



December 19, 2024

TO: Arizona Judicial Council

RE: Public Comment on Proposed Section 7-211: Community-Based Justice Worker Service Delivery Models

*Sent via email*

Dear Arizona Judicial Council,

Thank you for the opportunity to submit public comment regarding the proposed new *Section 7-211: Community-Based Justice Worker Service Delivery Models* (hereinafter Section 7-211). We applaud the Arizona Judicial Council for proposing Section 7-211 as an opportunity to increase access to justice for all Arizonians. We write on behalf of Frontline Justice,<sup>1</sup> a national organization dedicated to advancing justice workers who are not licensed attorneys as an evidence-based and scalable solution to addressing our nation's access to civil justice crisis. Justice workers are trained and trusted individuals working in communities to help people resolve their legal problems and advance just solutions at scale by providing targeted legal advice and representation. We are a nonpartisan organization, and our National Leadership Council represents a broad range of diverse perspectives,<sup>2</sup> all united to ensure equal access to justice for all.

The United States' crisis of access to civil justice is so well documented at this point that its facts require little rehearsal. Whichever measure of the *lack* of access to justice one chooses as a standard, the crisis has only deepened, at the same time that the number of American lawyers has grown, both in absolute terms<sup>3</sup> and relative to the size of the population.<sup>4</sup> More civil justice problems go unserved and unresolved than ever.<sup>5</sup> US courts have seen rising numbers of people

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<sup>2</sup> <https://www.frontlinejustice.org/#team>

<sup>3</sup> The population of U.S. lawyers has grown by 400% since 1970. See *Demographics*, A.B.A. PROFILE OF THE LEGAL PRO. 2023, <https://www.abalegalprofile.com/demographics.html>.

<sup>4</sup> To illustrate, the U.S. had one lawyer for every 695 people in 1951 and one lawyer for every 252 people in 2005. See CLARA N. CARSON WITH JEEYOON PARK, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2005 2 (2012).

<sup>5</sup> Americans experience an estimated at least 150 million new civil justice problems annually. See Rebecca L. Sandefur & James Teufel, *Assessing America's Access to Civil Justice Crisis*, 11 U.C. IRVINE L. REV. 753, 765 (2021). At least 120 million of those go unresolved. See THE HAGUE INST. FOR INNOVATION OF LAW & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., JUSTICE NEEDS AND SATISFACTION IN THE UNITED STATES OF AMERICA 235 (2021), <https://iaals.du.edu/sites/default/files/documents/publications/justice-needs-and-satisfaction-us.pdf>. The Legal Services Corporation's 2022 study of the legal needs of the low-income population finds an increase in the proportion of the civil justice issues of the poor that receive no or inadequate service, from 86% in 2017 to 92% in 2022. *Justice Gap Research*, LEGAL SERVS. CORP., <https://www.lsc.gov/initiatives/justice-gap-research>.

appearing without representation.<sup>6</sup> Civil legal aid offices routinely turn away as many eligible people as they serve for lack of resources.<sup>7</sup> Arizona is no exception; in fact, according to the National Center for Access to Justice’s Justice Index, Arizona ranks at the bottom (45th) among all US jurisdictions (including DC and Puerto Rico) in providing civil legal services to low-income people.<sup>8</sup> Only 7 states and territories rank lower.

As outlined below, the evidence is abundantly clear: unless we expand access to legal advice and representation beyond lawyer-only solutions, justice problems will continue to overwhelm Americans and effective solutions will be impossible to scale.<sup>9</sup> Our submission suggests seven recommendations below to Section 7-211 to ensure equal access to civil justice for all Arizonians.

### **Recommendation 1: Good Moral Character and Background Check Requirements Should Not Be Unduly Burdensome to Applicants or Sponsoring Organizations**

Section (E)(3)(a) and (E)(4)(a) require that community justice workers and community legal advocates, respectively, be of “good moral character.” This requirement lacks any definition and is overbroad. Further, these sections require a criminal background check conducted by the approved community-based or legal services organization. While it is reasonable that community-based and legal services organizations apply their own policies to vetting staff and volunteers, this provision would require an organization to conduct a background check for every community justice worker and legal advocate, which – if these programs are able to scale, as has been the case with the Alaska Community Justice Worker program -- could mean literally hundreds of criminal background checks, which are often provided by private companies that charge anywhere from \$25 to \$50 per background check. This requirement could cost sponsoring programs thousands of dollars at the scale required to meet the access to justice gap.

