

# Breaking Down the Barriers: Bringing Legal Technicians into Immigration Law

JANE KAPLAN\*

In 2015, the American Immigration Lawyers Association commissioned a task force to explore the future practice of immigration law. In reporting its findings, the chair of the task force asked the following:

Our profession is at a crossroads. We must decide whether we will continue to practice law as we have always done or whether we will instead acknowledge the change that is happening and begin to offer innovative new ways to deliver legal services . . . Do we enter into the debate to create and regulate non-lawyer providers? Do we have a further role in closing the justice gap in immigration?<sup>1</sup>

This Note suggests that such questions should be answered in the affirmative: the legal profession should recognize the value of non-lawyer providers in narrowing the access-to-justice gap.

Part I of this Note will introduce the access-to-justice gap and illustrate the problem in the context of immigration law. It will suggest that the access-to-justice gap stems from the fact that supply in the legal market is restricted due to the barriers to entry, which creates a demand for legal services that outweighs supply. Part II proposes the implementation of a licensed legal technician program that would allow certain licensed non-lawyers to provide legal services in immigration law in order to narrow the access-to-justice gap. Part III will address counterarguments and concerns with permitting non-lawyers to provide such services. A primary consideration in response to such counterarguments includes the ethical obligation of lawyers under the *Model Rules of Professional Conduct*.

## PART I: INTRODUCING THE ACCESS-TO-JUSTICE GAP

### A. THE PROBLEM

In its 2016 report, the ABA Commission on the Future of Legal Services concluded that “*most* people living in poverty, and the *majority* of moderate-income

---

\* J.D., Georgetown University Law Center (expected May 2020); B.A., Rollins College (2017). © 2019, Jane Kaplan.

1. *The Future of Immigration Law Practice: A Comprehensive Report*, American Immigration Lawyers Association at Preface (2016), [<https://perma.cc/X2ZJ-UHSU>].

individuals, do not receive the legal help they need.”<sup>2</sup> The ABA report noted that one in five Americans qualified for services provided by the Legal Services Corporation (LSC), a nonprofit established to provide financial support for civil legal aid to low-income Americans.<sup>3</sup> Although one in five Americans would likely need the LSC’s assistance if faced with a legal issue, the organization is underfunded and must turn people away if they do not meet other eligibility requirements.<sup>4</sup> This means that the LSC cannot possibly meet America’s overwhelming legal needs.<sup>5</sup> Moreover, the Commission on the Future of Legal Services concluded that *pro bono* efforts alone are not sufficient to address unmet legal needs.<sup>6</sup> According to the report, “U.S. lawyers would have to increase their *pro bono* efforts . . . to over nine hundred hours each to provide some measure of assistance to all households with legal needs.”<sup>7</sup> The report further demonstrates that the increasing problem of unmet legal needs is widely recognized and virtually undisputed.<sup>8</sup>

The access-to-justice gap refers to “the difference between the civil legal needs of low-income Americans and the resources available to meet those needs.”<sup>9</sup> Although the access-to-justice gap is widespread and undoubtedly impacts large numbers of individuals with civil legal needs, this Note focuses on the access-to-justice gap in the context of one group in particular—immigrants.<sup>10</sup> The lack of access to legal services is especially troubling in immigration law given that the government is always represented in immigration proceedings, but the individual is typically unrepresented.<sup>11</sup> Moreover, the likely existence of a language barrier makes it even more difficult for immigrants to proceed without representation.<sup>12</sup>

---

2. *Report on the Future of Legal Services in the United States*, ABA Commission on the Future of Legal Services at 5 (2016) (emphasis added), [<https://perma.cc/SXH6-T9TG>].

3. *Id.* at 12.

4. *See id.* at 13.

5. *See id.*

6. *Id.* at 5.

7. *Id.* at 14 (quoting Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, *Daedalus* 5 (2014)).

8. The report also noted that “in some jurisdictions, more than eighty percent of litigants in poverty are unrepresented in matters involving basic life needs, such as evictions, mortgage foreclosures, child custody disputes, child support proceedings, and debt collection cases.” *Id.* at 12.

9. *2017 Justice Gap Report*, Legal Services Corporation, [<https://perma.cc/N2BC-6EME>].

