INCREASING ACCESS TO JUSTICE: EXPANDING THE ROLE OF NONLAWYERS IN THE DELIVERY OF LEGAL SERVICES TO LOW-INCOME COLORADANS

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INTRODUCTION

Over the past century, our nation has made substantial progress in achieving racial[1] and gender equality.[2] Yet, with the arrival of the new millennium, economic discrimination still thrives in America. Nowhere is this more evident than in the judicial system. The most repugnant manifestation of the judiciary's economic discrimination is the lack of access to legal services for low-income Americans.[3]

For the past few years, the Colorado legal community has been engaged in a heated debate over the delivery of legal services to low-income individuals.[4] Pursuant to this dis-

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1. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

2. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973).

3. *See* LEGAL SERVS./PRO BONO COMM., COLORADO SUPREME COURT JUDICIAL ADVISORY COUNCIL, REPORT OF THE LEGAL SERVICES/PRO BONO COMMITTEE OF THE JUDICIAL ADVISORY COUNCIL 1–3 (1998) [hereinafter FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL]; ABA CONSORTIUM ON LEGAL SERVS. AND THE PUB., AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE (1996) [hereinafter AGENDA FOR ACCESS]; ACCESS TO JUSTICE WORKING GROUP, STATE BAR OF CAL., AND JUSTICE FOR ALL: FULFILLING THE PROMISE OF ACCESS TO CIVIL JUSTICE IN CALIFORNIA (1996); INST. FOR SURVEY RESEARCH AT TEMPLE UNIV. FOR THE ABA CONSORTIUM ON LEGAL SERVS. AND THE PUB., FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY (1994) [hereinafter LEGAL NEEDS STUDY]; ABA CONSORTIUM ON LEGAL SERVS. AND THE PUB., LEGAL NEEDS AND CIVIL JUSTICE (1994) [hereinafter LEGAL NEEDS AND CIVIL JUSTICE].

4. *See* FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 1–3; LEGAL SERVS./PRO BONO COMM., COLO. SUPREME COURT JUDICIAL ADVISORY COUNCIL, SECOND REPORT OF THE LEGAL SERVICES/PRO BONO COMMITTEE OF THE JUDICIAL ADVISORY COUNCIL 2 (1999) [hereinafter SECOND REPORT OF THE JUDICIAL ADVISORY COUNCIL]; LEGAL SERVS./PRO BONO COMM., COLO. SUPREME COURT JUDICIAL ADVISORY COUNCIL, THIRD REPORT OF THE LEGAL SERVICES PRO BONO COMMITTEE OF THE JUDICIAL ADVISORY COUNCIL (1999) [hereinafter THIRD

course, the legal community has promulgated a number of proposals meant to increase access to legal services for low-income Coloradans.[5] Perhaps the most promising, and certainly the most controversial of these proposals, was mandatory *pro bono*. Unfortunately, the Colorado Supreme Court, in May 1999, with the overwhelming support of the Colorado Bar Association, rejected both a mandatory *pro bono* requirement and mandatory reporting of *pro bono* services.[6] Instead, the court adopted an aspirational *pro bono* rule, requiring lawyers to provide fifty hours of service per year;[7] however, even its adoption lacked the support of the Colorado Bar.[8]

REPORT OF THE JUDICIAL ADVISORY COUNCIL]; COLO. SUPREME COURT JUDICIAL ADVISORY COUNCIL, COMM. ON PRO SE LITIGANTS, FINAL REPORT (1998) [hereinafter REPORT OF THE COMM. ON PRO SE LITIGANTS]; COLO. SUPREME COURT COMM. ON COUNTY AND DIST. COURT CIVIL JURISDICTION AND ACCESS ISSUES, COLORADO SUPREME COURT COMMITTEE ON COUNTY AND DISTRICT COURT CIVIL JURISDICTION AND ACCESS ISSUES REPORT (Aug. 10, 1999), http://www.court.state.co.us/supct/committees/civaccess/civaccess.htm; CBA Ethics Comm., *Formal Op. No. 101: Unbundled Legal Services,* COLO. LAW., Apr. 1998, at 21.; COLO. RULES OF PROF'L CONDUCT R. 1.2 (2000); COLO. R. CIV. P. 11; COLO. R. CIV. P. 311; Edwin L. Felter, Jr., *Litigants without Lawyers,* COLO. LAW., June 1996, at 23 (advocating expansion in the role of nonlawyers to increase low-income Coloradans' access to the courts).

5. *See* FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at xvi–xx (for discussion of proposals see *infra* Part II); REPORT OF THE COMMITTEE ON PRO SE LITIGANTS, *supra* note 4 (encouraging the Supreme Court and Bar to approve the unbundling of legal services); CBA Ethics Comm., *supra* note 4 (opinion adopted Jan. 17, 1998) (approving unbundled legal services); COLO. RULES OF PROF'L CONDUCT R. 1.2 (adopting the unbundling of legal services); COLO. R. CIV. P. 11 (permitting the unbundling of legal services); COLO. R. CIV. P. 311 (permitting the unbundling of legal services); COLO. SUPREME COURT COMM. ON COUNTY AND DIST. COURT CIVIL JURISDICTION AND ACCESS ISSUES, *supra* note 4 (recognizing that cost is the most significant factor prohibiting access to the courts and recommending the adoption of COLO. R. CIV. P. 26.3 in order to reduce costs to litigants in cases of limited monetary claims); Felter, *supra* note 4 (advocating expansion in the role of nonlawyers to increase low-income Coloradans' access to the courts).

6. *See* Letter from the Colorado Supreme Court to the Judicial Advisory Council Regarding Pro Bono (May 28, 1999), *at* http://www.courts.state.co.us/supct.committees/jac/jac.htm [hereinafter Supreme Court Response]; *Proposed Change to Colo. RPC 6.1 Concerning Aspirational Goals for* Pro Bono *Public Service,* COLO. LAW., Sept. 1999, at 19.

7. *See* COLO. RULES OF PROF'L CONDUCT R. 6.1 (2000). In essence, the new rule requires lawyers to *aspire* to "provide fifty hours per year of *pro bono* service, a substantial majority of which shall be for service to low-income people or organizations acting on their behalf." *Proposed Change to Colo. RPC 6.1 Concerning Aspirational Goals for* Pro Bono *Public Service,* COLO. LAW., Sept. 1999, at 19.

8. *See* Jo Ann Viola Salazar, *CBA and Supreme Court Action Regarding Aspirational Pro Bono Goal,* COLO. LAW., Dec. 1999, at 19.

Interestingly, at approximately the same time mandatory *pro bono* was rejected, the Colorado Supreme Court amended the Colorado Rules of Civil Procedure and the Colorado Rules of Professional Conduct to provide for the limited representation of clients.[9] Otherwise known as the "unbundling of legal services" or "discrete task services," the new limited representation rules allow an attorney to provide discrete legal services to an otherwise *pro se* party and to charge the client accordingly.[10] Thus, a low-income individual who cannot afford full-fledged representation by an attorney can now "order" certain legal services "à la carte."[11] In contrast to the mandatory *pro bono* debate, the Colorado Supreme Court's approval of limited representation has been relatively uncontroversial, with dissent emanating only from the federal bench.[12]

Although a step in the right direction, permitting limited representation does not, by itself, go far enough to ensure adequate access to legal services for Colorado's indigent.[13] More radical measures, however, such as mandatory *pro bono*, have faced opposition and, ultimately rejection, by the Colorado legal community.[14] Thus, the dilemma presents itself. An acceptable solution to the inadequate access to legal services for Colorado's indigent necessarily depends on two distinct but equally important components. On the one hand, the solution must be far reaching in order to achieve the desired outcome—an increase in the delivery of legal services to low-income Coloradans. On the other hand, the solution must secure the support of a seemingly conservative Colorado legal community.

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9. *See* COLO. R. CIV. P. 11; COLO. R. CIV. P. 311; COLO. RULES OF PROF'L CONDUCT R. 1.2.

10. *See* COLO. R. CIV. P. 11; COLO. R. CIV. P. 311; COLO. RULES OF PROF'L CONDUCT R. 1.2.

11. *See* Karen Abbott, *'A La Carte' Legal Menu Available In Colorado: People Can Choose to Retain Lawyers for Certain Services, But Only in the State Courts*, DENV. ROCKY MTN. NEWS, Sept. 20, 1999, at A5; *see also* Raymond P. Micklewright, *Discrete Task Representation a/k/a Unbundled Legal Services*, COLO. LAW., Jan. 2000, at 5.

12. *See* Abbott, *supra* note 11; *see also* Editorial, *Holding Line on Legal Fees*, DENV. ROCKY MTN. NEWS, Sept. 22, 1999, at A54; John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15.

13. *See Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 FORDHAM L. REV. 1751, 1774–75, Recommendations 47–48, 51 (1999) [hereinafter *Recommendations*]; *Report of the Working Group on Limited Legal Assistance*, 67 FORDHAM L. REV. 1819, 1822 (1999).

14. *See* Supreme Court Response, *supra* note 6.

This comment argues that increasing the permissible scope of lay representation in Colorado is an effective means of providing low-income Coloradans adequate access to the judicial system. Perhaps more importantly though, this comment seeks to establish that expanding the role of nonlawyers[15] in the delivery of legal services to low-income Coloradans is a viable proposal because, unlike mandatory *pro bono*, it has the potential to secure the support of the Colorado legal community.

Part I details the inequities existing under the current system. Part II proposes expanding the role of nonlawyers in order to increase access to justice for low-income Coloradans. Part III, the heart of this comment, focuses on identifying support for this proposal within the Colorado legal community. Parts III.A and III.B analyze two recent attempts by the Colorado legal community—mandatory *pro bono* and the unbundling of legal services—to rectify the inequities of the current delivery system. Part III.A concludes that the Colorado legal

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15. The ABA Commission on Nonlawyer Practice divides nonlawyer legal activity into three basic categories: document preparation, paralegal, and legal technician. First, the Commission defines a document preparer as "a person who assists in the preparation of forms and documents using information provided by a Self-Represented Person." *See* ABA COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS xvii (1995). Colorado has historically referred to these persons as scriveners. Scriveners, the Colorado Supreme Court has held, are not engaging in the unauthorized practice of law because they provide no legal advice to clients—they only assist in the preparation of documents. *See* Colorado Bar Ass'n v. Miles, 557 P.2d 1202 (1976). The second category of lay practitioners is comprised of paralegals. The Commission Report defines a paralegal as "a person who performs substantive legal work or provides advice to a client with the supervision of a lawyer or for which a lawyer is accountable." ABA COMM'N ON NONLAWYER PRACTICE, *supra*, at xviii. In Colorado, paralegals do not engage in the unauthorized practice of law as long as they are appropriately supervised. *Cf.* People v. Fry, 875 P.2d 222 (Colo. 1994) (censuring defendant for failure to supervise paralegal as such failure constituted aiding a nonlawyer in the unlawful practice of law). Finally, the Commission report defines a legal technician as "a person who provides advice or other substantive legal work to the public with regard to a process in which the law is involved, without the supervision of a lawyer and for which no lawyer is accountable." ABA COMM'N ON NONLAWYER PRACTICE, *supra*, at xviii. Moreover, "[t]he fact that a Legal Technician may seek guidance from a lawyer (without being either supervised by or accountable to the lawyer) does not give the Legal Technician the status of a Paralegal." *Id.* In Colorado, a legal technician, as defined by the Commission, is engaging in the unauthorized practice of law; *Cf.* Denver Bar Ass'n v. Public Utils. Comm., 391 P.2d 467, 471 (1964) (see discussion *infra* Part III.C). Thus, this comment advocates allowing legal technicians to engage in the practice of law.

community's principal reasons for rejecting mandatory *pro bono* implicitly supports expanding nonlawyer roles. Part III.B concludes that the Colorado Supreme Court's relatively uncontroversial adoption of the new limited representation rules also supports increasing the permissible scope of lay representation in Colorado. Finally, Part III.C examines the current status of nonlawyer representation in Colorado—including the amorphous concept of the unauthorized practice of law—and suggests that the Colorado Supreme Court's interpretation of this doctrine would permit an expansion in lay representation.

I. LOW-INCOME INDIVIDUALS DO NOT HAVE ADEQUATE ACCESS TO JUSTICE UNDER THE CURRENT SYSTEM

A. *The Nationwide Neglect of Low-Income Individuals*

Our current institutions are not able to deliver adequate legal services to low-income Americans. In fact, upwards of eighty percent of the legal needs of the nation's poor are not being met.[16] According to the Comprehensive Legal Needs Study ("CLNS"),[17] the most exhaustive survey of its kind, forty-eight percent of low-income households[18] faced one or more civil legal issues during 1992.[19] Of those low-income households experiencing legal need, approximately half are facing more than one legal issue.[20] Yet, seventy-one percent of these civil legal issues were not brought to the "system of justice." [21] Survey respondents cited cost as one of the primary reasons they failed to seek help from the judicial system.[22]

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16. *See* ACCESS TO JUSTICE WORKING GROUP, *supra* note 3, at 17. The Access to Justice Working Group of the State Bar of California reviewed more than twenty-five studies, conducted over the past twenty years, which demonstrate that approximately eighty percent of the legal needs of the nation's poor are not being met. *See id.*

17. *See* LEGAL NEEDS STUDY, *supra* note 3.

