
[47] CAL. BUS. & PROF. CODE § 6402.
[48] CAL. BUS. & PROF. CODE § 6405.
[49] CAL. BUS. & PROF. CODE § 6402.2.
[50] CAL. BUS. & PROF. CODE § 6400(d)(1).
[51] CAL. BUS. & PROF. CODE § 6400(d)(2).
[52] CAL. BUS. & PROF. CODE § 6400(g).
[53] CAL.CODE REGS. tit. 16, § 3950.
[54] CAL. BUS. & PROF. CODE § 6401.6.
[55] CAL. STATE BAR, CIVIL JUSTICE STRATEGIES TASK FORCE: REPORT AND RECOMMENDATIONS (2015).

A 2013 Nevada law authorized individuals to register as a document-preparation service and to provide limited legal help to self-represented persons. Unlike other states, this limited practice of law is regulated by the Secretary of State, rather than by the courts or the state bar.[56]

The requirements for registration and renewal are modest compared to other jurisdictions. Applicants must pass a background check, but they are not required to satisfy any educational or experience requirements or to pass an examination. Although registrants must file a $50,000 bond with the Secretary of State[57] and are prohibited from engaging in deceptive practices,[58] there are no detailed rules of professional conduct and no continuing education requirements.

Registrants are authorized to prepare and submit pleadings, applications, and other documents in an immigration or citizenship proceeding or in any proceeding "affecting the legal rights, duties, obligations or liabilities of a person."[59] Registrants also may prepare wills and trusts[60] and provide published factual information about legal rights, obligations, and procedures, if that information was written or approved by an attorney.[61] The statute also mandates the use of written agreements with mandatory disclosures about the limited scope of practice.[62]

Although registrants are authorized to prepare a wide range of legal documents, they may not offer other legal services. Registrants are expressly prohibited from communicating a client's position to another person; negotiating a client's rights or responsibilities; appearing on behalf of a client in court; or providing any advice, explanation, opinion, or recommendation about a client's legal rights, remedies, defenses, options, or the selection of documents or strategies.[63]

Washington

In 2014, Washington's first prospective LLLTs enrolled in approved courses at law schools, and the first graduates were licensed in 2015.[64] Applicants must have an associate's degree or better, and must complete 45 hours of paralegal studies and 15 hours of family-law-specific course work from a law school or a paralegal program approved by either the ABA or the LLLT Board.[65] Washington's work-experience requirement is substantial: eligible applicants must have 3,000 hours of law-related work

[56] NEV. REV. STAT. § 240A.250, *et seq*.
[57] NEV. REV. STAT. §§ 240A.110(3), 240A.120.
[58] NEV. REV. STAT. § 240A.240.
[59] NEV. REV. STAT. §§240A.030(1)(a), 240A.040(2)–(3).
[60] NEV. REV. STAT. § 240A.040(1).
[61] NEV. REV. STAT. § 240A.240(6).
[62] NEV. REV. STAT. §§ 240A.180, 240A.190.
[63] NEV. REV. STAT. § 240A.240.
[64] REPORT OF THE LIMITED LICENSE LEGAL TECHNICIAN BOARD TO THE WASHINGTON SUPREME COURT: THE FIRST THREE YEARS 4 (2016).
[65] ADMIS. TO PRAC. RULE 28(D)(3).

experience under the supervision of an attorney.[66] Applicants also must pass three separate examinations and a background check.[67]

Once licensed, LLLTs must comply with requirements like those in other states, including obtaining malpractice insurance, complying with rules of professional conduct, and completing 10 hours of continuing education each year.[68] Currently, LLLTs may provide limited legal services in only one practice area: family law.[69] Even within the approved practice area, LLLTs may not assist clients with more complex issues, including de facto parentage or nonparental-custody actions or cases involving the Indian Child Welfare Act, property division, bankruptcy, anti-stalking orders, certain major parenting-plan modifications, UCCJEA jurisdiction issues, and disputed relocation actions.[70]

Like licensed paraprofessionals in other states, LLLTs may select, complete, file, and serve approved family-law pattern forms.[71] LLLTs also may explain the relevance of facts, inform clients about court procedures, review and explain documents received from the opposing party's attorney, and perform legal research.[72] However, an LLLT may not draft other legal documents or letters to third parties setting forth legal opinions, unless the document or letter is first reviewed and approved by a Washington-licensed attorney.[73]

Other legal services traditionally provided by attorneys remain off-limits to LLLTs. The rules do not authorize LLLTs to provide legal advice beyond explaining forms, documents, and procedures. LLLTs are expressly prohibited from negotiating the client's rights, attending depositions, appearing in court, and initiating or responding to appeals.[74] Washington is considering expanding the scope of services to better meet the needs of clients and to increase judicial efficiency, but, at present, the services that an LLLT may perform are relatively limited.[75]

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[66] ADMIS. TO PRAC. RULE 28(E)(2).
[67] ADMIS. TO PRAC. RULE 28(E)(1); APP. REG. 5(D).
[68] ADMIS. TO PRAC. RULE 28(I).
[69] ADMIS. TO PRAC. RULE 28, APP. REG 2(B)(3). Washington may soon authorize a second area of limited practice in "Estate and Healthcare Law," to address unmet need for services to seniors and "people of all ages who are disabled, planning ahead for major life changes, or dealing with the death of a relative." Washington Limited License Legal Technician Board, Memorandum to the Board of Governors, January 9, 2017.
[70] ADMIS. TO PRAC. RULE 28, APP. REG. 2(B)(3).
[71] ADMIS. TO PRAC. RULE 28(F)(6).
[72] ADMIS. TO PRAC. RULE 28(F)(1)-(3), (5), (7).
[73] ADMIS. TO PRAC. RULE 28(F)(8).
[74] ADMIS. TO PRAC. RULE 28(H); APP. REG. 2(B)(3).
[75] *See* WASHINGTON LLLT BOARD, MEETING MINUTES (November 17, 2016) (reporting the recommendation of the Family Law Advisory Committee to expand the scope of permitted services); *see also* UTAH PARALEGAL PRACTITIONER STEERING COMMITTEE, MINUTES 7 (July 21, 2016) (reporting that Washington may permit LLLTs to talk to opposing counsel when appropriate and to appear in court solely to assist clients in answering questions of fact).

By early 2017, only 20 LLLTs had been licensed, about half of whom remained employed by law firms.[76] Reportedly, a large number of students are enrolled in courses required for licensing, but no firm numbers were available.

Utah

Inspired by Washington, the Utah Supreme Court convened a task force in May 2015 to study whether Utah should develop a similar program.[77] The Chair, Justice Himonas, described the task as the examination of "a market-based, supply-side solution to the unmet needs of litigants."[78] While expressly acknowledging the value of lawyers, the task force recognized that self-represented litigants in areas "where the law intersects everyday life" need information, advice, and assistance that they are not getting despite years of promoting pro bono and low-cost services.[79]

Ultimately, the task force recommended licensing paraprofessionals to provide limited legal services in three specific areas. Describing its report as a "planning blueprint," the task force recommended that the Utah Supreme Court appoint a steering committee to develop a detailed implementation plan.[80] The Utah Supreme Court accepted the recommendations, and the steering committee is expected to complete its work in 2017. The first "paralegal practitioners" could be licensed as early as the end of the year.[81]

Although the final rules are still being drafted, the task force's report, meeting minutes of the steering committee, and rule drafts disclose many details of the new program. Applicants must be of good moral character and pass an examination.[82] They must have at least an associate's degree and would be required to complete a paralegal studies program from an accredited institution, including approved practice-area course work.[83] For substantive law-related work experience, the task force concluded that Washington's bar was too high.[84] Utah will require 1,500 hours of law-related work experience that would include both paralegal work and law school internships, clinical programs, and clerkships.[85] Once licensed, paralegal practitioners would be required to comply with rules of professional conduct modeled on those for lawyers and to meet continuing legal education requirements.[86]

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[76] See WASH. STATE BAR ASSOC., LLLT DIRECTORY, at http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians/Directory.
[77] UTAH SUPREME COURT TASK FORCE TO EXAMINE LIMITED LEGAL LICENSING, REPORT AND RECOMMENDATIONS 7 (2015) ("UTAH REPORT").
[78] Justice Deno Himonas and Timothy Shea, *Licensed Paralegal Practitioners*, 29 UTAH BAR JOURNAL 16 (2016).
[79] UTAH REPORT, *supra* note 73, at 7.
[80] *Id*. at 7.
[81] Himonas and Shea, *supra* note 74, at 19.
[82] UTAH REPORT, *supra* note 73, at 36.
[83] PARALEGAL PRACTITIONER STEERING SUBCOMMITTEE, MINUTES (July 21, 2016).
[84] UTAH REPORT, *supra* note 73, at 29 (describing Washington's requirements as "so arduous that it remains to be seen whether LLLTs can provide services at rates significantly less than those provided by lawyers").
[85] PARALEGAL PRACTITIONER STEERING SUBCOMMITTEE, MINUTES (August 18, 2016).
[86] UTAH REPORT, *supra* note 73, at 36.

Utah will license paraprofessionals to provide limited legal services for three types of proceedings: family law, eviction, and debt collection. Family-law cases will be limited to those for temporary separation, divorce, paternity, cohabitant abuse, civil stalking, custody and support, and name changes.[87] For those types of proceedings, licensees will be able to select, prepare, file, and serve only court-approved forms and, when no pattern form exists, provide only "general information, opinions or recommendations about possible legal rights, remedies, defenses, procedures, options or strategies."[88]

Although the scope of services will be "centered on completing forms,"[89] Utah will nevertheless "take a bolder step" than other states.[90] Within an approved area, if a pattern form exists, then a licensee may have "extensive authority" to give advice about how to complete the form, to explain supporting documents, and to "advise about the anticipated course of the proceedings."[91] A licensee may be authorized to explain the other party's documents and "to counsel and advise a client about how a court order affects the client's rights and obligations."[92] Licensees will be able to represent clients in both mediated and nonmediated negotiations[93] and, if required, may be authorized to prepare a written settlement agreement.[94]

The boldness ends at the courthouse steps. The task force concluded that eliciting testimony and advocacy in hearings "is at the heart of what lawyers do" and should be "reserved for a licensed lawyer."[95] Therefore, licensees will not be allowed to present arguments, question witnesses, or otherwise represent a client in court.

Ontario

While the Washington and Utah programs are innovative in the United States, Ontario (Canada) began licensing paraprofessionals in 2007 to provide full legal services for several discrete types of proceedings. Ontario's program is a useful comparator, because it is structurally similar to the Washington and Utah programs but has been operating much longer. The most notable difference is that, for approved types of proceedings, licensed paralegals perform all tasks that lawyers traditionally perform, including representing clients in court.

[87] *Id*. at 8.
[88] *Id*. at 32.
[89] PARALEGAL PRACTITIONER STEERING SUBCOMMITTEE, MINUTES 2 (July 21, 2016).
[90] UTAH REPORT, *supra* note 73, at 30.
[91] *Id*. at 32.
[92] *Id*. at 33.
[93] PARALEGAL PRACTITIONER STEERING SUBCOMMITTEE, MINUTES (August 18, 2016).
[94] UTAH REPORT, *supra* note 73, at 33.
[95] *Id.* at 21.

Licensees may represent clients in four general types of proceedings: small-claims proceedings, provincial offenses before the Ontario Court of Justice,[96] summary-conviction proceedings,[97] and proceedings before administrative tribunals (including landlord-tenant and immigration matters).[98] A licensed paralegal may select, draft, complete, or revise any legal document for use in the proceeding; provide advice about any legal rights or responsibilities related to the proceeding; and negotiate legal rights and responsibilities on the client's behalf.[99] Licensees also may go to court and advocate for their clients.

Applicants must graduate from an accredited paralegal program, which must include general studies, paralegal studies, and a 120-hour field-work requirement. In addition to a background check, applicants must pass an examination that tests their knowledge of substantive and procedural law, professional responsibility, ethics, and practice management. Once licensed, paralegals must maintain malpractice insurance, comply with professional rules of conduct, and meet continuing education requirements.[100]

In 2012, Ontario completed a five-year review of the program, finding that the program had been successful and "provided consumer protection while maintaining access to justice."[101] The review also found a high degree of client satisfaction—74 percent of clients surveyed were satisfied or very satisfied with the paralegal services they received, and 68 percent thought the services were a good value.[102] In late 2016, the Attorney General issued a lengthy report recommending that the scope of the paralegal license be expanded to include certain family-law matters.[103] The proposal remains under review.

Other States

At least two other jurisdictions have recently considered licensing paraprofessionals. Both jurisdictions decided instead to develop a court "navigator" program, using nonlawyer volunteers to provide limited legal services in eviction and debt-collection proceedings.

As noted, in 2013 the New York City Bar Association studied the potential role of nonlawyers in addressing the access-to-justice gap, surveying jurisdictions inside and outside of the United States and reviewing paid and volunteer nonlawyer participation in the legal-services market. Among other

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[96] Provincial offenses are minor noncriminal offenses, including traffic violations and violations of municipal ordinances, like excessive noise complaints.
[97] Summary-conviction proceedings are limited to those in which the maximum penalty is no greater than six months in prison and/or a $5,000 fine.
[98] LAW SOC'Y ACT, BY-LAW 4, § 6(2).
[99] *Id*.
[100] The requirements are contained in By-Law 4 to the Law Society Act, but a useful summary of the requirements is available at: http://www.lsuc.on.ca/licensingprocessparalegal.aspx?id=2147495377.
[101] LAW SOCIETY OF UPPER CANADA, REPORT TO THE ATTORNEY GENERAL OF ONTARIO PURSUANT TO SECTION 63.1 OF THE LAW SOCIETY ACT 26 (2012).
[102] *Id*. at 25.
[103] JUSTICE ANNEMARIE E. BONKALO, FAMILY LEGAL SERVICES REVIEW (2016) (reviewing at great length the need and appropriate role for nonlawyers' assistance in family-law matters).

proposals, the Association recommended that New York adopt "some form of Washington State's legal technician model."[104] Despite the recommendation, New York is instead running three simultaneous pilot programs to test the use of volunteer court navigators in eviction and debt-collection proceedings.[105]

In 2015, an advisory committee of the Colorado Supreme Court formed a Limited License Legal Technician Subcommittee to study whether Colorado should implement some form of the Washington program. The subcommittee met at least four times through early 2016, with members expressing interest in developing a nonlawyer assistance program of some kind but preferring the New York navigator model.[106] After determining that the greatest area of need is help negotiating settlements and preparing for trial in eviction and debt-collection cases, the subcommittee was renamed and is now developing a pilot program that, if adopted, will use nonlawyer volunteers to advocate for unrepresented litigants in settlement negotiations and to assist them in preparing for court.[107]

Essential Elements of an Oregon Model

We do not recommend that Oregon adopt wholesale any of the other models discussed above. Instead, for every element of the program design, we separately weighed the advantages, disadvantages, costs, and benefits of various alternatives, including alternatives not considered by other states. We also considered critiques of existing programs and proposals to improve them.

