

1 **New Hampshire Citizens Commission on State Courts**
 2 **Draft Recommendations for Consideration March 13, March 20**

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 5 **Recommendation # 17**

6 **Research Committee:** Public Access to NH Courts

7
 8 **Recommendation:**

9 All Courts in the State of New Hampshire will meet or exceed the
 10 requirements for compliance with Federal and State laws pertaining to
 11 accessibility. Currently there is one courthouse that is not accessible, and
 12 the majority of the courthouses in this state have some areas that are not
 13 accessible. All court facilities shall have provisions for:

- 14
 15 A. Compliance with all applicable building codes for the removal
 16 of all structural barriers that prevent or impede physical access.
 17 B. The deployment and usage of effective and accessible methods
 18 of communication such as NH Relay, Telecommunication
 19 Devices for the Deaf (TTY), Assistive Listening Devices
 20 (ALDs), Computer Assisted Real-time Translation services
 21 (CART), Video Relay Services (VRS), accessible (508-
 22 compliant) websites and alternative formats for all printed
 23 materials (large print, Braille, audio-tape and computer disk).
 24 C. The removal of language barriers for non-English speaking
 25 citizens by providing translation services, Oral or Sign
 26 Language Interpreters, and translated written materials.
 27 D. Discrete funding sources for payment for communication
 28 access and for support of annual disability sensitivity training.
 29

30 **Rationale:** Accessible court facilities are required by the Federal Law,
 31 Title II of the Americans with Disabilities Act. In May of 2004 this was
 32 upheld by the [Tennessee v Lane US Supreme Court Decision](#).

- 33 • The following laws require accessible buildings and programs:
 34 ▪ [The Rehabilitation Act - Section 504](#)
 35 ▪ [The Americans with Disabilities Act](#)
 36 - [Title II Regulations](#)
 37 - [Title III Regulations](#)
 38 - [The ADA Standards for Accessible Design](#)
 39 ▪ [The NH State Building Code - NH RSA 155-A](#)

- 1 ▪ [The New Hampshire State Fire Code - NH RSA 153:5](#)
- 2 ▪ [The Architectural Barrier-Free Design Code for the State](#)
- 3 [of New Hampshire](#)

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5 • Effective and Accessible Methods of Communication are
6 required by the following laws:

- 7 ▪ [The Rehabilitation Act of 1973 - Nondiscrimination on](#)
- 8 [the basis of a disability – Section 504](#)
- 9 ▪ [Electronic and Information Technology Access - Section](#)
- 10 [508 of the Rehabilitation Act](#)
- 11 • [Title II of the Americans with Disabilities Act](#)
- 12 ▪ [Title VI of the U.S. Civil Rights Act](#)
- 13 ▪ [The Telecommunications Act of 1996](#)
- 14 ▪ [NH Interpreter Law RSA 521-A](#)
- 15 ▪ [NH Interpreter Licensure Law RSA 326-I](#)

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17 **Recommendation #18**

18 **Research Committee:** Public Access

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21 **Recommendation:** Fund full staffing for traditional civil legal services.

22 **Rationale:**

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24 Meaningful access to the New Hampshire Courts is limited by the inability
25 of many people to pay for traditional legal services. Economic and
26 procedural barriers present challenges for a growing percentage of our
27 population. It is estimated that among low-income citizens, only a small
28 fraction of those involved in civil matters have their legal needs met by the
29 current levels of legal assistance services. Moreover, a growing segment of
30 the moderate- and middle-income communities find themselves unable to
31 afford or access conventional legal representation.

32

33 Because of this inability, many people forgo the justice system, even when
34 they face problems in their lives that could be addressed by the legal system.
35 They know they cannot afford a large retainer, so they never even begin to
36 pursue their potential legal claims.

37

38 Another option for low-, moderate-, or middle-income people who cannot
39 afford to pay the cost of legal services is to represent themselves in court.

40 The rise in the number of *pro se* litigants has many negative effects: *pro se*

1 parties are not trained in the law and hence do an inadequate job of
2 representing themselves; justice is compromised; and litigants are deprived
3 of their full rights. The growth of untrained litigants also serves to
4 undermine the smooth functioning of the courts by introducing delays and
5 inefficiencies – a process that adds further to the legal costs for all.

6
7 We have come to realize that, before we suggest new and innovative
8 methods and strategies for dealing with economic barriers to legal access,
9 we should recognize that our current network of civil legal assistance is
10 excellent, and in many ways a model in terms of the quality of
11 representation and the level of cooperation among providers. That being
12 said, the system is woefully overburdened, and by some estimates only 20%
13 of the low-income people who need legal services are receiving them. This
14 is a delivery system that is tried and true – but lacks the resources to achieve
15 full success. We urge that there be a commitment to full funding.