18. Low-income households were defined as those households having an income of not more than 125% of the federal poverty level and were thus eligible for publicly funded legal assistance. *See* LEGAL NEEDS AND CIVIL JUSTICE, *supra* note 3, at 1.

19. *See* AGENDA FOR ACCESS, *supra* note 3, at 4.

20. *See* LEGAL NEEDS AND CIVIL JUSTICE, *supra* note 3, at 3.

21. *See* AGENDA FOR ACCESS, *supra* note 3, at 4 n.5. "System of justice" was defined by the study to include: attorneys, courts, alternative dispute resolution practices, and hearings before governmental bodies.

22. *See id.* at 10.

B. Colorado's Neglect of Low-Income Individuals

Colorado's failure to meet the legal needs of its indigent may be even greater than that of the rest of the nation.[23] Indeed, there is some indication that Colorado's poor experience annual unmet legal needs more than four times that of the national average.[24] According to the 1990 census, approximately 500,000 Coloradans live in "low-income households"[25] as defined by the CLNS.[26] Based on CLNS methodology, more than 130,000 of these households are faced with civil legal needs in Colorado each year.[27] Yet, during 1996, Colorado's legal services programs provided legal services to only 27,000 clients while *pro bono* attorneys served a mere 3000–5000 additional clients.[28] Together, "legal services and *pro bono* attorneys met only an estimated twenty-five percent of the legal needs of low-income individuals in Colorado."[29] This statistic is even more alarming when one realizes that "the legal difficulties of low-income Americans . . . frequently concern their ability to provide for basic human needs such as food, shelter, and health care."[30]

The dire situation of Colorado's indigent has been compounded by recent cutbacks in federal funding for Colorado's legal services programs.[31] In 1996, the Federal Government

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23. *See* FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 5.

24. *See* ACCESS TO JUSTICE WORKING GROUP, *supra* note 3, at 17. A Colorado survey conducted in 1986 by Jessica Pearson and Nancy Thoennes, *Assessing the Legal Needs of the Poor in Colorado*, 20 CLEARINGHOUSE REV. 200, 201 (1986), found that Colorado's poor experienced approximately 3.7 legal needs per household annually, whereas the CLNS determined the national average to be 0.8. *See* FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 4–5. A number of factors, including the methodology and date of the surveys, could explain the difference.

25. *See supra* note 18 (defining low-income households).

26. FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 5.

27. *See id.* at 6.

28. *See id.*

29. *Id.* Twenty-five percent is likely on the high side. The Judicial Advisory Council ("JAC") report notes that the methodology of the CLNS, which was used to derive the above statistics, was very conservative. *See id.* at 5–6. In addition, the 1990 census numbers, which serve as the starting point for the above calculations, were compared to the number of clients served by Colorado's legal services programs and *pro bono* attorneys in 1996.

30. *Id.* at 7; *see also* AGENDA FOR ACCESS, *supra* note 3, at 24–25.

31. *See* FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 7–8.

reduced funding for legal services programs across the nation by one-third.[32] Thus, total funding for legal services declined from $6 million in 1995 to $4.9 million in 1996.[33] To date, federal funding has remained constant at the reduced level.[34]

The thirty-three percent reduction in federal funding devastated Colorado's civil legal services programs.[35] The Legal Services statewide support office was forced to close its doors, and reduce its staff by sixteen percent in the remaining regional offices.[36] As a result, the availability of legal services to low-income Coloradans has been severely curtailed. "[L]egal services programs have been forced to provide representation in fewer cases and only advice or brief service in more and more cases."[37]

Finally, in addition to reducing the funding of state legal services programs, the Federal Government placed more stringent restrictions on the use of that federal money which remained available.[38] For instance, legal services programs can no longer recover attorney fees or challenge welfare reform measures.[39] The new restrictions also prohibit legal services programs from utilizing the class action mechanism to serve large numbers of poor Coloradans at once.[40]

As demonstrated by the low number of clients served by *pro bono* attorneys,[41] the availability of *pro bono* services in Colorado is also inadequate to meet the civil legal needs of the state's low-income residents.[42] The Legal Services/Pro Bono Subcommittee of the Judicial Advisory Council concluded that "the number of *pro bono* attorneys has leveled off or fallen in recent years."[43] Nationally, it has been estimated that less than seventeen percent of attorneys participate in *pro bono* programs.[44] In Colorado, surveys conducted by the Legal

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32. *See id.* at 8.
33. *See id.* at viii.
34. *See id.*
35. *See id.* at 7–8.
36. *See id.* at 8.
37. *Id.*
38. *See id.* at 8.
39. *See id.* at 9.
40. *See id.*
41. *See id.* at 9–11.
42. *See id.*
43. *Id.* at 10.
44. *See id.* at 9.

Services/Pro Bono Subcommittee of the Judicial Advisory Council "portray a system in which more than half the lawyers in many of the state's judicial districts, including some of the state's most populous, are not participating in organized, bar-sponsored *pro bono* programs."[45] In fact, estimates of attorneys providing *pro bono* services in Denver range as low as six percent.[46] Finally, similar to the now financially diminished Legal Services Program, existing *pro bono* programs have been forced to limit the type of legal services available due simply to a shortage of participating attorneys.[47]

One consequence of exorbitant litigation costs, reduced federal funding for Colorado's legal services programs, and the failure of the legal community to provide adequate *pro bono* representation, is an unprecedented abundance of *pro se* litigants throughout Colorado's judicial system.[48] Evidently, Colorado's current institutions are incapable of providing adequate legal assistance to Colorado's indigent.[49] Due to this institutional inadequacy, it is the duty of the Colorado legal community to introduce innovative measures that have the capacity to meet the low-income community's legal needs. Increasing the permissible scope of nonlawyer practice is one such measure.

II. A PROPOSAL: NONLAWYER PRACTICE IS AN EFFECTIVE AND ACCEPTABLE MEANS OF INCREASING THE DELIVERY OF LEGAL SERVICES TO LOW-INCOME INDIVIDUALS

Given the serious nature of Colorado's unmet legal needs, the time has come to accept nonlawyer practice as a viable solution to the failure of the bar to provide adequate legal assistance to low-income individuals.[50] To date, nonlawyers have

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45. *Id.* at 10.

46. *See id.* In contrast, high percentages of lawyers in rural counties do provide *pro bono* legal services. *See id.* at 10–11.

47. *See id.* at 11.

48. *See generally* REPORT OF THE COMM. ON PRO SE LITIGANTS, *supra* note 4; GOVERNOR'S TASK FORCE ON CIVIL JUSTICE REFORM, FINAL REPORT 35–44 (July 2000).

49. *See generally* REPORT OF THE COMM. ON PRO SE LITIGANTS, *supra* note 4; GOVERNOR'S TASK FORCE ON CIVIL JUSTICE REFORM, *supra* note 48; FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3.

50. *See* Hackin v. Arizona, 389 U.S. 143 (1967) (Douglas, J., dissenting); ABA COMM'N ON NONLAWYER PRACTICE, *supra* note 15; Felter, *supra* note 4, at 23; *Report of the Working Group on the Use of Nonlawyers*, 67 FORDHAM L. REV. 1813 (1999); *Recommendations*, *supra* note 13; Alex J. Hurder, *Nonlawyer Legal*

been underutilized in providing legal services to low-income individuals.[51] However, progressive courts,[52] the consumer movement,[53] increased litigation costs,[54] technology,[55] and the inability of the bar to satisfy unmet legal needs have forced the bar to reexamine its opposition to nonlawyer practice. [56] These factors indicate a continuing trend toward the inevitable expansion and acceptance of nonlawyer practice.[57]

A. *Benefits of Expanding Nonlawyer Practice*

Numerous authorities have recognized the potential benefits associated with expanding nonlawyer roles in providing legal services to low-income individuals.[58] The most obvious

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Assistance and Access to Justice, 67 FORDHAM L. REV. 2241 (1999); Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581 (1999); Deborah L. Rhode, *Meet Needs with Nonlawyers: It is Time to Accept Lay Practitioners—and Regulate Them*, A.B.A. J., Jan. 1996, at 104 [hereinafter Rhode, *Meet Needs with Nonlawyers*]; Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 1 J. INST. STUDY LEGAL ETHICS 197 (1996) [hereinafter Rhode, *Professionalism in Perspective*]; Debra Baker, *Is This Woman a Threat to Lawyers?: A Resurgence in Unauthorized Practice Complaints is Raising Questions about Whether the Court of Public Opinion Will Judge Lawyers as Guardians of the Common Good or Protectors of Their Own Turf*, A.B.A. J., June 1999, at 54; Anthony Bertelli, *Should Social Workers Engage in the Unauthorized Practice of Law?*, 8 B.U. PUB. INT. L.J. 15 (1998); Kathleen Eleanor Justice, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179 (1991).

51. *See* ABA COMM'N ON NONLAWYER PRACTICE, *supra* note 15.

52. *See* STANDING COMM. ON LAWYERS' RESPONSIBILITY FOR CLIENT PROT., ABA, 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/NONLAWYER PRACTICE, at xv–xx (1996) [hereinafter STANDING COMM. ON LAWYERS' RESPONSIBILITY].

53. *See* Rhode, *Professionalism in Perspective*, *supra* note 50, at 208.

54. *See* AGENDA FOR ACCESS, *supra* note 3, at 10.

55. *See* COMMISSION ON NONLAWYER PRACTICE, *supra* note 15, at 36–41.

56. *See generally* STANDING COMM. ON LAWYERS' RESPONSIBILITY, *supra* note 52.

57. *See id.* at xx.

58. *See* Hackin v. Arizona, 389 U.S. 143 (1967) (Douglas, J., dissenting); ABA COMM'N ON NONLAWYER PRACTICE, *supra* note 15; Felter, *supra* note 4, at 24; Bertelli, *supra* note 50; Rhode, *Meet Needs with Nonlawyers*, *supra* note 50, at 104; Rhode, *Professionalism in Perspective*, *supra* note 50; Justice, *supra* note 50; Wayne Moore, *Are Organizations That Provide Free Legal Services Engaged in the Unauthorized Practice of Law?*, 67 FORDHAM L. REV. 2397 (1999); Hurder, *supra* note 50; Russel Engler, *And Justice For All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1999); Denckla, *supra* note 50; *Report of the Working Group on the Use of Nonlawyers*, *supra* note 50; *Recommendations*, *supra* note 13.

benefit of expanding nonlawyer practice would be the increased number of professionals dedicated to satisfying the legal needs of low-income individuals,[59] particularly in cases that may not justify the expense of an attorney or may fail to attract an attorney.[60] Lay practitioners can fill this currently vacant niche in the delivery of legal services.[61]

Opponents of nonlawyer practice question the competency of lay practitioners. However, by narrowly focusing on a specific area of the law or engaging in a certain type of assistance, lay practitioners often develop not only competent, but highly specialized expertise.[62] Consequently, another benefit of nonlawyer practice is that legal advice provided by nonlawyers in their areas of expertise is often superior to that which could be provided by licensed general practitioners.[63]

Finally, nonlawyer practice would increase not only the availability of quality legal service to low-income households, but also its affordability.[64] Opponents of lay practice dispute this contention, arguing that competent nonlawyers will charge rates approximating that of licensed attorneys.[65] However, these critics fail to recognize the economic effect of increased competition. In those few instances where nonlawyers and the bar do compete, prices will drop and consumers will benefit.[66]

B. The Unfounded Rejection of Nonlawyer Practice

Notwithstanding the obvious benefits, the bar has repeatedly ignored the advice of numerous blue-ribbon committees and has traditionally opposed any expansion of nonlawyer

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59. *See* Hurder, *supra* note 50, at 2241–42.

60. *See* Rhode, *Meet Needs with Nonlawyers*, *supra* note 50, at 104; Rhode, *Professionalism in Perspective*, *supra* note 50, at 210; Baker, *supra* note 50.

61. *See, e.g.*, Unauthorized Practice of Law Comm. of the Supreme Court v. Employers' Unity, Inc., 716 P.2d 460 (Colo. 1986); *see* Felter, *supra* note 4, at 23. "[H]andicapped children seeking alternative school placements, battered women seeking temporary protective orders, claimants challenging denial of disability and unemployment claims" are just some examples. Rhode, *Professionalism in Perspective*, *supra* note 50, at 210; *see also* Baker, *supra* note 50. Expanding nonlawyer practice would also help satisfy the need for multilingual legal service providers. *See* Rhode, *Professionalism in Perspective*, *supra* note 50, at 210.

62. *See* Baker, *supra* note 50; *see also* Hurder, *supra* note 50, at 2241–42.

63. *See* Rhode, *Professionalism in Perspective*, *supra* note 50, at 206–07.

64. *See id.* at 209–10; *Recommendations*, *supra* note 13, at 1760.