In making recommendations, we aimed to balance three competing interests: (1) increasing access to justice by creating a viable, effective model for providing limited legal services; (2) protecting consumers from unqualified, negligent, or unethical practitioners; and (3) cost-effectiveness.

Any model for limited-scope licensure must address at least these questions: What minimum qualifications should a licensee have? How do we protect clients and the public? What is the proper scope of the license? All three questions are related. If the scope of the license is very limited, then the risk to clients is commensurately lower, and the minimum qualifications and regulatory scheme should reflect that lower risk. Some jurisdictions have, in our view, missed the mark on that calculus, imposing substantial barriers to entry and expensive regulatory burdens while authorizing licensees to do little more than complete, file, and serve standard forms. We believe a well-tailored Oregon paraprofessional licensing program has the potential to attract many qualified applicants. In addressing these questions, we considered the types of proceedings in which a high number of self-represented litigants participate; the complexity of those proceedings; the types of services that self-represented litigants say they want, need, and are willing to pay for; and whether a well-educated and experienced paraprofessional could provide those services competently.

We also concluded that the most we could realistically achieve, given the time constraints of this task force, would be to propose the essential elements of a paraprofessional licensing program, creating a "planning blueprint" for implementation by a future committee. In Utah, it has taken more than a year

[104] NEW YORK REPORT, *supra* note 20, at 30.
[105] SANDEFUR AND CLARKE, *supra* note 22.
[106] LTD. LICENSE LEGAL TECH. SUBCOMM., COLORADO SUP. CT. ADV. COMM., MEETING MINUTES (January 22, 2016).
[107] PROVIDERS OF ALT. LEGAL SERV. SUBCOMM., COLORADO SUP. CT. ATTY REG. ADV. COMM., MEMORANDUM (February 7, 2017).

for a committee four times the size of our workgroup to draft detailed rules and a plan to implement the essential recommendations of the task force. We endorse Utah's careful approach. Therefore, we recommend that the Board of Governors appoint a committee to draft, for approval by the Oregon Supreme Court, detailed rules of admission, practice, and professional conduct consistent with the following specific recommendations.

Minimum Qualifications

RECOMMENDATION NO. 1.1: An applicant should be at least 18 years old and of good moral character. Attorneys who are suspended, resign Form B, or are disbarred from practicing law should not be eligible for a paraprofessional license.

Because licensed paraprofessionals will be authorized to engage in the limited practice of law, they should be required to meet the same minimum age and character requirements as attorneys, as set forth in ORS 9.220. Specifically, an applicant should be at least 18 years old and of good moral character. Attorneys who are suspended for disciplinary reasons, resign Form B while discipline is pending, or disbarred from the practice of law should also be prohibited from engaging in the *limited* practice of law. Suspended, resigned Form B, or disbarred lawyers therefore should not be eligible to apply for a paraprofessional license.

RECOMMENDATION NO. 1.2: An applicant should have an associate's degree or higher and should graduate from an ABA-approved or institutionally-accredited paralegal studies program, including approved coursework in the subject matter of the license. Highly experienced paralegals and applicants with a J.D. degree should be exempt from the requirement to graduate from a paralegal studies program.

To ensure that licensees will have the general knowledge and skills required to provide limited legal services, we recommend imposing minimum education requirements. Although an education requirement seems appropriate, not everyone agrees. For example, the 1992 Oregon task force emphasized the need for license affordability.[108] Similarly, Nevada's program does not require a degree of any kind. Even the amount of general education required is subject to debate. Arizona and California require only a high school diploma or a GED for applicants with at least two years of law-related experience. In contrast, Washington and Utah require applicants to have an associate's degree or better.

Although affordability is clearly important, we concluded that it is equally (or more) important to ensure that licensees will have the general knowledge and skills necessary to competently provide services without attorney supervision. We also believe that a high school diploma, although perhaps sufficient for mere document preparation, may not be enough when the approved scope of services is broader. In short, we agree with Washington and Utah that an associate's degree is the appropriate minimum degree.

Applicants with only the minimum amount of required experience will be better prepared for practice if they also have some formal legal education. Paralegal studies programs prepare a person for a professional career in the law. The core curriculum includes both practical skills and legal theory and

[108] OSB LEGAL TECH. TASK FORCE, *supra* note 1, at 8.

covers essential subjects like civil procedure, legal ethics, and legal research. Programs also offer courses in family law, real-property law, and other practice areas in which paralegals are commonly employed. Most programs terminate with an associate's degree, a bachelor's degree, or a paralegal certificate. For comparison's sake, although attorneys today study the law at a postgraduate level, until the 1960s, the standard was only an undergraduate bachelor of law degree.[109] We concluded that, like other jurisdictions, Oregon should require applicants to have a degree or a certificate from an ABA-approved or institutionally accredited paralegal studies program.

To ensure that licensees will have adequate knowledge of each area in which the licensee will practice, applicants should be required to complete subject-matter-specific course work. Washington, for example, requires applicants to have instruction in a licensee's approved practice area.[110] The state's LLLT Board determines the key concepts or topics that practice-area instruction must include and the number of credit hours required.[111] Washington also designed an entirely new curriculum. Initially, only Washington law schools could offer the approved courses, which increased the cost substantially, limited the ability of students to get financial aid, and required students to move near one of the law schools for the length of the program. Washington has since amended its rules to allow community colleges to offer the approved curriculum.[112]

We agree with requiring course work, but we do not recommend the Washington approach. Licensees will offer limited services to a finite market, which will create a practical limit on the likely number of applicants. Designing an entirely new paralegal studies program for future licensees is not cost-effective or practical for Oregon. Two ABA-approved paralegal programs are currently in Oregon, including one at Portland Community College. Those institutions already have expertise in designing and implementing high-quality educational programs for paralegals, and they can offer subject-matter courses as part of their existing programs. We recommend that an implementation committee reach out to these institutions early to explore their interest in developing an approved subject-matter course that would adequately prepare potential licensees for limited practice.[113]

Finally, we recommend exempting two categories of applicants from the requirement of graduation from a qualified paralegal studies program. First, applicants with a J.D. degree already have more formal legal education than a paralegal studies program offers, making the requirement redundant. Second, paralegals with a high level of experience should be exempt. Washington and Ontario, for example, adopted waivers for certain paralegals with many years of experience working under the supervision of an attorney. We recommend a lower experience threshold than the 10 years that Washington requires. For comparison, to apply for the industry-recognized Professional Paralegal certification from the National Association for Legal Professionals, an applicant must have five years of

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[109] David Perry, *How Did Lawyers Become 'Doctors'?: From the L.L.B. to the J.D.*, 4 PRECEDENT 26 (2013).
[110] ADMIS. TO PRAC. RULE 28(D)(3)(c).
[111] *Id*.
[112] THOMAS M. CLARKE AND REBECCA L. SANDEFUR, PRELIMINARY EVALUATION OF THE WASHINGTON STATE LIMITED LICENSE LEGAL TECHNICIAN (2017).
[113] One of the institutions reached out to the workgroup when they learned about our work, but there was not enough time to engage in any meaningful discussion about developing appropriate practice-area courses.

paralegal experience.[114] Although the exact scope of the exemption should be left to an implementation committee to decide, we believe that five years of full-time paralegal experience under the supervision of an attorney should be an adequate substitute for obtaining a certificate from a qualified paralegal studies program.[115]

RECOMMENDATION NO. 1.3: Applicants should have at least one year (1,500 hours) of substantive law-related experience under the supervision of an attorney.

Most attorneys learn to practice law on the job and not before. Ideally, attorneys would learn under the supervision or mentorship of a more experienced attorney, but often that is not the case. There is no reason to follow the "learn on the job" model when licensing paraprofessionals. We therefore recommend that applicants should have at least one full year (1,500 hours) of substantive law-related experience working under the supervision of an attorney.[116] The experience should be acquired in the two years preceding the date of application for the license.[117]

Washington requires two years' worth of experience. Given the proposed requirement that applicants have a college degree and formal legal education, including approved subject-matter coursework, we believe that one year's equivalent of substantive law-related experience under attorney supervision is adequate.

Regulatory Requirements for Licensees

Attorneys are subject to an array of regulatory requirements meant to protect consumers from incompetent or unethical practitioners. Attorneys must comply with detailed rules of professional conduct, carry malpractice insurance, and meet continuing legal education requirements. Other than Nevada, all jurisdictions that license paraprofessionals subject them to the same or similar requirements that are imposed on attorneys. We recommend that Oregon do the same.

RECOMMENDATION NO. 1.4: Licensees should be required to carry liability insurance in an amount to be determined.

Arizona is the only jurisdiction that does not require licensed paraprofessionals to carry professional liability insurance or to obtain a bond. Even Washington, which does not require attorneys to carry insurance, requires LLLTs to be insured. To protect those who may be harmed by the negligent

[114] NALS CERTIFICATION RESOURCE MANUAL 5 (2016).
[115] If at least one year (1,500 hours) of the attorney-supervised, substantive law-related experience was completed in the prior two years, the applicant would also satisfy the minimum experience requirement.
[116] Most applicants will meet the requirement by working as a paralegal under attorney supervision, but the rule should be drafted to recognize other appropriate, attorney-supervised work experience like, for example, a clerkship by a law school graduate.
[117] At a presentation on the workgroup's progress on April 14, 2017, a member of the OSB Board of Governors suggested requiring the applicant to obtain a written certification from the supervising attorney. Washington has a similar requirement, and the workgroup unanimously agreed that the Oregon rules should include a similar provision.

provision of legal services, we recommend that licensees be required to carry malpractice insurance in an amount to be determined, preferably through the Professional Liability Fund.

RECOMMENDATION NO. 1.5: Licensees should be required to comply with professional rules of conduct modeled after the rules for attorneys.

Every jurisdiction other than California requires licensed paraprofessionals to comply with a code of conduct, although Nevada requires only that licensees refrain from certain deceptive practices. In Washington, Utah, and Ontario, the rules of conduct for paraprofessional licensees are substantially identical to the rules of conduct for attorneys. To protect the public from unethical practitioners, and to promote the integrity and reputation of licensed paraprofessionals, we recommend that licensees be required to comply with rules of conduct substantially the same as the Rules of Professional Conduct that apply to Oregon lawyers.

RECOMMENDATION NO. 1.6: Licensees should be required to meet continuing legal education requirements.

Requiring continuing legal education will assist licensees "in maintaining and improving their competence and skills and in meeting their obligations to the profession," just like attorneys.[118] Therefore, we recommend that licensees be required to complete a minimum number of hours of continuing legal education in each reporting period.[119] In determining the number of hours and required topics, the implementation committee should take into account the cost and availability of affordable CLE programs that will be relevant to the licensees' limited scope of practice.

RECOMMENDATION NO. 1.7: To protect the public from confusion about a licensee's limited scope of practice, licensees should be required to use written agreements with mandatory disclosures. Licensees also should be required to advise clients to seek legal advice from an attorney if a licensee knows or reasonably should know that a client requires services outside of the limited scope of practice.

Licensing paraprofessionals will introduce a new type of legal-services provider into the market. The public cannot be presumed to know the difference between an attorney and a limited-license paraprofessional. To avoid confusion, we recommend that licensees be required, as they are in other jurisdictions, to use written fee agreements with mandatory disclosures explaining that licensees are not attorneys and describing the limited scope of services that a licensee may provide.

Furthermore, it is inevitable that, in some cases, a client will require legal services that are beyond the licensee's limited scope of practice. Licensees should not be allowed to remain silent, but should be required to affirmatively recommend that a client seek legal advice from an attorney when the licensee knows or reasonably should know that a client requires legal services outside of the licensee's scope of practice.

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[118] OSB MINIMUM CONTINUING LEGAL EDUCATION RULES AND REGULATIONS (2016).

[119] The details of the rule, including the reporting period and required subjects, should be left to the implementation committee to decide, but the workgroup believes that a requirement equating to 10 hours per year should be sufficient given the limited areas of practice.

Scope of the License

People will employ licensed paraprofessionals only if the licensees can provide legal services that consumers need and want. Oregon consumers are already able to access an extensive online library of pattern forms in the area of family law. To be useful to self-represented litigants, licensees must be able to do more than simply complete and file pattern forms. The question is, how much more should licensees be permitted to do?

Licensees will, of necessity, be specialists. Their practices will be narrowly limited to certain types of routine matters for which they will have education, training, and experience before they are fully licensed to provide paraprofessional services. Just like attorneys, they will learn more and become more skilled with each month and year of practice, preparing the same forms, answering the same questions, and assisting in the same types of matters day after day. Licensees will carry liability insurance, comply with professional rules of conduct, and participate in continuing education. Such licensees will not be casual volunteers or shady, unlicensed document preparers advertising in corners of the internet. Licensed paraprofessionals will be skilled professionals, providing limited but much-needed assistance to the large number of individuals who have been unhappily navigating the court system alone, without attorneys, for decades.

For these reasons, the scope of the license should be commensurate with the needs of self-represented litigants and requirements should imposed on applicants and licensees to ensure their competence and integrity in practice. Licensees should be able to provide fairly robust out-of-court legal services, but should be narrowly confined to certain routine proceedings in which overwhelming numbers of litigants are self-represented.

RECOMMENDATION NO. 1.8: Initially, licensees should be permitted to provide limited legal services to self-represented litigants in family-law and landlord-tenant cases. Inherently complex proceedings in those subject areas should be excluded from the permissible scope of practice.