Moreover, empirical research indicates that criminal background checks are very often unreliable and inaccurate.<sup>10</sup> This research finds that “[c]ommon errors include incorrect social security numbers, inaccurate names, incorrect or ‘illogical’ birth dates, mismatched identities, and the reporting of sealed or expunged records.”<sup>11</sup> Consequently, a recent study found that criminal

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<sup>6</sup> See, e.g., Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 440–41 (2009).

<sup>7</sup> *Justice Gap Research*, *supra* note 4.

<sup>8</sup> <https://ncaj.org/state-rankings/justice-index>

<sup>9</sup> Matthew Burnett and Rebecca L. Sandefur. “*Designing Just Solutions at Scale: Lawyerless Legal Services and Evidence-Based Regulation*.” Public Law 19, no. 102, 2022.

<https://www.portaldeperiodicos.idp.edu.br/direitopublico/article/view/6604/2692>

<sup>10</sup> See, e.g. S. Lageson & R. Stewart (2024). *The problem with criminal records: Discrepancies between state reports and private-sector background checks*, CRIMINOLOGY, 62, 5–34. <https://doi.org/10.1111/1745-9125.12359>.

<sup>11</sup> *Id.*, p. 10.

records searches produced false-positive errors in *at least half of cases*.<sup>12</sup> This occurred because of errors in both public and private sources of background information. Background checks through private services typically used for these purposes often returned one or more “incident[s] that [did] not appear in official government record[s],” while official records reported incorrect information.<sup>13</sup> Research suggests that background checks are not only frequently inaccurate, but also discriminatory, as many communities with the greatest civil justice needs also experience over-policing.<sup>14</sup>

Empirical research also does not show a clear relationship between prior justice system involvement and the ability to safely and effectively provide help to individuals with their civil justice problems.<sup>15</sup> People who have had experience with the criminal justice system are arguably *more* familiar with the law and courts.<sup>16</sup>

### **Recommendation 2: Offer Alternatives to Testing for Community Legal Advocates**

We encourage the Council to consider alternatives to testing for community legal advocates, such as supervised practice, to align with empirical evidence suggesting that bar exams are both discriminatory and ineffective in gauging the knowledge and skills required for lawyers to be effective.<sup>17</sup>

### **Recommendation 3: Eliminate Mentoring Requirement for Community Legal Advocates**

Section (E)(4)(g) requires that “a certified community legal advocate must be mentored by instructors from an approved certified community legal advocate training organization or attorneys with subject-matter expertise in the approved areas of law in which the community legal advocate has been certified.” It is unclear what this section requires of organizations and attorneys or how it would be monitored. We suggest eliminating this section.

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<sup>12</sup> *Id.*, p. 5.

<sup>13</sup> *Id.* p., 17.

<sup>14</sup> See Rachel M. Kleinman and Sandhya Kajeepeeta (2023), *BARRED FROM WORK: The Discriminatory Impacts of Criminal Background Checks in Employment*. New York, NY: Thurgood Marshall Institute. <https://tminstituteldf.org/wp-content/uploads/2023/07/Barred-from-Work.pdf>

<sup>15</sup> Shawn D. Bushway (2024) *Resetting the Record: The Facts on Hiring People with Criminal Histories*. Santa Monica, CA: RAND Corporation. [https://www.rand.org/pubs/research\\_briefs/RBA2968-1.html](https://www.rand.org/pubs/research_briefs/RBA2968-1.html)

<sup>16</sup> See, e.g., Carrie Johnson (2024), “‘Cheat code to life’: Jailhouse lawyers help incarcerated people and themselves, too,” National Public Radio, October 16. <https://www.npr.org/2024/10/14/nx-s1-5075170/jailhouse-lawyers-initiative-prison-legal>

<sup>17</sup> See Institute for the Advancement of the American Legal System, *States Look Beyond Bar Exam to License Lawyers* (2022), available at <https://iaals.du.edu/blog/states-look-beyond-bar-exam-license-lawyers>.

#### **Recommendation 4: Offer Testing Fee Waivers**

Section (F) requires that community legal advocates or the organizations sponsoring them pay \$100 per test, test re-examination, and test re-registration. While it is reasonable that modest fees be assessed to cover the costs of administering the tests, we suggest a fee waiver for individuals or organizations that are unable to pay or who are volunteer (pro bono) community legal advocates.

