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Envisioning 100% Access to Justice in Colorado

by Daniel M. Taubman and Melissa Hart

In 2015, the national Conference of Chief Justices and Conference of State Court Administrators adopted Resolution 5, urging all states to work toward “the goal of 100 percent access [to justice] through a continuum of meaningful and appropriate services.”¹ This article considers what a system that had achieved 100% access to justice might look like in Colorado. As Resolution 5 recognizes, 100% access is almost certainly not going to mean that every person with a legal problem will have a lawyer to assist in resolution of that problem. Instead, effective assistance for those with civil legal needs will require a range of services that includes full representation by an attorney and also an array of tools short of full legal representation. These tools will include “expanded self-help services to litigants, new or modified court rules and processes that facilitate access, discrete task representation by counsel, increased pro bono assistance, effective use of technology, increased availability of legal aid services, enhanced language access services, and triage models to match specific needs to the appropriate level of services.”²

The Colorado legal community has been actively focused on addressing the justice gap since at least the establishment of the state’s Access to Justice Commission (ATJC) in 2003. The Colorado ATJC—one of the first in the country—was established to develop, coordinate, and implement policy initiatives to “expand access to and enhance the quality of justice in civil legal matters.”³ Today, it is one of several Colorado entities comprising lawyers and judges actively working to address the justice gap. The combined efforts of these entities, the courts, individual lawyers, and Colorado Legal Services (CLS) have led to significant progress in closing the justice gap, but there is still much work to be done.

This article discusses what Colorado has done to close the justice gap and explores what would need to happen to move from the current system to a fully integrated system that offers 100% access for those with civil justice needs. The discussion has been divided into three categories: (1) efforts to provide assistance to self-represented litigants; (2) efforts to expand opportunities for partial representation by an attorney; and (3) efforts to ensure that full representation is available to those who need it.

Assistance for Self-Represented Litigants

Some individuals navigating the court system do not need or want assistance from an attorney; others simply cannot afford one. Indeed, the number of self-represented litigants in the Colorado courts has been steadily increasing over the past several years.⁴ Both the courts and members of the bar have focused considerable attention on providing high-quality tools to make self-representation effective. Colorado has already made significant strides in improving the tools available for self-represented litigants, and several projects in their early stages will take the state system even further.

Where Are We Now?

Beginning in 2013, the Colorado Supreme Court has allocated annual funding for self-represented litigant coordinators—known as SRLCs or sherlocks—who are based in courthouses around the state and provide support and guidance to self-represented litigants. In Chief Justice Directive 13-01, then-Chief Justice Michael Bender set out the types of services that sherlocks could provide, distinguishing the legal advice that a lawyer provides a client from the kinds of legal and other information that the sherlocks may offer self-represented litigants.⁵ Today, sherlocks assist litigants in each of Colorado’s 22 judicial districts. In 2015, sherlocks provided information to more than 125,000 people who came into courthouses around the state.⁶ In addition to sherlocks, other court personnel, such as family court facilitators who assist parties in domestic cases, are available to answer questions and provide information (but not legal advice) to self-represented litigants.

Efforts are also under way to assist those who do not have easy access to a courthouse. For example, Elbert County attorney Ric Morgan has developed Virtual Pro Se Clinics, which use videoconferencing and screen-sharing to allow lawyers to connect with self-represented litigants in libraries around the state, primarily in rural areas.⁷ Clinic volunteers provide information to assist self-represented litigants while making clear that they are not entering into an attorney–client relationship with them.

Another resource that is expected to go live in early 2017 is the Equal Access Center (EAC), an interactive website that will con-

About the Authors



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nect unrepresented litigants in Colorado to legal resources.⁸ The website will provide users a step-by-step process for determining whether they can address their legal concern without a lawyer or whether they need partial or full representation. For those who represent themselves, either entirely or in part, the EAC will provide links to fillable forms for all types of civil matters. These forms, which the judicial branch has been developing for the past several years, are relatively easy to understand and are available in both English and Spanish. The EAC will also link users to helpful information and resources from CLS, the CBA, and other Colorado organizations.

