

## Summary of Testimony

Task Force to Expand Access to Civil Legal Services in New York

Chief Judge's Hearings

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Gillian K. Hadfield

Chief Judge Lippman, Justice Gonzalez, and Mr. James:

Thank you for inviting me to speak with you today about the crisis in access to justice in this country and in this state.

My name is Gillian Hadfield. I am the Kirtland Professor of Law and Professor of Economics at the University of Southern California. I specialize in the economics of legal markets and institutions. I have devoted significant efforts in recent years to analyzing the crisis in access to justice facing ordinary Americans and ways to solve it.

Being both a lawyer and an economist, and an academic to boot, I'm at triple threat of hiding behind "on the one hand, on the other hand" statements when it comes to addressing public policy problems. But I am here today to make a clear unequivocal statement: there is no way to solve the crisis of civil access to justice without fundamental change in the way the judiciary regulates the practice of law. More precisely, there is no way to generate the kind of legal help that ordinary New Yorkers need solely through the expenditure of public money on legal aid and the provision of pro bono and other charitable assistance. No way. Any solution that makes a dent in the problem will also have to involve expanding the types of people and organizations that are authorized to provide legal help. I realize that is a statement that is at odds with almost everything lawyers talk about when they talk about access to justice. But it shouldn't be. It should be the main topic of conversation: how will we expand access by expanding the range of options available to ordinary people when they face the ordinary legal needs of everyday life? This is not a scary option. It is not an unethical option. It is, in my view, the only responsible option.

Don't get me wrong. Increased funding in the form of increased money for courts, legal aid and court-based pro se support services is clearly needed. Although we are often told that the U.S. is a legalistic society, my research has shown that if we take into account the fact that the American approach to regulation is much more legally-

intensive<sup>1</sup> than elsewhere, the U.S. is in fact far behind other advanced countries (and some less advanced ones) when it comes to public expenditure on courts, judges and legal aid.<sup>2</sup> I support every effort to increase the level of court funding, legal aid and pro bono efforts.

But I believe it is a major mistake for the legal profession to focus exclusively on how to solve the access problem with more money—public or charitable money—and volunteer pro bono efforts alone. The reason is that the scale of the problem is such that any reasonable amount of public funding or legal aid or pro bono work can never be more than a partial solution. The need for legal help—dare I say the demand for legal help—far, far outstrips what can be met only through publicly funded and charitable forms of supply.

Let's focus just on the part of the problem that your Task Force has been charged with studying: the civil legal needs of low-income New Yorkers living at or below 200% of the poverty line. The 2010 Task Force report demonstrated that approximately half of all these low-income households were facing an average of one and a half civil legal problems when they were surveyed. That's 3 million people or a little over 1 million households. That's 1.5 million legal problems in low-income households.

Suppose you wanted to provide every household experiencing civil legal problems just *one hour* of legal help with each problem they faced. What would that cost? The average hourly rate for a general practitioner working in solo or small firm practice in New York—the kind of lawyer who provides services to ordinary folks rather than corporations—is about \$200. A little more math: 1 million households times 1.5 problems times \$200 per hour equals \$300 million. That's for *one hour* for each problem. Even if you think you could find enough lawyers willing to work for, say, \$150 an hour (which no survey of lawyers that I've seen suggests is possible), you're still talking \$225 million. Of course, for very few legal problems is one hour of help much help at all.

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<sup>1</sup> For example: one way to protect borrowers in mortgage lending markets is to regulate the terms of mortgages that may be offered—requiring minimum down payments, for example, or prohibiting adjustable interest rates or balloon payments. Another approach is to allow lenders to offer whatever terms they choose and to protect borrowers with legal rights—to disclosure, to truth-in-lending, to cooling-off periods, etc. The latter approach may generate more options for people in the marketplace, but it also imposes more legal costs on consumers who have to 'pay' to regulate the market individually—learning about legal rights ahead of time, reviewing disclosures, interpreting complex individualized terms, bringing claims when rights are violated.

<sup>2</sup> I provide some data about this in my article *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans* (37 Fordham Urb. L. J. 129).

The total budget for the Judiciary’s Civil Legal Services initiative in New York this year is \$25 million. That would buy 1 million low-income households about seven and a half minutes of legal help at \$200 an hour. Indeed, the entire budget for New York state courts this year—\$2.3 billion—would buy these 3 million low-income people only about seven and a half hours of attorney assistance with each of their legal problems.

