



The Resource Page

NON-LAWYERS EMERGING ROLES IN THE U.S. LEGAL SYSTEM

Whether lawyers like it or not, there is an active movement across the United States to develop and utilize non-lawyers in legal practice. Sometimes called “allied legal professionals” (ALP), their use is growing and becoming more standardized.” For years, the issue has been simmering in various ways. There are instances of fee-sharing with non-lawyers, especially those who have a strong skill specialty or considerable subject matter knowledge (e.g. digital discovery, computer programming, legal writing). Some states have begun licensing of certain types of non-lawyers to allow a subclass of legal providers, particularly for low-income access to advice, and pro se litigation assistance. Washington began allowing licensed non-lawyers to offer advice without a supervising lawyer in 2018. Licenses usually allow legal advice, and even appearance in court. Since 2014, New York has operated its Court Navigator Program to allow non-lawyer “navigators,” without licenses, to assist unrepresented litigants in housing and consumer debt cases by advice, written materials, and individual assistance for court appearances. Whether non-lawyer “advice” is practice of law remains an ongoing dilemma. In addition, non-lawyer ownership of law firms has aroused considerable controversy. In August 2022, the American Bar Association condemned non-lawyer law firm ownership.

In November 2022, the Institute for the Advancement of the American Legal System (IAALS) published a report entitled “The Landscape of Allied Professional Programs in the United States.” https://iaals.du.edu/sites/default/files/documents/publications/landscape_allied_legal_professionals.pdf

The study indicates that as many as 16 states have begun, or are studying, a new tier of legal service providers. The report lays a basis for the large topic by reviewing underlying issues like program specifics, roles, attorney supervision, in-court representation, as well as fee-sharing and non-lawyer ownership interests. It also reviews non-lawyer education, testing, and training. Overall, the study concludes that non-lawyers professionals are “competent enough to handle the work,” and “have

more specialized education and training in their focused areas of practice than most incoming attorneys.” It is accordingly likely that more states will begin looking into expanding the roles of non-lawyers, especially to accommodate the growing needs of low-income pro se litigants.

ASSESSING EQUITY IN STATE COURTS

A new interactive tool and accompanying resources are now available from the National Center for State Courts at www.ncsc.org/racialjusticeassessment. The Racial Justice Organizational Assessment Tool for Courts is designed specifically for judges, court administrators, HR professionals, court DEI professionals, or others within the court who are seeking to ensure a diverse, equitable, and inclusive workplace that delivers on the promise of equal justice for all. It was developed to provide court leaders with a comprehensive framework for (a) assessing the current state of court policies and practices and (b) developing a data-driven plan for learning and improvement in pursuit of these ideals, which are central to the mission of courts and critical to their legitimacy. The tool is designed to be broadly informative to court leaders at any level and in any type of court, no matter where the court is in its efforts to actively “examine what systemic change is needed to make equality under the law an enduring reality for all, so that justice is not only fair to all but also is recognized by all to be fair.” It can be revisited at routine intervals to help court leaders identify and plan next steps in ongoing work, and track progress over time. The tool was developed under the Blueprint for Racial Justice initiative with funding support from the State Justice Institute.

FEDERAL TRADE COMMISSION PROPOSES TO PROHIBIT NON-COMPETE CONTRACT CLAUSES

In January 2023, the Federal Trade Commission (FTC) proposed a new rule that would ban non-compete clauses or provisions between employers and employees, paid or unpaid, including independent contractors, and rescind current non-compete clauses in effect. <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-pro>

poses-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition It would not apply to non-disclosure agreements, but would remove any restrictions for any employee to engage in the same or similar business as their former employer. In addition, a bipartisan Senate bill has been introduced to outlaw non-compete agreements. https://www.murphy.senate.gov/imo/media/doc/workforce_mobility_act.pdf

Opposition to these efforts is uniform in the business community. <https://www.uschamber.com/finance/antitrust/the-ftcs-noncompete-rulemaking-is-blatantly-unlawful> There are a growing number of commercial courts developing in state courts, which involve non-compete cases. <https://businesscourtsblog.com/wp-content/uploads/2019/01/The-Steady-Growth-of-Business-Courts-00769228xB05D9.pdf> It is unknown what effect, if any, such a rule or statute would have on these efforts.

BAN PEREMPTORY CHALLENGES?

The American Society of Trial Consultants recently issued a position paper opposing the elimination of peremptory challenges. The paper is in response to heightened national awareness of the need to both improve the diversity and inclusion of juries, and the ability to uncover bias in prospective jurors. Recent state actions to eliminate peremptory challenges, and a paper published by Jessica Salerno, Valerie Hans, and others on the limitations of standard voir dire and rehabilitation methods in uncovering and eliminating juror bias is available at <https://psycnet.apa.org/record/2021-90818-005>. The paper discusses the importance of both diverse and impartial juries and the need to preserve peremptory challenges in order to remove biased jurors who may not be struck for cause. Importantly, the paper also outlines improvements to voir dire procedures that some will increase judges’ and counsels’ ability to identify juror bias and therefore appropriately exercise cause strikes and peremptory challenges. To see the full paper, go here: <https://www.astcweb.org/resources/Documents/ASTC%20Position%20Paper%20on%20the%20Elimination%20of%20Peremptory%20Challenges%20-%20FINAL%207-14-2022.pdf>