

COMMENTS FROM REBECCA L. SANDEFUR AND MATTHEW BURNETT

to the

Administrative Conference of the United States (ACUS)

Nonlawyer Assistance and Representation

89 Fed. Reg. 55913

August 30, 2024

We offer this submission in response to the request for comments on “Nonlawyer Assistance and Representation” by the Administrative Conference of the United States (ACUS).¹ ACUS is “is requesting public input on representation and other forms of assistance provided by nonlawyers to participants in federal agency adjudication.”² We share these comments in our personal capacity as empirical scholars focused on researching and advancing evidence-based solutions to addressing the access to justice crisis in the United States.³

Nationally, Americans experience at least 150 million new civil justice problems annually.⁴ At least 120 million of those go unresolved.⁵ As we have written elsewhere,

[w]hichever 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 and relative to the size of the population. More civil justice problems go unserved and unresolved than ever. US courts have seen rising numbers of people appearing without representation. Civil legal aid offices routinely turn away as many eligible people as they serve for lack of resources. Traditional responses, centered on lawyers as producers and deliverers of legal

¹ 89 Fed. Reg. 55913, <https://www.federalregister.gov/documents/2023/08/17>.

² *Id.*

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⁴ Rebecca L. Sandefur & James Teufel. 2021. “Assessing America’s Access to Civil Justice Crisis.” 11 *U.C. Irvine L. Rev.*

⁵ The Hague Inst. for Innovation of Law & The Inst. for the Advancement of the Am. Legal Sys. 2021. Justice Needs and Satisfaction in the United States of America.

services, have not met vast civil legal needs, resulting in people facing life-altering legal issues with no one to help them and communities locked out of using their own law.⁶

This crisis extends to the multitude of federal administrative agencies serving Americans civil legal needs where, as the request for comments indicates, a significant “barrier to accessing representation or assistance is the critical shortage of affordable legal services.”⁷ As the request for comments also acknowledges, “[a]gencies have long innovated various ways to expand assistance and widen the pool of available representatives ... [f]or example, many agencies currently permit participants in agency adjudications to be represented by accredited or qualified nonlawyers.”⁸ We applaud ACUS’s longstanding efforts to make recommendations to reduce barriers to assistance by representatives other than licensed attorneys⁹, including its recent recommendations and work to encourage adoption and innovation across federal agencies,¹⁰ as well as the work of the US Department of Justice Office for Access to Justice.¹¹ Below we offer four recommendations.

Recommendation 1: Increase transparency in how representatives are defined, recognized, and authorized across agencies.

Agencies differ considerably in how representatives are defined, recognized, and authorized in their work. For example, in immigration, accredited representatives who are not attorneys must work for recognized nonprofit organizations¹², while for some kinds of federal benefits a person navigating a process may work with a representative of their choice with much less specification. Knowledge of how different kinds of helpers become authorized or are recognized to participate in these processes is critical for beginning to understand variation across agencies in the size of these workforces, in the characteristics of incumbents in these roles, and in the outcomes of their work. The publication of these

⁶ Matthew Burnett and Rebecca L. Sandefur. Forthcoming. “A People-Centered Approach to Designing and Evaluating Community Justice Worker Programs in the United States.” *Fordham Urban Law Journal*. (Notes suppressed)

⁷ 89 Fed. Reg. 55913.

⁸ *Id.*

⁹ See, e.g., Admin. Conf. of the U.S., Recommendation 86-1, *Nonlawyer Assistance and Representation*, 51 FR 25641 (July 16, 1986).

¹⁰ See, e.g., Admin. Conf. of the U.S., Recommendation 2023-5, Best Practices for Adjudication Not Involving an Evidentiary Hearing, 89 FR 1509 (Jan. 10, 2024); Admin. Conf. of the U.S., Recommendation 2023-6, Identifying and Reducing Burdens on the Public in Administrative Proceedings, 89 FR 1511 (Jan. 10, 2024)

¹¹ See White House Legal Aid Interagency Roundtable, *Access to Justice in Federal Administrative Proceedings: Nonlawyer Assistance and Other Strategies* 19 (2023)

¹² 8 C.F.R. § 1292.11 (2019).

rules and criteria in a systematic way would greatly aid in understanding how this work is staffed and conducted, and lay the groundwork for more robust research and better understanding about how different agency rules and approaches might expand or limit access to justice. ACUS would be well positioned to support this effort.

Recommendation 2: Recommend that agencies eliminate the use of the term “nonlawyer” to describe authorized representatives who are not licensed attorneys.

Many federal agencies use the term “nonlawyer” to describe authorized representatives who are not licensed attorneys. The use of this term is 1) unhelpful to clarifying meaningful definitions or roles for authorized representatives; 2) has no precedent in any other licensed profession that we are aware of, and is exclusionary and often pejorative; and 3) is a distinction that is not based in evidence if the goal is safe and effective representation.

First, rather than distinguishing between lawyers and other authorized representatives, it would be more straightforward to simply define the characteristics of individuals who are authorized (or not authorized) to represent individuals before federal administrative agencies regardless of whether they hold a license to practice law. If, for example, agencies wish to specifically exclude lawyers who are disbarred or face disciplinary actions from being authorized representatives, they can do so among the other exclusions applied to any representative.