#### **Recommendation 5: Expand the Scope of Authorized Legal Services**

Section (G) is perhaps most concerning, as it deviates from other community justice worker programs emerging across the United States that allow in-court representation by justice workers, including Alaska<sup>18</sup> and the proposed rule in Texas, which allows justice workers to practice in justice courts.<sup>19</sup> As written, Section 7-211 limits community justice workers to providing “legal assistance and legal advice” and representation only in administrative proceedings. Certified legal advocates are afforded somewhat broader authorization to engage in negotiations, preparations for hearings and mediations, and to sit at the counsel table during administrative and court hearings, but are not authorized to fully represent their clients in court. Arizona’s proposed limitations on the scope of practice substantially constrain the ability for these new roles to provide access to justice and are not supported by existing empirical evidence.

Research evidence shows that a wide range of court-based proceedings are routinely and effectively handled by justice workers in the US and other jurisdictions. “Evidence shows that nonlawyer advocates can perform as well or better than lawyers in social security appeals, state tax courts, and unemployment compensation appeals in the United States, and in a range of government tribunals in the United Kingdom.”<sup>20</sup> One of the most rigorous and illuminating studies comes from England and Wales and compared justice workers and lawyers “across a range of civil case types, including benefits, housing, debt, personal injury, immigration, and employment, [and] assessed the quality of services provided through peer review of closed case files.” The study found that both kinds of providers were equally likely to produce competent work; “[h]owever, [justice workers] were six times more likely than lawyers to produce work that reviewers rated as

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<sup>18</sup> <https://www.alsc-law.org/wp-content/uploads/2022/12/Alaska-Bar-Rule-43.5.pdf>

<sup>19</sup> <https://www.txcourts.gov/media/1458990/249050.pdf>

<sup>20</sup> Rebecca L. Sandefur, “Legal advice from nonlawyers: consumer demand, provider quality, and public harms.” *Stan. JCR & CL* 16 (2020) at 304, summarizing research reported in HAZEL GENN & YVETTE GENN, *THE EFFECTIVENESS OF REPRESENTATION AT TRIBUNALS* 243-44 (Lord Chancellors Department and Queen Mary College, University of London 1989) and in HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYER AND NONLAWYERS AT WORK* 23, 51 (1998). The Genn and Genn study explored the impact of lawyer and nonlawyer representation in four types of tribunals through analysis of hundreds of tribunal files, observation of hundreds of hearings, and interviews with tribunal staff, representatives, appellants and applicants. Kritzer’s study examined the impact of lawyer and nonlawyer representation in thousands of cases through a combination of observation, interviews, and case file review.

excellent.” In the US, a study of housing court navigators showed that low-income tenants assisted by trained volunteer nonlawyer Navigators to answer landlord petitions for nonpayment of rent “asserted more than twice as many defenses as litigants who received no assistance.”<sup>21</sup> As a result, “tenants assisted by [these Navigators] were 87 percent more likely than unassisted tenants to have their defenses recognized and addressed by the court.”<sup>22</sup> “For instance, judges ordered landlords to make needed repairs about 50 percent more often in Navigator-assisted cases.”<sup>23</sup> A second type of Navigator project involved trained caseworkers (employees of a nonprofit organization) working in the Brooklyn Housing Courts with litigants from case inception to resolution. Encouragingly, “[i]n cases assisted by these... Navigators, zero percent of tenants experienced eviction from their homes by a marshal.”<sup>24</sup>

### **Recommendation 6: To Support Sustainability, Permit Nominal Fees to Be Charged to Clients**

Section (H) requires that “participants must not be charged any fees or costs for legal assistance or legal advice provided by authorized community justice workers or community legal advocates.” While it is unusual for most nonprofit legal services providers and community-based organizations to charge legal fees, there are examples where nominal fees to clients by nonprofit organizations provide critical revenue. Perhaps the most robust example of this is nonprofit immigration legal services providers.<sup>25</sup> Other programs, such as the Eviction Defense Network in Los Angeles, use sliding scale fees to ensure financial resilience.<sup>26</sup> Ongoing sustainability will be key to the success of community justice worker programs if we hope to address the access to civil justice crisis at scale.<sup>27</sup> We see no rational basis to restrict nominal fees by nonprofit organizations for legal services to ensure sustainability.