10. It’s important to note that unlike in other areas of law, “legal service organizations that receive federal funding are prohibited from providing legal advice or representation to undocumented immigrants.” Carreen Shannon, *To License or Not to License- A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers*, 33 *CARDOZO L. REV.* 437, 445 (2011).

11. “Although there is no right to appointed counsel at government expense, respondents in immigration removal proceedings must be advised of their right to be represented. Generally, this reading of rights occurs at the first hearing in immigration court, known in practice as the ‘master calendar hearing.’ . . . judges are required to distribute a list of free and low-cost legal services to immigrants who appear before them.” Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 *U. PA. L. REV.* 1, 14 (2015).

12. Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 *FORDHAM URB. L.J.* 1227, 1238 (2014).

The first national study of access to counsel in United States immigration courts provides insight into just how many immigrants must face the perils of the court system without legal representation.<sup>13</sup> The study focused its analysis on removal proceedings, which account for 97% of the proceedings heard in immigration court.<sup>14</sup> This makes them the largest category of immigration decisions.<sup>15</sup> In removal proceedings, the immigration judge determines whether to deport an immigrant or allow them to remain in the United States.<sup>16</sup> The national study included 1,206,633 removal cases decided by approximately 377 different immigration judges between 2007 and 2012.<sup>17</sup> It concluded that “only 37% of immigrants were represented by counsel in cases decided during the six-year period.”<sup>18</sup>

The national study also analyzed the type of attorney representation that was provided, finding that “90% of all removal representation was provided by small firms and solo practitioners.”<sup>19</sup> The other 10% of representation was provided by nonprofit organizations, law school clinics, medium firms, and large firms.<sup>20</sup> Therefore, “since only 37% of immigrants obtained representation, just under 2% of all immigrants facing removal during [the] study period obtained pro bono legal services from nonprofit organizations, law school clinics, or large firms.”<sup>21</sup> These results illustrate that the scarcity of access to legal services in America is especially troubling for immigrants.

#### B. THE SOURCE OF THE ACCESS-TO-JUSTICE GAP

Underlying the access-to-justice gap is a market failure created by government intervention in the field of legal services. Barriers to entering the legal market erected by the American Bar Association restrict the supply of legal services, which prices low-income communities out of the market.<sup>22</sup> In other words, the restrictions on entry to the legal market have severely limited the pool of individuals who are able to provide legal representation in immigration proceedings (or any type of legal services).<sup>23</sup>

---

13. See Eagly, *supra* note 11, at 6.

14. *Id.* at 12.

15. *Id.* at 11.

16. *Id.*

17. *Id.*

18. *Id.* at 16. In reaching this conclusion, the study considered an immigrant to be “represented” if: “(1) an EOIR-28 form was filed with the court prior to the completion of the merits proceeding; or (2) an EOIR-28 form was filed after the judge reached the decision, but an attorney appeared in at least one hearing within the relevant merits proceeding.” *Id.* at 15.

19. *Id.* at 26.

20. *Id.*

21. *Id.* at 27.

22. For further discussion on how the *Model Rules of Professional Conduct* may impede innovation and hinder the delivery of legal services, see *Report on the Future of Legal Services in the United States*, ABA Commission on the Future of Legal Services at Ch. 2 (2016), [<https://perma.cc/8Z9E-NFG8>].

23. Some might characterize this imbalance as a monopoly. See, e.g., Neil M. Gorsuch, *Access to Affordable Justice*, Duke Law Center for Judicial Studies, 52 (2016) (noting that while consumer-friendly

To be sure, the ABA and many states have broadly interpreted the “practice of law” to prohibit non-lawyers from providing any assistance that might be construed as legal assistance.<sup>24</sup> Some jurisdictions “take a circular approach and define the practice of law as what lawyers do.”<sup>25</sup> Other jurisdictions “simply prohibit, without defining, the practice of law by non-lawyers.”<sup>26</sup> When it comes to the practice of immigration law specifically, a notary or other non-lawyer individual is permitted to “transcribe information” onto a form; however, “activity such as advising the consumer of which form to select or coaching on how to respond to form questions is the practice of law since these activities involve legal analysis and advice.”<sup>27</sup> In the past, the Federal Trade Commission and the Department of Justice have expressed concerns over these broad definitions. In a letter to the Kansas State Bar, the FTC and DOJ wrote:

The definition of the practice of law should be limited to those activities where specialized legal knowledge and training is demonstrably necessary to protect the interests of consumers . . . The Justice Department and the FTC are concerned about increasing efforts across the country to prevent non-lawyers from competing with lawyers through the adoption of excessively broad unauthorized practice of law rules and opinions by state courts and legislatures.<sup>28</sup>

As this letter illustrates, such broad definitions raise a consumer protection issue. In short, the barriers to entering the legal market keep non-lawyers out, while the excessively broad definition of the practice of law ensures that non-lawyers stay out. The result is that the demand for legal services outweighs the supply, leaving immigrants without access to legal services and ultimately without access to justice.

---

markets include a diversity of goods and services to choose from, “markets with just one good of uniform character are often the product of a producer-friendly monopoly or some similar competitive failure”). It is tempting to use the term ‘monopoly’ to describe the issue here. However, in the context of legal services, the monopoly is the result of government action. Therefore, the standard term ‘monopoly’ does not seem to provide an accurate representation of the market failure.

24. See Susan Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and Its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 722 (2007) (“Comment two to Model Rule 5.5 explains that the meaning of ‘practice of law’ varies by jurisdiction.”) (footnote omitted).

25. Rhode, *supra* note 12, at 1233.

26. *Id.*

27. Avoiding the Unauthorized Practice of Law, ABA Commission on Immigration at 4 (2017), [https://perma.cc/4C3M-2R94].

28. Lori W. Nelson, *LLLT- Limited License Legal Technician: What It Is, What It Isn't, and the Grey Area In Between*, 50 FAM. L.Q. 447, 450 (2016) (citing Comments on Kansas Bar Association’s Proposed Definition of the Practice of Law, Letter from R. Hewitt Pate, Assistant Att’y Gen’l, and Aaron Comentz, Trial Att’y, U.S. Dep’t of Justice, by direction of the Fed. Trade Comm’n, Deborah Platt Majoras, Chairman, to Jeffrey Alderman, Exec. Dir., Kan. Bar Ass’n (Feb. 4, 2005), https://www.justice.gov/atr/comments-kansas-bar-associations-proposed-definition-law-practice).

## PART II: A PROPOSED SOLUTION

### A. INTRODUCING THE LEGAL TECHNICIAN PROGRAM

The basic law of supply and demand provides that increasing the supply of legal services offers a fairly obvious solution to the problem.<sup>29</sup> The more difficult question is how to increase the supply—or perhaps, what supply means in this context. While the focus has generally been on increasing the supply of *lawyers*, this Note suggests that the solution lies in increasing the supply of *legal services* through the implementation of licensed legal technician programs. Although the term “licensed legal technician” is difficult to clearly define given that the profession is still developing and that there are several variations of the program, a limited licensed legal technician may be defined as “a paralegal with at least an associate degree plus additional advanced training in core subjects.”<sup>30</sup>

The goal of increasing access to justice is better served by allowing licensed non-lawyers to provide certain legal services because this would provide consumers (here, immigrants) with access to quality legal services. Access to justice means more than the availability of legal services—“it relates to the availability and affordability of accurate and competent legal information, advice, and representation.”<sup>31</sup> While increasing the pool of lawyers would technically increase the supply, this will not provide access to justice because consumers still would not have a choice between a range of available services, and many would still not be able to afford quality legal services. Moreover, a key function of a consumer-friendly market, including one that provides legal services, is to provide a diversity of goods and services to choose from.<sup>32</sup> Furthermore, many of the less complex legal needs could be resolved at the lower cost of legal technician services, rather than the substantial cost of a lawyer. Overall, licensed legal technicians offer a key solution to narrowing the access-to-justice gap in immigration law by allowing licensed non-lawyers to provide legal services, thereby increasing the supply of available legal services and importantly, providing an opportunity for immigrants to actually access those services.

As non-lawyers, the potential inclusion of licensed legal technicians into the legal system raises some interesting questions about the role(s) they will play. The lack of available legal services for immigrants has long been discussed and the potential role for non-lawyers in this space has already been acknowledged. Under current federal regulations, several categories of individuals are permitted to provide legal representation in immigration proceedings: attorneys, law students and law graduates under the supervision of a licensed attorney, reputable

---

29. See Gorsuch, *supra* note 23, at 49 (“Consistent with the law of supply and demand, increasing the supply of legal services can be expected to lower prices, drive efficiency, and improve consumer satisfaction.”).