65. *See Rhode, Professionalism in Perspective*, *supra* note 50, at 210.

66. *See id.*

practice.[67] Colorado, too, has a history of opposition to nonlawyer practice.[68] Unfortunately, this history of opposition is perhaps best explained by the self-interest of the bar in restricting competition.[69] As Professor Rhode points out, "No professional group, no matter how well-intentioned, can make disinterested assessments of the public welfare on an issue where its status and livelihood are so directly implicated."[70]

As in the case of the self-interested bar's opposition, other claims that nonlawyer practice is detrimental to the public welfare are largely unfounded. Although few in number, studies which analyze the harm caused by nonlawyers indicate that such harm is relatively slight.[71] For instance, one study conducted in five states over a period of sixty-one years determined that only eight percent of the prosecutions brought against those practicing law illegally alleged specific harm.[72] Additional studies have reached similar results.[73] In light of

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67. *See* Rhode, *Professionalism in Perspective, supra* note 50, at 201; Justice, *supra* note 50 (reporting that some California attorneys viewed expansion of nonlawyer practice as an assault on the "monopoly" of the bar); *see also* James Podgers, *Legal Profession Faces Rising Tide of Non-Lawyer Practice*, A.B.A. J., Dec. 1993, at 51, 56 (noting that over eighty-five percent of lawyers polled supported the prosecution of independent paralegals who prepare legal documents or give legal advice).

68. *See* Joseph G. Hodges, *Colorado Bar Association Nonlawyer Task Force Commission, Comments on Nonlawyer Activity in Law-Related Situations—A Report with Recommendations* (Jan. 16, 1996) (compiled by the ABA Center on Professional Responsibility) (supporting the minority report of Sevier and Werner which opposed the recommendations of the ABA Commission on Nonlawyer Practice). *But see* Felter, *supra* note 4, at 23.

69. *See* Rhode, *Professionalism in Perspective, supra* note 50, at 202.

70. *Id.* at 203.

71. *See* STANDING COMM. ON LAWYERS' RESPONSIBILITY, *supra* note 52, at xvii–xviii.

72. *See id.* at xvii.

73. *See id.* at xviii. In a more recent study, only thirty-nine percent of states responding to a survey reported receipt of any unauthorized practice of law ("UPL") complaints from clients. *See id.* Furthermore, only twenty-one percent of responding states reported receipt of any cases that involved specific injury. *See id.* In Arizona, only thirteen percent of the 550 UPL complaints received by the Arizona State Bar over a five-year period were filed by nonlawyers. *See id.* However, thirty percent of the complaints did allege some specific harm. *See id.* Types of harm "included the need to engage in further litigation because of a failed legal outcome, delay in litigation, breach of confidentiality, and failure to return legal papers." *Id. See also* Ralph C. Cavanagh & Deborah L. Rhode, *Project, The Unauthorized Practice of Law & Pro Se Divorce: An Empirical Analysis*, 86 Yale L.J. 104 (1976). The study determined that many clients were paying attorneys substantial sums to complete simple tasks which could readily be done by nonlawyers. *See id.* at 137–53. Moreover, the error rate for form preparation be-

these results, current regulations prohibiting non-lawyer practice are, at the very least, over encompassing.[74] At worst, these prohibitions are entirely unjustified.[75]

C. Consequences of Rejecting Nonlawyer Practice

The bar's unjustified opposition to nonlawyer practice has two main consequences. First, and most importantly, the opposition by the bar to nonlawyer practice results in an inexcusable increase in unmet legal needs.[76] Second, because the bar continues to oppose nonlawyer practice while remaining unable to meet existing legal needs, the bar's opposition to nonlawyer practice contributes to the public's negative perception of the legal profession.[77] This negative perception of the legal profession is further exacerbated where nonlawyer practice prohibitions are upheld in the face of consumer demand.[78]

D. Regulation Not Rejection

The unscrupulous conduct of lay practitioners is a potential threat to consumers.[79] Potentially, though, this threat is no greater than that posed by the conduct of the practicing bar.[80] The main difference is that lawyers are subject to disciplinary controls. Thus, the appropriate solution to such a threat is not prohibition but regulation.[81]

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tween attorneys and non-attorneys was about the same. *See id.* In essence, the study concluded that unauthorized practice prohibitions were largely unjustified. *See id.*

74. *See* Rhode, *Professionalism in Perspective, supra* note 50, at 200 (arguing that "the current breadth of unauthorized practice prohibitions ill serves the public interest").

75. *See* Cavanagh & Rhode, *supra* note 73.

76. *See id.*

77. *See id.; see also* Baker, *supra* note 50.

78. *See* Baker, *supra* note 50.

79. *See* Rhode, *Professionalism in Perspective, supra* note 50, at 207.

80. *See id.* at 205–06. "The only comparative research to date on these practitioners, in contexts such as pro se divorce and agency proceedings, finds that nonlawyer specialists perform about as effectively as lawyers. Moreover, in the only reported survey on consumer satisfaction, lay practitioners rate higher than attorneys." *Id.*

81. *See id.* Professor Rhode argues that overly-broad unauthorized practice rules coupled with strong consumer demand for low cost legal services results in unregulated lay practice. *See id.* at 208. Thus, not only are abuses more frequent

Admittedly, devising a regulatory mechanism would be the most difficult aspect of expanding the role of nonlawyers. While construction of a detailed regulatory program is beyond the scope of this comment,[82] the conclusions of the American Bar Association Commission on Nonlawyer Practice ("ABA Commission" or "Commission") are instructive.

The primary recommendation of the ABA Commission is particularly significant. The Commission concluded that "[e]ach state should conduct its own careful analytical examination, under the leadership of its [highest court] to determine whether and how to regulate . . . nonlawyer activity."[83] Although this Commission's work has been criticized for shirking its responsibility to develop a detailed regulatory regime, passing this duty to the states is the logical conclusion.[84] A regulatory framework to govern nonlawyer practice in a state should be developed within the rules, regulations, and common law of that state. Moreover, as with the mandatory *pro bono* debate in Colorado, comprehensive discussion within the legal community should precede the ultimate decision concerning proper regulation of nonlawyers.[85] Consequently, consistent with the ABA Commission's recommendation, it is the responsibility of the Colorado legal community, with the supreme court at the helm, to thoroughly develop a proper regulatory regime to govern nonlawyer practice.[86]

Notwithstanding its primary recommendation—that states develop their own regulatory mechanism—the ABA Commission on Nonlawyer Practice did set forth some broad regulatory principles to guide states in their efforts. First, an activity should be prohibited only if "no regulatory approach will effectively and economically achieve acceptably low levels of harm to consumers."[87] Conversely, "[i]f there is relatively little serious risk to life, health, safety or economic well-being, regula-

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than in a regulated profession, but when such abuses occur, victims lack adequate redress.

82. For a comprehensive discussion of regulatory regimes, see ABA COMM'N ON NONLAWYER PRACTICE, *supra* note 15; Bertelli, *supra* note 50; Rhode, *Professionalism in Perspective*, *supra* note 50.

83. ABA COMM'N ON NONLAWYER PRACTICE, *supra* note 15, at 4.

84. *See, e.g.*, Rhode, *Professionalism in Perspective*, *supra* note 50.

85. *See infra* Part III.A.

86. *See* ABA COMM'N ON NONLAWYER PRACTICE, *supra* note 15, at 9.

87. *Id.*

tion may not [even] be needed."[88] For those activities, which fall between these two categories, the ABA Commission recommends devising a regulatory program.[89]

To this end, the "predicted costs and effectiveness of different options for reducing the predicted harm while avoiding counterbalancing negative consequences" should inform the consideration of various regulatory alternatives.[90] Additionally, the state should consider whether "potential consumers of law-related nonlawyer services have the knowledge needed to properly evaluate the qualifications of nonlawyers offering the services."[91] Finally, and obviously, the state should determine if "actual benefits of regulation likely to accrue to the public outweigh any likely negative consequences of regulation."[92] As will be discussed in Parts III.B and III.C, these broad regulatory principles dovetail nicely with Colorado's treatment of unbundled legal service and its approach to the unauthorized practice of law.

Before determining the appropriate regulatory regime, however, the Colorado legal community must first accept nonlawyer practice as a necessary and effective means of providing adequate legal assistance to low-income Coloradans.

III. IDENTIFYING SUPPORT FOR NONLAWYER PRACTICE WITHIN THE COLORADO LEGAL COMMUNITY

Support for expanding the permissible scope of nonlawyer practice in Colorado is implicit within: 1) the Colorado legal community's rejection of mandatory *pro bono*; 2) the Colorado legal community's relatively uncontroversial approval of discrete task representation; and 3) the Colorado Supreme Court's approach to the unauthorized practice of law in Colorado.

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88. *Id.*
89. *See id.*
90. *Id.*
91. *Id.*
92. *Id.*

A. *The Colorado Legal Community's Principal Reasons for Rejecting Mandatory* Pro Bono *Implicitly Support Nonlawyer Practice*

Analyzing the Colorado legal community's recent debate over whether to institute mandatory *pro bono* provides insight into the institutional thought processes of the Colorado legal community with regards to the delivery of legal services to low-income individuals. This insight reveals the plausibility of implementing a proposal to expand the role nonlawyers play in delivering legal services to the low-income residents in Colorado.[93]

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93. In response to federal funding cutbacks for Colorado's legal services programs and the poor *pro bono* record of Colorado attorneys, the Legal Services/Pro Bono Subcommittee of the Judicial Advisory Council was established. *See* FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 1. At the request of then Chief Justice Anthony Vollack and Council Chair Justice Rebecca Love-Kourlis, the Subcommittee began meeting in January 1997:

> (1) to explore the issues of developing and implementing an effective plan for raising critically needed funds for Colorado's legal services programs; (2) to make recommendations to the Supreme Court on ways to increase the amount of pro bono service performed by lawyers throughout the state of Colorado; and (3) to explore the role of judges in encouraging lawyers to engage in pro bono service.

Id. at v. The Legal Services/Pro Bono Subcommittee released its first report in June of 1998. The report, reflecting the impeccable scholarship of the Subcommittee's members—Ed Kahn, co-chair; Gene Nichol, co-chair; Jon Asher; Hon. Amanda Bailey; Angelina de la Torre; Walter Garnsey, adjunct member; Barbara Kelley, adjunct member; Hon. Howard Kirshbaum; Ruth Lehman, adjunct member; Ernie Marquez, adjunct member; JoAnn Salazar, adjunct member; Sue Smedstad; Joyce Sterling; and Hon. Daniel Taubman—made a number of recommendations. *See id.* at xvi–xx. The recommendations fell into four general categories. First, the Subcommittee recommended a number of measures aimed at increasing funding for the state's legal services programs. *See id.* at xi. The second and third recommendations, by far the most controversial, advocated the adoption of a mandatory *pro bono* requirement and a mandatory reporting of *pro bono* services requirement, respectively. *See id.* at xi–xiv. Finally, the Subcommittee recommended expanding the judiciary's role in encouraging *pro bono* activities. *See id.* at xiv–xv. Tellingly, the Subcommittee did not consider expanding the roles of nonlawyers. The Report also did not discuss the pros and cons of limited representation. *See infra* Part III.B. However, this omission was likely deliberate, as a discussion of limited representation was included within a contemporaneous report of another subcommittee of the Judicial Advisory Council. *See* REPORT OF THE COMM. ON PRO SE LITIGANTS, *supra* note 4.

1. A Brief History of the Mandatory *Pro Bono* Debate

Over the past few years, mandatory *pro bono* has taken center stage in a heated debate among the Colorado legal community concerning the delivery of legal services to the poor. In 1997, the Colorado Supreme Court asked The Legal Services/Pro Bono Subcommittee of the Judicial Advisory Council to investigate ways of increasing *pro bono* service performed by Colorado's lawyers. The Subcommittee's recommendations concerning *pro bono* service consisted of three distinct proposals: 1) revision of Colorado Rule of Professional Conduct 6.1 to require each Colorado lawyer under the age of sixty-five to perform *pro bono* service for the lesser of twenty-five hours or three percent of a lawyer's total work hours;[94] 2) adoption of a supreme court rule requiring Colorado lawyers to report the number of *pro bono* hours they perform each year;[95] and 3) as an alternative to the mandatory *pro bono* proposal, adoption of American Bar Association (ABA) Model Rule 6.1, which contains an aspirational provision requiring fifty hours of *pro bono* service each year.[96]

In order to allow for a full debate amid the Colorado legal community, the Judicial Advisory Council (JAC), at its June

94. *See* Ed Kahn & Ed Lederman, *Mandatory Reporting of Pro Bono Services*, COLO. LAW., May 1999, at 43. During the summer of 1997, the Judicial Advisory Council conducted a survey of forty-five randomly chosen Colorado lawyers in order to assess the current level of *pro bono* service across the state. *See* FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 35. The sample included rural and urban attorneys as well as solo practitioners and those working in law firms. *See id.* The survey found that sixty-nine percent of the attorneys interviewed provided at least twenty-five hours of either free or reduced services. *See id.* at 36. However, whereas seventy-nine percent of solo practitioners provided *pro bono* services, only about fifty-three percent of law firm attorneys did so. *See id.* Institutional and social pressure generated by law firm culture in conjunction with associates' heavy billable hour requirement may explain the lower percentage of law firm attorneys providing *pro bono* legal services. Finally, only thirty-eight percent of the survey sample provided twenty-five or more hours of free *pro bono* service. *See id.* Based on the results of this survey, the Council estimated that "a mandatory pro bono rule may increase the number of hours of pro bono service annually by between 76,672 and 164,181 . . . equivalent to adding between 51 and 109 full-time attorneys to . . . the legal services programs in Colorado." *Id.* The breadth of this range is caused by the JAC's uncertainty as to how many attorneys would opt to "buy out" their *pro bono* obligation as allowed by the proposed rule. *See id.*

95. *See* FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 65.