And if you didn’t want to pay hourly rates for that assistance? It would require every one of the approximately 150,000 New York licensed attorneys to work an additional 10 hours pro bono a year for *each hour* of help provided for all those facing a legal problem. To put this number in perspective, in the 2008 ABA Pro Bono survey, American lawyers provided an annual average of 28 hours of pro bono services to persons of limited means.<sup>3</sup> The average time spent on a single pro bono case was 24 hours—meaning that on average, American lawyers are helping the equivalent of one person or household a year with a legal problem. If this average applies in New York, it means 150,000 households receive pro bono help—that’s 10% of the 1.5 million legal problems low-income households tell us they are facing.

It gets worse. The legal needs surveys, like the one your Task Force conducted in 2010, only ask households about their “erupted” problems—the divorce in progress, the job termination, the foreclosure or eviction notice. The iceberg under the water consists of all the stages before disaster strikes when people are making decisions about how to navigate their legal lives: deciding how to plan for child custody or income-sharing as a relationship struggles; whether to take a job or comply with employer demands or how to respond to an incipient hostile environment; whether to sign that mortgage or rental agreement or accept that offer to consolidate debt. This is the kind of legal work, of course, that the only “persons” who can really afford legal services in today’s legal world—our “corporate persons”—predominantly call upon: advice about how to comply with regulations, execute deals, avoid disputes or minimize liability. Ordinary Americans have effectively no access to such advice. And that plays no small role in determining just how many of those problems erupt and land in your courthouses. The scale of the demand for legal assistance in America is huge, and almost entirely unmet.

That’s why I believe any reasonable response to the crisis in access to justice for ordinary households in New York must involve a serious effort to increase the supply of low-cost legal assistance. There is a straightforward way to do this: allow people and organizations other than lawyers and law firms to provide some forms of legal assistance.

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<sup>3</sup> In addition, attorneys provided an average of 13 hours in pro bono work for organizations that serve those with limited means. The survey is not particularly clear about this but it appears that this would include, for example, serving on the board of a non-profit or assisting the organization with legal matters—not providing legal services directly for the people served by the organization.

I imagine every lawyer in the room is gasping at this point. How can a non-lawyer provide legal assistance? Isn't that recipe for shoddy assistance? Exploitation? Fraud?

No. It's not. Other professions do this in perfectly reasonable ways. Take medicine. Does a full-fledged MD have to deliver every service needed to address every medical issue you face in order to receive quality care? No. Medical care is a team sport, provided by a wide variety of medical professionals: nurses, radiologic technologists, pharmacists, nurse practitioners, physical therapists, chiropractors, registered massage therapists, certified nurse midwives, certified registered nurse anesthetists, etc. Many of these providers are licensed and authorized to provide services directly to those with medical problems. They are not limited to working under the direct supervision of MDs. Thank goodness. Because if they were we'd be paying MD rates for every sore throat and backache.

There is an urgent need for the judiciary to change the landscape of options available to those with legal needs: to exercise your ultimate authority to decide who can provide legal assistance by expanding that list beyond expensive JD-trained and bar-licensed attorneys.

Of course we want some services delivered only by expensive JD-trained and bar-licensed attorneys—we only want surgery performed by surgeons, too. But where are our nurse practitioners? Our legal systems desperately need the equivalent of nurse practitioners and other non-MD health care providers. We need non-JD legal providers who can perform simpler legal work at much lower cost and thereby fill an enormous part of the gaping legal need in this state.

The scale of the demand for such help—interpreting the terms of a rental or mortgage agreement before it is signed or breached, before it becomes the basis for an eviction, collection or foreclosure action, for example—is the great virtue here. Yes, individual situations vary. But in large numbers there is a lot of repetition. This means that it is possible to come up with relatively standardized approaches that will suit the needs of many people. Not all—the nurse practitioner working independently in a medical clinic, for example, needs to be trained to recognize when the persistent cough is more than a cold and needs to be handled by the more expensive MD. So too would non-JD legal providers need to be trained to recognize when a rental or mortgage problem calls for more expensive measures than the common solution provides—such as recognizing when there is a potential violation of significant legal obligations by a landlord or mortgage lender. This is the kind of triage that no doubt our current overworked legal aid providers have to provide on a daily basis: screening the requests for help that inundate them to determine which ones they can do something significant for and which ones they cannot. Our public interest law firms do this as well—they refrain, I'm sure with regret, from helping those with ordinary problems to find those where the help can have broad impact. I'm quite confident that in many areas there are ways to train people who

do not hold JDs to perform some of this function, following established protocols and accessing informed databases and networks of JD-based advice when needed.