Many observers have called for the licensing a legal paraprofessional, who would serve as the legal equivalent of a nurse practitioner, and meet all of a person's "basic" legal needs. That may be the future of the law—a world in which all attorneys are specialists and all "routine" legal work is performed by well-qualified but less expensive nonlawyers. For present purposes, however, we focused on the acute, demonstrable need in two areas: family law and housing law.

The numbers of self-represented litigants in these areas are staggering. In 86 percent of Oregon family-law cases, one or both litigants are unrepresented.[120] In landlord-tenant cases, the numbers are even higher. Despite more than two decades of efforts to encourage pro bono and unbundled legal services, the problem has grown. As a joint family-law task force concluded in 2011, the high number of self-represented litigants has become a permanent feature of Oregon's legal system.[121] Our immediate goal is to better meet the legal needs of these litigants.

[120] OSB, *supra* note 5, AT 4.
[121] OSB/OJD JOINT TASK FORCE ON FAMILY LAW FORMS AND SERVICES, REPORT 4 (2011).

Oregon has been a leader in this area. Since 2000, Oregon courts have used family-law facilitators—court-supervised nonattorney staff, who help self-represented litigants select, complete, file, and serve pattern forms and provide general information, including information about court procedures. Unstable funding, limited availability, and the fear of engaging in the unauthorized practice of law get in the way of such efforts. But the proven success of family-law facilitators in Oregon and other states suggests that knowledgeable and experienced paralegals can make a meaningful difference.

In landlord-tenant matters, nonlawyers already participate, but only on behalf of landlords. These nonlawyer representatives are repeat players who know the laws and understand the procedures, giving landlords a significant advantage over most tenants. Tenants have no choice but to represent themselves or to hire an attorney. Most self-represent. Early results from the New York Navigator pilot program show that even inexperienced volunteers with a little training can have a significant positive impact. Tenants who received nonlawyer assistance were 87 percent more likely to have their affirmative defenses recognized by the court.[122]

In light of the clear access-to-justice gap in family law and housing law, we recommend that the OSB move toward the licensure of paraprofessionals for limited practice in those areas. A third subject area worthy of consideration is debt collection. Utah is moving in that direction, and the 1992 and 2015 Oregon task forces thought debt-collection cases might be appropriate for limited assistance. In New York City, debt collection is one of the two areas of focus for the navigator pilot programs. Although, for reasons of time, we were unable to give debt collection the same attention that we gave family law and housing law, we recommend this for further study.

With respect to family law, we recommend that certain proceedings be excluded from the scope of the limited license due to their inherent complexity, such as de facto parentage or nonparental-custody actions, disposition of debt and assets if one party is in a bankruptcy, and custody issues involving the Indian Child Welfare Act. In Utah, the scope of practice for family law will be limited to proceedings for divorce, paternity, temporary separation, cohabitant abuse, civil stalking, custody and support, and name change.[123] Washington has a more extensive list of specific exclusions within otherwise-approved family-law matters.[124] In drafting the rules, an implementation committee should include any exclusions that are reasonable and necessary to protect self-represented litigants, but should keep in mind that for most self-represented litigants, the alternative to receiving assistance from a licensee will be receiving no assistance at all. Washington has already begun to rethink some of its exclusions.

RECOMMENDATION NO. 1.9: Licensees should be able to select, prepare, file, and serve forms and other documents in an approved proceeding; provide information and advice relating to the proceeding; communicate and negotiate with another party; and provide emotional and administrative support to the client in court. Licensees should be prohibited from representing clients in depositions, in court, and in appeals.

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[122] SANDEFUR AND CLARKE, *supra* note 22, at 4.
[123] UTAH REPORT, *supra* note 73, at 30.
[124] ADMIS. TO PRAC. RULE 28, REG. 2(B)(3).

Many task forces, committees, and observers have embraced the idea of licensing paraprofessionals, but even proponents wrestle with the proper scope of the license. As attorneys, we are trained to see nuance and complexity in even the simplest disputes. We take a custom approach to every matter, preferring to control all aspects of the case from intake to appeal. Studies show that self-represented litigants in routine matters often cannot afford, or do not want, the level of service that attorneys provide.[125] In matters that self-represented litigants perceive as simple or low risk, like an uncontested divorce, they often make a reasonable cost-benefit assessment and decide not to hire an attorney. At the same time, they report a willingness to pay for lower-cost, limited assistance to help them navigate the process.

In deciding what licensees should be permitted to do, we considered what their education, training, and experience will prepare them to do and what self-represented litigants need and want the licensees to do in the approved types of proceedings.

At a bare minimum, licensees should be permitted to select, prepare, file, and serve model forms and other documents in an approved type of proceeding. Even mere document preparers in other states can do that much. But if that is all a licensee can do, there may be little reason to hire one. Oregon already has extensive family-law model forms, and many forms may now be completed and filed through an automated online interview process. If no model form is available, there are an endless array of websites with free or low-cost forms and documents.

What self-represented litigants need is not ministerial form-filling assistance, but help selecting the forms and understanding what the forms require and how that information will be used. They need help understanding what information to gather and where to find it. They need help understanding the process, from filing to entry of the judgment. They need to know what to expect at a hearing, what to bring, how to dress and act, and how to organize their paperwork to present to the court. Without an attorney to ask, self-represented litigants are left to rely on advice from friends and family; to scour the internet for information, which is often irrelevant or wrong; and, worst of all, to hire unlicensed and unregulated nonlawyers who advertise low-cost legal help. Therefore, we recommend that licensees be authorized to provide legal information and advice in connection with approved proceedings.

Self-represented litigants also need help communicating and negotiating with other parties. For example, at the first appearance in eviction proceedings, the parties are encouraged to negotiate stipulated agreements, if appropriate. The tenant, never having seen one before, may have no idea whether the offered terms are reasonable or whether she should (or even may) ask for something better. Some self-represented litigants are poorly educated; some have limited English proficiency; and many may be too overwhelmed, afraid, or angry to communicate or negotiate effectively. In Utah, anyone can represent a person in a mediated negotiation, so licensees will also be able to do so. But Utah's implementation committee has decided that licensees also should be able to communicate with and represent clients in nonmediated negotiations. In Washington, licensees are prohibited from representing clients in mediations, but Washington is already working on eliminating that restriction.

[125] *See*, *e.g.*, IAALS, CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT (2016).

We recommend that Oregon, like Utah, allow licensees to communicate and negotiate with another party in an approved proceeding.

Finally, licensed paraprofessionals should be allowed to provide emotional and administrative support to their clients in court. When individuals represent themselves, they are already at a great disadvantage. They often have no idea what to expect at a hearing. For most litigants and even many attorneys, appearing in court is intimidating and stressful. It can be difficult for self-represented litigants to stay focused on the proceeding while also trying to take notes, sort through pages of documents, or just figure out where in a document to find the information the judge requested. Licensees should be empowered to help self-represented litigants be better prepared and more effective in court.[126]

Ontario, Canada is the only jurisdiction studied by the workgroup that allows licensed paraprofessionals to appear and argue on behalf of clients in court. Licensees in Ontario represent clients in summary-conviction proceedings and in the Ontario Court of Justice, where licensees defend clients charged with municipal offenses. Other states that license paraprofessionals, including both Washington and Utah, prohibit licensees from representing clients in depositions, in court, and in appeals. We agree that those functions should continue to be provided only by licensed attorneys.

Other Recommendations

RECOMMENDATION NO. 1.10: Given the likely modest size of a paraprofessional licensing program, the high cost of implementing a bar-like examination, and the sufficiency of the education and experience requirements to ensure minimum competence, we do not recommend requiring applicants to pass a licensing exam. If the Board of Governors thinks that an exam should be required, we recommend a national paralegal certification exam.

The most difficult decision we wrestled with is whether to require applicants to pass a test similar to the bar exam for lawyers. Other jurisdictions require one. Testing, however, is of debatable utility in weeding out good practitioners from bad ones, in part because exams do not test all relevant skills, such as the ability to communicate and negotiate effectively.[127] It is precisely those skills that will be important for licensed paraprofessionals practicing in housing law and family law. As discussed above, we recommend that applicants be required to complete approved subject-matter coursework and have at least one year of substantive law-related work experience under the supervision of an attorney. Those requirements are stricter than what exist for a new attorney who intends to practice

[126] The recommendation is similar to a New York task force proposal to allow licensed and regulated nonlawyers to provide emotional and administrative support in court, which the task force called "a humane and modest step forward." NEW YORK REPORT, *supra* note 20, at 3. New York's proposal was inspired by so-called "McKenzie Friends" in the United Kingdom. McKenzie Friends are support individuals—including friends, family, and trained volunteers—who appear in court with self-represented litigants to take notes, provide moral support, and provide "quiet advice." *Id*. at 22.

[127] For a brief, accessible summary of the debate over the bar exam, see Elizabeth Olson, *Bar Exam, the Standard to Become a Lawyer, Comes Under Fire*, NEW YORK TIMES, March 19, 2015, available at: https://www.nytimes.com/2015/03/20/business/dealbook/bar-exam-the-standard-to-become-a-lawyer-comes-under-fire.html.

family law and, in our view, are a better guarantor of minimum competence for paraprofessionals, who have a very limited scope of practice.

Then there is the cost of testing. We learned that developing and administering a well-designed test for paraprofessional applicants would be the single greatest expense that the bar would incur in implementing this program.[128] Realistically, the number of applicants each year is likely to be too small, at least initially, to enable the bar to recover those costs.

For those reasons, after extensive discussion, we do not recommend requiring a paraprofessional licensing exam.

We recognize, however, that, for some people, a core belief in testing may outweigh these concerns. If the Board of Governors or the implementation committee determines that some form of testing should be required, we recommend exploring the use of a national paralegal certification exam as an alternative to designing and administering a new, Oregon-specific exam. There are three recognized national paralegal organizations[129] that have developed such certification exams.[130]

RECOMMENDATION NO. 1.11: To administer the program cost effectively, we recommend integrating the licensing program into the existing structure of the bar, rather than creating a new regulatory body.

When Ontario decided to license and regulate paralegals who engage in the limited practice of law, a heated debate erupted. Paralegals wanted to form their own body and self-regulate, as attorneys do. The Law Society of Upper Canada, the equivalent of a state bar, argued that no other organization was better suited to regulate the practice of law. The Law Society prevailed, and five years after the Law Society Act was passed, licensed paralegals were reporting a high degree of satisfaction.[131] Ontario made the right choice.

The Oregon State Bar is the organization that is most qualified by knowledge and experience to design and administer a licensing program for the limited practice of law by paraprofessionals. Creating an entirely new body to regulate a small number of licensees is neither cost effective nor necessary. Because implementing a licensing program will require collaboration among the Board of Governors, the

[128] To create an effective high-stakes examination for paraprofessionals, the bar would need to hire test designers and psychometricians to develop and test the examination. The bar also would incur costs in administering a proctored, high-stakes exam semi-annually or annually.

[129] The three organizations are NALS, the National Association of Legal Assistants (NALA), and the National Federation of Paralegal Associations (NFPA).

[130] Membership is not required to sit for any of the exams, though applicants must meet minimum eligibility requirements and pay fees of approximately $300 for nonmembers. In Washington, one of the examinations that LLLT applicants must pass is NFPA's Paralegal Core Competency Exam, a multiple-choice examination that tests, among other things, a paralegal's knowledge of legal terminology, civil procedure, legal ethics, and areas of substantive law.[130] NALA and NALS exams cover the same types of topics but include both multiple-choice questions and a writing component. The workgroup did not reach any conclusion about which national exam is best.

[131] LAW SOCIETY OF UPPER CANADA, *supra* note 98, at 26.

Board of Bar Examiners, the Oregon Supreme Court, and the Oregon Legislature, further input from those stakeholders is required.

Conclusion

After 25 years of watching the access-to-justice gap grow, it is time to begin filling it. Licensing paraprofessionals will not solve the problem, but it can greatly ameliorate it. We urge the Board of Governors to adopt these recommendations.

APPENDIX A: Licensed Paraprofessional Programs Comparison Chart

Licensed Paraprofessional Programs

		Arizona	California	Nevada	Utah[1]	Washington	Ontario, CA
Title		Legal Document Preparer	Legal Document Assistant and Unlawful Detainer Assistant	Document Preparation Service	Licensed Paralegal Practitioner	Limited License Legal Technician	Licensed Paralegal
Practice Area(s)		Any	Any (LDA); eviction (UDA)	Any	Family law, eviction, debt collection	Family law	Small claims, ADR, provincial offenses, summary convictions
Education and Experience	Minimum education	Varies by work experience	Varies by work experience	n/a	Associates degree	Associates degree	Accredited paralegal program graduate
	Required course work	n/a	n/a	n/a	Paralegal studies, practice area course	Paralegal studies, practice area course	General and practice area courses
	Law-related work experience	0-2 years, varies by educational degree	0-2 years, varies by educational degree	n/a	1,500 hours	3,000 hours	120 hours field work
Licensing Exam		Yes	No	No	Yes	Yes	Yes
Insurance/Bond		No	Bond	Bond	TBD	Insurance	Insurance
Rules of Conduct		Yes	No	No, but deceptive practices prohibited	Yes	Yes	Yes
Scope of services	Select forms	Yes	No	Yes	Yes	Yes	Yes
	Complete pre-approved forms	Yes	Yes	Yes	Yes	Yes	Yes
	Draft other legal forms	Yes	No	Yes	No	Yes, if approved by attorney	Yes
	File and serve forms	Yes	Yes	Yes	Yes	Yes	Yes
	Provide legal information	Yes	Yes, only approved published materials	Not addressed	Yes	Yes	Yes
	Provide legal advice	No	No	No	Yes, limited in scope	Yes, limited in scope	Yes
	Negotiate on client's behalf	No	No	No	Yes, in mediation	No	Yes
	Appear in court	No	No	No	No	No	Yes
Other	Trust accounts	No	No	No	Yes	Yes	Yes
	Continuing education	Yes	Yes	No	Yes	Yes	Yes
	Oversight	LDP Board	Dept. of Consumer Affairs, Counties	Secretary of State	Board (TBD)	LLLT Board	Paralegal Standing Committee
Statute/Rule		ACJA 7-208	CA Bus. & Prof. Code §6400 et seq	NRS 240A	Draft Rule 14-802	APR 28	Law Society Act

[1] Utah's program has not yet launched, but a special committee appointed by the Supreme Court completed extensive pre-implementation work in 2016 and early 2017.