Second, the term “nonlawyer” is exclusionary and is often used pejoratively, diminishing the valuable contributions of authorized representatives who are not lawyers make in ensuring meaningful representation before agencies in decisions that can have life-altering consequences. There is no other profession that we are aware of in which it is acceptable to refer to members of their community in this way (“non”), and certainly no other profession in which it is codified in statutes and regulations.

Finally, this distinction has no basis in evidence if the goal is effective representation. A range of research demonstrates that the legal work provided by people who are not lawyers but authorized to practice law is safe and effective.¹³ These studies measure service quality in a variety of ways: through case outcomes, customer satisfaction, effectuation (successful completion of legal acts), customer complaints, and expert review of legal

¹³ See Rebecca L. Sandefur. “Legal Advice from Nonlawyers: Consumer Demand, Provider Quality and Public Harms,” *Stanford Journal of Civil Rights and Civil Liberties* 16: 283-314. See also Herbert M. Kritzer. 1998. *Legal advocacy: Lawyers and nonlawyers at work*. University of Michigan Press.

work product. One of the most rigorous and illuminating studies comes from England and Wales and compared authorized legal representatives who are not lawyers and

solicitor providers of legal advice across a range of civil case types, including benefits, housing, debt, personal injury, immigration, and employment, assessed the quality of services provided through peer review of closed case files. [Both kinds of providers] were equally likely to receive failing grades for their work: a quarter of the case files prepared by each failed the quality review. However, [authorized representatives] were six times more likely than lawyers to produce work that reviewers rated as excellent. [These representatives] can not only perform as well as lawyers, they can perform better.¹⁴

If eliminating this unnecessary distinction is a bridge too far, minimally ACUS should recommend that agencies instead use an alternative to “nonlawyer.” We recommend “authorized representative.”

Recommendation 3: Recommend that agencies and the federal government provide funding and technical assistance for nonprofit and community-based organizations to train and support authorized representatives.

While ACUS recommendations ensuring transparency, consistent language, and equal opportunity for authorized representatives across federal agencies will have a significant impact, ultimately more needs to be done to ensure that nonprofit and community-based organizations (including legal aid and other social service providers) can meaningfully train and support authorized representatives to provide effective services. There is significant variation in existing models of funding and technical assistance, but even in the context of immigration and veteran accredited representatives (which have comparatively more robust nonprofit services infrastructure for authorized representatives serving low-income communities), there is no or limited federal funding and technical assistance offered by agencies. If the goal is to increase access to justice, ACUS would be well placed to map and identify promising practices among agencies that enable and empower authorized representatives in community settings to provide free or low-cost services.

¹⁴ *Id.* at 307 and 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.

Recommendation 4: Invite collaboration with researchers

The work of administrative agencies is critical to the enactment of federal policy priorities. An important development in this work in recent years has been a greater focus by the federal government on evidence-based policy making and implementation.¹⁵ A recent gathering of federal agencies and researchers, funded by the National Science Foundation¹⁶ and led by a team including the authors of this comment, highlighted opportunities for collaboration between the two as a route to producing rigorous, actionable intelligence that can both enrich scholarship and inform policy making and implementation.¹⁷ ACUS principals were among the participants in this workshop.

Participants identified important actions that federal agencies can take to cultivate these collaborations. One of the most fundamental is to signal openness to collaborations with researchers and to make data available for research. ACUS should encourage participating agencies to be open to these collaborations and to make data available, both making new discoveries possible and making more visible the important work going on in these settings.

Of particular interest are data about activity in these processes and fora that is conducted by authorized representatives who are not licensed attorneys. At the present time, the scope and distribution of this activity across agencies and processes is not known. Specifically, it would be valuable to be able to establish basic facts such as

- a. the frequency of this kind of participation across different kinds of processes and fora
- b. characteristics of adjudicators and authorized representatives, such as their training and the organizations they work for or who sponsor their participation
- c. outcomes achieved by different kind of advocates, including lawyers and others

These basic facts are necessary to understand what work authorized representatives are currently doing and the impacts of that work. Opening up these data to researchers increases the capacity of the space to produce these fundamental discoveries.

¹⁵ <https://obamawhitehouse.archives.gov/omb/evidence>

¹⁶ https://www.nsf.gov/awardsearch/showAward?AWD_ID=2341716

¹⁷ Rebecca L. Sandefur, Matthew Burnett, Emily Taylor Poppe, Lauren Sudeall, and James Teufel. 2024. Access to Justice Research as a Tool for Advancing Federal Priorities: Workshop Report. Tempe, AZ: Justice Futures Project. https://thesanfordschool.asu.edu/sites/default/files/2024-06/Access%20to%20Justice%20Research%20as%20a%20Tool%20for%20Advancing%20Federal%20Priorities_FIN.pdf

In sum, authorized representatives who are not licensed attorneys play a critical role in helping administrative agencies make fair and accurate determinations and in helping people connect to benefits and services that are theirs by legal right or formal entitlement. ACUS's attention to existing models for expanding and diversifying the sources of legal assistance available to people facing potentially life-altering issues comes at a critical time, when not only administrative agencies but jurisdictions around the country are exploring ways to make rights and benefits truly accessible to the people our agencies and institutions are meant to serve. We applaud ACUS for working to drive these efforts forward.

Respectfully submitted,

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