Most of the programs available to self-represented litigants in Colorado offer assistance outside the courtroom. When a self-represented litigant comes into the courtroom, however, some of the most confusing hurdles present themselves. Self-represented litigants may not know the legal rules (e.g., the rules of evidence) or the cultural norms (e.g., how to address the court) that can give represented parties an advantage in front of a judge. In 2016, the judicial branch launched two pilot projects—one urban, one rural—through which specially trained non-lawyers can assist self-represented litigants in court. These “court navigators” provide litigants general information about what to expect in the courtroom, one-on-one assistance, and moral support. Significantly, they can also speak in court on behalf of self-represented litigants when requested to do so by a judge. These navigator pilot projects were modeled on the successful navigator programs that have been active in certain courts in New York since 2014.

Where Do We Go from Here?

The bench and bar have made significant strides in bolstering assistance for self-represented litigants in recent years. To move to a system of 100% access, there must be continued support to expand projects that have already been started. The EAC and navigator programs are important additions to the work already in progress, and both the judicial branch and other stakeholders should be attentive to their continued development.

In addition, judges need to continue to attend trainings focused on how they can assist self-represented litigants in the courtroom without breaching their obligation of neutrality between the two parties before them. Such a training, discussing comment 2 to Rule 2.6 of the Colorado Rules of Judicial Conduct, was held at this year’s judicial conference. As services for self-represented litigants expand, ongoing judicial training will be a necessary component of ensuring the efficacy of the services.

At the same time, we must remain aware that many litigants are unrepresented in instances where they truly need representation. No system can claim to meet the goal of 100% access if it leaves those people without the support of a needed legal expert.

Partial Representation

For many years, lawyers have provided partial representation to clients in the form of consultation, drafting contracts, and business planning.⁹ Similarly, legal services lawyers, confronted with limited resources, have often provided brief advice and service to clients to maximize the number of clients receiving legal assistance. During the last two decades, however, increasing numbers of clients have sought partial representation in litigation matters. This is due to a number of forces, including the need of middle-income clients for

more affordable legal representation, the desire of some clients to exercise more control over their litigation, and the availability of online legal resources that make client participation in litigation more feasible.

The Colorado Supreme Court has encouraged partial representation, often called limited-scope representation or unbundling, through a series of rule changes, beginning in 1999, and through an organized campaign by the CBA and other organizations to educate lawyers about how to effectively and ethically provide limited-scope representation in litigation matters.

Where Are We Now?

In 1999, the Colorado Supreme Court promulgated two significant rule changes to encourage limited scope representation. First, the Court amended Colo. RPC 1.2(c) to state specifically that lawyers could limit the scope, as well as the objectives, of their representation. This rule change gave attorneys explicit authority to offer clients assistance with one part of a case—for example, representing a client only in a temporary orders hearing in a dissolution of marriage case—without obligating the lawyer to take on the entire matter. Second, the Court amended CRCP 11(b) and 311(b) to authorize ghostwriting, the substantial preparation of pleadings and briefs by a lawyer for a pro se litigant, with the proviso that the litigant was required to include a statement on a brief or pleading that he or she had received substantial assistance from a lawyer. The litigant was also required to list the name and contact information of that lawyer.

Although these rule changes authorized limited scope representation, such representation was infrequent, at least in part because lawyers were uncertain about how unbundling would work. In 2006, the Colorado Supreme Court established its Pro Bono Recognition Program, which recognizes firms that pledge to provide annually 50 hours of pro bono work per attorney in the firm. Former Justice Gregory Hobbs, who championed the program, also saw in the annual recognition ceremonies the opportunity to provide training on how to use unbundling to provide assistance to a client without committing to the uncertainties of time and expense that taking on a bigger matter can introduce.

At these presentations, and in other contexts, lawyers continued to express concern that if they provided limited representation to a client, a judge might not let them withdraw from a case following the completion of that limited representation. Responding to this concern, the Colorado Supreme Court in 2011 adopted CRCP 121, § 1-1(5), which states that lawyers providing limited scope representation must complete a form advising the court of their limited representation, and complete another form advising the court when they have completed the representation. Consequently, lawyers in Colorado may now provide limited representation and have the right to withdraw from that representation when the limited representation is finished. The judge may not require continued representation of a client.¹⁰

With these rules in place, the stage was set to encourage more lawyers to provide limited scope representation. In 2014, the CBA’s Modest Means Task Force began an “unbundling road show,” in which judges and attorneys whose practice included unbundling presented continuing legal education (CLE) programs on the ethical and practical issues involved in including unbundling in a private practice. These well-received programs were presented throughout the state in conjunction with local bar associations and

local access to justice committees. Judges frequently attended these presentations and encouraged lawyers to engage in limited scope representation. More recently, the Modest Means Task Force (now the Modern Practice Initiative) began collaborating with the CBA Young Lawyers Division to provide unbundling presentations geared toward young lawyers.