96. *See id.* at 42.

12, 1998 meeting, agreed to defer action on the mandatory *pro bono* proposals for at least six months.[97] During this interval, the Colorado legal community engaged in numerous debates and discussions concerning mandatory *pro bono*.[98] In addition, a survey conducted by the State Court Administrator's Office ascertained public opinion on the mandatory *pro bono* issue.[99]

The JAC, at its March 12, 1999 meeting, ultimately declined to recommend a mandatory *pro bono* rule to the Colorado Supreme Court by a vote of 11–11 with one member abstaining.[100] The JAC did, however, unanimously recommend mandatory reporting of *pro bono* services.[101] Nevertheless, on May 28, 1999, the Colorado Supreme Court declined to accept this recommendation.[102] The court reasoned that "we view the mandatory reporting as a step toward the imposition of mandatory *pro bono* requirements. Since we are unwilling to arrive at that destination, we are also unwilling to take the first step."[103] The court's action is not particularly surprising. Just five months earlier, the Colorado Bar Association's Board of Governors rejected mandatory *pro bono* and mandatory reporting by a margin of 10–1 and 9–1, respectively.[104]

Despite the Colorado Supreme Court's strong opposition to *mandatory pro bono*, the court did manage to adopt a new *aspirational pro bono* rule based on ABA Model Rule 6.1.[105] Unfor-

97. *See id.* at ii.

98. *See, e.g., id.* at 2; Kahn & Lederman, *supra* note 94, at 43; Diane Hartman, *Colorado Bar Association Board of Governors Debates Mandatory Pro Bono*, COLO. LAW., Feb. 1999, at 25; Ben Aisenberg, *A Letter from the President of the Colorado Bar Association*, COLO. LAW., May 1999, at 15; Debate, *You Can't Make Me. Or Can You? A Debate on Mandatory Pro Bono* [hereinafter Debate] (on file with author).

99. *See* SECOND REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 4, at 4. "[Ninety percent] of the [survey] respondents felt there is a need for free or low cost legal services for individuals who cannot afford legal help." *Id.* A similar survey conducted by NBC's 9News found that sixty-five percent of those surveyed supported the proposed mandatory *pro bono* rule. *See id.* at 5.

100. *See* SECOND REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 4, at 1–2.

101. *See id.* Apparently, while there was contentious disagreement over the mandatory *pro bono* proposal, the scarcity of dependable data concerning *pro bono* service warranted a recommendation of the mandatory reporting proposal.

102. *See* Supreme Court Response to the Judicial Advisory Council Regarding Pro Bono (May 28, 1999). Only Justice Gregory Hobbs dissented. *See id.*

103. *Id.*

104. *See* SECOND REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 4, at 2–3.

105. *See* COLO. RULES OF PROF'L CONDUCT R. 6.1.

tunately, the prospect of its adoption fails to generate much excitement among proponents of indigent rights.[106] Similar aspirational provisions found in the Lawyer's Oath, the comments to Colorado Rule of Professional Conduct 6.1, and the policy of the Colorado Bar Association have all failed to result in the adequate delivery of legal services to low-income Coloradans.[107] Indeed, the insufficiency of these pre-existing aspirational provisions contributed to the mandatory *pro bono* initiative in the first place.[108] Even the JAC itself "[was] not persuaded that the adoption of ABA Model Rule 6.1 is likely to have a significant effect on the amount of *pro bono* service provided by Colorado's lawyers."[109] Moreover, the Council "is not aware of any studies which have been conducted to indicate whether the adoption of an aspirational *pro bono* goal has in fact served its purpose to increase the amount of *pro bono* service provided by lawyers."[110]

2. Lessons Learned from the Mandatory *Pro Bono* Debate [111]

The debate over mandatory *pro bono* provides unique insight into the Colorado legal community's collective opinion of its obligation to provide adequate legal services to the state's low-income residents. Therefore, a careful analysis of this debate enables one to suggest the integration of nonlawyer prac-

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106. *Cf.* THIRD REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 4, at 12–13 (noting that although no studies indicate that an aspirational goal would increase the amount of *pro bono* service, the JAC recommends the adoption of such a rule in the hope that it will serve this purpose).

107. *See* FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 38–40.

108. *See id.*

109. *Id.* at 42.

110. THIRD REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 4, at 13.

111. In light of the Colorado Supreme Court's stated grounds for its rejection, *see supra* text accompanying note 103, a discussion of the arguments for and against mandatory reporting of *pro bono* services is omitted from this section. Additionally, constitutional objections are omitted as they are beyond the scope of this comment. The JAC was of the opinion, however, that a well-drafted mandatory *pro bono* rule would not violate the U.S. Constitution. *See* FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 50. For a succinct summary of the constitutional issues raised by mandatory *pro bono*, see B. George Ballman, Jr., *Amended Rule 6.1: Another Move Towards Mandatory Pro Bono? Is it What We Want?*, GEO. J. LEGAL ETHICS (Spring 1994).

tice in a way that addresses the concerns of the mandatory *pro bono* opposition, thereby increasing its chances of acceptance. Accordingly, although mandatory *pro bono* was ultimately rejected, the thoughtful discussion it generated could still prove invaluable in rectifying the plight of Colorado's low-income individuals.

Importantly, the opposition appears to have conceded the propriety of two of the JAC's principal reasons for implementing a mandatory *pro bono* rule. First, the opposition admitted that, on its own, the Colorado legal community had failed miserably to meet the legal needs of Colorado's indigent.[112] The resolution of the Colorado Bar Association's Board of Governors opposing the mandatory *pro bono* proposals explicitly recognized the need for an increase in the availability of legal services to low-income Coloradans.[113] Further, the resolution stated that "this problem is one perceived by the members of this association as requiring a social program that society as a whole should participate in resolving."[114] Second, the opposition does not appear to have challenged the assertion that mandatory *pro bono* would help to mitigate negative public opinion of the legal profession.[115] A mandatory *pro bono* rule, proponents argued, would provide the Colorado legal community with proof of its efforts to increase the availability of legal services to low-income Coloradans, and therefore change the

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112. *See Resolution of the Colorado Bar Association* (Jan. 9, 1999) (noting that the opposition to mandatory *pro bono* conceded that the Colorado legal community had failed to meet the legal needs of Colorado's indigent).

113. *See id.*

114. *See id.*; *see also* Omar J. Arcia, Comment, *Objections, Administrative Difficulties and Alternatives to Mandatory Pro Bono Legal Services in Florida*, 22 FLA. ST. U. L. REV. 771, 781 (1995) (attached as Appendix B to the dissenting statement of Barbara J. Kelley). The comment concludes that "lawyers alone cannot significantly increase access to the civil justice system to the poor." *Id.*

115. "Lawyers are viewed by the public as 'dour and greedy' enriching themselves through 'legal subtleties that lawyers have created.'" Roberto L. Corrada, Pro Bono Representation and the Business of Law, Address at the Ivory Street Luncheon 2 (May 7, 1997) (on file with author); *see also* FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 40–41 (indicating that approximately eighty percent of the public feel that the judicial system does more to make lawyers rich than decide right from wrong). A recent Talmey-Drake Poll on Colorado judicial issues found that seventy-seven percent of the respondents believed that the interests of the average person were ill-served by the complexity of the legal system. *See id.* Eighty-one percent felt that "'[t]he average person . . . can't afford the time or money to sue or be sued.'" *Id.*

negative public perception of Colorado lawyers.[116] Although opponents of a mandatory *pro bono* rule appear to have largely avoided confronting these issues, they did successfully attack its adoption on a number of other fronts.

One popular criticism, for example, was that mandatory *pro bono* offended the professional character of the bar.[117] A profession, these critics argued, is distinguished from other business endeavors by the dedication of its members to public service.[118] The legal profession has historically demonstrated this dedication through its unparalleled commitment to civic service.[119] *Pro bono* work is a manifestation of the spirit of public service, which defines the legal profession. Thus, to require *pro bono* service is to undermine the very essence of what it means to be a lawyer.[120] Consequently, the very nature of *pro bono* work demands that it remain voluntary.[121] As the age-old maxim says, you can't legislate morality.

Conversely, other mandatory *pro bono* opponents have argued that practicing law is indeed a business, and it is for this reason that *pro bono* work should not be required.[122] This argument is often conceptualized as the good times/bad times dilemma. During times of prosperity, an attorney is simply too busy with paying clients to engage in *pro bono* legal work. Conversely, during economic recession, an attorney is just trying to make a decent living and cannot afford to devote time to *pro bono* work.[123]

This "economic argument" was especially divisive for the Colorado bar in the context of the mandatory *pro bono* pro-

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116. *See id.* at 40. *But see* Ballman, *supra* note 111 (summarizing the constitutional issues relating to mandatory *pro bono*).

117. *See* Arcia, *supra* note 114, at 779.

118. *See* Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1121–22, 1132–33 (1991); Debate, *supra* note 98 at 3; *cf.* Kahn & Lederman, *supra* note 94, at 45 ("[P]ro bono stands for the proposition that the legal profession itself will provide . . . free representation, *for the sake of fairness and justice.*") (emphasis added); George M. Kraw, Comment, *Pro Malo Publico*, THE RECORDER, Aug. 25, 1999, at 4 ("Pro bono work is an 'obligation of a professional monopoly.'").

119. *See* Kraw, *supra* note 118, at 4.

120. *See* Ernest Marquez, Esq., Dissent to Recommendations of Legal Services/Pro Bono Subcommittee Regarding Mandatory Pro Bono 10 (June 1998) (on file with author); FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 44.

121. *See* FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 44; *see also* Arcia, *supra* note 114.

122. *See* Marquez, *supra* note 120, at 3.

123. *See* Debate, *supra* note 98, at 2.

posal. Those who could afford to treat the practice of law as a "purely professional occupation" tended to support the proposal because the economic argument simply did not apply to them. Conversely, small town attorneys, and others susceptible to the economic ramifications of a mandatory *pro bono* rule, often opposed its passage, notwithstanding their dedication to *pro bono* legal work.[124]

Additionally, opponents have argued that mandatory *pro bono* would result in incompetent representation.[125] Lawyers who are required to perform *pro bono* legal work would do so grudgingly.[126] Consequently, the quality of representation afforded to *pro bono* clients may suffer.[127] Furthermore, even if an attorney is more than willing to perform *pro bono* work, the legal issues commonly faced by indigent Coloradans are often outside her area of expertise.[128] Thus, opponents have argued that the ethical requirement of competent representation set forth in Colorado Rule of Professional Conduct 1.1 would be internally inconsistent with a requirement to perform legal services outside an attorney's area of expertise.[129] This fear of incompetence may be compounded by concern that malpractice insurance would not cover *pro bono* representation.[130]

Finally, opponents argue that even if attorneys accepted mandatory *pro bono* in theory, insurmountable administrative and enforcement difficulties would prohibit its implementation.[131] For instance, a huge bureaucracy would have to be created to monitor each attorney's compliance with the new rule and ensure that purported *pro bono* cases fell within the rule's guidelines.[132] Additionally, mandatory *pro bono* would require

124. *See* Marquez, *supra* note 120, at 3; FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 48–49.

125. *See* Cramton, *supra* note 118; FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 46; Arcia, *supra* note 114.

126. *See* Ballman, *supra* note 111, at 12.

127. *See id.*

128. *See id.*

129. *See* FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 46; Debate, *supra* note 98, at 2.

130. *See* FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 47.

131. *See id.* at 50; *see also* Cramton, *supra* note 118; Arcia, *supra* note 114.

132. *See* FIRST REPORT OF THE JUDICIAL ADVISORY COUNCIL, *supra* note 3, at 50.

more money and manpower to overcome the lack of competency issues described above.[133]

Mandatory *pro bono* was the most controversial and thoroughly debated issue to face the Colorado legal community in recent years. The above arguments summarize the viewpoint of an ardent and ultimately successful opposition. Notwithstanding the paucity of the ultimate outcome, the decision-making process brought to light the severity and immediacy of the access to justice problem. Moreover, the debate exposed areas of common ground while narrowing the disputed issues. No one in the Colorado legal community doubts that Colorado's poor have insufficient access to legal services. Nor is there any apparent disagreement that the situation must be rectified. The only discord resounds in choosing the appropriate method to achieve the desired outcome. Thus, although mandatory *pro bono* was ultimately rejected, the rationales relied upon to overcome the initiative can be used to predict Colorado's acceptance of an expansion in nonlawyer practice.