Think about one of the major sources of court burden: misunderstandings about procedures and requirements and forms by pro se litigants in housing or family court, for example. Your Task Force has heard (and surely experienced) the delays and complications created by the flood of people with no alternative but to represent themselves. Yes, it would be nice if every one of these people had a full-fledged JD licensed to practice in New York to represent them. But if we can't do that—and we can't—then think about how much improved the situation would be for all concerned if these people could at least obtain low-cost assistance from people with sufficient expertise to help them navigate the process: to tell the person facing eviction for unpaid rent that if she wants to argue that her apartment has no heating and the ceiling is falling down<sup>4</sup>, then she should bring some pictures and other evidence to court. To help people to understand what a form is asking for and to explain what some of the arcane legal language in a court order or rule means. There is much that can be done that is very helpful here that does not require deep legal expertise.

Authorizing intelligent, trained and well-supported non-JD legal assistants does not involve entering into uncharted waters. The United Kingdom, for example, has a long history of allowing a wide variety of differently trained individuals and organizations to provide legal assistance. And fortunately some very fine legal scholars have studied how well this works. Their key finding: it works very well. Indeed, in many cases, people are better served by a non-lawyer organization that *specializes* in a particular type of legal help—navigating housing or bankruptcy matters, for example—than they are by a struggling solo practitioner with a general practice. Another key finding: when people have access to lower cost alternatives to full-fledged attorneys, they use these resources. And that means they don't ignore their issues as often, they don't let them fester until they erupt into a major mess in your courthouse. Your 2010 legal needs study showed that significant majorities of low-income New Yorkers with legal problems—65% of those with housing problems, 59% of those with financial problems, 50% of those with health insurance problems—took *no action* in response to their problems. That's what in the business we call a high rate of “lumping it.” Studies in the U.K., by comparison, show much lower rates of lumping it—perhaps as low as 5-10%. Again the analogy to medical care is illuminating: untreated problems often just become worse problems.

The U.S. unfortunately has little experience with non-JD legal assistance—although that may be changing. Washington State has just this past month embarked on a plan to authorize what they call “limited license legal technicians” to perform carefully defined services for people, without direct supervision by an attorney. The

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<sup>4</sup> A vignette shared by one of the judges who testified before you in last year's hearings.

Washington State program is just getting underway with the appointment of a board to develop procedures for application, licensing and supervision of these LLLTs. It will be a program to watch.

But New York should not wait to see how Washington turns out. It should act now to evaluate its options for expanding the supply of legal assistance to New York's citizens. And it should do so in a firmly policy-oriented and evidence-based way. For too long this issue has been allowed to become buried under the intuition-based objections of existing members of the legal profession. (These are often sincerely held worries about the capacity to help those with legal trouble, although they are also, one must admit, sometimes plainly motivated by protectionist fears of competition.) If we treat this, as we absolutely must, as a matter of serious policy and we put our intuitions to the test of theory and empirical evidence, I guarantee we will find that the traditional fears are unfounded. There are numerous ways to ensure levels of quality and care in legal matters that outperform our current situation by substantially decreasing cost and increasing access. How about an RFP—a request for proposals—from a wide range of possible providers and policymakers, not merely the current members of the legal profession? I think New York, given your energy and devotion to this question, could turn the corner on innovation in legal services and take a major leadership role in a matter that is of desperate need of fresh thinking both here and throughout the country.

I urge the New York judiciary to be the next to take this bold step towards serious, meaningful resolution of the crisis in our courts and in our justice system. Ultimately it is the state judiciary that is accountable for the wisdom of a policy that denies ordinary people access to the services that well-trained, cost-effective non-JD legal assistants could provide. As a wonky policy analyst, I can say without doubt that the policy has no grounding in good economics or good sense. It is time for it to change.