30. Nelson, *supra* note 28, at 452.

31. AILA, *supra* note 1, at 5–2.

32. See Gorsuch, *supra* note 23, at 52.

individuals, accredited representatives, and accredited officials.<sup>33</sup> That is, in immigration law, non-lawyers (known as BIA accredited representatives) are actually permitted to provide legal services.<sup>34</sup> “Partially accredited representatives may only represent individuals before the Department of Homeland Services (DHS), while fully accredited representatives may represent respondents in Immigration Court and before the BIA, as well as DHS.”<sup>35</sup> In implementing the BIA accreditation program, the Department of Justice explicitly sought to increase the supply of individuals who are able to provide legal services for immigrants. However, the BIA accreditation program has not been successful in narrowing the access-to-justice gap.<sup>36</sup>

The challenge in resolving the access-to-justice gap involves a proper balance between restricting entry to the legal market (perhaps not everyone should be practicing law) and the need to provide access to quality legal services. In other words, we want to increase access to available legal services but ensure that the service is provided by competent individuals (to avoid further harm). The BIA program fails to achieve this goal due to its inherent limitations. As the AILA Task Force noted, “unless recognized organizations obtain significant funding, they can only provide services to a small fraction of consumers in the legal services marketplace.”<sup>37</sup> As such, the present immigration system continues to “suffer [] from a lack of qualified immigration practitioners.”<sup>38</sup>

The BIA accreditation regime illustrates, among other things, the space for non-lawyers and the potential for non-lawyers to play a role in providing legal

---

33. ABA Commission on Immigration, *supra* note 27 (citing 8 C.F.R. § 1292.1).

34. The Board of Immigration accredited representative program allows non-lawyers to seek accreditation and perform immigration services when certain conditions are satisfied. First, the organization with which the individual is affiliated must receive authorization for a representative to practice before the Department of Homeland Security or the Board of Immigration Appeals. The organization can seek recognition if it

(1) is a non-profit, religious, charitable, social service, or similar entity; (2) offers immigration legal services to indigent and low-income clients and has policies to allow for a waiver of fees if needed; (3) maintains federal tax-exempt status; (4) has a minimum of one accredited representative on staff; (5) identifies a designated authorized officer; and (6) has access to adequate knowledge, information, and experience.

*Id.* at 5. Once the organization satisfies these conditions (thereby receiving recognition), it must apply to accredit each individual to act as a representative. The organization seeking recognition, and the non-lawyer seeking accreditation “must demonstrate prior experience and knowledge of immigration law, raising the question of how such experience and knowledge could have been acquired in the first place without violating the strictures against the unauthorized practice of law.” Shannon, *supra* note 10, at 451.

35. AILA, *supra* note 1, at 5–4.

36. One inherent limitation in the BIA accreditation program is that “individuals cannot apply for accreditation on their own”—an organization that has received recognition must apply on their behalf. *See* Shannon, *supra* note 10, at 448. Accredited individuals cannot sustain their own business. Perhaps more importantly, the program has raised concerns about whether the standards for qualifying are sufficient to provide effective legal assistance. It appears that the only qualifications for accreditation include good moral character, and prior experience and knowledge of immigration law. *Id.* at 448–51.

37. AILA, *supra* note 1, at 5–5.

38. *Id.*

services for immigrants. While accredited representatives will likely “continue to play a critical role in addressing the legal service needs of indigent immigrants in the coming years,”<sup>39</sup> licensed legal technicians should be added to the list of individuals who are able to provide legal representation in immigration proceedings. The legal technician program could better serve the primary goal of the accreditation program: to allow non-lawyers to enter the market (in an effort to expand the pool of individuals who can provide legal services) and increase access to quality legal services for immigrants.

## B. WHAT WE CAN LEARN FROM OTHER NON-LAWYER PROGRAMS

The value of non-lawyer services (and even licensed legal technician programs) in the legal market has gained increasing recognition in recent years.<sup>40</sup> Washington, New York, and the United Kingdom’s adoption of similar programs are illustrative of this increasing recognition and offer useful guidance in implementing a legal technician program for immigration law.