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18 **Recommendation #19**

19 **Research Committee:** Public Access

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21 **Recommendation:**

22 Commit New Hampshire to a “Civil Gideon,” – that is, to recognize that, in
23 the same way that criminal cases that may result in the loss of liberty compel
24 the state to provide an attorney for a defendant, so too should civil cases that
25 could result in significant loss – such as the custody of a child or the loss of
26 a home – compel the state to provide legal representation to those who could
27 not otherwise afford it.

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29 **Rationale:**

30 This in many ways defines who we are as a society. Should people lose
31 custody of their children or be evicted from their homes simply because their
32 legal opponent has more money? This recommendation is not a particular
33 strategy so much as it is a philosophical commitment to a fair society, with
34 liberty and justice for all.

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37 **Recommendation # 20**

38 **Research Committee:** Public Access

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40 **Recommendation:**

1 Promoting the development and use of legal insurance

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3 **Rationale:**

4 We urge the creation of a system of legal insurance, whereby for a
5 reasonable premium, average people would have access to a lawyer to
6 advise them on their rights and duties and to assist them in advocating for
7 their legal interests. Legal insurance would help people with moderate and
8 middle incomes who are unable to afford private lawyers to represent them,
9 but who are ineligible for the system created to assist the State's low-income
10 population (New Hampshire Legal Assistance, Legal Advice & Referral
11 Center, and the Bar's Pro Bono Program). Legal insurance could be like
12 health insurance, helping the average person out when the need arises
13 (which presumably would be a lot less often than health needs). The
14 premiums could be paid by the State, employers, and/or individuals on a
15 sliding scale.

16

17 At the least, we would encourage the State to create a system of catastrophic
18 legal insurance, provided free to those who could not otherwise afford it.
19 This would be akin to catastrophic medical insurance: there are clear
20 parallels, in that only a very few in our society could afford the very large
21 out-of-pocket costs of either a medical or legal disaster. Perhaps it is time to
22 encourage the development of a vehicle so such insurance is universally
23 available.

24

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26 **Recommendation # 21**

27 **Research Committee:** Public Access

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29 **Recommendation:**

30 Creating a Statewide Citizens' Advocate to look out for the legal needs of
31 the average resident of New Hampshire.

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34 **Rationale:**

35 The Committee recommends that the State create an Office of the Citizens'
36 Advocate, to make the kind of work our (and other) committees are doing
37 sustainable into the future. The Citizens' Advocate could be modeled on the
38 Public Utilities Commission (PUC) Consumer Advocate (for utility issues)
39 and the Attorney General's Consumer Protection Unit (some consumer
40 issues), or on similar programs adopted in other states. An Advisory Board

1 representing the public should be appointed to provide advice and feedback
2 to the Citizens' Advocate.

3
4 The Citizens' Advocate would work to assure that the justice system meets
5 the legal needs of the average person. The Office would monitor the system
6 and advise the courts as to whether there are any procedural improvements
7 that the court system can make (like the suggestion for case managers),
8 including changes that might be necessitated by changes in NH's population
9 (e.g., the need for language interpreters) or by changes in types of cases
10 filed. The Advocate's staff would also evaluate trends in legal issues and
11 court results which might have widespread impact on litigants and the
12 community. As to the latter issues, the Advocate's Office might recruit
13 volunteer attorneys willing to take on systemic advocacy on behalf of
14 average citizens.¹ Or such issues could be referred to advocacy
15 organizations such as New Hampshire Legal Assistance (if the client is low-
16 income), the Disabilities Rights Center (if the client has a disability),
17 consumer groups, etc., to be approached from a class-wide or systemic
18 perspective. We recommend that, in addition, the Citizens' Advocate be
19 authorized to bring cases on its own, in order to help average citizens to
20 address particular issues they could not otherwise afford to address.

21
22 The Office of the Citizens' Advocate should also undertake a systematic
23 study, in detail, of exactly what kinds of legal needs are not being served
24 adequately in different parts of New Hampshire. In which geographic areas,
25 at which income levels, for which types of legal issue, are the unmet needs
26 the greatest? The study should include, in addition to the needs of people
27 who choose to represent themselves, the legal needs of people who despair
28 of even entering the legal system because they know they cannot afford to
29 pay for the legal representation necessary to have a fair chance to vindicate
30 their rights. Some legal areas (e.g., family law) seem to have a high number

¹ Many legal issues affect large numbers of people in similar ways. Some of these can be efficiently addressed by the recruitment of a panel of private lawyers who would be willing, pro bono, to bring a systemic challenge to particular procedures or practices. The private bar ordinarily would not accept such cases, because they require a large investment of unpaid attorney time. But in the spirit of public service, we believe a number of attorneys would be willing to cooperate with the Citizens' Advocate and accept cases that could potentially benefit a great many people who otherwise could not afford legal representation. This could greatly increase the enforceability of legal rights beyond what the current staff of legal services organizations can provide.