Other efforts to encourage modest means representation and unbundling abound. The Colorado Women's Bar Association, the Colorado Hispanic Bar Association, and the Colorado Lawyers Committee have hosted pro bono legal nights to provide brief legal advice to litigants. Local access to justice committees regularly host legal resource days and family law resource days, which have included opportunities for low- and middle-income litigants to obtain brief legal advice.

Where Do We Go from Here?

To realize a fully integrated access to justice system with available and effective partial representation, Colorado must expand existing efforts in several ways.

First, while some judges have embraced the practice of unbundled representation, judicial education about unbundling must continue. Judges throughout the state should encourage lawyers to engage in limited scope representation.¹¹ Judges need to understand how unbundling works for lawyers providing limited scope representation, clients receiving limited representation, and opposing counsel in cases that include unbundled service.¹² To make unbundled service as effective, ethical, and fair as possible, lawyers and judges must engage in open and honest conversation about the challenges that unbundling can present and how to address those challenges.

Second, CLS has been extremely effective in leveraging its funding to provide brief service and advice to thousands of additional low-income clients throughout the state. In 2015, CLS provided legal advice or brief legal service to 5,972 individuals. An additional 5,544 people who sought help from CLS received legal information, materials, or a specific referral.¹³ To support this work, the judicial branch and the bar must continue to advocate for increased funding for CLS. According to the 2016 Justice Index developed by the National Center for Access to Justice, Colorado ranks among the bottom five states with regard to state funding for legal aid services.¹⁴ This must change if Colorado is to become a model state for access to justice.

Third, the judicial branch, the bar, and local access to justice committees must work together to establish a coordinated system for referring potential clients to lawyers willing to provide limited scope representation. Pro se litigants who receive information from one of the state's sherlocks should have access to these referrals so they can seek help from an attorney when needed. While some judicial districts already maintain such lists, every judicial district should offer this resource. As the EAC is built out, this information can also be available statewide through that site.

Fourth, the judicial branch and the bar should focus efforts on educating the public about the availability of lawyers who will provide partial representation. Many clients assume that legal services are beyond their means or that lawyers are unable to provide partial representation. The CBA has already prepared an excellent brochure to educate the public about unbundling. The bench and bar should work together to disseminate this and other user-friendly materials to the public. For many clients, understanding that a

lawyer can help with one part of a case puts obtaining legal assistance within reach.

Fifth, Colorado's law schools should educate their students about the availability of unbundling and more generally about the opportunities to establish a financially viable practice by representing modest means clients. Every law student is required to take a course in legal ethics to graduate. These courses, which focus on the ethical rules and professional development, are an ideal forum for discussing the justice gap and the obligation of every lawyer to participate in addressing the gap.¹⁵

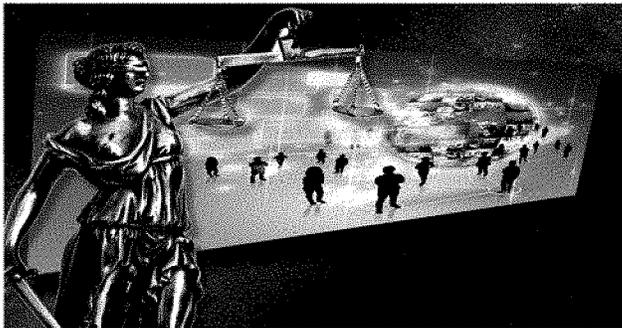
Full Representation

Some cases require full representation by an attorney due to their complexity, the level of conflict between the parties, or the presence of other factors (e.g., domestic violence or custody disputes) that may make the course of litigation less predictable. The most significant challenge Colorado faces today in developing a system of 100% access to justice is to ensure that free or low-cost representation is available to low- and middle-income litigants requiring full representation by an attorney.

Where Are We Now?

Full representation for low- and middle-income litigants generally comes from one of three sources: legal aid organizations, private attorneys offering pro bono services, and attorneys who offer affordable legal services through reduced rates and alternative billing arrangements.