APPENDIX B: Oregon Circuit Court Cases with Representation, OJD (2016)

	w/ Representation	% w/ Represen-tation	w/o Representation	Identified as ProSe	% UnRep & ProSe	Total Cases
Domestic Relations						
Dissolution	6,219	20%	12,044	12,783.00	80%	31,046
Annulment	33	38%	25	30.00	63%	88
Filitation	720	32%	1,390	155.00	68%	2,265
Domestic Relations Other	3	21%	0	11.00	79%	14
Petition Custody/Support/Visitation	1,752	22%	3,195	3,008.00	78%	7,955
Separation	8	32%	6	11.00	68%	25
Civil						
Property - General	1,864	55%	1,432	91.00	45%	3,387
Civil Appeal from Lower Court	4	44%	5	0.00	56%	9
Contract	38,795	58%	27,822	624.00	42%	67,241
Tort - General	288	83%	56	1.00	17%	345
Property - Foreclosure	6,102	33%	12,395	120.00	67%	18,617
Injunctive Relief	798	74%	248	27.00	26%	1,073
Tort - Malpractice Legal	154	91%	13	3.00	9%	170
Tort - Malpractice Medical	847	87%	124	8.00	13%	979
Tort - Products Liability	259	77%	78	1.00	23%	338
Tort - Wrongful Death	363	89%	42	3.00	11%	408
Protective Orders						
Protective Order - FAPA	1,782	9%	15,336	2,635.00	91%	19,753
Protective Order - Elder Abuse	351	6%	4,448	895.00	94%	5,694
Protective Order - Foreign Restraining Order	4	9%	42	0.00	91%	46
Protective Order - Sexual Abuse	24	11%	166	23.00	89%	213
Protective Order - Stalking	416	8%	4,516	492.00	92%	5,424

Landlord/Tenant						
Landlord/Tenant - General	436	37%	744	13.00	63%	1,193
Landlord/Tenant - Residential	7,843	15%	45,307	456.00	85%	53,606
Landlord/Tenant - Appeal	6	55%	4	1.00	45%	11
Small Claims						
Small Claims - Appeal	2	17%	9	1.00	83%	12
Small Claims - General	798	1%	119,575	3,511.00	99%	123,884
Total Number of Parties	69,871	20%	249,022	24,903.00	80%	343,796

Data Explanation:

This chart displays whether any party had representation, or not, within the cases from the case categories requested. Therefore, the data is presented not on a case basis, but on a party basis. For instance, if both the plaintiff and respondent were represented it would count as "2" in the w/representation count. If only one party was represented then it would count as “1” in the represented column and “1” in the w/o representation column.

Alternative Legal Services Delivery Workgroup
Report & Recommendations

It has become axiomatic that the legal-services market is evolving and will continue to evolve. Although market changes are being felt industry wide, the pace of change is particularly acute with respect to an historically underserved market segment—individuals and small businesses.

These changes are being driven by several factors. First, technological advances have allowed consumers in this market segment to bypass the traditional attorney-client relationship. Driven by the desire to resolve their legal issues efficiently and at the least possible cost, these consumers are increasingly likely to search the internet, rely on online lawyer reviews to locate a match, and seek out unbundled legal services.[132] Alternatively, they avoid lawyers altogether and rely on web-based software to create customized forms and documents to meet their legal needs. Online commoditization of services now sets their expectations; they demand instant access to qualified lawyers and legal resources as well as transparent, competitive pricing.

Second, both lawyers and nonlawyer businesses see the potential in this market segment, and are stepping into the void. Lawyers are reaching out to solicit business through websites, blogs, and social media; increasingly relying on online advertising and referral services to connect them with prospective clients; and using web-based platforms to offer limited-scope consultations or services to clients who have been referred to them by third parties. Nonlawyer businesses have developed online service-delivery models ranging from the most basic form providers to sophisticated referral networks.

The Oregon State Bar Board of Governors directed the Legal Futures Task Force to consider how it may "best protect the public and support lawyers' professional development in the face of the rapid evolution of the manner in which legal services are obtained and delivered." The Regulatory Committee directed this workgroup to consider whether and to what extent our current regulatory framework should be refined in light of the changing market.

I. Summary of Recommendations

We make the following four recommendations to the Committee as a whole:

RECOMMENDATION 2:
REVISE RULES OF PROFESSIONAL CONDUCT TO REMOVE BARRIERS TO INNOVATION

2.1 Amend current advertising rules to allow in-person or real-time electronic solicitation, with limited exceptions. By shifting to an approach that focuses on preventing harm to consumers, the bar can encourage innovative outreach to Oregonians with legal needs, while promoting increased protection of the most vulnerable. The proposed amendments to the Oregon Rules of Professional Conduct would secure special protections for prospective clients who are incapable of making the decision to hire a lawyer or have told the lawyer they are not interested, or when the solicitation involves duress, harassment or coercion.

[132] As noted in the accompanying Self-Navigation Workgroup Report & Recommendations, *infra*, not all self-represented litigants are aware of the option to seek out unbundled services, even though this is a growing segment of the legal market.

2.2 Amend current fee-sharing rules to allow fee-sharing between lawyers and lawyer referral services, with appropriate disclosure to clients. Currently, only bar-sponsored or nonprofit lawyer referral services are allowed to engage in fee-sharing with lawyers. Rather than limit market participation by for profit vendors, the bar should amend the Oregon Rules of Professional Conduct to allow fee-sharing between all referral services and lawyers, while requiring adequate price disclosure to clients, and ensuring that Oregon clients are not charged a clearly excessive legal fee.

2.3 Amend current fee-sharing and partnership rules to allow participation by licensed paraprofessionals. If Oregon implements paraprofessional licensing, it should amend the Oregon Rules of Professional Conduct to allow-fee sharing and law firm partnership among regulated legal professionals. Any rule should include safeguards to protect lawyers' professional judgment. The Board should also direct the Legal Ethics Committee to consider whether fee-sharing or law firm partnership with other professionals who aid lawyers' provision of legal services (e.g. accountants, legal project managers, software designers) could increase access-to-justice and improve service delivery.

2.4 Clarify that providing access to web-based intelligent software that allows consumers to create custom legal documents is not the practice of law. Together with this effort, seek opportunities for increased consumer protections for persons utilizing online document creation software.

A discussion of our process and recommendations follows.

Workgroup Process and Guiding Principles

We began our work by gathering information about the new entrants in the market, reviewing the existing regulatory structure. We also were mindful of the mission of the Oregon State Bar and the Regulatory Objectives proposed by the American Bar Association, which include protection of the public; delivery of affordable and accessible legal services; and the efficient, competent, and ethical delivery of such services.

We then focused on the following points of tension between the existing regulatory framework and various alternative legal-services delivery models currently in the market (with a brief nod to what we could reasonably see on the horizon):

- Whether the lawyer advertising rules' prohibition on in-person and real-time electronic solicitation unduly hinders access to legal services.
- Whether the prohibition on fee sharing with nonlawyers unduly restricts legal-referral services, thereby frustrating consumers' ability to find legal help.
- Whether paraprofessionals, if licensed by the Oregon State Bar, should be allowed to share fees and engage in partnerships with lawyers.
- Whether lawyers should be allowed to take part in alternative business structures.
- Whether the provision of online legal-form creation using "intelligent" interactive software constitutes the unlawful practice of law, and if so, whether that is desirable.

As we worked through these issues, we were mindful of two things.

First, any recommendations should be consistent with the mission of the Oregon State Bar, "to serve justice by promoting respect for the rule of law, by improving the quality of legal services, and by increasing access to justice."

Second, because the Board of Governors' Policy & Governance and Public Affairs Committees have found the ABA Model Regulatory Objectives for the Provision of Legal Services to be "consistent with the mission and objectives" of the Oregon State Bar, we also believe that those ABA objectives—which were specifically designed to provide a framework to jurisdictions considering how to approach the regulation of "nontraditional" legal services[133]—are appropriate guiding principles for our work.

The ABA Model Regulatory Objectives for the Provision of Legal Services are:

A. Protection of the public
B. Advancement of the administration of justice and the rule of law
C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems
D. Transparency regarding the nature and scope of legal services to be provided, credentials of those who provide them, and the availability of regulatory protections
E. Delivery of affordable and accessible legal services
F. Efficient, competent, and ethical delivery of legal services
G. Protection of privileged and confidential information
H. Independence of professional judgment
I. Accessible civil remedies for negligence and breach of other duties owed, and disciplinary sanctions for misconduct
J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system

We believe that the recommendations in this report, as amplified below, are consistent with both the ABA's stated objectives and the mission of our state bar.

The Future is Here

For more than a decade, citing technological innovation, the access-to-justice gap, and consumer dissatisfaction with the status quo, legal futurists have advocated for the creation of new models for delivering legal services. In 2017, it is time for even the least tech-oriented among us to sit up and take note.

As observed by the 2016 ABA Commission on the Future of the Legal Profession,

> "The legal landscape is changing at an unprecedented rate. In 2012, investors put $66 million dollars into legal service technology companies. By 2013, that figure was $458

[133] The ABA adopted the Model Regulatory Objectives in February 2016, and suggested that courts "be guided by the ABA Model Regulatory Objectives for the Provision of Legal Services when they assess the court's existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers." ABA RESOLUTION 105 (February 2016).

> million.[134] One source indicates that there are well over a thousand legal tech startup companies currently in existence."[135]

ABA Resolution 105 (February 2016). Growth in this market segment is exponential. A January 2017 report concluded that, "despite not being recognized widely as a cohesive segment of the legal services market," alternative legal-services providers account for "$8.4 billion in legal spending."[136]

Much of this change is driven by consumers who are demanding access to legal services in the same manner and with the same convenience as they purchase other services and products—a phenomenon that one well-respected commentator calls the "Uberization of Legal Services."[137] A 2015 report from the Georgetown Law Center similarly noted:

> "In the six and a half years since the onset of the Great Recession, the market for legal services has changed in fundamental – and probably irreversible – ways. Perhaps of greatest significance has been the rapid shift from a sellers' to a buyers' market, one in which clients have assumed control of all of the fundamental decisions about how much legal services are delivered and have insisted on increased efficiency, predictability, and cost effectiveness in the delivery of the services they purchase."[138]

All indicators suggest that these changes are here to stay.

By "alternative legal-services providers," we mean those that "present an alternative to the traditional idea of hiring an attorney at a law firm to assist in every aspect of a legal matter."[139] These services are "alternative" because they "are delivered via a model that departs from the traditional law firm delivery model"—"for example, by using contract lawyers, process mapping, or web-based technology."[140]

The catalog of such providers is vast, and growing. Many have a stated objective to serve the needs of both legal consumers and law firms. New services include the following: rating and reviewing of lawyers (e.g., Avvo, LawyerReviews, Lawyerratingz, Yelp); referring consumers to lawyers and providing price quotes (e.g, Avvo, RocketLawyer, LawGives, LawKick, LawNearMe, LegalMatch, PrioriLegal); offering unbundled, fixed-fee legal services (e.g, Avvo, DirectLaw, LawDingo, LawGo, LegalHero, LawZam, LegalZoom, RocketLawyer); providing customized legal forms (e.g, LegalZoom, RocketLawyer); locating contract lawyers (e.g, Axiom, Hire an Esquire,

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[134] Joshua Kubick, *2013 was a Big Year for Legal Startups; 2014 Could Be Bigger*, TECHCO (Feb. 14, 2015), available at http://tech.co/2013-big-year-legal-startups-2014-bigger-2014-02.
[135] *See* AngelList, *Legal Services*, *available at* https://angel.co/legal.
[136] Thomson Reuters Legal Executive Institute, The Center for the Study for the Legal Professional at Georgetown University Law Center and Saïd Business School at the University of Oxford, *Alternative Legal Service Providers: Understanding the Growth and Benefits of These New Legal Providers* (January 2017), at i.
[137] Richard Granat, *The Uberization of Legal Services* (June 19, 2015*) available at* http://www.elawyeringredux.com/2015/06/articles/law-startups/the-uberization-of-legal-services/.
[138] Georgetown Law, *Center for the Study of the Legal Profession's 2015 Report on the State of the Legal Market*, *available at* http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/upload/FINAL-Report-1-7-15.pdf.
[139] This definition of Alternative Legal Service Providers is taken from the January 2017 study, *supra* at note 136.
[140] *Id.*

CounselOnCall); providing e-discovery and legal process support (e.g, clio, QuisLex, Veritas); and providing targeted legal information and advice in specific areas, such as immigration (e.g, Bridge US), traffic court (e.g, Fixed), and business formation and intellectual property (e.g, SmartUpLegal).

As we learned more about this market, we were fortunate to hear presentations from representatives of Avvo and LegalZoom. They provided valuable information about the market segment that they are attempting to serve, the controls that they have in place, and their regulatory concerns. Although we take a different perspective on some issues, it was extremely valuable to learn how they work and what gaps they seek to fill in the market.

We also learned that Oregon lawyers and consumers are actively engaged in these new markets. The Bar's General Counsel has received numerous inquiries from Oregon lawyers regarding whether various models of alternative legal-services providers are consistent with the Oregon Rules of Professional Conduct. Providers' websites show that Oregon lawyers and law firms are participating in meaningful numbers. Although it is not possible to quantify the volume of such services being provided to Oregon consumers, both LegalZoom and Avvo count hundreds of Oregon attorneys as participants in their programs.

How We Regulate Today

Any proposal for revising our regulatory framework must account for the respective roles played by the Oregon Supreme Court, the Oregon State Bar, the Department of Justice, the Secretary of State, and the Department of Consumer and Business Services.

A. Regulation of Lawyers

Legal services offered by Oregon lawyers are regulated by both the Oregon Supreme Court (which has inherent, constitutional, and statutory authority to regulate the practice of law) and the Oregon State Bar (which is a statutory instrumentality of the judicial branch).

i. Oregon Supreme Court

> "No area of judicial power is more clearly marked off and identified than the courts' power to regulate the conduct of the attorneys who serve under it. This power is derived not only from the necessity for the courts' control over an essential part of the judicial machinery with which it is entrusted by the constitution, but also because at the time state constitutions, including our own, were adopted the control over members of the bar was by long and jealously guarded tradition vested in the judiciary."