1 of parties unable to afford legal representation, but other legal problems no
 2 doubt exist where people would be better off if they could obtain legal
 3 representation but do not have access to it because of a disability or
 4 financial, language, or cultural barriers. The proposed study committee
 5 would assess where the needs are, and analyze what kind of solutions might
 6 best address each particular need. The Citizens' Advocate would then lead
 7 the effort, along with the court system, to make the necessary solutions a
 8 reality.

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12 **Recommendation # 22**

13 **Research Committee:** Public Access

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15 **Recommendation:**

16 Streamlining court scheduling and promoting greater use of technology and
 17 communication access services for court conferences and hearings.

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19 **Rationale:**

20 Streamlining court scheduling to eliminate the "cattle call" of attorneys and
 21 litigants would reduce the amount of down time at the courthouse for
 22 attorneys and litigants and the resulting associated costs. Current scheduling
 23 practices, which do not provide litigants with specific hearing times, drive
 24 up the cost of representation and can translate into lost wages and/or
 25 increased child care expenses for litigants, both pro se and represented. At
 26 the same time, certain hearings may lend themselves to telephone and/or
 27 video conferencing, reducing time and cost in travel to the courthouse.

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30 **Recommendation # 23**

31 **Research Committee:** Public Access

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33 **Recommendation:**

34 Create ways to support *pro se* litigants, including:

- 35
36 A. Creating a public education program to educate people who may
 37 have legal claims about the court's procedures; the resources
 38 available to them; and legal issues that people should consider in
 39 evaluating their legal needs. One such resource is "unbundled"
 40 legal services, where attorneys are permitted to work with a client

1 on a portion of a legal case, even if they do not handle the entire
2 case.

- 3 B. Expanding the “case manager” system, ideally with a well-
4 trained case manager in each court, who would interview clients,
5 and either refer the client to legal services providers, recommend
6 and facilitate alternative dispute resolution, or provide procedural
7 guidance and support if the client chooses to move forward *pro*
8 *se*.
- 9 C. Encouraging the use of non-lawyer professionals to provide
10 simpler law-related services within their areas of competency.
- 11 D. Helping people involved in uncontested divorces to handle their
12 own cases, by developing an “uncontested divorce kit” and
13 providing paraprofessional support to guide people through the
14 court process.

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16 **Rationale:**

17 Our conclusion is that a little bit of a lawyer is better than none at all.
18 Keeping in mind that the ultimate ideal is to have full representation by an
19 attorney with a thorough and integrated knowledge of the client and his/her
20 needs, the fact is that a shrinking percentage of the population is in a
21 position to hire an attorney in that manner. Until the day arrives when New
22 Hampshire can achieve the ideal, we should not pretend that the *pro se*
23 population will go away; instead, we need to find ways to support and
24 facilitate the *pro se* process.

25
26 Encouraging attorneys to provide unbundled services (in appropriate
27 circumstances) will provide critically important representation to many
28 litigants who otherwise would not have a lawyer at all. Additionally,
29 building a “case manager” system would be a cost-effective way to triage
30 *pro se* cases, deflecting many from the court system (and increasing the
31 efficiency of those that remain). For certain legal issues, a lay person can
32 handle many tasks on her own, with assistance/guidance from a lawyer or
33 paraprofessional. Such assistance should be made available, ranging from
34 the development of a “kit” (as for uncontested divorces) to guide people, to a
35 clinic where attorneys, in person, walk the party through the necessary forms
36 and other filings.

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39 **Recommendation # 24**

1 **Research Committee: Public Access**

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3 **Recommendation:**

4 Explore and encourage innovation in how regular legal services are billed,
5 including:

- 6 A. Alternatives, where appropriate, to a billable hour system;
7 B. Fee-shifting and fee-sharing in family law cases, where one
8 party has access to much greater financial resources than the
9 other.

10
11 **Rationale:** Supreme Court Justice Stephen Breyer and others argue that the
12 billable hours system puts lawyers on a treadmill and seriously impacts their
13 ability to perform *pro bono* work and other public service. Some argue that
14 hourly billing also creates a gap between the value of services and their cost
15 – which can result in higher costs for those who are indeed paying for legal
16 services, or who hope to. We recommend that the Bar encourage and
17 explore other structures for compensation, including “value billing” (setting
18 a flat fee for performance of a specific task or completion of a particular
19 project).

20
21 We also recommend fee-shifting and fee-sharing in family law disputes –
22 where one party has access to much greater financial resources than the
23 other – as a way of fairly sharing family assets between both parties, but also
24 as a way to de-escalate legal disputes and encourage settlement.