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The most consistent source of full representation for low-income clients in Colorado is CLS. In 2015, for example, CLS provided full legal representation to 1,895 clients.¹⁶ The reality, however, is that CLS is chronically underfunded, and the organization is not able to offer representation to at least half of the eligible clients who reach out for assistance.¹⁷ Nor does CLS serve the many people whose income is high enough to make them ineligible for legal services, but much too low to allow them to retain an attorney.

Recognizing the limitations of CLS, the Colorado Supreme Court has adopted various measures during the past decade to encourage private, in-house counsel and government lawyers to provide pro bono service. Those measures include establishing the Pro Bono Recognition Program, providing CLE credit for pro bono service, permitting retired or inactive lawyers to provide pro bono service, and streamlining procedures for approval of in forma pauperis petitions.¹⁸

The Pro Bono Recognition Program has encouraged hundreds of law firms and lawyers to take on pro bono representation as a regular part of their practice. The program recognizes firms that pledge annually to provide at least 50 hours of pro bono service per attorney in the firm. The pledge includes a requirement that the firm or legal entity give the pro bono work performed by attorneys the same credit, for purposes of meeting a billable hours requirement, that it gives to hours billed to a paying client. Each year, the Court recognizes firms who take the pledge both by publishing the list of firms on its website and in ceremonies held around the state to celebrate the participating firms. The number of law firms and other legal entities pledging to provide pro bono service through the program has increased significantly in recent years, largely because of a concerted push to recruit new participants by the Service/Access to Justice Working Group of the Chief Justice's Commission on Professional Development. Last year, 301 law firms and other entities participated in the pledge. According to Justice Will Hood, who oversees the program, 159 of these participants met or exceeded their 50-hour per-attorney goal.

An unknown number of attorneys provide pro bono representation around the state independent of the pledge program. It is

unclear just how many pro bono attorneys provide legal representation because there is no statewide reporting requirement as exists in 9 other states.¹⁹ Currently, Colorado has a patchwork of bar-sponsored and other pro bono programs, some of which gather information on the number of pro bono cases or hours of pro bono service provided. Because there is no requirement that they do so, there is a lack of information regarding the extent to which the legal needs of low- and moderate-income Coloradans are being met through pro bono representation.

Pro bono representation is not enough to address the justice gap for clients who need full representation; it simply cannot meet the need. There has been growing attention, in Colorado and around the country, to the urgent need for attorneys who will offer legal services at prices that middle class Coloradans can afford. In 2012, the CBA established its Modest Means Task Force to help address the lack of affordable legal services, not only for low-income Coloradans but for most Coloradans. As this task force recognized, prevailing market rates for legal services are so high that even people with moderate and reasonably comfortable annual incomes could not afford to pay for full representation by an attorney. The task force published a nationally recognized tool kit, *Successful Business Planning: Representing the Moderate Income Client*,²⁰ that provides tips for attorneys on establishing a cost-effective, affordable legal practice. The task force collaborated with the Colorado Attorney Mentoring Program to provide mentors for attorneys wishing to focus their practice on modest means representation, and also with CLE in Colorado to provide training sessions on modest means practice.

In recent years, members of the task force have been exploring the creation of an affordable law practice "incubator": a 12- to 18-month program that would support attorneys seeking to establish an affordable law practice with training, mentoring, and free access to a range of online legal services for law practice management and client development. Similar incubators have been developed in other states, with more than 80 currently operational incubators supported by law schools, bar associations, legal aid organizations, and foundation grants. In June 2016, a group of stakeholders interested in the establishment of a Colorado incubator met to discuss what such a program might look like. A working group is currently drafting a business plan, with the hope of launching a Colorado incubator in 2017.

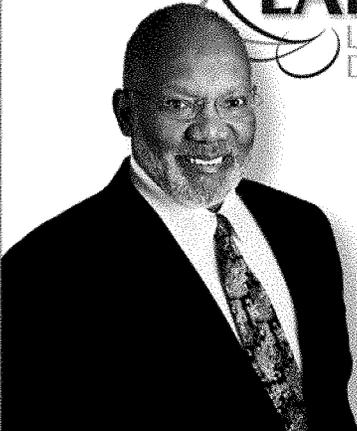
Recognizing that increased client awareness of the existence of modest means practices is essential to making them an effective resource, some local bar associations and local access to justice committees maintain lists of local attorneys who have agreed to provide modest means representation or unbundled services. Also, sherlocks in at least two judicial districts refer pro se litigants to law firms whose lawyers provide pro bono services and reduced or alternative fee arrangements.