Ramstead v. Morgan, 219 Or 383, 399, 347 P2d 594 (1959).

The Oregon Supreme Court's regulatory authority with respect to the practice of law is grounded in both separation-of-powers considerations under Article III, section 1, of the Oregon Constitution, *see, e.g., State ex rel. Acocella v. Allen*, 288 Or 175, 180, 604 P2d 391 (1979), and the doctrine of inherent power, *see, e.g., Sadler v. Oregon State Bar*, 275 Or 279, 286, 550 P2d 1218 (1976). *See also, e.g.*, ORS 9.529 ("The grounds for denying any applicant admission or reinstatement or for the discipline of attorneys set forth in ORS 9.005 to 9.757 are not intended to limit or alter the inherent power of the Supreme Court to deny any applicant admission or reinstatement to the bar or to discipline a member of the bar.").

The Oregon Supreme Court is empowered to admit, regulate, and discipline lawyers. The court promulgates the Oregon Rules of Professional Conduct and Rules for Admission, and the court is the ultimate arbiter of what constitutes the practice of law in Oregon.

ii. The Oregon State Bar

The Oregon State Bar is an instrumentality of the judicial branch. ORS 9.010(2). Among other things, the Bar administers the lawyer admissions and disciplinary systems. ORS 9.210 (admissions); ORS 9.534 (discipline).

The Bar brings enforcement actions against Oregon lawyers for violation of the Oregon Rules of Professional Conduct, which are promulgated by the Oregon Supreme Court. These rules apply to any Oregon lawyer who is a member of the Oregon State Bar, including those who offer legal services online or through alternative delivery models. Of particular relevance to this report are the rules that regulate lawyer advertising (*see* RPC 7.1–7.5) and, with limited exception, prohibit lawyers from engaging in fee sharing or forming partnerships with nonlawyers (*see* RPC 5.4).

B. Regulation of Nonlawyers Providing Legal Services

The current framework for the regulation of persons and businesses other than lawyers and law firms engaged in legal-services delivery includes the Oregon State Bar, but primarily relies on other players. The primary purpose of this framework is to prevent individuals without law licenses from harming consumers.

i. Oregon State Bar

The Bar has authority to investigate the unlawful practice of law and to seek civil injunctions to prevent harm by nonlawyers engaged in the practice of law. ORS 9.160. Apart from this limited authority, however, the Bar does not have authority to regulate nonlawyers.

The Oregon State Bar's Referral & Information Service helps connect Oregon's legal consumers with lawyers and disseminates information about available legal resources.[141]

ii. Oregon Department of Justice

The Department of Justice has authority over consumer fraud and unfair trade practices, including allegations pertaining to the unauthorized practice of law, mortgage-foreclosure fraud, and other unconscionable quasi-legal practices. The Department has the authority to seek civil relief for unfair trade practices, including negotiating an assurance of voluntary compliance.[142]

[141] More information about the Bar's Lawyer Referral Service is available at https://www.osbar.org/public/legalinfo/1171_LRS.htm.
[142] Further information on the Oregon Department of Justice's Consumer Protection efforts is available at http://www.doj.state.or.us/consumer/pages/index.aspx.

iii. Oregon Secretary of State

The Secretary of State regulates individuals with notary commissions. The Secretary of State accepts complaints regarding notaries who misrepresent their scope of authority by claiming the ability to practice law or holding themselves out as *notarios publicos*.[143]

iv. Oregon Department of Consumer and Business Services

The Department of Consumer and Business Services (DCBS) regulates persons and entities that offer legal insurance, perform debt collection, and offer debt-management services.[144] The DCBS does not, however, directly regulate lawyers or legal-referral services. The DCBS does not require Oregon lawyers who engage in debt collection or debt management to obtain a license to do so if their activity is incidental to the practice of law. *See, e.g.,* ORS 697.612(3)(b) ("An attorney licensed or authorized to practice law in this state, if the attorney provides a debt management service only incidentally in the practice of law.").

RECOMMENDATION 2.1: Advertising Rules

2.1 The Bar should amend current advertising rules to allow in-person or real-time electronic solicitation, with limited exceptions for prospective clients who are incapable of making the decision to hire a lawyer or who have told the lawyer that they are not interested, or when the solicitation involves duress, harassment, or coercion.

We turned our attention first to the advertising rules for lawyers, because they have a profound impact on how lawyers engage with prospective clients online. *See* RPC 7.1–7.5.

For some time, the Bar has been engaged in an effort to modernize these rules, based in part on concerns regarding constitutionality. A 2009 Advertising Task Force made recommendations that ultimately resulted in the 2013 adoption by the Oregon Supreme Court of amendments to Rule 7.1, principally on the ground that the existing rules were overbroad and under-inclusive. The amended rule removed certain restrictions on the manner of lawyer advertising and placed the regulatory focus on false and misleading content.

Within the last year, the Oregon Supreme Court has also adopted changes in advertising rules that replaced the requirement that lawyers include their complete office address in all advertising with a simple requirement for "contact information," RPC 7.3, and removed the requirement that lawyers who engage in targeted advertising must label their advertising as "Advertising Material," RPC 7.2(c).

Even with these significant changes in place, we believe that the advertising rules require further revision.

The 2009 Advertising Task Force concluded that "Article I, Section 8 of the Oregon Constitution prevents the blanket prohibition against in-person or real-time electronic solicitation of clients by lawyers or their agents or employees that is presently contained in RPC 7.3." The changes discussed above left that part of the rule intact. In its current form, Rule 7.3 permits lawyers to engage in in-person or real-time electronic

[143] Further information on the Oregon Secretary of State's regulation of notary publics and efforts to prevent abuse by notarios publicos is available at http://sos.oregon.gov/business/Pages/notary-public-notario-publico.aspx.
[144] More information about the Division of Financial Regulation is available at http://dfr.oregon.gov/Pages/index.aspx.

solicitation *only* if the prospective client is a lawyer, a close personal friend, or an individual with whom the lawyer has a past professional relationship.

Historically, the rule against in-person and real-time electronic solicitation was thought necessary to avoid overreaching by lawyers, particularly when such solicitation was directed at unsophisticated or vulnerable prospective clients. We conclude, however, that such legitimate consumer-protection concerns can be protected by a more narrowly tailored rule that reflects the reality of the current market and that does not implicate free-speech protections under Article I, section 8. This is particularly the case with real-time solicitation, where the contact is not face to face. We are not convinced that online solicitation poses the same risks as those created (at least arguably) by some in-person solicitation, and it indisputably hinders consumers' ability to find appropriate legal assistance.

Consequently, we endorse the Legal Ethics Committee's proposed amendment to Rule 7.3 (which has been adopted by the Board of Governors), which would amend Rule 7.3 as follows:

RULE 7.3 SOLICITATION OF CLIENTS

~~(a)~~ A lawyer shall not ~~by in-person, live telephone or real-time electronic contact~~ solicit professional employment **by any means if** ~~when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted~~:

~~(1) is a lawyer; or~~

~~(2) has a family, close personal, or prior professional relationship with the lawyer.~~

~~(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:~~

"(a) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person who is the target of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;

"(b) the [person who is the] target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

"(c) the solicitation involves coercion, duress or harassment."

~~(c) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.~~

Although we recommend adopting these changes that have already been approved by the Board of Governors, we do observe that the language of Rule 7.3 might be more clear if it referred to the "subject" of the solicitation, rather than the "target."

We also observe that amending Rule 7.3 would have no effect on the current *statutory* restrictions on in-person solicitation in personal-injury cases.[145] We recommend that stakeholders continue to evaluate the constitutional status of that restriction.

RECOMMENDATION 2.2: Amend Lawyer-Referral Services Fee-Sharing Rules

2.2 The Bar should amend current fee-sharing rules to allow fee-sharing agreements between lawyers and lawyer-referral services, with appropriate disclosure to clients.

Oregon lawyers are generally prohibited from "giv[ing] anything of value to a person for recommending the lawyer's services," RPC 7.2(b), subject to exceptions for advertising and the usual charges of a lawyer-referral service, RPC 7.2(b)(1)–(2).[146] Similarly, Rule 5.4 prohibits lawyers from sharing a legal fee with a nonlawyer, including an advertiser or referral service, unless the referral service is a bar-sponsored or not-for-profit service. RPC 5.4(b)(5).

The historical justification for such prohibitions has been a concern that allowing lawyers to split fees with nonlawyers and to pay for referrals would potentially compromise the lawyer's professional judgment. For example, if a lawyer agreed to take only a small portion of a broader fee paid to one who recommends the lawyer's services, that modest compensation arguably could affect the quality of the legal services. Similarly, a percentage-fee arrangement could reduce the lawyer's interest in pursuing more modest claims.

We acknowledge that important concern, and we do not propose discarding regulation of lawyers' fee arrangements. We do believe, however, that the current rule is ill-suited to a changing market in which online, for-profit referral services may be the means through which many consumers are best able to find legal services. Innovative referral-service models that could assist in shrinking Oregon's access-to-justice gap should not be stifled by a rule that was written for a very different time.

Rather, borrowing from the approach taken for attorney fee splits in Rule 1.5(d), we suggest a revision that balances the legitimate historical concerns with relaxed regulation by requiring written disclosure of the fact of the fee split and the manner of its calculation. Because the rules should also continue to ensure that any fee is reasonable, we further recommend new wording that essentially prohibits the overall fee shared by a lawyer and a referral service from being clearly excessive as defined in RPC 1.5.

Finally, we note that, despite the existence of Rule 5.4, Oregon lawyers are currently participating in an online attorney-client "matchmaking" service that has been found by other bars to be referral services that engage in the improper sharing of fees.[147] Although the Oregon State Bar has not squarely addressed this issue, and no bar complaints have yet been filed arising from such activity, it is entirely possible that

[145] ORS 9.500 provides, "No person shall solicit within the state any business on account of a claim for personal injuries to any person, or solicit any litigation on account of personal injuries to any person within the state, and any contract wherein any person not an attorney agrees to recover, either through litigation or otherwise, any damages for personal injuries to any person shall be void."

[146] Rule 7.2(b)(2) was amended on January 1, 2017, to remove the requirement that the lawyer-referral service be "not for profit."

[147] *See* Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2016-200, 9/16; Ohio Supreme Court Board of Professional Conduct Op. 2016-3; South Carolina Ethics Op. 16-06 (2016).

the Bar will soon be required to decide whether lawyers who participate in popular online attorney-client matchmaking services are engaged in unethical conduct. This is yet another reason to carefully examine the continuing utility of Rule 5.4 in its current form.

Accordingly, we recommend that Rule 5.4 be amended to provide:

> **RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER**
>
> (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
>
> ***
>
> (5) a lawyer may **pay the usual charges of a lawyer-referral service, including sharing legal fees with the service** ~~pay the usual charges of a bar-sponsored or operated not-for-profit lawyer referral service~~**, only if**:
>
> **(i) the lawyer communicates to the client in writing at the outset of the representation the amount of the charge and the manner of its calculation, and**
>
> **(ii) the total fee for legal services rendered to the client combined with the amount of the charge would not be a clearly excessive fee pursuant to Rule 1.5 if it were solely a fee for legal services**, including fees calculated as a percentage of legal fees received by the lawyer from a referral.

In addition, we recommend that Rule 7.2 be amended to provide:

> **RULE 7.2 ADVERTISING**
>
> (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communication, including public media.
>
> (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
>
> ***
>
> (1) pay the usual charges of a legal service plan or a lawyer-referral service **in accordance with Rule 5.4**;

This proposed change to Rule 5.4 would equal the playing field between for-profit, nonprofit, and bar-sponsored lawyer-referral services. It would allow for-profit referral services to take advantage of the same fee-sharing exception currently offered to bar-sponsored and nonprofit lawyer-referral services, but would ensure consumer protection through fee-sharing disclosures and a requirement that the overall fee not be clearly excessive.

We discussed at length whether, in addition to written disclosure as discussed above, lawyers should be required to obtain a client's informed consent to share a legal fee with a lawyer-referral service. This approach would be consistent with other approaches taken when there is some concern that a lawyer's fiduciary duty of loyalty to the client could be implicated by self-interest or a relationship with a third party. *See, e.g.,* RPC 1.5(d) (fee splitting among lawyers not at the same firm); RPC 1.7(a)(2) (material limitation conflict); RPC 1.8(a) (business transactions with clients). Although we have stopped short of

making that recommendation, we note that our proposal could be easily amended to require informed consent, should the Board wish to do so.

Taken together, these proposed changes to RPC 5.4 and RPC 7.2 would allow lawyers to use a broader range of referral services, while increasing price transparency for consumers and continuing to ensure an overall reasonable fee.

RECOMMENDATION 2.3: Allow Alternative Business Structures with Licensed Paraprofessionals

2.3 If and when the Board pursues a licensed paraprofessional program, the Bar should amend current fee-sharing and partnership rules to allow participation by licensed paraprofessionals. We recommend further consideration of allowing similar participation by other types of professionals who aid lawyers' provision of legal services.

With limited exception, the Oregon Rules of Professional Conduct prohibit nonlawyer ownership of law firms, RPC 5.4(b), (d); nonlawyer direction of a lawyer's professional judgment, RPC 5.4(c); and sharing legal fees with nonlawyers, RPC 5.4(a). These restrictions are intended to guard against the practice of law by nonlawyers, the sharing of client confidences with people not bound by the Oregon Rules of Professional Conduct, and the risk that a nonlawyer could interfere with a lawyer's independent professional judgment. Hazard, G., Hodes, W., & Jarvis, P., *The Law of Lawyering*, §48.02 (4th ed. 2015).

We now join numerous other jurisdictions in questioning whether these prohibitions are the most appropriate means for protecting the interests of consumers, and whether the rules should be liberalized to account for new, alternative business structures.