In 2012, Washington became the first state to adopt a limited license legal technician (LLLT) program, which allows non-lawyers to provide specific types of legal services in the area of family law.<sup>41</sup> Various issues were taken into consideration as the Practice of Law Board (POLB) discussed the adoption of a rule allowing non-lawyers to provide legal services, including the obligation to ensure that the public would not be harmed and the obligation to provide competent representation.<sup>42</sup> The POLB also considered “the desire to avoid [the] unreasonable restraint of trade.”<sup>43</sup> In analyzing this issue, the board reviewed the letter from the Federal Trade Commission and the U.S. Department of Justice (discussed above).<sup>44</sup>

---

39. *Id.*

40. As the American Bar Foundation noted, “[t]here is now a major movement in the United States to expand the use of appropriately trained and supervised individuals without full formal legal training to provide help to people who would otherwise be without legal assistance of any kind.” American Bar Foundation, *Roles Beyond Lawyers: Summary and Recommendations of an Evaluation of the New York City Court Navigators Program and its Three Pilot Projects*, 3 (2016). Some examples include Arizona’s document preparer program and California’s Legal Document Assistants Program. See Nelson, *supra* note 28, at 456–57. State task forces have made recommendations on non-lawyer providers in Colorado, Connecticut, Mississippi, New Mexico, Oregon, and Utah. *Id.* at 458–61.

41. See *Limited License Legal Technician Program*, WASH. ST. B. ASS’N (Jan. 30, 2019), [https://perma.cc/FN9Q-GZ4T] (including order and rule).

42. Nelson, *supra* note 28, at 450.

43. *Id.*

44. Recall that the letter stated:

The definition of the practice of law should be limited to those activities where specialized legal knowledge and training is demonstrably necessary to protect the interests of consumers. Otherwise, consumers benefit from preserving competition between lawyers and non-lawyers. . . . The Justice Department and the FTC are concerned about increasing efforts across the country to prevent non-lawyers from competing with lawyers through the adoption of excessively broad unauthorized practice of law rules and opinions by state courts and legislatures.

*Id.*



The Board determined that family law was the best area of law for the introduction of the LLLT program for two primary reasons: (1) the practice area of family law consists of many discreet tasks, and (2) there exists a great need to provide representation for low and moderate income clients in this area.<sup>45</sup> This framework can similarly be applied to immigration law. It is clear that the need for representation is especially great in the area of immigration law, and there are similarly discreet tasks that can be defined. Admittedly, family law differs from immigration law in several respects including the risks the clients face at trial. Arguably, the stakes are higher during immigration proceedings, where the threat of deportation looms large. Although the legal help provided by legal technicians may not be perfect, the alternative is no legal help at all. Therefore, while the risks facing clients in immigration proceedings may be greater, the client is still likely better off if help is offered by a legal technician. Despite any differences between immigration law and family law, Washington's adoption of the limited license legal technician program highlights the increasing jurisdictional recognition of the value of non-lawyer services, even in complex areas of law.<sup>46</sup> That Washington chose to begin with family law does not undermine the potential value of bringing legal technician programs into the field of immigration law.

New York's adoption of the Court Navigator Program is another example of the introduction of non-lawyer services in the legal market.<sup>47</sup> The Court Navigator Program is a volunteer program that allows non-lawyers "to support and assist unrepresented litigants during their court appearances" in certain cases, including landlord-tenant and consumer debt cases—other areas in which the percentages of unrepresented litigants are especially high.<sup>48</sup> Court navigators undergo special training before they are allowed to volunteer.<sup>49</sup> Their duties include assisting with court forms, helping to keep paperwork orderly, and explaining the court process to litigants.<sup>50</sup> In some courtrooms, they are permitted to enter the courtroom with the litigant to "respond to factual questions asked by the judge," but they cannot represent clients in the traditional sense.<sup>51</sup> A 2016 American Bar Foundation report concluded that the program has been a

---

45. *Id.* at 451.