Where Do We Go from Here?

Ensuring the availability of full legal representation to both poor and middle class Coloradans will require significant additional funding for CLS and an increased commitment by Colorado lawyers to provide pro bono service. In addition, more lawyers will need to commit to representing middle income clients as part or all of their legal practice. Notwithstanding these challenges, there are ways to improve the situation in the near future.

First, the judicial branch and the CBA must continue their strong efforts to increase federal and state funding for CLS and to

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increase private funding for CLS through contributions to the Legal Aid Foundation of Colorado. Specifically, the judicial branch and the bar should take notes from other states, such as New York, Texas, New Mexico, and Wyoming, where advocacy efforts have led to significant increases in state funding for legal services programs.

Second, more effort should be made to understand exactly what the state of pro bono service is in Colorado.²¹ The Colorado ATJC should request that all pro bono programs gather information about the number of pro bono cases, the hours spent on those cases, and how many lawyers provide such representation. In addition, the Colorado Supreme Court should request that law firms participating in its Pro Bono Recognition Program provide similar information to the judicial branch. This information could be compiled and made available annually, perhaps by the ATJC, to help organizations assess how effective pro bono representation is at meeting legal needs.

Third, several steps should be taken to encourage attorney provision of pro bono services:

- The Colorado Supreme Court should create a system for lawyers to voluntarily report the number of hours of pro bono service that they provide each year. Such information should be requested when an attorney passes the bar and should continue on a cumulative basis as long as that attorney is an active member of the bar. Thus, for example, an attorney providing 50 hours of pro bono representation in year one for 10 years would ultimately be listed as having provided 500 hours of pro bono service.
- Organizations supporting pro bono service (e.g., Metro Volunteer Lawyers), other legal aid organizations, and many local and specialty bar associations currently offer free CLE programs to provide lawyers willing to provide pro bono representation with substantive knowledge in areas of particular need. These programs should be expanded and supported around the state.
- The Colorado Supreme Court should take steps to ensure that pledging law firms and other entities provide information about whether they have met their goals and what kinds of work their lawyers are doing to meet those goals. The justices and other judges throughout the state should continue to take a leadership role in encouraging lawyers to provide pro bono service and recognizing them on a statewide and local basis when they have met their aspirational goals under Colo. RPC 6.1 or otherwise have made significant accomplishments in providing pro bono service. Such conduct by judges is specifically endorsed in Colorado Code of Judicial Conduct, Rule 3.7, Comment 5.
- The Service/Access to Justice Working Group of the Chief Justice's Commission is exploring possible revisions to Colo. RPC 6.1 to make the rule more understandable and to better motivate lawyers to provide pro bono service to low-income Coloradans and affordable representation to modest means Coloradans. These efforts should continue.

Finally, law schools, bar associations, and other stakeholders should continue and expand efforts to educate attorneys about the feasibility of establishing a sustainable career by serving the large majority of the population who cannot pay the rates that many lawyers currently charge. CLE programs should be developed to educate attorneys about alternative fee structures to the billable

hour and about how to leverage technology and client cooperation to reduce the costs of representation. Ideally, the current efforts to establish an affordable practice incubator in Colorado will be successful and will provide an opportunity to expand discussion within the legal community about how to make paid legal services affordable for more Coloradans.

Conclusion

Following the release of Resolution 5, the Center on Court Access to Justice for All announced the "Justice for All" initiative to support state efforts to engage all relevant stakeholders to actively work toward the goal of 100% access to effective assistance for essential civil legal needs. The suggestions included here, like other innovations, will be most effective if they engage a broad range of stakeholders all over Colorado. To that end, a coalition that includes the CBA and the ATJC was recently awarded a Justice for All grant with the aim of taking comprehensive stock of "where we are and where we need to go" in Colorado to achieve 100% access. The culmination of this effort will be a Justice Summit later this year where Coloradans can meet to coordinate successful collaborations.

More efforts are under way in Colorado to achieve access to justice for all than ever before, but there is still significant distance to travel. Some of the most important changes outlined here may require attitudinal adjustments over time, but they are absolutely essential. Addressing the justice gap may require the legal community to abandon long-standing resistance to change that can hinder innovation.²²

All partners in the profession, from law schools to courts to bar leaders, must be engaged in helping lawyers better understand the economics of providing legal services. The reality is that the large majority of Coloradans are either too well off to receive free legal services but not sufficiently well off to pay the rates that most lawyers charge for their services. Ultimately, the goal of 100% access will require us all to confront that reality and address it systematically.