The ABA Commission on the Future of Legal Services, in its April 8, 2016, Issues Paper Regarding Alternative Business Structures (ABS), defined the term *alternative business structures* to include "business models through which legal services are delivered in ways that are currently prohibited by Model Rule 5.4."[148]

The Commission observed that "[a] variety of ABS structures exist in other jurisdictions, and they have three principal features that differentiate them from traditional law firms":

- "First, ABS structures allow nonlawyers to hold ownership interests in law firms. The percentage of the nonlawyer ownership interest may be restricted (as in Italy, which permits only 33% ownership by nonlawyers) or unlimited (as in Australia).
- Second, ABS structures permit investment by nonlawyers. Some jurisdictions permit passive investment, while other jurisdictions permit nonlawyer owners only to the extent that they are actively involved in the business.
- Third, in some jurisdictions, an ABS can operate as a multidisciplinary practice (MDP), which means that it can provide non-legal services in addition to legal services."[149]

[148] The ABA Futures Commission's Alternative Business Structures Issues Paper (April 8, 2016) is available in full at http://www.americanbar.org/content/dam/aba/images/office_president/alternative_business_issues_paper.pdf.
[149] *Id.*

The Commission further reported that, as of April 2016, two jurisdictions in the United States (Washington State and the District of Columbia), and many foreign jurisdictions (Australia, England, Wales, Scotland, Italy, Spain, Denmark, Germany, Netherlands, Poland, Spain, Belgium, Quebec, British Columbia, Ontario, and Singapore) permitted some form of ABS.[150]

A powerful reason to consider loosening the restrictions of Rule 5.4 is that some of its purposes are already served by other rules. The Bar's former General Counsel has pointedly asked whether the provisions of Rule 5.4 are "arguably redundant and unnecessary":

> "[L]awyers are already prohibited by RPC 5.5(a) from assisting someone in the unlawful practice of law. In addition, RPC 1.6(c) provides a more general requirement that lawyers 'make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.' In other words, lawyers who work with nonlawyers have a duty to ensure that those nonlawyers maintain the confidentiality of client information. Moreover, RPC 5.3 requires that lawyers who have supervisory authority over nonlawyers to 'make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.'"[151]

A. Paraprofessional Ownership

If the Board adopts our Committee's recommendation to implement a paraprofessional licensing program, then we recommend that such licensees be allowed to share legal fees with and participate in ownership of law firms, with appropriate safeguards to protect lawyers' independence of professional judgment.

This recommendation accords with what Washington has done. In 2015, Washington adopted Rule of Professional Conduct 5.9, which allows "Limited Licensed Legal Technicians" to share fees with lawyers and to form partnerships with lawyers under certain circumstances. That rule provides:

> "RPC 5.9 BUSINESS STRUCTURES INVOLVING LLLT AND LAWYER OWNERSHIP
>
> (a) Notwithstanding the provisions of Rule 5.4, a lawyer may:
>
> (1) share fees with an LLLT who is in the same firm as the lawyer;
>
> (2) form a partnership with an LLLT where the activities of the partnership consist of the practice of law; or
>
> (3) practice with or in the form of a professional corporation, association, or other business structure authorized to practice law for a profit in which an LLLT owns an interest or serves as a corporate director or officer or occupies a position of similar responsibility.
>
> (b) A lawyer and an LLLT may practice in a jointly owned firm or other business structure authorized by paragraph (a) of this rule only if:
>
> (1) LLLTs do not direct or regulate any lawyer's professional judgment in rendering legal services;

[150] *Id.*

[151] Helen Hierschbiel, *The Wave of the Future? Alternative Law Practice Business Structures*, THE OREGON STATE BAR BULLETIN (November 2015) available at http://www.osbar.org/publications/bulletin/15nov/barcounsel.html.

(2) LLLTs have no direct supervisory authority over any lawyer;

(3) LLLTs do not possess a majority ownership interest or exercise controlling managerial authority in the firm; and

(4) lawyers with managerial authority in the firm expressly undertake responsibility for the conduct of LLLT partners or owners to the same extent they are responsible for the conduct of lawyers in the firm under Rule 5.1."

In our view, this rule change strikes an appropriate balance between respecting the primary role and responsibility of lawyers, while removing overly strict barriers to new service models that may lead to the delivery of legal services at a lower cost to more consumers. If Oregon goes in the direction of licensing paraprofessionals, we recommend adoption of a similar new rule that essentially exempts such licensees from the prohibitions under Rule 5.4.

B. Ownership by Other Supporting Professionals

In addition to licensed paraprofessionals, it is worth considering whether other types of professionals who aid lawyers should be able to participate in sharing fees and owning businesses with lawyers. Such professionals may include legal-project managers, business executives, accountants, and people with technological expertise. *See, e.g.*, D.C. Rule of Professional Conduct 5.4(b).

Although the information we received relating to this issue was by and large anecdotal, it is undoubtedly the case that some people with high-level skills may be unwilling to partner with lawyers on innovative alternative legal-services delivery models because they are ineligible to own an equity stake in a law firm.[152] This barrier may have a negative impact on innovation within the legal market, inhibiting the creation of models that could better serve the needs of legal consumers. The issue merits further study and should be referred to the Legal Ethics Committee.

C. ABS Pilot Program

One alternative legal-services provider suggested to our Committee that the Oregon Supreme Court explore creating a "pilot program," temporarily suspending the operation of Rule 5.4 to allow the development of pilot-ABS entities. Although the idea is interesting, we are unaware of a clear path for creating such a pilot program. There is no established process for the creation of temporary or interim Oregon Rules of Professional Conduct.

D. Summary

We believe that allowing economic partnerships between lawyers and licensed paraprofessionals (if such a program is established) is an important but relatively modest step toward liberalizing the rules to promote innovation of new models for delivering legal services. Although we do not specifically recommend further changes to allow alternative business structures at this time, we believe that this is the wave of the

[152] Not all evidence of the impact and utility of ABSs is anecdotal. For instance, the Solicitors Regulation Authority of the United Kingdom has been licensing Alternative Business Structures since 2007, and has published data on how ABS licensees are providing increased access to lower-income-client groups and how the licensees are engaged in the legal market. *See e.g.* Solicitors Regulation Authority, *Research on alternative business structures (ABSs)* (May 2014), *available at* http://www.sra.org.uk/documents/sra/research/abs-quantitative-research-may-2014.pdf.

future and that the Bar should continue to actively consider which provisions in Rule 5.4 are necessary for consumer protection and which provisions otherwise may be worthy of amendment in some fashion.

RECOMMENDATION 2.4: Address Online Form Creation

2.4 The Bar should seek clarification whether providing access to web-based intelligent software that allows consumers to create custom legal documents is not the practice of law, and should seek opportunities to incorporate increased consumer protections.

The legal-services market is seeing significant growth in the availability of online form providers. Unlike "standard" forms, these services may involve the creation of a customized document through "intelligent" software that engages the customer in an interactive question-and-answer process.

The obvious question is whether such providers are engaged in the practice of law in Oregon. The Oregon Supreme Court has generally drawn a distinction between *selling* standardized legal forms—which is not considered the practice of law—and *selecting* particular forms for a customer—which is considered the practice of law. In *Oregon State Bar v. Gilchrist*, 272 Or 552, 538 P2d 913 (1975), the state bar alleged that several individuals had engaged in the practice of law through the advertising and sale of do-it-yourself divorce kits. The Court held:

> "We conclude that in the advertising and selling of their divorce kits the defendants are not engaged in the practice of law and may not be enjoined from engaging in that practice of their business. We conclude, however, that all personal contact between defendants and their customers in the nature of consultation, explanation, recommendation or advice or other assistance in selecting particular forms, and filling out any part of the forms, or suggesting or advising how the forms should be used in resolving the particular customer's marital problems does constitute the practice of law and must be and is strictly enjoined."

Gilchrist, 272 Or at 563–564, 538 P2d at 919. Although *Gilchrist* was decided several decades before the advent of "intelligent" form-creation software, these new providers, to the extent that they are engaging consumers in an interactive information-gathering process, may implicate the court's emphasis on "recommendation" and "assistance in…filling out any part of the forms." The question is unsettled.

Even so, we must recognize the utility of empowering self-navigators to craft forms themselves when they lack the means or ability to hire legal counsel (or simply wish not to). Harnessing technology to enable self-navigators to create forms that meet their specific needs undoubtedly supports the Bar's goal of increasing access to justice. The Oregon Judicial Department itself has recognized this, and is presently developing a catalog of intelligent forms, called iForms, for self-represented litigants.[153]

On the other hand, we believe that such forms may not be appropriate for all consumers, particularly when complex legal issues are involved. We believe, in short, that the Bar should embrace the trend toward intelligent form-creation software, balanced by appropriate consumer protections.

[153] The Workgroup is of the opinion that the Oregon Judicial Department has the inherent authority to offer forms to litigants appearing before Oregon courts and that, as a separate branch of government, the courts should not be subject to any regulation of their ability to provide such forms.

Accordingly, we recommend that the Bar take the position that the sale of customized legal forms by providers of "intelligent" software is generally not the practice of law, and that the Bar also pursue several specific consumer protections so that:

(1) The consumer is provided with a means to see the blank template or the final, completed document before finalizing a purchase of that document.

(2) An Oregon licensed attorney has approved each aspect of any legal document offered to Oregon consumers, including each and every potential part thereof that may appear in the completed document, and the logical progression of the questions presented to the Oregon consumer.

(3) The consumer has the ability to confirm that an Oregon attorney completed the review.

(4) The provider has confirmed that the consumer understands that the forms or templates are not a substitute for the advice or services of an attorney before the consumer may complete the form and prior to the purchase of the form.

(5) The provider discloses its legal name and physical location and address to the consumer.

(6) The provider does not disclaim any warranties or liability and does not limit the recovery of damages or other remedies by the consumer.

(7) The provider does not require the consumer to agree to jurisdiction or venue in any state other than Oregon for the resolution of disputes between the provider and the consumer.

(8) The provider has a consumer-satisfaction process.

(9) The provider does not require the consumer to engage in binding arbitration.

(10) The provider provides adequate protections for the consumer's personally identifiable data.

(11) Any terms and conditions required by the provider are fully, clearly, and conspicuously displayed to the consumer in simple and readily understood language.

Such protections could, presumably, be appropriately enforced through existing mechanisms, such as the Oregon Unlawful Trade Practices Act, ORS 646.605 *et seq*.

SELF-NAVIGATORS WORKGROUP REPORT & RECOMMENDATIONS

INTRODUCTION: DEFINING THE PROBLEM AND POTENTIAL SOLUTIONS

As addressed elsewhere in this Task Force report, the number of self-navigators (i.e., self-represented litigants) in Oregon's courts has grown and continues to grow.[154] Our Task Force proposes ways to reduce that number. However, it is important to recognize that, even if we succeed in increasing access to affordable legal services, some litigants will continue to be self-represented out of necessity or by choice. Regardless of whether self-representation is desirable in and of itself, it is desirable that self-navigators have access to resources that can make their journey through the court system as efficient and painless (for themselves and others) as possible. Thus, the purposes of this workgroup were to gather information about existing Oregon resources for self-navigators, how those resources could be accessed, and to identify areas for improvement.

We reviewed current data and literature regarding self-navigation and gathered information about how other states have addressed this issue. We also heard presentations by the Oregon Judicial Department (OJD), the OSB Lawyer Referral Service (LRS), Legal Aid, the Washington County law library, and two Oregon Circuit Court judges.

A framework for analysis began with several core questions: What resources are available for self-navigators in Oregon? What gaps or barriers exist in the availability or accessibility of information? How can we do better?

We tested the availability and accessibility of on-line resources from the standpoint of consumers in the following areas: landlord tenant, family law, small claims, and collections. We studied past efforts in Oregon and elsewhere that have discussed options for addressing needs, including the development of courthouse Self-Help Centers. Some of the groups in Oregon and elsewhere studying or highlighting the problems for self-navigators include the State Family Law Advisory Committee (SFLAC), the Conference of Chief Justices' Civil Justice Improvements Committee[155] and ideas from the September 2016 Oregon Access to Justice Forum.[156] In some cases, the recommendations of other groups may be incorporated here, and efforts have been made to acknowledge these ongoing efforts.

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[154] Data on current statistics on self-representation in Oregon courts is included in the chart entitled Oregon Circuit Court Cases with Representation (2016), *supra* at Paraprofessional Regulation Report & Recommendations, Appendix B.

155 In 2016, the Conference of Chief Justices' Civil Justice Improvements Committee released a Civil Justice Initiative (CJI) report with 13 recommendations intended to reduce cost and delay in civil litigation and improve customer service to litigants, including self-navigators. Among other things, the CJI report details national trends about the increasing number of cases with one or more self-represented litigants, and persistent issues that arise for those litigants and the courts. Oregon is in the initial stages of a statewide effort to evaluate the CJI report. We note that recommendations made in this report may similarly address concerns raised in the CJI report, and ongoing statewide CJI efforts also may continue to address self-navigator issues in the Oregon courts.

[156] Materials for the Summit include information on family law, self -help centers, small claims and other information on self-help and can be found on the Campaign for Equal Justice website: http://www.cej-oregon.org/pdfFiles/ATJ%20Forum/2016-09-08%20ATJ%20Forum%20-%20ALL%20MATERIALS.pdf.

RECOMMENDATION 3: IMPROVE RESOURCES FOR SELF-NAVIGATORS

We made six recommendations aimed at improving access to justice for self-navigators in Oregon.

3.1 Coordinate and integrate key online resources utilized by self-navigators. Establish a committee with representatives from the three stakeholder groups -- Oregon Judicial Department (OJD), the bar, and Legal Aid -- to coordinate and collaborate on the information available on their respective websites, including cross-links when appropriate.

3.2 Create self-help centers in every Oregon courthouse. The Oregon State Bar and OJD should consider proposing or supporting the creation of Self-Help Centers to assist self-navigators, including the use of dedicated and trained court staff and volunteers. The goal should be Self-Help Centers in every court in Oregon.

3.3 Continue to make improvements to family law processes to facilitate access by self-navigators. Implement the recommendations of the OJD's State Family Law Advisory Committee regarding family-law improvements to assist self-navigator. Seek to improve training and ensure statewide consistency in training to family-court facilitators.

3.4 Continue to make improvements to small claims processes to facilitate access by self-navigators. Implement the recommendations from the 2016 Access to Justice Forum regarding small claims process. Support changes to provide better courthouse signage, instruction, and education for consumers.

3.5 Promote availability of unbundled legal services for self-navigators. Educate lawyers about the advantages of providing unbundled services, including the existence of new trial court rules. Provide materials on unbundled services to Oregon lawyers (OSB website, Bar Bulletin and through local, specialty bars and section), including ethics opinions, sample representation and fee agreements, and reminders about blank model forms that can be printed from OJD's website.