46. One argument against adopting the program was that family law is too complex. The Family Law Section of the Washington State Bar Association opposed the limited license legal technician program, noting that "[f]amily law is one of the most challenging areas of legal practice, balancing the skill of litigation with knowledge of the law, the psychology of clients going through one of the most stressful events of their lives, and developing the necessary financial acumen to make a practice thrive." *Id.* at 449 (quoting Jean Cotton, *Legal Technicians Aren't the Answer: The Family Law Section's Executive Committee Weighs In*, WASH. ST. B. NEWS 31 (July 2008)).

47. See Mary Juetten, *Legal Technicians Belong in Courtrooms*, ABA Journal (Apr. 13, 2018), [<https://perma.cc/F8XD-6CG5>].

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*



success.<sup>52</sup> The study revealed that “litigants who received the help of any kind of navigator were 56 percent more likely than unassisted litigants to say they were able to tell their side of the story.”<sup>53</sup> The success of the court navigator program demonstrates that even seemingly minor assistance navigating the legal system can have a significant impact on litigants in need of legal services.

In the United Kingdom, the Citizens’ Advice Bureau—staffed by trained non-lawyer volunteers—assists millions of individuals.<sup>54</sup> “The network relies on 22,200 trained volunteers to keep the service running and provides advice from in person in bureau as well as by phone, in people’s homes and via the internet.”<sup>55</sup> A quick glance at the Citizens’ Advice website reveals a wide array of helpful resources, including an entire section dedicated to seeking immigration law assistance. The Citizens Advice Bureau offers legal assistance for various immigration needs, including: visa eligibility and applications (such as advice on filling out forms, although they will not fill out the form for you), getting replacement immigration documents, addressing issues with coming or staying in the UK (for example, applying for residence permits), and becoming a British citizen.<sup>56</sup> The website directs you to an immigration “specialist” if “your situation is more complicated.”<sup>57</sup> The existence of this program, and this statement in particular, suggests that lawyers and non-lawyers *can* co-exist in the legal market. Indeed, the Citizens’ Advice Bureau recognizes, and explicitly states, that they cannot provide legal services pertaining to all legal needs, and more complicated issues *may* require a lawyer. Nonetheless, the Citizens Advice Bureau plays a key role in the legal market by providing access to basic legal services.

### C. WHAT WILL THE PROGRAM LOOK LIKE?

Of course, the success of a legal technician program in immigration law necessarily hinges on an effective regulatory structure. In establishing this structure, several competing factors require a delicate balance: for example, the cost and training for becoming a legal technician should not be so burdensome that it deters individuals from seeking a license, but the training should be comprehensive and complete so that individuals can provide quality services. Additionally, the scope of a legal technician’s practice should be broad enough to incentivize individuals to seek a license, but some may argue that the practice should still be limited in scope (to avoid swallowing up the role of a lawyer and engaging in

---

52. American Bar Foundation, *Roles Beyond Lawyers: Summary and Recommendations of an Evaluation of the New York City Court Navigators Program and its Three Pilot Projects*, 4 (2016). The report further noted that an evaluation of the program “uncovered evidence that assistance from appropriately trained and supervised individuals without formal legal training is associated with changes in a range of outcomes, including both legal and real-life outcomes.” *Id.*

53. *Id.*

54. Rhode, *supra* note 12, at 1232.

55. *History of the Citizens Advice Service*, Citizens Advice, [https://perma.cc/W55F-3L55].

56. *Get Immigration Advice*, Citizens Advice, [https://perma.cc/P2E3-N6JQ].

57. *Id.*

the unauthorized practice of law). While this Note seeks to provide insight into the adoption of a legal technician program, it does not purport to answer the many questions that will need to be addressed to establish a workable program. These questions are better answered by the appropriate authority, namely a dedicated commission that is appointed to answer them. In determining how to implement the legal technician program in Washington, for example, a commission was appointed to conduct a comprehensive review of the practice of family law in the state.<sup>58</sup> The commission should determine, among other things, the scope of a licensed legal technician's practice in immigration law.<sup>59</sup>

As noted above, the program should incentivize individuals to become licensed, while also providing sufficient training and education. That is, the cost of proper training should not be so burdensome that legal technicians would be disincentivized by the cost of gaining a license or technicians would become licensed and subsequently increase the prices of legal services to cover the costs of training. That would, of course, defeat the purpose of establishing such programs in order to ensure that such legal services are more accessible. In terms of training and educational requirements, Washington again offers a useful model. Under Washington's requirements:

[a]n applicant must have good moral character and demonstrate fitness to practice as an LLLT; have at least an associate degree; have an additional forty-five credit hours of core curriculum instruction in paralegal studies at an approved educational institution; and have instruction in the approved practice area, the key concepts of which are determined by the LLLT Board.<sup>60</sup>

In terms of education:

[t]he applicant must take and pass all required examinations and have 3,000 hours of substantive law-related work experience supervised by a licensed lawyer. This experience must be acquired within three years of requesting licensure . . . an applicant must demonstrate that he or she has the financial

---

58. See Nelson, *supra* note 28, at 449. The Washington POLB determined that

[t]he LLLT can obtain relevant facts and explain their relevancy to the client; inform the client of procedures, including deadlines, necessary documents that must be filed, and the general course of the proceeding; inform the client of the protocol for filing documents; provide the client with self-help materials prepared by a lawyer or approved by the Board; select, complete, file, and have served appropriate forms, as well as advise the client regarding the forms; perform legal research; draft legal letters and documents that are not forms, so long as such work is reviewed and approved by a lawyer; advise a client about other documents that may be necessary to the client's case and explain how those documents may impact the case; and assist the client in obtaining the necessary documents or records (i.e., birth, death, or marriage certificates).

*Id.* at 452 (citing WASH. CT. ADMISSION AND PRAC. R. 28, Limited Practice Rule for Limited License Legal Technicians (2013)).

59. Presumably, it would be reasonable to permit legal technicians to represent an immigrant in immigration proceedings given that this is within the scope of an accredited representative's authority.

60. Nelson, *supra* note 28, at 453.

ability to pay for damages “resulting from his or her acts or omissions in the performance of services permitted by [the] rules.”<sup>61</sup>

Any legal technician program developed for immigration law should require similar qualifications.

### PART III: RESPONDING TO CONCERNS AND COUNTERARGUMENTS

#### A. LEGAL TECHNICIANS WILL TAKE JOBS AWAY FROM LAWYERS

In its 2016 report, the ABA recognized that “the profession must embrace the idea that, in many circumstances, people other than lawyers can and do help to improve how legal services are delivered and accessed,” and that the ABA “is well positioned to lead this effort.”<sup>62</sup> Yet, lawyers and legal organizations have continued to reject proposals for legal technician programs despite its potential to narrow the access-to-justice gap. Lawyers (and scholars) who oppose the implementation of non-lawyer services often argue that such programs would take jobs away from lawyers.<sup>63</sup> This argument fails to account for the fact that it is entirely reasonable for lawyers and non-lawyers to coexist in the legal market. Consider the role of doctors and nurse practitioners in the medical profession. The medical profession “has long recognized that people with health problems can be helped by a range of assistance providers”<sup>64</sup> without sacrificing the job security of doctors.

In addition to the fact that it is entirely possible for lawyers and non-lawyers to coexist in the legal market, the claim fails to take into consideration the ethical obligations of lawyers under the *Model Rules of Professional Conduct*. The preamble to the *Model Rules* provides:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession . . . A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance . . . A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.<sup>65</sup>

The legal profession has an obligation to provide access to the legal system and it is currently failing to carry out this obligation. Restricting non-lawyers from providing services that can narrow the access to justice gap directly violates

---

61. *Id.* (quoting A.P.R. 28(E)(4)).

62. Report on the Future of Legal Services in the United States, *supra* note 2, at 9.

63. See, e.g., Julian Aprile, *Limited License Legal Technicians: Non-lawyers Get Access to the Legal Profession, but Clients Won't Get Access to Justice*, 40 SEATTLE U. L. REV. 217, 237 (2016).

64. Robert Ambrogi, *Who says you need a law degree to practice law?*, WASH. POST (Mar. 13, 2015), [<https://perma.cc/FD3W-HNCN>].

