PL on the DL: Domestic Violence Courts' "Quiet Partnership" with Nonlawyer Advocates

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Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan and Alyx Mark, Judges and the Deregulation of the Lawyer's Monopoly, 89 **Fordham L. Rev.** 1315 (2021).

State supreme courts claim the exclusive, inherent authority to define and regulate the "practice of law." Based on this authority, courts have enjoined as the unauthorized practice of law (UPL) all manner of potentially helpful legal assistance by nonlawyers, including counseling, advising, and assistance with documents, as well as representation in court. When it suits them, however, it turns out that trial courts accept extensive nonlawyer assistance behind the scenes, including nonlawyer counseling of clients, preparation of pleadings, and discrete courtside assistance. Courts may even encourage and institutionalize the role of nonlawyer advocates through designated workspace and workflows. But they like to keep it on the down low.

Of course, it is not the "unauthorized" practice of law if courts allow it. And courts' claims to regulatory authority are strongest regarding who appears before them. But what are the implications of an *unacknowledged* nonlawyer assistance regime? This is the question posed by Jessica Steinberg and her *comadres* in their study of domestic violence courts' "quiet partnership" with a "shadow network" of nonlawyer advocates "to substitute for the role counsel has traditionally played." (P. 1316.)

The study is based on observations of roughly 275 protective order hearings in two states, as well as interviews with judges, protective order attorneys, and nonlawyer advocates who work with petitioners in protective order matters. (P. 1328.) Nonlawyer advocacy programs are widespread in the protective order context, in which more than 75 percent of parties appear without a lawyer. As the authors report, over half of the nearly two thousand domestic violence programs in the country provide "court advocacy/legal accompaniment" services. (P. 1329.) The nonlawyers who assist petitioners seeking protective orders are known as "domestic violence advocates" and work for nonprofits funded, in part, by the Violence Against Women Act; however, they are based in the courts. (P. 1330.)

The study finds that the scope of nonlawyer assistance in protective order proceedings is extensive. Domestic violence advocates "provide the full range of services one might expect from a lawyer, short of appearing in court."

> Advocates identify protective orders as an option, among many, that domestic violence survivors might pursue. They elicit factual information from petitioners in service of preparing protective order pleadings. They assist in the development of evidence. They offer explanations about what the court process entails. And finally, they counsel petitioners on whether to pursue legal recourse, how to select remedies, and how to clear procedural hurdles, such as service of process. (Pp. 1331-32.)

The counseling offered by nonlawyer advocates is difficult to distinguish from the type of nonlawyer advising that is routinely prohibited as UPL in other contexts; on the contrary, it looks much like the "strategic expertise" that lawyers provide in navigating relationships, norms, and procedures in court. (Pp. 1335-36.) Moreover, although they do not formally "appear" in court, domestic violence advocates "are stationed inside the courtroom during protective order proceedings," where they whisper instructions and reminders to petitioners and are on call to step into the hallway mid-proceeding to advise petitioners who seem confused. (P. 1331.) In one study location, "advocates have a permanent office next to the filing clerk," and in the other, they "work out of the basement of a government building next to the

courthouse." At both study sites, court clerks automatically direct petitioners with a claim of intimate partner violence to advocates for a range of services, including help completing court paperwork. (P. 1330.)

The authors explain that judges rely on nonlawyer advocates for docket control. Judges are under "enormous pressure" to process cases quickly and, without assistance, it can be difficult for petitioners to develop and present their claims. (P. 1329.) Yet, judges are reluctant to acknowledge the role of nonlawyer advocates—or even to acknowledge their presence—lest it undermine the appearance of judicial neutrality or provoke backlash from the bar. For instance, "[o]ften, work that appears like active fact gathering by judges in the courtroom … is carefully curated by nonlawyer advocates who have developed factually specific pleadings that guide a judge's questioning of the petitioner." (P. 1317). At one site, advocates' role has become more concealed over time:

> In the past, advocates were permitted to make a speech prior to the commencement of the protective order docket, identifying themselves and the services they provided. However, judges grew uncomfortable with the advocates' public appearances, since it gave the impression that the court favored petitioners over defendants. Notably, advocates' firm institutional status … did not shrink after the prefatory speech was abolished. Advocates … continue to perform their role in the same way—they occupy permanent space within the courts to meet with survivors and accompany every petitioner to the judge's chambers after a hearing concludes. It was only the public-facing part of their role that disappeared. (P. 1342.)

Thus, judges' extensive reliance on nonlawyer advocates is "hidden behind the scenes." (P. 1316.) As Steinberg et al. write:

> There is a paradox at play here. On the one hand, advocates are intimately embedded in the courts, serve a majority of petitioners who file protective orders, and are relied on by judges to off-load the burdens of serving pro se parties. They are quite visible to judges, court staff, and pro se parties—and, ultimately, were visible to us as observers of these courts. On the other hand, the advocates' activities—while known to actors within the court ecosystem—are hidden from public view or, at the very least, hiding in plain sight Their role is not formally acknowledged or regulated by the bar or state supreme courts. (P. 1331.)

The authors identify three important implications of this unacknowledged nonlawyer assistance regime. First, there is a lack of transparency about the role of nonlawyer advocates and "even whether petitioners are required to avail themselves of the advocates' services or merely have the option to do so."

> One advocate voiced a common source of confusion, which is that pro se parties do not understand who an advocate is, who they work for, and what they do. She states that "a lot of people think I'm court staff. I kinda just explain that I'm an . . . advocate and that I'm there to help them." (P. 1331.)

Second, we are squandering "an opportunity to develop norms and best practices around a paraprofessional role," at a time when states are actively experimenting with new roles for independent paraprofessionals. (P. 1341.) Both Utah and Arizona have begun licensing specialized nonlawyer practitioners and researchers are tracking the results. Washington recently scrapped a similar experiment, citing a lack of interest among practitioners. A key issue in designing new models for nonlawyer assistance is the type and length of training necessary to ensure quality of service in different contexts. Yet, courts' reliance on nonlawyer advocates in protective order proceedings—a widespread, established model for assistance that "appears to be working as intended" (P. 1341.)—is not officially recognized, sanctioned, or championed as a possible template.

Finally, the lack of public acknowledgement of nonlawyer advocates' role "conceals a massive due process rift" between petitioners and alleged abusers.

> Petitioners have access to experienced advocates who assist with almost every aspect of protective order proceedings, while defendants typically have no assistance at all. At stake for defendants are their freedom of movement, custody of their children, and eviction from their residences. Bringing the advocates' role into public view would make clear that state supreme courts and bar associations need to take steps to level the playing field. (P. 1341.)

The authors argue that trial judges should be encouraged to be candid about the role of nonlawyer advocates so that "paraprofessionals might be brought out of the shadows, fully integrated into open courts, and authorized to offer services currently considered sacrosanct by the practicing bar—including providing legal advice and speaking on behalf of clients in live proceedings." (P. 1349.) They suggest that trial judges be included in conversations about regulatory reform, "leveraging their experiences in working with advocates" to help formulate new paraprofessional roles. (P. 1345.) And they call upon legislatures and state supreme courts to provide political cover for this effort, to protect elected judges from potential backlash and ensure that existing advocates "be protected, not ousted" by new regulatory regimes. (P. 1349.)

The study should be required reading for those interested the work of state trial courts, the role of judges, and evidence-based regulatory reform.

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