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<sup>21</sup> Rebecca L. Sandefur & Thomas M. Clarke, Roles Beyond Lawyers, Summary, Recommendations and Research Report of An Evaluation of the New York City Court Navigators Program and its Three Pilot Projects, 4 (Dec. 2016) at 4.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 5.

<sup>25</sup> See, e.g. Catholic Legal Immigration Network, Starting a Legal Immigration Program: Capacity Building in a Charitable Community Agency, at 6. (“A substantial factor in the growth of the Catholic network of charitable immigration legal programs is their ability to sustain themselves by charging nominal fees for immigration services. A typical program in the Catholic network recovers between 30 to 40 percent of program expenses by charging nominal fees. This is important for program survival and program growth. Grant funding is not as reliable as fees, and a steady stream of fee income helps ensure that the program stays solvent.”) Available at <https://www.cliniclegal.org/sites/default/files/2019-11/starting-legal-immigration-program.pdf>.

<sup>26</sup> <https://www.tenantstogether.org/resources/eviction-defense-network#:~:text=provide%20consultations%20for%20a%20donation,people%20over%20our%20income%20guidelines>

<sup>27</sup> See Matthew Burnett and Rebecca L. Sandefur, *A People-Centered Approach to Designing and Evaluating Community Justice Worker Programs in the United States*, 51 Fordham Urb. L.J. 1509 (2024) at 1534. Available at: <https://ir.lawnet.fordham.edu/ulj/vol51/iss5/6>

## Recommendation 7: Reconsider Continuing Education Policy

Section (M) requires community justice workers and community legal advocates to participate in 4 hours of continuing legal education each year, including 1 hour of ethics training. Just as it is important for lawyers to keep abreast of changes in the law in their areas of practice, this will also be important for community justice workers and community legal advocates. However, formal Continuing Legal Education (CLE) requirements are not likely an effective way to achieve that goal, particularly when many justice workers will be volunteers. What little research investigates the effectiveness of these requirements in keeping attorneys up to speed on changes in the law finds little evidence that they do so, despite the expense of time and money required to produce them and to participate in them.<sup>28</sup> Indeed, noted scholars of legal education and professionalism point out that “[t]here is no research ‘demonstrating that lawyers who participate in CLE deliver better services than lawyers who do not.’”<sup>29</sup>

Other states that have authorized justice workers have approached meeting this need in different, more flexible and accessible ways. For example, Alaska’s community justice worker program worked with adult education specialists to design effective, competence-based trainings.<sup>30</sup> Once justice workers are initially trained, they “have access to an online portal... which provides resources such as templates, forms, and legal guides as well as a forum for collaboration and support among community justice worker volunteers and [supervising] staff.”<sup>31</sup> They are also supported by a Community Justice Worker Resource Center.<sup>32</sup> Utah, in its legal services regulatory “sandbox” authorizes entities to train and deploy justice workers, and then requires those entities to report data on client outcomes, complaints, and other elements of service on a regular basis in an active, evidence-based model for monitoring competence of service.<sup>33</sup> We encourage Arizona to explore these and other alternate routes to ensuring accessible continuing competence of justice workers.

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<sup>28</sup> Deborah L. Rhode and Lucy Ricca (2014), *Revisiting MCLE: Is Compulsory Passive Learning Building Better Lawyers?*, 22(2) PROFESSIONAL LAWYER (2014). See also Rima Sirota (2022), *Can Continuing Legal Education Pass the Test? Empirical Lessons from the Medical World*, NOTRE DAME J. L., ETHICS & PUB. POL’Y.

<sup>29</sup> Rhode and Ricca *supra* n. 22 at 2.

<sup>30</sup> See Joy Anderson and Sarah Carver. 2024. “Community Justice Workers – Alaska’s Response to the Access to Justice Crisis.” *MIE JOURNAL* 38(1):33-36

<sup>31</sup> Sarah Carver and Joy Anderson (forthcoming), *Community Justice Workers: Part of the Solution to Alaska’s Legal Deserts*, ALASKA LAW REVIEW.

<sup>32</sup> <https://www.alsc-law.org/leadership/>

<sup>33</sup> Rebecca L. Sandefur and Lucy Ricca. 2024. “Outside the Box: How States are Increasing Access to Justice through Evidence-Based Regulation of the Practice of Law.” *JUDICATURE* 108(1) <https://judicature.duke.edu/articles/outside-the-box-how-states-are-increasing-access-to-justice-through-evidence-based-regulation-of-the-practice-of-law/>

Sincerely,

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