65. MODEL RULES OF PROF'L CONDUCT pmb1.

a lawyer's duty to "seek improvement of the law" and "access to the legal system."<sup>66</sup>

### B. NON-LAWYERS WILL HARM CONSUMERS

Another significant concern with allowing non-lawyers to provide legal services is that non-lawyers will harm consumers because they lack the requisite knowledge and training and would be engaging in the unauthorized practice of law.<sup>67</sup> However, this harm can be deterred by providing sufficient qualification requirements. As the above discussion suggests, responding to the access-to-justice gap necessarily involves a delicate balance between the potential harm to consumers from non-lawyer services and the need to provide access to legal services. It is true that the qualifications for becoming a legal technician should be more stringent than those for becoming an accredited representative. However, the fact that legal technicians will not have attended law school for three years and taken the bar exam does not alone indicate that consumers will be harmed by such individuals. Indeed, legal technicians should be required to undergo training and take certification exams. Moreover, "other nations permit non-lawyers to provide legal advice and assist with routine documents, and the evidence available does not suggest that their performance has been inadequate."<sup>68</sup> One study compared the "outcomes for low-income clients in the United Kingdom on matters such as welfare benefits, housing, and employment," and noted that "non-lawyers generally outperformed lawyers in terms of concrete results and client satisfaction."<sup>69</sup> Moreover, the authors of the study concluded that "it is specialization, not professional status, which appears to be the best predictor of quality."<sup>70</sup> Thus, the data suggests that "[e]xtensive formal training is less critical than daily experience for effective advocacy."<sup>71</sup>

### C. IMMIGRATION LAW IS TOO COMPLEX FOR NON-LAWYERS

Related to the argument that legal technician programs will harm consumers is the concern that immigration law is too complex for non-lawyers. While this is a valid concern, this argument does not justify the exclusion of non-lawyers from the legal market. Indeed, Immigration and Naturalization Service regulations already allow certain non-lawyers to represent individuals in immigration proceedings. As discussed above, "certain nonlawyers can be accredited by the BIA—an administrative appellate body within the U.S. Department of Justice's (DOJ)

---

66. MODEL RULES OF PROF'L CONDUCT pmb1.

67. This argument suggests that it would be unauthorized because such technicians are not lawyers, who are authorized to practice.

68. Rhode, *supra* note 12, at 1234.

69. *Id.* (footnote omitted).

70. *Id.* at 1234–35 (footnote omitted).

71. *Id.* at 1235 (citing Herbert Kritzer, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 148, 76, 108, 148, 190, 201 (1998)).

Executive Office for Immigration Review (EOIR)—to represent people in immigration matters.”<sup>72</sup> “[T]he largest class of nonlawyers who can represent people in immigration matters consists of . . . accredited representatives.”<sup>73</sup> In implementing the BIA accreditation program, the DOJ dismissed concerns about the complexity of immigration law as a barrier to non-lawyer services, “insisting that the new rule would offer ‘improved procedures.’”<sup>74</sup>

The complexity of immigration law actually advances the need for increased access to representation:

In fact, the whole point of the regulatory regime permitting lay representation in immigration matters is to expand the pool of individuals eligible to help immigrants in dealing with the notoriously complex set of laws and rules governing immigration status, especially given both the acknowledged shortage of qualified lawyers and the proliferation of nonlawyer immigration “consultants” and others who . . . often provide inadequate or even fraudulent advice to immigrants.<sup>75</sup>

Although the BIA accreditation system falls short of fully resolving the access-to-justice gap due to several limitations noted above, the existence of the BIA program and the DOJ’s response nonetheless demonstrates that non-lawyer services have the potential to narrow the access-to-justice gap, even in the complicated area of immigration law.

#### D. CONCLUSION

The legal profession is often resistant to change and its attitude toward the development of legal technician services is no exception. In this case, the profession’s resistance to change is impeding innovation and harming consumers. Although legal technician programs may not offer a perfect solution, the above discussion demonstrates that the adoption of such programs has the potential to narrow the access-to-justice gap in immigration law. It is time to break down the barriers—and welcome innovation.

---

72. Shannon, *supra* note 10, at 441 (citing 8 C.F.R. §§ 292.1(a)(4), 1292.1(a)(4) (2011)).

73. *Id.* at 448.

74. *Id.* at 450 (quoting Requests for Recognition; Accreditation of Representatives, 49 Fed. Reg. 44,084, 44,085 (Nov. 2, 1984) (amending 8 C.F.R. § 292.2(b),(d))).

75. *Id.* at 449 (footnote omitted).