

November 1, 2024

Chief Justice Nathan L. Hecht
Supreme Court of Texas
Supreme Court Building
201 W. 14th Street, Room 104
Austin, Texas 78701

SENT VIA EMAIL

Email: rulescomments@txcourts.gov

Re: Public Comment on Proposed Rules Governing Licensed Court-Access Assistants

Dear Chief Justice Hecht and Justices of the Supreme Court of Texas,

Thank you for the opportunity to provide public comment in response to Misc. Docket No. 24-9050, Preliminary Approval of Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants. The recommendations below relate specifically to community justice workers, or what the proposed rule defines as Licensed Court-Access Assistants (LCAAs).¹ We submit this comment as empirical researchers who use the tools of social science to investigate access to justice and the effectiveness of both new and established ways to respond to America's persistent access to justice crisis. We commend the Texas Supreme Court for its leadership in moving this work forward, and its commitment to eliminating barriers for justice workers to provide safe and effective legal advice and representation to members of their communities.

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 terms² and relative to the size of the population.³ More civil justice problems go unserved and unresolved than ever.⁴ US courts have seen rising numbers of people appearing without representation.⁵ Civil legal aid offices routinely turn away as many eligible people as they serve for lack of resources.⁶ Texas is no exception; in fact, Texas ranks at the bottom (46th) among all US states in providing civil legal services to low-income people.⁷ With only one legal aid lawyer for every 7,000 people who qualify (5.2 million people), 90% of the civil legal needs of low-income Texans go unmet.⁸

¹ Article XVI of the proposed rules.

² 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>.

³ 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 JEEYOUN PARK, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2005 2 (2012).

⁴ 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>.

⁵ See, e.g., Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 440–41 (2009).

⁶ *Justice Gap Research*, *supra* note 4.

⁷ *Access to Legal Services Working Group Fact Sheet*, TEXAS ACCESS TO JUSTICE COMMISSION (2024), <https://texasatj.org/>.

⁸ See *id.*

With the proposed rules governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants, Texas is leading the way among states (including Alaska, Arizona, and Utah) making bold, evidence-based reforms to tackle this seemingly intractable crisis. We applaud these efforts, and make the following recommendations based on empirical evidence. While other areas of professional practice, such as medicine, have a robust history of using empirical evidence to inform providers' work and practice, law has been less engaged with empirical evidence about the design and impact of legal services to the public. Systematic empirical evidence goes beyond anecdote or personal experience to offer insight into "what works" and reveal consistent patterns of effectiveness, sustainability, and scalability in models for providing people access to justice, illuminating promising opportunities and showing when traditional approaches are less effective than desired.

RECOMMENDATIONS

1) Expand the Pool of Authorized Legal Assistance Organizations

Article XVI Section 1(A)(1) defines an "Approved legal assistance organization" as a nonprofit that is funded by the Texas Access to Justice Foundation, Legal Services Corporation, or "provides at least 50% of its legal services at no cost to individuals living at or below 200% of the federal poverty guidelines published annually by the U.S. Department of Health and Human Services."⁹ While income is one factor that puts people at greater risk of experiencing civil legal problems, evidence suggests there are multiple other factors that increase an individual's vulnerability to civil legal needs, including disability, experience of domestic violence, and LGBTQ+ status, among others.¹⁰ Restricting the scope of authorization to organizations based solely on their service to populations who pass a stringent income means-test will unnecessarily restrict services available to vulnerable populations that are at higher risk of civil legal needs and yet still cannot afford a lawyer (e.g. veterans, the elderly, and people with disabilities). Instead, we recommend that authorized legal assistance organizations be defined as any tax-exempt, nonprofit, charitable, or social service organization with appropriate in-house (staff), volunteer, or contracted attorney supervision.

2) Take Steps to Further Eliminate Barriers to Participating in Justice Work

Article XVI Section 2(B) states that to be "eligible for licensure as a court-access assistant, an applicant must pass a criminal-history background check." This requirement is vague and likely overbroad. In the context of this aspect of the proposed rule, it is unclear, for example, what it means to "pass" a criminal background check and how far back the check would go (for example, Texas has a 7-year rule for jobs with salaries under \$75,000). Empirical research indicates that criminal background checks are very often unreliable and inaccurate.¹¹ 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."¹² Consequently, a recent study found that criminal records searches produced false-positive errors in *at least half of cases*.¹³ 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

⁹ Article XVI, Article XVI, Section 1(A)(1)(c)

¹⁰ See, e.g., Kathryn M. Young & Katie R. Billings, *An Intersectional Examination of U.S. Civil Justice Problems*, 2023 UTAH L. REV. 487, 490 (2023), <https://doi.org/10.26054/Od-zv1c-rh2z>.