3. Why the Colorado Legal Community's Rationale for Rejecting Mandatory *Pro Bono* Supports an Expansion in the Role of Nonlawyers

The Judicial Advisory Council's Committee on Pro Se Litigants, another blue-ribbon committee charged by the Colorado Supreme Court with addressing inadequate legal assistance in Colorado, concluded that "the philosophy must be that the absence of counsel will not be an impediment to access to or use of the judicial system."[134] According to the discussion regarding mandatory *pro bono*, the Colorado legal community agrees with this assertion.[135] Even the Colorado Board of Governors, which vehemently opposed mandatory *pro bono*, acknowledged the desperate need for legal services among low-income Coloradans.[136] Moreover, the Board of Governors conceded that the bar alone could not provide an adequate solution to the problem.[137] Thus, in its statement opposing mandatory *pro bono*, the Board of Governors provided implicit support for expanding

133. *See id.*
134. REPORT OF THE COMM. ON PRO SE LITIGANTS, *supra* note 4, at 2.
135. *See supra* note 112 and accompanying text.
136. *See supra* note 113 and accompanying text.
137. *See supra* note 114 and accompanying text.

the role nonlawyers play in delivering legal services to Colorado's indigent.

The Colorado Supreme Court's blue-ribbon Committee on Pro Se Litigants also determined that "[t]he presence of pro se litigants is an expression of a growing public need, and that need must be met in a way that *the public will find appropriate.*"[138] Opponents of mandatory *pro bono* do not appear to have contested the propriety of this assertion either.[139] The bar must find a way to rebuild public confidence in the profession. As with mandatory *pro bono*, expanding lay practice in Colorado would provide the Colorado legal community with proof of its efforts to increase the availability of legal services to low-income Coloradans. Accordingly, expansion of nonlawyer practice would contribute substantially to changing the negative public perception of Colorado lawyers.[140]

For those who based their opposition to mandatory *pro bono* on its affront to the "profession" of law, allowing lay practice in Colorado seems equally offensive at first. However, through careful integration, the dignity and integrity of the profession will be maintained and, potentially, even enhanced. For instance, the unauthorized practice of law ("UPL") doctrine is the regulatory mechanism by which professional integrity is ensured. It was originally intended to prevent a nonattorney from representing himself as a licensed member of the bar. The UPL doctrine would continue to serve this purpose, as lay practitioners will be required to clearly disclose to clients that they are not licensed attorneys. Moreover, as will be discussed further in Part III.C, the complexity of issues involved, the amount at stake in the case, and the economic feasibility of obtaining representation by an attorney will limit the type of representation permissibly engaged in by lay practitioners. Thus, the structure of integration will itself implicitly recognize the unique benefits of retaining a licensed attorney and will therefore maintain the professional integrity of the bar.

Not only will opening the "practice of law" to qualified lay practitioners satisfy legal need and consumer demand while maintaining the professional integrity of the bar, it will, unlike

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138. REPORT OF THE COMM. ON PRO SE LITIGANTS, *supra* note 4, at 1 (emphasis added).

139. *See supra* notes 115–116 and accompanying text.

140. *See supra* notes 77–78 and accompanying text.

mandatory *pro bono*, do so with comparatively little impact on the bar.[141] The pervasive impact of mandatory *pro bono* contributed greatly to its defeat.[142] If the Colorado Supreme Court had adopted the mandatory *pro bono* proposal, every Colorado attorney would have been affected. Large firm attorneys in urban areas who already face billable hour requirements in the two-thousands would simply be forced to work more, or else face disciplinary measures. Conversely, rural opponents of mandatory *pro bono* hung their hats on the potential economic impact of being required to provide free legal services.[143] Allowing lay practitioners to provide legal services, however, would have little impact on either group.

Lay practitioners would probably not engage in the types of services provided by large corporate firms,[144] and even if lay practitioners did provide similar services, they would serve a different clientele. Moreover, the Colorado Supreme Court, itself, has acknowledged that lay practice is a viable alternative to consumers where the amount at stake does not warrant employment of an attorney.[145]

As for the rural bar, attorneys would benefit by not being *required* to provide free legal services. In addition, rural attorneys faced with a prospective client, who desires legal assistance but lacks sufficient means to pay the attorney's customary fees, would have the option of referring the indigent client to a nonlawyer provider. Thus, be it good times or bad,[146] allowing lay practitioners to engage in the practice of law benefits both rural attorneys and rural consumers by increasing the options available to each.

Competition between attorneys and lay practitioners will certainly occur. But when it does, the consumer ultimately will benefit.[147] Thus, if the bar wishes to rebut derisive claims that it perpetuates its monopoly at the expense of the public welfare, it must accept the small degree of competition associated with expanding nonlawyer practice. Before the bar quibbles

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141. *See supra* notes 60–61 and accompanying text.

142. *See supra* Part III.A.2.

143. *See id.*

144. *See supra* notes 59–63 and accompanying text.

145. *See* Unauthorized Practice of Law Comm. v. Employers Unity, Inc., 716 P.2d 460, 463 (Colo. 1986).

146. *See supra* notes 122–123 and accompanying text.

147. *See supra* note 66 and accompanying text.

over the drawback of competition, it should not forget that its own failure to meet existing legal need initially sparked the debate over mandatory *pro bono*. Therefore, by allowing nonlawyers to fill a vacant niche in the delivery of legal services, low-income Coloradans would receive increased access to legal services at relatively little cost to the practicing bar.

The nature of lay practice also obviates competency concerns, which contributed to the defeat of mandatory *pro bono*.[148] Whereas mandatory *pro bono* may have resulted in lawyers grudgingly providing legal services outside their areas of expertise, nonattorneys will narrowly focus their practices by providing services in a single area of the law or by providing a single type of assistance. Therefore, lay practitioners would develop a level of expertise essentially unachievable in the mandatory *pro bono* framework. Additionally, mandatory *pro bono* would avoid many costs associated with training attorneys in unfamiliar fields, and regulatory mechanisms would help to ensure competence.

Finally, in the context of nonlawyer practice, careful integration of mandatory *pro bono* could address administrative hurdles, another frequent complaint of mandatory *pro bono* opponents. For instance, if an expansion of nonlawyer roles is achieved by broadening the category of those permitted to engage in the practice of law as opposed to narrowing the definition of the practice of law,[149] the Colorado Supreme Court would bring lay practitioners under its regulatory authority. Therefore, the regulatory regime that currently governs attorneys could simply be modified to apply to lay practitioners as well. This modification would minimize costs associated with regulating lay practice.

The cost of implementing nonlawyer practice in Colorado is, however, a valid concern. If the cost of establishing and regulating nonlawyer practice becomes too high, and this cost is then spread to nonattorney practitioners via registration fees or other cost-spreading mechanisms, it will impair the ability of lay practitioners to provide affordable legal assistance. This concern is valid in other contexts as well, such as in establishing educational requirements for nonlawyer providers. Nevertheless, the legal community must view the costs of expanding

148. *See supra* notes 62–63, 125–130 and accompanying text.
149. *See infra* Part III.C.3.

lay practice in light of the substantial benefit to low-income Coloradans.

Although hotly contested and ultimately unsuccessful, the mandatory *pro bono* proposal secured consensus on a number of issues. First, low-income Coloradans suffer from inadequate access to legal services. Second, our current institutions are incapable of providing these individuals with the assistance they so desperately need. Third, the legal profession must pursue creative solutions to this problem and implement an adequate delivery system as soon as practicable. Accordingly, the Colorado legal community must consider, and ultimately accept, an expansion in nonlawyer practice. This is a viable alternative to the imposition of mandatory *pro bono* and an effective means of satisfying the currently unmet legal needs of Colorado's indigent.

B. The Colorado Legal Community's Approval of Discrete Task Representation Indicates Support for Nonlawyer Practice

1. Adoption of and Justification for the New Limited Representation Rules

Interestingly, as Colorado attorneys vigorously debated the pros and cons of mandatory *pro bono*, the unbundling of legal services—another proposal meant to increase the availability of legal services to low-income Coloradans—quietly wove its way through the rule-making process, apparently without incident.[150] The concept of unbundling legal services, or discrete

150. *See generally* REPORT OF THE COMMITTEE ON PRO SE LITIGANTS, *supra* note 4; Micklewright, *supra* note 11. Apparently, the sole dissent to the adoption of the unbundling rules came from the United States District Court for the District of Colorado. *See generally* Kane, *supra* note 12. On June 30, 1999, one day before the new rules were to take effect, the federal bench signed an order prohibiting limited representation in Colorado Federal District Court. *See id*; Abbott, *supra* note 11,. The order stated limited representation is "inconsistent with the view of the judges of this court concerning the ethical responsibilities of members of the bar of this court." Abbott, *supra* note 11. U.S. District Judge John Kane Jr., the most outspoken opponent of unbundling legal services, has argued that "accept[ing] responsibility for somebody else's total welfare" by providing the entire bundle of legal services is what makes the practice of law a profession. *Id.* However, Colorado Supreme Court Justice Hobbs attributes the difference of opinion regarding unbundled legal services to the types of cases handled by the

task representation, has existed for quite some time.[151] It has received increased attention in recent years, however, due to the growing number of *pro se* litigants in Colorado courts.[152] According to Colorado Supreme Court Justice Gregory Hobbs, there is at least one *pro se* party in approximately forty percent of the cases before Colorado's district and county courts.[153] Parties often proceed *pro se* because they cannot afford an attorney, or they *believe* that an attorney is simply too expensive.[154]

Traditionally, agreeing to represent a client bound an attorney, legally and ethically, to: "(1) gather[] facts, (2) advis[e] the client, (3) discover[] facts of the opposing party, (4) research[] the law, (5) draft[] correspondence and documents, (6) negotiat[e], and (7) represent[] the client in court."[155] Accordingly, the client was required to pay for this "entire bundle" of legal services. Therefore, under the old rules, obtaining legal assistance often proved cost prohibitive for many low-income Coloradans.[156]

Pursuant to the new rules, however, clients can essentially order any of the legal services previously included in the full

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Federal Courts. *See id.* Federal judges often preside over patent-infringement cases, civil rights accusations, and complex environmental cases. *See id.* State court judges, on the other hand, must resolve landlord-tenant disputes, child custody battles, divorce cases, and other everyday disagreements that frequently occur between ordinary individuals. *See id.* Therefore, the need for limited representation is perhaps greater in state court due to the lower average income of the litigants. Moreover, whereas approximately 200,000 civil cases are filed in Colorado's state and county courts each year, only 2000 civil cases are filed in the Colorado federal district court. *See id.* Thus, the sheer number of litigants in state court generates a greater need for unbundled legal services.

151. As early as 1978, the American Bar Association Ethics Committee recognized the propriety of unbundled legal services. *See* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1414 (1978).

152. *See* REPORT OF THE COMMITTEE ON PRO SE LITIGANTS, *supra* note 4, at 11; Connie Peterson, *Number of Litigants without Lawyers Grows: Is Unbundling Legal Services an Answer?* 19 THE DOCKET 15 (Feb. 1996); CBA Ethics Comm., Formal Op. 101, *supra* note 4.

153. *See* Abbott, *supra* note 11, at 5A. In divorce cases, at least one party represents himself or herself more than half of the time. *See id.* Apparently, the need for unbundled legal services is not limited to the state courts. "The U.S. District Court for the District of Colorado reported that thirty-six percent of civil filings between January and May 1995, were filed pro se." CBA Ethics Comm., Formal Op. 101, *supra* note 4.

154. *Cf.* REPORT OF THE COMMITTEE ON PRO SE LITIGANTS, *supra* note 4.

155. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAMILY LAW Q. 422, 422–23 (1994).

156. *See* CBA Ethics Comm., Formal Op. 101, *supra* note 4.

bundle "à la carte."[157] Consequently, limited legal assistance is now available to many clients who would have previously proceeded on an entirely *pro se* basis. Under the new "unbundling" rules,[158] not only may a lawyer and client agree to limit the objectives of the representation, but they may also limit its scope.[159] In addition, the new rules permit an attorney to provide certain services to clients of limited means without making an entry of appearance.[160] Finally, the new rules allow an attorney to assist in drafting documents for a *pro se* party without making an entry of appearance.[161] Notwithstanding this allowance, any documents drafted with the assistance of an attorney must bear that attorney's signature.[162]

The comment to Rule 1.2 of the Colorado Rules of Professional Conduct ("Rule 1.2") reflects the drafters' intent in adopting unbundled legal services. The comment provides that "the consultation with the client shall include an explanation of the risks and benefits of such limited representation."[163] Moreover, "[a] lawyer must provide meaningful legal advice consistent with the limited scope of the lawyer's representation."[164] Finally, the comment makes explicitly clear that the

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157. *See* Abbott, *supra* note 11, at 5A.