Notes

1. Conference of Chief Justices and Conference of State Court Administrators, Resolution 5: Reaffirming the Commitment to Meaningful Access to Justice for All (2015), www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/18_JFA.authcheckdam.pdf.

2. *Id.*

3. www.cba.cobar.org/index.cfm/ID/20129/DPWAJ/Access-to-Justice-Commission.

4. Gardner, "A Crisis in Colorado's Civil Courts," *5280 Magazine* (June 2016), www.5280.com/magazine/2016/05/crisis-colorados-civil-courts.

5. Chief Justice Directive 13-01.

6. www.courts.state.co.us/Self_Help/information.cfm.

7. Morgan, "The Virtual Pro Se Clinic Concept," *43 The Colorado Lawyer* 77 (May 2014).

8. Hood and Cordova, "The Colorado Equal Access Center: Connecting Unrepresented Litigants to Legal Resources through Technology," *45 The Colorado Lawyer* 55 (Oct. 2016).

9. New Ethics Opinion 101: Unbundling/Limited Scope Representation, *45 The Colorado Lawyer* 36 (Sept. 2016).

10. These changes in the state rules have recently been substantially mirrored by changes to local rules in the U.S. District Court for the District of Colorado, which now permit lawyers to offer limited scope repre-

sentation with the permission of the presiding judge. *See* D.C.COLO. LAttyR 2(b)(1), 5.

11. At the September 2016 judicial conference, Justice Will Hood, Judge Daniel M. Taubman, Judge Adam J. Espinosa, and attorney Danae Woody presented a session entitled “Unbundled Representation: What’s Allowed and Why Encourage It?”

12. New Ethics Opinion 101, *supra* note 9.

13. Colorado Legal Services 2015 Report.

14. Justiceindex.org.

15. As long ago as 1937, the Committee on Cooperation With the Bench and Bar of the Association of American Law Schools (chaired by Dean Wiley Rutledge, before his appointment to the U.S. Supreme Court), noted the need to create legal clinics to serve “the client of modest means.” The report stated that this “proposal offers so many possibilities for increasing the effectiveness of the profession’s service to the community and at the same time providing at least a partial solution of the lawyer’s economic dilemma that it should have the careful study of every agency concerned with the administration of justice.” *See* Program and Reports of Committees, Association of American Law Schools 42, 55–56 (1937).

16. Colorado Legal Services 2015 Report.

17. *See, e.g.*, Rhode, *Access to Justice* 3 (Oxford University Press 2004).

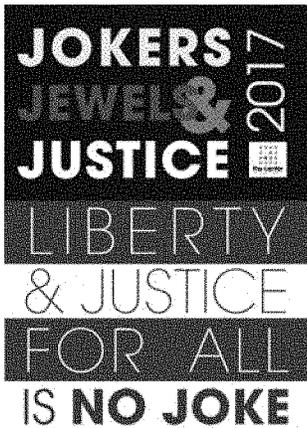
18. *See* Hobbs, Jr., “Judicial Support for Pro Bono Legal Service,” 89 *Den. U. L. Rev.* 851 (2012).

19. *See* www.americanbar.org/groups/probono_public_service/ts/pb-reporting.html (listing states).

20. *Successful Business Planning: Representing the Moderate Income Client* (CBA 2013). CBA members can download this resource for free at www.cobar.org/For-Members/Modern-Law-Practice-Initiative/Successful-Business-Planning-Representing-the-Moderate-Income-Client.

21. *See* Stark, “Colorado Survey on Pro Bono Participation,” 45 *The Colorado Lawyer* 57 (Jan. 2016). A January 2015 survey of all Colorado lawyers showed that 64% of respondents do pro bono work for persons of limited means, but did not indicate what percentage of respondents satisfied the aspirational goal of 50 hours per year of pro bono service under Colo. RPC 6.1.

22. *See, e.g.*, American Bar Association Commission on the Future of Legal Services, Report on the Future of Legal Services in the United States (recommending steps the bar can take to close the access to justice gap in the United States, including exploration of alternative regulatory systems that would allow different types of legal services providers). ■



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