¹¹ See, e.g. Lageson, S., & Stewart, R. (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>.

¹² *Id.*, p. 10.

¹³ *Id.*, p. 5.

official records reported incorrect information.¹⁴ 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.¹⁵

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.¹⁶ People who have had experience with the criminal justice system are arguably *more* familiar with the law and courts.¹⁷

3) Expand the Scope of Practice to Include Additional Critical Areas of Unmet Civil Legal Need

Article XVI Section 4(A) limits LCAA practice to civil justice courts. We recommend that the Court expand the scope of practice for justice workers to address critical unmet legal needs that go beyond matters overseen by justice courts. While justice courts handle a range of cases that represent critical legal needs for low-income Texans, including small claims, debt, and evictions, we encourage the Commission to consider other areas of vast unmet legal need such as family, employment, and health issues that fall outside of the jurisdiction of justice courts. According to a 2015 study of the civil legal needs of low-income Texans, 78% of health-related legal needs went unmet, 94% of employment law issues went unmet, and 76% of family law issues went unmet.¹⁸

Research evidence shows that these matters and others in a wide range are routinely and effectively handled by justice workers in other jurisdictions.¹⁹ 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.”²⁰ 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 excellent.”²¹ The evidence base shows clearly that justice workers can perform at least well as lawyers across a wide range of case types.

4) Eliminate CLE Requirements for LCAAs

Article XVI Section 6(A) requires “all licensed court-access assistants to complete at least 3 hours of continuing education by the sponsoring approved legal assistance organization or another entity approved by the Court or JCTC.” 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 LCAAs and other justice workers. However, formal Continuing Legal Education (CLE) requirements are not likely an effective way to achieve that goal, particularly when many LCAAs 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

¹⁴ *Id* p., 17.

¹⁵ See Rachel M. Kleinman and Sandhya Kajeepeta (2023), *BARRED FROM WORK: The Discriminatory Impacts of Criminal Background Checks in Employment*. New York, NY: Thurgood Marshall Institute. <https://tminstitutelfd.org/wp-content/uploads/2023/07/Barred-from-Work.pdf>

¹⁶ 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

¹⁷ 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>

¹⁸ Enriquez, Roger et. al., *Texas Unmet Legal Needs Survey: A Survey of Low-Income Texans* (2015), at Figure 2.

¹⁹ See Rebecca L. Sandefur (2020). *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 STAN. J. C.R. & C.L. 283 (2020).

²⁰ *Id* at 307-308, describing findings from RICHARD MOORHEAD ET AL., 2001. *QUALITY AND COST: FINAL REPORT ON THE CONTRACTING OF CIVIL, NON-FAMILY ADVICE AND ASSISTANCE PILOT*. The Stationery Office.

²¹ *Ibid*.

expense of time and money required to produce them and to participate in them.²² 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.’”²³

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.²⁴ 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 CJW volunteers and [supervising] staff.”²⁵ They are also supported by a Community Justice Worker Resource Center.²⁶ 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.²⁷ We encourage Texas to explore these and other alternate routes to ensuring accessible continuing competence of LCAAs.

5) Require Reasonable Data Collection from Authorized Legal Assistance Organizations

The inception of these new programs in Texas offers a critical opportunity to embed reasonable data collection in the reporting of authorized legal assistance organizations supporting LCAAs, so that the Texas Supreme Court, the Texas Access to Justice Commission, local service providers, legislators, researchers, and other Texans can learn in real-time about the impact of these programs and how they may be made more effective.

Kind regards,

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²² 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.

²³ Rhode and Ricca *supra* n. 22 at 2.

²⁴ 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

²⁵ Sarah Carver and Joy Anderson (forthcoming), *Community Justice Workers: Part of the Solution to Alaska’s Legal Deserts*, ALASKA LAW REVIEW.

²⁶ <https://www.alsc-law.org/leadership/>

²⁷ 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/>