158. Colorado's unbundling rules are encompassed in changes made to Colorado Rule of Civil Procedure 11, Colorado Rule of Civil Procedure 311, and Colorado Rule of Professional Conduct 1.2. *See* COLO. R. CIV. P. 11; COLO. R. CIV. P. 311; COLO. RULES OF PROF'L CONDUCT R. 1.2 (2000). The changes to civil procedure Rule 311 are identical to those in Rule 11; however, whereas Rule 11 applies in the Colorado District Courts, Rule 311 applies in county courts.

159. *See* COLO. RULES OF PROF'L CONDUCT R. 1.2.

160. *See* COLO. R. CIV. P. 11(b).

161. *See id.* Civil procedure Rule 11(b) also provides that "[a]ssistance by an attorney to a *pro se* party in filling out pre-printed and electronically published forms that are issued through the judicial branch for use in court are not subject to the certification and attorney name disclosure requirements of this Rule 11(b)." *Id.*

162. *See id.* Such a requirement not only serves traditional certification purposes, but also prevents "ghostwriting" which may give *pro se* parties an unfair advantage. *See* Melody Kay Fuller, *Unbundling Family Law Practice Creates Pro Bono Opportunities*, COLO. LAW., Sept. 1998, at 29, 30; Peterson, *supra* note 152; Abbott, *supra* note 11, at 5A; *see also* Johnson v. Board of County Comm'rs, 868 F. Supp. 1226 (D. Colo. 1994), *rev'd on other grounds*, 85 F. 3d 489 (10th Cir. 1996).

163. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt.; *see also* REPORT OF THE COMMITTEE ON PRO SE LITIGANTS, *supra* note 4, at 13. The Committee Report argues that ethical concerns are essentially eliminated if "the client is adequately informed and consents and the terms of the representation are reasonable under the circumstances." *Id.*

164. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt.

limited representation rules do not excuse the lawyer from liability for providing negligent legal advice.[165]

The changes to Rule 1.2 only officially condone what was already ethically permissible under Colorado Bar Association Ethics Committee Formal Opinion 101 ("Formal Opinion 101").[166] Formal Opinion 101 recognized that:

> Outside the courtroom, unbundled legal services are both commonplace and traditional. For example, clients often negotiate their own agreements, but before the negotiation ask a lawyer for advice on issues that are expected to arise. Sometimes, a lawyer's only role is to draft a document reflecting an arrangement reached entirely without the lawyer's involvement. Clients involved in administrative hearings (such as zoning or licensing matters) may ask their lawyer to help the client prepare for the hearing, but not to appear at the hearing. In each of these situations, the lawyer is asked to provide discrete legal services, rather than handle all aspects of the total project.[167]

Therefore, the CBA Ethics Committee concluded that discrete task representation is also an appropriate way to provide some degree of legal assistance to the vast number of *pro se* litigants flooding Colorado's courts.[168]

In order to achieve its policy goal of increasing legal assistance to low-income Coloradans, Formal Opinion 101 broadly interpreted the former version of Colorado Rule of Professional Conduct 1.2 to allow for the unbundling of legal services in litigation and non-litigation matters.[169] The CBA Ethics Committee determined that "Rule 1.2 of the Colorado Rules of Professional Conduct allows a lawyer and client to limit the scope of the lawyer's representation."[170] In reaching this conclusion, the CBA Ethics Committee reasoned that "the creation of barriers to the procurement of legal advice by those in need and who are

165. *See id.* The rule states that "[a] lawyer remains liable for the consequences of any negligent legal advice. Nothing in this rule is intended to expand or restrict, in any manner, the laws governing civil liability of lawyers." *Id.*

166. *See* COLO. RULES OF PROF'L CONDUCT R. 1.2; CBA Ethics Comm., *supra* note 4.

167. CBA Ethics Comm., *supra* note 4.

168. *See id*; REPORT OF THE COMMITTEE ON PRO SE LITIGANTS, *supra* note 4, at 3–5.

169. *See* CBA Ethics Comm., *supra* note 4.

170. *Id.*

unable to pay in the name of legal ethics ill serves the profession."[171] Interestingly, as discussed above, the language of the newly enacted Rule 1.2 has been broadened to explicitly condone limitations on the scope of representation.[172] Thus, one could infer that the Colorado Supreme Court Rules Committee did not think the pre-existing version of Rule 1.2 supported the CBA Ethics Committee's sweeping interpretation.[173] Nevertheless, Formal Opinion 101 exemplifies how creative problem solving coupled with the inherent flexibility of the Rules can overcome superfluous barriers to the procurement of legal services by low-income Coloradans. Moreover, Formal Opinion 101, as well as the Colorado Supreme Court's subsequent modification of Rule 1.2, indicates a willingness within the Colorado legal community to pursue innovative solutions to the inadequate availability of legal assistance.[174]

2. Why Colorado's Acceptance of Limited Representation Supports Expanding the Role Nonlawyers Play in Delivering Legal Services to Low-Income Coloradans.

The realization that unbundled legal services would increase the availability of legal assistance to a number of low-income individuals served as a major catalyst to the adoption of the limited representation rules. This same rationale supports an expansion in the role nonlawyers play in delivering legal services to Colorado's needy. First, as discussed in Part III.B.1, Formal Opinion 101 was issued to further a policy goal of increasing the availability of legal assistance to low-income Coloradans and to assuage the impact of *pro se* litigants on Colo-

171. *Id.* (quoting New York State Opinion 613 (Sept. 24, 1990)).

172. *See* COLO. RULES OF PROF'L CONDUCT R. 1.2 (2000).

173. In fact, the Comment to the old Rule 1.2 stated that "[a]n agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1." COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. However, the CBA Ethics committee stated that "the duty of competence of Rule 1.1 is circumscribed by the scope of representation agreed to pursuant to Rule 1.2." CBA Ethics Comm., *supra* note 4; *see also* Johnson v. Board of County Comm'rs, 868 F. Supp. 1226 (D. Colo. 1994), *rev'd on other grounds*, 85 F. 3d 489 (10th Cir. 1996).

174. Only a few other states, including California, New York, and Arizona, allow attorneys to provide limited representation. *See* Abbott, *supra* note 11, at 5A.

rado's courts.[175] Expanding nonlawyer practice will serve these same ends.[176] Secondly, the CBA Ethics Committee liberally interpreted Rule 1.2 to allow for limited representation because "the creation of barriers to the procurement of legal advice by those in need and who are unable to pay in the name of legal ethics ill serves the profession."[177] Similarly, ethical provisions, which presently deter lay representation, should be interpreted or modified to permit nonlawyer practice beneficial to the public.

By officially condoning the unbundling of legal services, the Colorado Supreme Court implicitly acknowledged that the legal profession is becoming more and more consumer driven. Thus, if there is a consumer demand for nonlawyer representation, it is the responsibility of the Colorado legal community to satisfy it. Otherwise, the public will continue to view the bar's monopoly with suspicion. Moreover, allowing limited representation permits the consumer to exercise increased control over the scope and objectives of the representation. Thus, the uncontroversial adoption of the new unbundling rules reflects the Colorado legal community's recognition that the consumer has the ability to shoulder a higher proportion of the responsibilities of representation. In fact, the comment to the new Rule 1.2 acknowledges the ability of consumers to evaluate the "risks and benefits" of limited representation.[178] If consumers are able to evaluate the risks and benefits of limited representation competently, then they can certainly assess the risks and benefits of lay representation. Accordingly, the Colorado legal community should recognize the propriety of providing the consumer with the additional choice of nonlawyer representation.

Rules written to govern nonlawyer practice, like the new unbundling rules, should include adequate safeguards. For instance, the new Rule 1.2 requires an attorney to explain the risks and benefits of limited representation.[179] Rules written to govern nonlawyer practice should contain a comparable provision. Other principles embodied within the new limited representation rules could be made applicable to nonlawyers also.

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175. *See* CBA Ethics Comm., *supra* note 4.
176. *See supra* Part II.
177. *See supra* note 175.
178. *See* COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt.
179. *See id.*

Accordingly, a lay representative should be required to sign any documents submitted to a court.[180] Furthermore, a lay representative should provide meaningful legal advice consistent with the nature of the representation.[181] Finally, because a lawyer providing limited representation under the new rules is still liable for negligent legal advice, the rules should also hold a lay representative liable for negligent advice.[182] However, the contours of such a liability provision would require careful shaping. For example, should the rules hold lay representatives to the same standards as attorneys, or should their performance be measured only against other nonlawer providers?

Unbundled legal services and lay representation do raise some serious social questions. For instance, some poverty law experts have argued that condoning either limited representation or lay representation can perpetuate a system in which the poor receive second-hand justice.[183] Admittedly, both limited representation and lay representation may not provide the quality of legal assistance afforded to a multinational corporation. Although a noble principle, prohibiting limited representation or nonlawyer practice on this ground smacks of blind idealism. First, within the bar, not all lawyers are created equal. Thus, the fees charged by attorneys vary according to expertise and experience. Consequently, one may be able to afford an attorney—but not the best attorney. Second, by denying Colorado's indigent legal assistance because we fear the perpetuation of a dual system of justice, we effectively deny these individuals any legal assistance at all. Accordingly, while limited representation and nonlawyer practice may not provide the poor with the legal assistance afforded to a multimillionaire, it would increase low-income Coloradans' access to justice. To deny low-income Coloradans this opportunity, and require them to proceed *pro se* because the bar cannot allow the perpetuation of a dual system of justice is not only senseless, it is insulting.

The Colorado judiciary's willingness to allow limited representation in its courts suggests that the legal community is

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180. *Compare* COLO. R. CIV. P. 11 and COLO. R. CIV. P. 311.

181. *Compare* COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt.

182. *See id.*

183. *See Report of the Working Group on the Use of Nonlawyers, supra* note 50, at 1815; *Report of the Working Group on Limited Legal Assistance, supra* note 13, at 1820.

cognizant of its failure to provide Colorado's indigent with adequate legal assistance under the current system. Moreover, the new rules evince the legal community's intent to pursue creative and cutting-edge solutions. Hence, the relatively uncontroversial adoption of the new limited representation rules indicates support within the Colorado legal community for expanding the role nonlawyers play in providing legal assistance to low-income individuals.

A substantial step in the expansion of nonlawyer roles could be achieved by further liberal interpretations of the rules governing the practice of law. Broad interpretation of these rules, such as the construction given to Rule 1.2 in Formal Opinion 101, prevents the erection of artificial barriers to the procurement of legal services. Consequently, the availability of legal services to Colorado's indigent is increased.

As noted by the Colorado Supreme Court's Committee on Pro Se Litigants, "[t]he bottom line is that the ethical standards of the profession should not limit the access of citizens to their courts."[184]

C. Colorado's Approach to the Unauthorized Practice of Law Indicates Support for Nonlawyer Practice

The proscription of lay practice via the unauthorized practice of law doctrine is the principal *legal* obstacle to expanding the role of nonlawyers in the delivery of legal services to low-income Coloradans.[185] Each state has developed its own body of rules concerning the unauthorized practice of law.[186] In Colorado, a combination of case law, statute, and court rule governs the unauthorized practice of law.[187] Out of this amalgam of authority, an amorphous and somewhat perplexing set of principles has developed to govern nonlawyer practice.

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184. REPORT OF THE COMM. ON PRO SE LITIGANTS, *supra* note 4, at 13.

185. *See Report of the Working Group on the Use of Nonlawyers, supra* note 50, at 1816.

186. *See generally* STANDING COMM. ON LAWYERS' RESPONSIBILITY FOR CLIENT PROT., *supra* note 52.

187. *See id.* at 16.

1. Unauthorized Practice of Law Case Law in Colorado

Pursuant to Article III of the Colorado Constitution,[188] "[t]he judiciary has inherent and plenary powers with or without legislative enactment, to regulate and control the practice of law to the extent that is reasonably necessary to the proper functioning of the judiciary."[189] Thus, although a number of statutes purport to govern various aspects of the practice of law,[190] the Colorado Supreme Court has made clear that such statutes are merely gratuitous and are allowed to exist only because they conform to the authority of the judiciary.[191] Conversely, "[l]egislation tending to limit the scope of that which constitutes the practice of law would" violate the constitution.[192]

As a result of the above-described relationship between the legislative and judicial branches, judicial pronouncements of what constitutes the practice of law are definitive. However, in *Denver Bar Ass'n v. Public Utilities Commission,*[193] the Colorado Supreme Court noted the difficulty of providing an all-inclusive definition of the practice of law.[194] There, the court stated, "[t]here is no wholly satisfactory definition as to what constitutes the practice of law."[195] Nevertheless, the court did articulate the following functional definition: "[O]ne who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting him in connection with these rights

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188. The court has cited both Article III and Article VI of the Colorado Constitution as the source of its authority to regulate the practice of law. *See* Denver Bar Ass'n v. Pub. Utils. Comm'n of Colo., 391 P.2d 467, 470 (Colo. 1964) (citing Article III); Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822, 823 (Colo. 1982) (citing Article VI).

189. Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998, 1002–03 (Colo. 1957).

190. *See, e.g.*, COLO. REV. STAT. § 12-5-101 (2000); COLO. REV. STAT. § 12-5-112 (2000); COLO REV. STAT. § 8-43-316 (2000); COLO. REV. STAT. § 26-2-127(1)(a)(IV) (2000).

191. *See* Denver Bar Ass'n v. Public Utils. Comm'n of Colo., 391 P.2d 467, 470 (Colo. 1964).

192. *Id.*

193. 391 P.2d 467 (Colo. 1964).

194. *See id.* at 471.

195. *Id.*

and duties is engaged in the practice of law."[196] A further investigation of the case law demarcates the bounds of this definition and reveals the potential to develop a refreshingly straightforward and practical approach to nonlawyer practice in Colorado.

Application of the unauthorized practice of law doctrine should be reserved exclusively for those situations where proscription of an activity is necessary to protect the public from the unscrupulous conduct of ill-willed profiteers. For instance, in *Unauthorized Practice of Law Committee v. Grimes,*[197] the respondent had not been admitted to the bar in Colorado nor was he registered to practice in Colorado.[198] Nevertheless, Mr. Grimes had represented himself through advertisements in local publications as a "lawyer," "legal counsel," and "lay assistant."[199] Moreover, he "accepted fees and prepared legal motions, notices, and other memoranda for various individuals and also advised members of the public as to what he thought their legal rights and obligations were."[200] In doing so, the Colorado Supreme Court determined that the "actions [he took] on behalf of individuals who . . . paid him fees would [have constituted] actionable malpractice if committed by a lawyer."[201] The court reasoned: "We do not license attorneys, as the respondent claims, to create a monopoly or to hamper the access of citizens to the courts. The purpose of the bar and our admission requirements is to protect the public from unqualified individuals who charge fees for providing incompetent legal advice."[202] Ultimately, the Colorado Supreme Court held the respondent in contempt of court and sentenced him to six months in jail.[203]

In *Unauthorized Practice of Law Committee v. Prog,*[204] the behavior of respondent Mr. Prog was comparable to that of Mr. Grimes. One pleading filed by Mr. Prog during the contempt proceedings read in part:

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196. *Id.*
197. 654 P.2d 822 (Colo. 1982).
198. *See id.* at 825.
199. *See id.*
200. *Id.*
201. *Id.*
202. *Grimes*, 654 P.2d at 822.
203. *See id.*
204. 761 P.2d 1111 (Colo. 1988).

> [The disciplinary prosecutor] is a power-hungry female, who thrives on de-facto rules ONLY. She is a persecutor. She is not a District Attorney. She has no power, judicially speaking. She has threatened one, Sy Prog with imprisonment, sanctions of all kinds and wants him to be held in contempt pursuant to her backbone, rules, not Laws of the Land.[205]

Needless to say, Mr. Prog met a fate similar to that of Mr. Grimes.

Denver Bar Ass'n v. Public Utilities Commission and *Unauthorized Practice of Law Committee v. Employers Unity, Inc.*[206] are representative of cases at the other end of the unauthorized practice of law spectrum. In *Public Utilities Commission*, the Colorado Supreme Court decided whether a lay person could "practice" before the Colorado Public Utilities Commission.[207] The Denver and Colorado Bar Associations, along with individual attorneys, challenged the Commission's authority to adopt a rule that allowed lay representation in Commission proceedings.[208] The bar associations argued that such an adoption would "constitute a usurpation of power vested in the Supreme Court which, alone, has the authority to say who shall and who shall not practice law in this state."[209] The Colorado Supreme Court readily agreed that only it has the "exclusive power . . . to determine what is or is not the practice of law and to restrict such practice to persons licensed by this Court to serve as lawyers."[210] However, as discussed above, a court will generally leave legislative or administrative pronouncements purporting to govern the practice of law undisturbed if they conform to the court's authority.[211]

Thus, before determining the rule's validity, the Colorado Supreme Court was first required to determine whether lay representation before the Public Utilities Commission constituted the practice of law. The court began its analysis with a policy statement, recognizing that:

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205. *Id.* at 1112 n.1 (alteration in original).

206. 716 P.2d 460 (Colo. 1986).

207. *See* Denver Bar Ass'n v. Pub. Utils. Comm'n of Colo., 391 P.2d 467, 469 (Colo. 1964).

208. *See id.*

209. *Id.*

210. *Id.* at 471.

211. *See* Felter, *supra* note 4, at 23–24.

> More people . . . are directly affected by the processes of administrative boards and quasi-judicial tribunals than by adjudications of the courts. Justice, to the majority of our population, is more apt to mean the fairness of an old age pension or unemployment insurance board than the soundness of a judicial pronouncement.[212]

Accordingly, "[w]hether one . . . is practicing law depends upon the circumstances of the particular case there under consideration."[213] The court then proceeded to delineate specific circumstances that would and would not constitute the practice of law before administrative bodies.[214] Finally, in a dashing stroke of ambiguity, the court concluded:

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212. *Public Utils. Comm'n*, 391 P.2d at 469 (quoting Reuben Oppenheimer, *The Supreme Court and Administrative Law*, 37 COLUM. L. REV. 1 (1937)).

213. *Pub. Utils. Comm'n*, 391 P.2d at 471.

214. *See id.* at 470–71. Among those activities which would constitute the practice of law before administrative bodies are:

> 1) Where one instructs and advises another in regard to the applicable law on an agency matter so that he may properly pursue his affairs and be informed as to his rights and obligations.
>
> 2) Where one prepares for another documents requiring familiarity with legal principles beyond the ken of the ordinary layman.
>
> 3) Where one prepares for another, for filing before the administrative agency, applications, pleadings, or other procedural papers requiring legal knowledge and technique.
>
> 4) Where one appears for another before an administrative tribunal in adversary or public proceedings involving the latter's right of life, liberty or property according to the law of the land.
>
> 5) Where one, on behalf of another, examines and cross-examines witnesses and makes objections or resists objections to the introduction of testimony, the exercise of which requires legal training, knowledge, and skill.
>
> 6) Where one represents another in a rate-making or rate-revision case and the question of deprivation of property without due process of law is present.

Id. (citations omitted). Among those activities which would not constitute the practice of law before an administrative body are:

> 1) The completion of forms which do not require any knowledge and skill beyond that possessed by the ordinarily experienced and intelligent layman.
>
> 2) Representation of another in a hearing relating to the making or revision of rates, except as noted in the foregoing item No. 6.
>
> 3) Performing the services of engineers, experts, accountants and clerks.
>
> 4) Acting in an agency proceeding involving the adoption of a rule of future action which affects a group and where no vested rights of liberty or property are at stake.

Id. at 472 (citations omitted).

> As to matters in which no legal principle is involved and the subject matter of the hearing has a value or represents an amount insufficient to warrant the employment of an attorney, permission is granted . . . to permit laymen to represent others in accordance with Rule 7 (b), *even though such representation may constitute practicing law.*[215]

Importantly, the court chose not to limit its holding to lay representation before administrative bodies.[216] Instead, it reasoned that, "[t]he character of the act done, rather than that it is performed before the Commission, is the factor which is decisive of whether it constitutes the practice of law."[217] Thus, the logic of *Public Utilities Commission,* that permissible lay representation depends upon "the circumstances of the particular case" and "the character of the act done," could be used as a framework to establish the bounds of nonlawyer representation in administrative *and* judicial proceedings.

In *Employers Unity, Inc.,* the Colorado Supreme Court shed some light on the seemingly ambiguous reasoning of *Public Utilities Commission.* The court was called to decide whether lay representation—pursuant to section 8-74-106(1)(e) of the Colorado Revised Statutes—before an administrative body within the Colorado Department of Labor and Benefits, constituted the unauthorized practice of law.[218] Whereas some debate existed in *Public Utilities Commission* as to whether the respondents actually practiced law, there was no question as to the respondents' actions in *Employers Unity, Inc.,* since their actions paralleled those engaged in by attorneys everyday.[219] These actions included: making opening statements, conducting direct and cross examination of witnesses, offering and objecting to evidence, and making closing arguments.[220] Finally, after "trial," the lay representatives may, if warranted, "prepar[e] written arguments to present to the Industrial Commis-

215. *Id.* (emphasis added). The ambiguity stems from the fact that the court appears to allow limited lay representation in circumstances which involve no legal principles. However, in the same sentence, the court permits lay representation in circumstances which may constitute the practice of law. Can one practice law without involving any legal principle?

216. *See id.* at 471.

217. *Id.*

218. *See* Unauthorized Practice of Law Comm. v. Employers Unity, Inc. 716 P.2d 460, 461 (Colo. 1986).

219. *See id.* at 463.

220. *See id.*

sion, which may include reference to the transcript, relevant statutes, and occasionally citing case law."[221] Nevertheless, while necessarily admitting that the respondents engaged in the practice of law, the court upheld its authority to do so.[222]

The court's decision rested on a number of factors. First, the report of the hearing master, which the court adopted essentially verbatim, recognized the historical acceptance of lay representation in the field of labor and employment.[223] Moreover, the master noted that such representation "poses no threat to the People of the State of Colorado."[224] Finally, the master found that the amounts at stake in such proceedings "do not warrant the employment of an attorney."[225] Therefore, the master concluded that lay representation is a cost-effective means of serving the best interest of the public.[226] Consequently, the court permitted the respondents to continue representing parties before Referees in the Division of Employment and Training, notwithstanding the clear characterization of their activities as the practice of law.[227]

2. Statutes and Regulations Purporting to Govern the Unauthorized Practice of Law

As discussed in Part III.C.1, the Colorado Supreme Court has the exclusive authority to define the practice of law and determine who may or may not engage therein. Nevertheless, gratuitous statutory provisions and other multifarious pronouncements concerning the unauthorized practice of law can be found in a variety of Colorado authorities. A brief discussion of these provisions provides additional insight into Colorado's approach to the unauthorized practice of law.

In addition to the statutory provision at issue in *Employers Unity, Inc.*, a number of other Colorado statutes also appear to allow representation by nonlawyers in certain areas of the

221. *Id.*
222. *See id.* at 464.
223. *See id.* at 463.
224. *Id.*
225. *Id.*
226. *See id.*
227. *See id.* at 464.

law.[228] For instance, a provision of the Workers' Compensation Act provides that a notice of hearing shall: "Inform the parties that they have a right to be represented by an attorney *or other person of their choice at the hearing*."[229] Another statute allows an officer of a closely held corporation to appear on behalf of the corporation in certain worker's compensation proceedings where the amount at issue does not exceed ten thousand dollars.[230] Finally, in the social services arena, section 26-2-127(1)(a)(IV) of the Colorado Revised Statutes provides that an applicant appealing a denial of benefits may "represent himself or herself or he or she may be represented by legal counsel, or by a relative, friend, or other spokesman, and such representation by nonlawyers shall not be considered to be the practice of law."[231]

Although presently unchallenged, each statutory provision purporting to allow representation by nonlawyers would presumably be covered by the principles of *Public Utilities Commission* and *Employers Unity, Inc.*[232] Accordingly, under appropriate circumstances, the Colorado Supreme Court would probably approve of nonlawyer representation in workers' compensation and social services cases. Thus, the statutes would likely be construed as "gratuitous" and allowed to stand.[233]

Colorado Rules of Civil Procedure 201 through 260 govern "the admission and regulation of lawyers, as well as prohibitions against the unauthorized practice of law."[234] Specifically, Rule 201.3(2) defines the practice of law consistent with "long-standing case authority."[235]

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228. *See* COLO. REV. STAT. § 8-43-211(1)(c) (2000); COLO. REV. STAT. § 8-43-316 (2000); COLO. REV. STAT. § 26-2-127(1)(a)(IV) (2000). In addition, sections 39-2-127 and 13-1-127 "appear to permit nonlawyers to represent individuals and (in some circumstances) corporations before the Board of Assessment Appeals." STANDING COMM. ON LAWYERS' RESPONSIBILITY, *supra* note 52, at 81. *But see* Op. Colo. Att'y Gen., No. 98-4 (1988), 1988 Colo. AG LEXIS 4, at *1 (indicating that lay representation would not be allowed before the Board of Assessment Appeals despite statutory language to the contrary).

229. § 8-43-211(1)(c) (emphasis added).

230. *See* § 8-43-316.

231. § 26-2-127(1)(a)(IV).

232. *See* Felter, *supra* note 4, at 24.

233. *See supra* notes 192–196 and accompanying text.

234. Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822, 823 (Colo. 1982).