3.6 Develop and enhance resources available to self-navigators. While OSB, OJD and legal aid have made strides in providing information that is useful for self-navigators, we must continue to improve existing resources and develop new tools.

During our work, we attempted to identify existing entities that are well-positioned to implement these recommendations. In some cases, it may be prudent to assign an on-going group—whether within the Bar, the OJD, or elsewhere—that can meet periodically to review the implementation of recommendations, if adopted.

RECOMMENDATION 3.1: Coordinate and integrate key online resources utilized by self-navigators.

Oregon has three robust websites that provide legal information to self-navigators. They are the Oregon Judicial Department's website and corresponding court websites,[157] the Oregon State Bar's public website,[158] and Oregon legal aid organizations' informational website, Oregon Law Help[159].

These existing resources are heavily used by Oregonians. Oregon Law Help has almost 750,000 page views a year; and the OJD homepage also has about 750,000 views each year, excluding access from the courthouses. The Bar's public site has more than one million page views a year. While these three websites link to each other, in some cases, the information is outdated, and in others, the link creates a dead end, without linking back to court forms or other key resources such as the Oregon Lawyer Referral Service.

In recent years, OJD has launched interactive forms ("iForms") on its website; this effort is ongoing. In addition, OJD's "Self-Help" page, its Family Law Website, and individual court websites provide information about court proceedings, contact information, and links to other external resources. Beginning in June 2017, OJD is rolling out a staged overhaul of its own website and the individual court websites, to make them more cohesive, user-friendly, and mobile-device friendly.

OJD also currently provides courthouse terminals to permit access to public case information, and most courts also have an eFiling terminal for attorneys. New courthouse construction projects are looking ahead to expanding the use of court terminals or kiosks for both lawyers and self-represented litigants, but final planning is not yet confirmed. The availability of additional kiosks, in any court or statewide, depends in large part on funding.

The Oregon State Bar's website provides legal information on a variety of topics, as does Oregon Law Help. The bar's website (information available to the public tab) provides a wealth of information on legal topics, but only lists three subject areas under the "Do It Yourself" Heading: restraining order hearings, small claims court, and summary dissolution. The Bar is in the process of updating its website as a part of a management system software upgrade.

The quantity and quality of online information is impressive, but more needs to be done to make this information more accessible. Some states have created a single website that serves as a central repository for legal self-help website information. We considered whether Oregon should similarly consolidate its self-help resources onto one website. The idea of a primary website for self-navigators has advantages, but we ultimately rejected this approach for the following reasons: 1) because it is unlikely that any of the three current stakeholders would give up their sites, the creation of a fourth self-help website might only duplicate effort and create confusion; 2) each stakeholder's website has a slightly different emphasis and has certain strengths directed at different audiences; and 3) moving to one central website would likely be costly and these resources could be better spent elsewhere. (It should be noted that both OJD and the OSB quickly made some changes to their websites in response to this group's work.) Rather than create a new website, we recommend the following specific steps for improving and coordinating the online resources now available:

157 The Oregon Judicial Department's primary website is available at http://www.courts.oregon.gov/ojd/pages/index.aspx.
158 The Oregon State Bar's public website is available at https://www.osbar.org/public/.
159 Oregon legal aid's website is available at http://oregonlawhelp.org/.

- Establish a committee with representatives from the three stakeholder groups (OJD, OSB, and Legal Aid), to coordinate and collaborate on the information available on their respective websites, including cross-links when appropriate.[160] Their work should include:
    - Providing updated information about new content or formatting on each group's website, particularly where new cross-links can be created or stale cross-links should be removed;
    - Seeking the assistance of lawyers and public members who can assist with testing access to self-navigation tools on various legal subject areas and make recommendations to the stakeholders for improvement;
    - Considering the expertise of each stakeholder (for example, Legal Aid is likely to have the most thorough information available to tenants in landlord tenant disputes);
    - Creating higher visibility for these three primary websites;
    - Providing opportunities on the websites for public input and feedback[161]; and
    - Encouraging the three primary websites to include clear links for finding legal services.

RECOMMENDATION 3.2: Create self-help centers in every Oregon courthouse.

Self-help forms and access to the internet are a step in the right direction in increasing access to justice, but more individualized help is needed. As explained in a California report,

> "Although technology can increase the efficiency and reach of legal assistance and provide innovative methods of providing legal information, it cannot substitute for the in-person assistance of attorneys and other self-help center staff. Self-represented litigants need much more than just written information or Web sites or computer kiosks."[162]

The need for individualized attention puts a strain on existing court staff. Oregon judges have described the administrative challenges and ethical dilemmas that they face, including balancing neutrality with ensuring that a litigant has a meaningful opportunity to be heard.

In response to the drain on court staff and barriers faced by self-represented litigants in the area of family law, many states adopted family law facilitation programs. The Oregon Legislature created the family-law facilitation program in 1997. Family-law facilitator program staff may provide "educational materials, court forms, assistance in completing forms, information about court procedures," and referrals to other agencies and resources. ORS 3.428. Employees or others who provide services to litigants through the program are not engaged in the practice of law. ORS 3.428(4). The program operates under the supervision of the family-court department or the presiding judge.

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160 At the least, the Work Group recommends that each of the stakeholder groups appoint a designated staff person who can work with designated staff from the other groups to discuss and coordinate content and link updates.

161 Because providing a comment section seems to signal that people should post the details of their legal problem, the best approach may be to ask, "Is this page helpful"?

162 Judicial Council of California/Administrative Office of the Courts, *Equal Access Fund—A Report to the California Legislature* (March 2005), available at http://www.courts.ca.gov/documents/Equal-Access-Fund-March-2005.pdf.

The facilitators—who are not lawyers—provide in-person assistance to litigants in family-law cases, such as reviewing forms, providing information about court processes, providing post-hearing support, and providing community-resource reference information. They do not provide legal advice.

The programs differ, from minimal hours in some judicial districts to full support in others. All programs provide assistance with routine family-law cases, and some also provide assistance with FAPA and other restraining orders, as well as with probate and minor guardianships. By statute, the court-facilitator programs are limited to family-law cases, ORS 3.428. There is currently a draft proposal to expand the facilitator program beyond its current family-law scope.

It is helpful to understand why individuals self-represent and what their experiences are. A recent study, entitled *Cases without Counsel: Research on Experiences of Self-Representation in U.S. Family Court*, by the Institute of the Advancement of the American Legal System, studied why individuals self-represent and their experiences in doing so.[163] About three-fourths of the participants in the study, which included participants in Multnomah County family-law cases, represented themselves because they simply could not afford legal representation or because they had other financial priorities. Another one-fourth, however, expressed a preference for self-representation, even if they had financial resources for pay for a lawyer. "The underlying sentiments driving litigants' preference to self-represent included the relationship between the parties, agreement between the parties, a desire to retain control, and a do-it-yourself mentality," at 18. The *Cases without Counsel* study went on to address how disadvantages play out when individuals choose to represent themselves in family-law cases, including a negative impact in the case and an already stressful process becoming even more stressful. And, of the cases studied, about one half of the litigants had some assistance from a lawyer, but most of those litigants were dissatisfied with the help they received.

In a companion publication, *Cases Without Counsel: Our Recommendations after Listening to the Litigants*, the project made several additional recommendations to courts, bar associations, and legal-services providers about how to improve the experiences of self-navigators.[164] Many of these recommendations are incorporated in this Workgroup Report.

To improve the experiences of self-navigators in other areas of law, many states and foreign countries have developed self-help centers, providing assistance beyond family-law facilitation programs. The California courts started their Self-Help Centers more than 10 years ago, and they now exist in every California judicial district. California's Self-Help Centers should serve as a model in Oregon.[165]

The California model essentially expanded that state's family-law facilitator program to also address landlord-tenant issues, debt-collection issues, conservatorships, restraining orders, guardianships, small claims, simple probate issues, and traffic citations. Not all grantees cover these areas. Courts are

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163 Natalie Ann Knowlton et al., Institute of the Advancement of the American Legal System, *Cases without Counsel: Research on Experiences of Self-Representation in U.S. Family Court* (May 2016), *available at* http://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf.

164 Natalie Anne Knowlton, Institute of the Advancement of the American Legal System, *Cases without Counsel: Our Recommendations after Listening to the Litigants* (May 2016), *available at* http://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_recommendations_report.pdf.

165 For an educational video about the creation and operation of California Self-Help Centers, see a video created by the Judicial Council of California and the Public Welfare Foundation entitled "Learning about Legal Self-Help," available at http://www.publicwelfare.org/civil-legal-aid/.

provided with basic technology and space to operate, including computer terminals and video play-back equipment and appropriate signage.

When individuals arrive at the Self-Help Center, a triage clerk assesses the appropriateness of the problem and typically refers the case to an attorney or paralegal, called an "expeditor." That person provides more substantive help. Self-Help Centers do not provide legal advice, but instead provide information and education. They do not screen for conflicts, income eligibility, or legal status.

Assistance from Self-Help Center staff is provided in-person; by telephone; in workshops; in classes; and via telephone hotlines, videoconferencing, e-mail, or other methods of communication. Staff must be able to provide assistance and referrals.

We make recommendations below based on what we believe will be best practices, recognizing that limitations on resources and scarcity of funding will undoubtedly affect what type of Self-Help Centers ultimately may be created. We feel strongly that funding for Self-Help Centers should not compete with, or nor interfere with funding for Oregon's Legal Aid programs, which are grossly underfunded and are currently under threat of losing federal funding (about 30% of funding).

Recommendations:

- The Oregon State Bar should consider proposing or supporting legislation that, to the extent needed, would permit the creation of Self-Help Centers to assist self-navigators, including the use of dedicated and trained court staff and volunteers. The goal should be to have Self-Help Centers in every court in Oregon.[166]
- Key areas for providing service should include family law, landlord-tenant, consumer issues (specifically, debt collection), and small claims, with possible future expansion into other areas, such as guardianships, conservatorships, and probate. Additionally, any practical barriers to providing assistance on traffic-court matters should be removed.
- Self-Help Centers should be available to help self-navigators regardless of income eligibility.
- When possible, a lawyer should supervise Self-Help Center staff and volunteers.[167]
- All staff or volunteers providing assistance should complete training (a certification process) in each subject area in which he or she will provide assistance to customers in Self-Help Centers, and training should be standardized and made available via webinar.
- Law students should be encouraged to volunteer or be employed as staff in Self-Help Centers, but academic credit is not recommended for these programs, and law students should be required to undergo the same training and certification as any other staff or volunteer.[168]
- Self-Help Center staff and volunteers (including lawyers) would not provide legal advice. Nonetheless, clear signage should reiterate that no attorney-client relationship is being formed and that confidentiality and privilege do not apply. The current court-facilitator

166 Janice Morgan, Executive Director of Legal Aid Services of Oregon, and an advisor to the group abstained from discussing or supporting any legislative proposals, as is required by her position and federal funding.
167 The workgroup recognized that this rule may need to provide for local flexibility, as lawyers may not be available to supervise court-facilitators in rural areas.
168 The Workgroup acknowledged that law school accrediting authorities require close supervision by faculty and that the mission of providing appropriate supervision for academic credit would be an expenditure of additional resources.

statute, ORS 3.428(4), states that "an employee or other person providing services to litigants through a family-law facilitation program as provided in this section is not engaged in the practice of law in this state for purposes of ORS 9.160." It is anticipated that any Oregon Self-Help Center legislation would contain similar wording.

- Self-Help Center staff and volunteers would not appear in court on behalf of a party.
- Self-Help Center staff and volunteers would make appropriate referrals to lawyers or other legal professionals when the types of services that the Self-Help Center can provide are not sufficient.
- Self-Help Centers should be housed in convenient locations for the courts and customers, and should be open during hours that are convenient for customers.
- Self-Help Centers should be equipped with appropriate resources and technology—including computer stations, video play-back equipment, access to conference rooms for training, and written materials.
- The courts and Self-Help Center staff and volunteers should work closely with the local bar, legal aid programs, and other stakeholders who strive to provide access to justice to Oregonians.
- To the extent that lawyers act as volunteers in Self-Help Centers, special efforts should be made to ensure that pro bono lawyers will not participate in the representation of either party outside of the Self-Help Center. Avoiding the appearance of impropriety is important to maintaining the integrity of the justice system. Oregon RPC 6.5, the rule of professional conduct related to lawyer service for nonprofit and court-annexed limited legal services programs, should be reviewed to determine its potential application to lawyers who volunteer in Self-Help Centers, and whether amendments are appropriate.
- Implement and/or review the 2007 recommendations by the SFLAC after further input and evaluation by the SFLAC.
- To the extent that full-service Self-Help Centers are not feasible at this time in Oregon, the workgroup nonetheless recommends:
    - Expanding the scope of ORS 3.428 to include areas other than family law.
    - Launching a pilot program for further implementation and modification as additional resources become available.

RECOMMENDATION 3.3:
Continue to make improvements to family law processes to facilitate access by self-navigators.

According to 2016 OJD data, approximately 80 percent of litigants in dissolution and custody cases are self-represented. As previously noted in this report, the Oregon courts have long recognized that self-represented litigants in family-law cases face barriers and create a drain on court resources. The

family-law facilitator program under ORS 3.428, was established to help address this problem.[169] All but one of the Oregon judicial districts (i.e., Columbia County) currently have family law facilitation programs in place, in conjunction with both the local court and the OJD's family law Program. In addition, the Oregon Judicial Department's State Family Law Advisory Committee (SFLAC) makes recommendations to improve the family-law process for self-represented litigants.

In Oregon, two recent changes are aimed at improving the experiences of self-represented family-law litigants: (1) changes to UTC 8.110 regarding unbundled legal services and (2) the development of informal domestic-relations trials.