235. *See id.* at 825. Colorado Rule of Civil Procedure 201.3(2) defines the practice of law as:

Rule 5.5 of the Colorado Rules of Professional Conduct also speaks to the unauthorized practice of law.[236] Rule 5.5 provides in pertinent part: "A lawyer shall not . . . assist a person who is not a member of the Colorado bar in the performance of an activity that constitutes the unauthorized practice of law."[237] The comment indicates that the rule is necessary to "protect[] the public against rendition of legal services by unqualified persons."[238] However, the rule does not prevent a lawyer from "providing professional advice and instruction to nonlawyers whose employment requires knowledge of law . . . ."[239] Thus, the rule leaves the door open for liberal interpretation of the rule—similar to that which occurred in Formal Opinion 101's construction of former Rule 1.2—which would permit coopera-

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(a) the private practice of law as a sole practitioner or as a lawyer employee of or partner or shareholder in a law firm, professional corporation, legal clinic, legal services office, or similar entity; or

(b) employment as a lawyer for a corporation, partnership, trust, individual, or other entity with the primary duties of:

(i) furnishing legal counsel, drafting documents and pleadings, and interpreting and giving advice with respect to the law, and/or

(ii) preparing, trying or presenting cases before courts, executive departments, administrative bureaus or agencies; or

(c) employment as a lawyer in the law offices of the executive, legislative, or judicial departments of the United States, including the independent agencies thereof, or of any state, political subdivision of a state, territory, special district, or municipality of the United States, with the primary duties of[:]

(i) furnishing legal counsel, drafting documents and pleadings, and interpreting and giving advice with respect to the law, and/or

(ii) preparing, trying or presenting cases before courts, executive departments, administrative bureaus or agencies; or

(d) employment as a judge, magistrate, hearing examiner, administrative law judge, law clerk, or similar official of the United States, including the independent agencies thereof, or of any state, territory or municipality of the United States with the duties of hearing and deciding cases and controversies in judicial or administrative proceedings, provided such employment is available only to a lawyer; or

(e) employment as a teacher of law at a law school approved by the American Bar Association throughout the applicant's employment; or

(f) any combination of subparagraphs (a)–(e) above.

COLO. R. CIV. P. 201.3(2).

236. *See* COLO. RULES OF PROF'L CONDUCT R. 5.5.; COLO. RULES OF PROF'L CONDUCT DR 3-101 (1998).

237. COLO. RULES OF PROF'L CONDUCT R. 5.5.

238. *Id.* cmt.

239. *Id.*

tion between attorneys and nonlawyers where such cooperation is in the public interest.

Similar to the message of Rule 5.5, the ethical considerations of Colorado Rules of Professional Responsibility Canon 3 evince an intent to protect the public.[240] However, unlike Rule 5.5, the ethical considerations leave no "wiggle room" to argue for cooperation between lawyers and lay practitioners, even if such cooperation would be in the public interest.[241] The pervasive concern of Canon 3 is the absence of any regulatory mechanism to effectively deal with the potential incompetent or unscrupulous representation of lay practitioners.[242] Thus, Ethical Consideration 3–3 instructs:

> A nonlawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards.[243]

Finally, Ethical Considerations 3–1 and 3–4 express the concern that "[a] layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention."[244]

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240. *See* COLO. CODE OF PROF'L RESPONSIBILITY Canon 3 (1999).

241. *See, e.g., id.* at EC 3-8.

242. *See id.* at EC 3-1, 3-2, 3-3 (1998).

243. *Id. at* EC 3-3.

244. *Id.* at EC 3-4. The Colorado Attorney General's Office has also considered the unauthorized practice of law. *See* Op. Colo. Att'y Gen., No. 98-4 (1988), 1988 Colo. AG LEXIS 4. The Attorney General opined that although the Supreme Court has permitted lay representation where it poses "no threat to the People of the State of Colorado," nonattorneys would not be allowed to represent either individuals or corporations before the Board of Assessment Appeals notwithstanding statutory language to the contrary. *Id.* at *4–8. The Attorney General reasoned that unlike the arena of unemployment compensation, substantial funds are often at stake in tax cases, *see id.* at *6, and competent resolution of the complex legal and factual issues common in tax cases requires the representation of professionally trained attorneys. *See id.* at *7.

3. Why Colorado's Approach to the Unauthorized Practice of Law Supports an Expansion in the Role of Nonlawyers.

In essence, Part III.C.1 reveals that the Colorado Supreme Court will allow nonlawyer representation where it is in the best interest of the public. The mandatory *pro bono* debate divulged the unanimous opinion of the Colorado legal community that increasing the availability of legal services to low-income Coloradans is in the best interest of the public. Nonlawyer representation will increase the availability of legal services to Colorado's indigent.[245] Thus, the Colorado Supreme Court should allow nonlawyer practice where doing so increases the availability of legal assistance to the low-income community. The principles expressed in *Public Utilities Commission* and *Employers Unity, Inc.* support this conclusion.

By not limiting the holding of *Public Utilities Commission* to administrative representation, the court left open the possibility of allowing lay practice in other contexts. Thus, pursuant to *Public Utilities Commission,* the permissibility of lay representation should depend upon "the circumstances of the particular case" and "the character of the act done," not simply whether it occurred before an administrative agency.[246] *Employers Unity, Inc.* provides additional factors for determining the propriety of lay practice. Under *Employers Unity, Inc.,* nonlawyer representation should be allowed where such representation poses "no threat to the People of the State of Colorado" and the amount at stake in such proceedings "do[es] not warrant the employment of an attorney."[247]

However, this inquiry should be broadened. Consistent with *Employers Unity, Inc.,* the only relevant consideration should be whether lay representation in a given situation is a cost-effective means of serving the best interest of the public.[248] Thus, even if the amount at stake does indeed warrant employment of an attorney, lay representation should be allowed where the claimant would otherwise be forced to proceed *pro se*

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245. *See supra* Part II.

246. Denver Bar Ass'n v. Pub. Utils. Comm'n, 391 P.2d 467, 471 (Colo. 1964).

247. Unauthorized Practice of Law Comm. v. Employers Unity, Inc., 716 P.2d 460, 463 (Colo. 1986).

248. *See id.*

because obtaining representation by an attorney is cost-prohibitive. Numerous Colorado statutes permitting nonlawyer representation, although gratuitous, further support this contention.[249] Moreover, the acquiescence of the Colorado Supreme Court to these statutes, whether explicit or implicit, further supports the assertion that lay practice should be allowed where it benefits the public.

The need to improve public perception of the legal profession was one of the primary reasons the Colorado Supreme Court Judicial Advisory Council recommended implementing mandatory *pro bono*.[250] Commentators have noted that aggressively prosecuting the unauthorized practice of law contributes to the public's negative opinion of the bar. The public perceives unauthorized practice of law prosecutions as action taken, not to protect the public, but to protect the bar's monopoly, especially where the nonlawyer provider has not harmed anyone.[251] Negative public opinion is only compounded where nonlawyer providers are prosecuted in the face of consumer demand for their services.[252]

In order to encourage nonlawyer representation, ethical rules, which currently discourage nonlawyer representation, should and can be construed to permit it where doing so is in the public interest.[253] For instance, Colorado Rule of Professional Conduct 5.5 provides that "A lawyer shall not . . . assist a person who is not a member of the Colorado Bar in the performance of an activity that constitutes the unauthorized practice of law."[254] By excluding beneficial lay representation from the definition of the unauthorized practice of law, the rule can be interpreted to allow for cooperation between attorneys and lay representatives where such cooperation is in the public interest.[255]

An expansion of the role nonlawyers play in the delivery of legal services could be achieved either by narrowing the defini-

249. *See supra* Part III.C.2.

250. *See supra* notes 116–117 and accompanying text.

251. *See* Baker, *supra* note 50.

252. *See id.*

253. *Cf., e.g.,* CBA Ethics Comm., *supra* note 4 (interpreting ethical rules to permit unbundling of legal services where doing so is in the public interest).

254. COLO. RULES OF PROF'L CONDUCT R. 5.5.

255. *Cf. supra* Part III.B.2. (discussing the Colorado Ethics Committee's use of liberal interpretation to further a policy goal of increasing the availability of legal services to low-income Coloradans).

tion of the practice of law or by expanding the category of those permitted to engage in the practice of law. The broad definition of the practice of law in *Public Utilities Commission*,[256] and the encompassing language of Colorado Rule of Civil Procedure 201.3(2),[257] seem to argue for the latter approach. If lay representation *were* perceived as the practice of law, the Colorado Supreme Court would have authority over nonlawyer practitioners through existing disciplinary mechanisms. Consequently, this would substantially reduce the cost associated with regulating lay practitioners. This orientation would also provide a basis for requiring lay representatives to meet certain standards of ethical and professional responsibility. Thus, by securing a means of ensuring high standards of professionalism among lay practitioners, the concerns reflected by the admonitions of Canon 3's Ethical Considerations concerning the potential unscrupulous conduct of nonlawyers, would be eliminated.

Other concerns expressed by Canon 3 have also been alleviated. For instance, the recent rule change allowing the unbundling of legal services indicates the Colorado Supreme Court's recognition that consumers are capable of assessing the risks and benefits of varying degrees of legal representation.[258] This recognition effectively supersedes the concerns expressed in Ethical Considerations 3–1 and 3–4 regarding the inability of a layperson to evaluate the quality of nonlawyer representation.

Grimes and *Sy Prog* make it clear that the state of Colorado must prevent the injurious actions of incompetent individuals through an appropriate corrective mechanism. The Unauthorized Practice of Law doctrine should continue to serve this purpose. However, *Public Utilities Commission* and *Employers Unity, Inc.* make it equally clear that the regulatory mechanism, itself, should not operate to the detriment of the public. Accordingly, relevant professional and ethical rules should be interpreted or modified to allow for lay representation that benefits the public.

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256. *See* Denver Bar Ass'n v. Pub. Utils. Comm'n, 391 P.2d 467, 471 (Colo. 1964).

257. *See supra* note 238.

258. *See* COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt.; *cf. Holding Line on Legal Fees, supra* note 12 (discussing criticisms of unbundling).

The ultimate objective of Colorado's approach to the unauthorized practice of law—be it derived from statute, court rule, or case law—is to allow activities, which further the public interest. Although facially simplistic, this message apparently has eluded the legal community which promulgated it. As a result, the rules governing the unauthorized practice of law result in the "creation of barriers to the procurement of legal advice by those in need."[259] Tearing down these barriers and allowing a broader array of lay representation enhances the availability of legal services to Colorado's indigent and is, therefore, in the public interest. Thus, an expansion in nonlawyer practice would be consistent with Colorado's existing authority governing lay representation.

CONCLUSION

The mandatory *pro bono* debate brought the Colorado legal community to one unavoidable conclusion—it must eliminate barriers which preclude Colorado's low-income residents from obtaining adequate legal assistance. Nonlawyer practitioners could potentially play an integral part in achieving this goal. First, however, the Colorado legal community must accept expanding the permissible scope of lay representation as a viable means of increasing both the availability and the affordability of legal assistance to Colorado's indigent. Many of the rationales offered in opposition to mandatory *pro bono* do not similarly support a rejection of nonlawyer practice. Others actually support expanding the role of nonlawyers. Moreover, expanding lay practice in Colorado is a natural extension of the Colorado Supreme Court's willingness to allow unbundled legal services. In fact, the newly enacted unbundling rules could serve as the basic framework on which to build an acceptable regulatory mechanism. Finally, the Colorado Supreme Court's approach to the unauthorized practice of law acknowledges circumstances where lay representation is indeed in the best interest of the public. Consequently, the Colorado legal community should redress its failure to meet the legal needs of Colorado's low-income individuals by integrating lay practitioners into the community of legal providers.

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259. CBA Ethics Comm., *supra* note 4, at 22 (quoting New York State Op. 613 (Sept. 24, 1990)).

Expanded lay representation is not a perfect solution. This option would enable many low-income Coloradans to access previously unaffordable legal assistance. However, such legal assistance is not free. Thus, some of our poorest residents may continue to lack adequate access to legal services. Moreover, there are valid concerns about a system that does not provide poor people with the same degree of legal assistance as affluent people. Finally, whether nonlawyer practice will help alleviate low-income Coloradans' inadequate access to the courts depends largely on choosing an appropriate regulatory regime.

Unfortunately, there remain many details to address. For instance, would lay practitioners be required to carry malpractice insurance? To what degree, if any, should a communication between the lay practitioner and client be protected by the attorney-client privilege? Many questions must be answered before lay practitioners can be successfully integrated into the delivery system. One answer is already clear, though. Regulation of lay practitioners, not proscription, best serves the public interest.

It was not the intent of this comment to answer all of these questions. Instead, its purpose was to stimulate a comprehensive debate concerning nonlawyer practice in Colorado. If the legal profession is truly committed to civic responsibility, then it must consider this matter for the sake of Colorado's low-income residents.

Although expanding the scope of nonlawyer practice is admittedly an imperfect solution, it is a necessary step toward achieving the ultimate goal of equal justice for rich and poor alike. However, for now, whether or not the legal community should allow lay representation comes down to one simple point: Some competent legal assistance is better than none.[260] As evidenced by the new unbundling rules, the Colorado Supreme Court seems to agree. Thus, Colorado should accept nonlawyer practice as a viable means of increasing the availability of legal services to low-income Coloradans.

260. *Cf.* Felter, *supra* note 4, at 23 (advocating expansion in the role of nonlawyers).