A new Uniform Trial Court Rule, UTCR 8.110, which became effective in August 2016, sets out certain notice and service requirements that apply if unbundled legal services are used in family-law cases. These requirements will also soon apply to all civil cases.[170]

More informal proceedings will soon become available to litigants in certain family-law cases. Self-navigators with trials in domestic-relations cases will soon be able to choose whether to proceed with a formal trial or to proceed with an "Informal Domestic Relations Trial" (IDRT) under a new Uniform Trial Court rule that is scheduled to become effective on August 1, 2017 (UTCR 8.120). IDRTs permit parties—whether represented by counsel or not—to present their sides of the case in a more informal way. Cross- examination is not permitted, witnesses generally are not allowed to appear (except for approved experts), the rules of evidence (but not the right to appeal) are waived, and only the judge is permitted to ask questions. If both parties opt for an IDRT, then one will be held; otherwise, if one or both parties opt for a traditional trial, then a traditional trial will be held. Deschutes County Circuit Court has been piloting IDRTs successfully for several years, and the OJD anticipates that IDRTs will be a useful option for parties in uncomplicated cases involving marital assets, as well as in certain other cases.

The OJD's SFLAC is another group that makes recommendations to assist self-navigators. The SFLAC is a statutory, legislatively created committee whose members are appointed by the Chief Justice. The SFLAC's charge is to inform the OJD, the Chief Justice, and the State Court Administrator about reforms that would benefit the management of family conflict in the judicial system. The SFLAC has a standing Self-Represented Litigants Subcommittee that meets each month.

In 2007, the SFLAC issued a comprehensive report and made seven recommendations for improvements.[171] Many of these recommendations have been implemented or partially implemented, but others—such as the creation of a Self-Represented Litigants Task Force—have stalled due to lack of funding. Some of the workgroup's recommendations in this report are similar to earlier outstanding recommendations from the SFLAC's 2007 report, and the 2007 report otherwise shows that issues for self-navigators have persisted for many years in the courts.

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169 *See* discussion of family-law facilitator programs *supra* in Recommendation 3.2.

170 The UTCR Committee has recommended, and the Chief Justice has approved, applying those same requirements to all civil cases, effective August 2017 (to be enacted as a new UTCR 5.170).

171 *See* State Family Law Advisory Committee (SFLAC) of the Oregon Judicial Department, *Self-representation in Oregon's Family Law Cases: Next Steps* (September 2007), available at https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/downloads/final_report_on_self_representation_090607.authcheckdam.pdf.

At the request of one member of the Regulatory Committee, who also serves on the SFLAC, the Workgroup reviewed materials describing Australian "Family Relationships Centres" (FRCs), which are designed to attempt to serve families in crisis by offering an array of services at reasonable cost in a consumer-friendly location. The model is "an early intervention strategy to help parents manage the transition from parenting together to parenting apart in the aftermath of separation, and are intended to lead to significant cultural change in the resolution of post-separation parenting disputes." Patrick Parkinson, *The Idea of Family Relationship Centres In Australia,* 51 Family Court Review 2 (April 2013), 195-213. The Australian model also includes an online mediation program. FRCs in Australia are publicly funded but privately run facilities that offer mediation, legal services, financial services, counseling, parent education, and the like in a single location. The SFLAC continues to review the Australian model and the feasibility of implementing portions of that model in Oregon. The workgroup concluded that this approach would likely require fundamental changes to family law in Oregon and was beyond the scope and expertise of this Workgroup. The OJD's SFLAC has voted to study this model and may be making a related recommendation to the Chief Justice.

Many of the recommendations in this workgroup report apply to family law—increasing interactive court forms, increasing information on websites, and increasing the number of lawyers to help with unbundled legal services:

- Support the recommendations of the SFLAC regarding family-law improvements to assist self-navigators.
- Improve training and ensure statewide consistency in training to family-court facilitators, especially regarding the parameters of their work.[172]

RECOMMENDATION 3.4:
Continue to make improvements to small claims processes to facilitate access by self-navigators.

More than 54,000 small-claims cases were filed in 2016 statewide, almost double the number of family-law cases filed, and three times the number of landlord-tenant cases. Many of our recommendations are based on the observation of one lawyer who sat in on small claims proceedings in 14 Oregon counties,[173] as well as on recommendations by a panel presented at the September 2016 Oregon Access to Justice Forum on Self-Represented Parties in Small Claims and Consumer Law.[174] They are the following:

- Information about fee waivers and deferrals should be more prominently displayed on all websites, and judges and clerks should be trained on fee deferrals and waivers in small-

172 The workgroup noted that training in the existing family-law facilitator program could be improved. The biggest concern discussed by the workgroup, and also supported by a review of court-facilitator programs, is that facilitators are so concerned about the practice-of-law prohibition that they do not feel comfortable providing assistance. *See also*, *Cases without Counsel Study*, page 27–28, supra at note 163 which found a similar problem expressed by both litigants and court staff.

173 Janay Haas, *It Can be a Jungle Out There: A Litigants View of Small Claims Court*, OREGON STATE BAR BULLETIN (June 2014), available at http://www.osbar.org/publications/bulletin/14augsep/smallclaims.html.

174 Hon. Steven A. Todd, Judge Pro Tem, Richard Slottee, and Bret Knewtson, "Self-Represented Parties in Small Claims and Consumer Law," Access to Justice Forum (2016), available at http://www.cej-oregon.org/pdfFiles/ATJ%20Forum/2016-09-08%20ATJ%20Forum%20-%20ALL%20MATERIALS.pdf.

claims cases and other cases. (Discussion is underway at the OJD about various statewide issues relating to fee waivers and deferrals).

- Improve courthouse signage about the location of small claims hearings and the location of the clerk's office.
- Provide instructions so that small-claims litigants understand that their case is not the only one scheduled for a certain time, so they should plan to arrive on time and then wait their turn and plan their day accordingly.[175]
- Information available to self-navigators should make clear that, in limited cases, lawyers may appear in small-claims court.
- Explore whether the limits on small claims should be increased.
- Consider whether claimants should be able to be represented by trained and certified nonlawyers or lawyers in cases in which the opposing party, typically a corporation, is represented by either a lawyer or a trained representative.
- Update county-court websites to link to interactive forms.[176]
- Consider recommendations proposed by a panel at the September 2016 Oregon Access to Justice Forum that deal with small-claims and consumer cases.[177] In particular, the workgroup recommends supporting the following recommendations:
    - Require that an affidavit or declaration be attached to the complaint showing proof of assignment, debits and credits, date and form of last communication with defendant in an attempt to resolve the claim, and statement about exemptions from judgment.
    - Extend the 14-calendar-day period to respond to the complaint to a longer time.
    - Include in service documents a clear and conspicuous notice that the defendant can request additional time to respond by sending a letter to the court.
    - Set up mediation before the time that the defendant must respond to the complaint.
    - Establish a small-claims court monthly explanation program, like that of the Oregon State Bar's Debtor Creditor Section Pro Bono Bankruptcy Clinic. Utilize the services of pro bono volunteer attorneys and law students to provide explanation and advice.

RECOMMENDATION 3.5: Promote availability of unbundled legal services for self-navigators.

Low-income Oregonians may qualify to receive free legal assistance from Legal Aid. In fact, about 84% of the time, Legal Aid lawyers are able to help clients resolve their issues with just brief advice and

175 OJD is currently working on a change to its instructions, as a response to this preliminary recommendation.

176 OJD is the process of updating all county-court webpages and will be using a standard page template to link to forms and other information.

177 In particular, the workgroup recommends reviewing the recommendations contained in the presentation on *Self-Represented Parties in Small Claims and Consumer Law*, which are available in the materials at 344–361, available at http://www.cej-oregon.org/pdfFiles/ATJ%20Forum/2016-09-08%20ATJ%20Forum%20-%20ALL%20MATERIALS.pdf.

service—most of the time helping clients resolve their issues without having resort to the courtroom or litigation. As explained by Janice Morgan, Executive Director of Legal Aid Services of Oregon, such an outcome is not necessarily by design, but, in many cases, is simply a result of the lack of resources to provide all services that may be needed. In fact, Oregon's Legal Aid programs can meet only about 15% of the legal needs of the poor in civil matters, and therefore must limit its work to the highest priority areas (typically food, shelter, income maintenance, and safety from domestic violence), and also must often limit the level of service that it provides. Legal Aid does try to supplement its services through pro bono assistance and self-help materials, including self-help classes. In addition to legal aid, there are other Oregon organizations that provide representation to low- or middle-income individuals in discrete areas of representation (immigration law, family law, and employment law) for free or for a reduced fee, but the needs of this population are not being met.

The OSB's Lawyer Referral Service (LRS) has panels of lawyers available to provide assistance to self-navigators, although those services may not be clearly identified as such from a consumer standpoint, are not prominent on the LRS's website that is visible to consumers, and are not prominent in the enrollment application for lawyers. Consumers may be frustrated by the lack of information about lawyer assistance, including a lack of transparency about the fees.

The LRS's Modest Means Program is very popular with Oregonians (it receives approximately 30,000 calls per year), but, due to limitations on the number of lawyers willing to take reduced-fee cases and the strict eligibility requirements for the program, only 3,000 clients are placed each year. There appear to be some barriers, both financial and otherwise, to significantly expanding the Modest Means Program. Third-party vendors (like AVVO and Legal Zoom) may be working to fill some of these needs; although they advertise legal services to self-navigators, those referrals are made only to lawyers who have joined those networks.

Unbundled legal services—that is, the provision of agreed-on, discrete legal services to a client by a lawyer—is another resource available to self-navigators who otherwise would proceed without counsel. In the past, the provision of unbundled legal services was viewed unfavorably; although it is unlikely that that perception continues today, it does not appear that lawyers market these types of services. For individuals who do not qualify by either income or priority area, little information is available about the numbers of lawyers in the private bar who currently provide unbundled services to self-navigators, and there are few lawyers who advertise services in this way. Oregon has taken steps within the last year to clarify that unbundled legal services are permitted. A new Uniform Trial Court Rule, UTCR 8.110, which became effective in August 2016, sets out certain notice and service requirements that apply if unbundled legal services are used in family-law cases, and the UTCR Committee has recommended, and the Chief Justice has approved, applying those same requirements to all civil cases, effective August 2017 (new UTCR 5.170). The new UTCRs may prompt an increased use of unbundled legal services and in advertising that type of representation to potential clients.

The following recommendations are intended to encourage Oregon lawyers in private practice to assist self-navigators:

- Educate lawyers about the advantages of providing unbundled services, including the existence of new trial-court rules.
- Provide materials on unbundled services to Oregon lawyers (on the OSB's website; in the Bar Bulletin; and through local, specialty bars and sections), including ethics opinions,

sample representation and fee agreements, and reminders about blank model forms that can be printed from the OJD's website.

- Develop sample business plans for new lawyers, including information about how to incorporate unbundled services. Disseminate this information with other messages and materials to new lawyers.
- Offer a CLE program to private lawyers about how to market unbundled legal services to self-navigators. Such a CLE program also might be of interest to the New Lawyers Division.
- Support the efforts of the OSB Public Service Advisory Committee (PSAC) to expand the Modest Means Program and subject areas for unbundled services through the LRS, and make these services more prominent and visible to both consumers and lawyers.
- Encourage the PSAC to explore methods to increase the visibility of limited-scope representation to self-navigators on the LRS, the OSB's website, and through other bar outreach efforts.
- Continue efforts to recruit more lawyers to help self-navigators through the LRS, especially in areas that are underserved. This includes recruiting lawyers for the Modest Means Program, particularly in those geographic areas that are underserved.
- Consider expansion of the Modest Means Program.

The availability of limited legal assistance from licensed paralegals also would benefit self-navigators. The Paraprofessional Regulation Workgroup of the OSB's Futures Task Force's Regulatory Committee has made a separate recommendation on that topic.

RECOMMENDATION 3.6: Continue to develop and enhance resources available to self-navigators.

While OSB, OJD and legal aid have made huge strides in publishing information that is useful to self-navigators, we must continue to develop and enhance available resources.

- Continue developing interactive forms and materials on the OJD's website.[178]
- Seek feedback from self-navigators on whether online materials are helpful.[179]
- Continue the efforts of OSB staff to expand the information on the OSB's public website to include more topics under "Do It Yourself," even if this is just a cross-reference to Oregon Law Help or other resources.
- Continue the efforts of OSB staff to expand and update the OSB's web pages to include links to other sources (e.g., small-claims information is outdated and does not mention or link to the OJD's interactive forms).

178 To date, the OJD offers interactive form packets for small claims, residential Forcible Entry and Detainer (FED) evictions, satisfaction of money awards, applying for or renewing a Family Abuse Prevention Act (FAPA) restraining order, dissolution, separation, unmarried parents, and parenting plans. The OJD's next iForms release will include an updated FAPA packet, followed by family-law modifications and temporary orders. Other forms are in the process of being evaluated for interactive form development, including some nonfamily-law forms.

179 Because providing a comment section may encourage consumers to share the details of their legal problem, the best approach may be to include a one-question survey, merely asking "Is this page helpful?" as many websites do.

- Continue ongoing efforts to redesign local courts' web pages.
- Educate lawyers about the resources that are available for self-navigators. This could include regularly targeting bulleted and website information to new lawyers through the OSB's swearing-in packets or the OSB's New Lawyer Mentoring Program materials.
- Train lawyers on how to interact with self-represented individuals (the Multnomah County Bar Association recently presented a CLE program on this topic).
- Expand the visibility of help to self-navigators through the OSB's Lawyer Referral Service.
- Support the efforts of legal aid in making printed materials available in libraries, as well as through community partners and social-service agencies.
- Consider placing kiosks that can link to courthouses in rural areas where travel to the county courthouse poses a barrier to the access of justice.[180]
- Expand the number of self-help classes available on various legal topics, either through court programs, legal aid, or other stakeholders.
- Provide a gap analysis to see what forms and resources should be developed.
- Catalog existing short do-it-yourself videos for self-navigators. Some are available through the various stakeholders' websites. Ask the OSB to evaluate whether members could volunteer to create additional videos where gaps exist.
- Consider developing visual materials and new technologies, such as online interactive tools about how to prepare for a court proceeding.[181]
- Review materials to confirm that they are easy to understand and aimed at an appropriate grade level in terms of reading ability (ideally at no higher than an 8th grade reading level).

180 Kiosks are used by some states as a way to connect individuals in rural areas to the court where travel distance to the courthouse is difficult. Arizona is one such example. *See* Alicia Davis, *et al*., *2014-2018 Mohave County Courts, Arizona Strategic Plan, available at http://www.mohavecourts.com/whatsnew/StrategicPlan.pdf*.
181 Examples of effective visual materials can be found in *Cases without Counsel*, *supra*, at note 163.