Responsive Law
The Consumer's Voice in the Legal System

Comments on: Issues Paper on the Future of Legal Services

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Responsive Law thanks the Commission for the opportunity to present these comments. Responsive Law is a national, nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its customers.

The Scope of the Access to Justice Crisis Demands Drastic Changes to the Regulatory Structure of Legal Services[1]

The United States is facing an access to justice crisis. While many calculations of the extent of this crisis focus on the poorest Americans, the scope of the crisis extends all the way to Americans of modest means and beyond, to encompass most of the middle class.

The World Justice Project reports that the U.S. is currently tied with Kyrgyzstan, Mongolia and Uganda in terms of the affordability and accessibility of its civil justice system.[2] In New York, over 90% of people involved in housing, family, and consumer problems are forced to appear in court without legal representation.[3] Studies in other states generally find that the proportion of unrepresented individuals exceeds 80%.[4]

[1] Responsive Law, along with others, submitted an *amicus curiae* brief to the U.S. Supreme Court in *FTC v. North Carolina Board of Dental Examiners* (No. 13-534, argued October 14, 2014, decision pending). This section is based in substantial part on material from that brief, which has been submitted to the Commission with these comments.

[2] World Justice Project, Rule of Law Index 2014, http://world justiceproject.org/sites/files/files/wjp_rule_of_law_index_2014_report. pdf (2014).

[3] Wallace B. Jefferson, Chief Justice of the Supreme Court of Texas, Liberty and Justice for Some: How the Legal System Falls Short in Protecting Basic Rights, 19th Annual Justice William J. Brennan Lecture on State Courts and Social Justice, Address at N.Y.U. School of Law (Feb. 27, 2013).

[4] Gillian K. Hadfield & Jamie Heine, Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans, in Beyond Elite Law: Access To Civil Justice For Americans Of Average Means, S. Estreicher and J. Radice (eds.) (forthcoming 2015).

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At hourly rates that do not dip much below $200 and which routinely exceed $300, few average Americans can afford to pay lawyers for assistance with everyday legal needs: simple estate planning; providing for elder care; arranging child custody and obtaining child support; addressing consumer debt problems and foreclosure; managing disputes over employment conditions or pay; obtaining access to legal entitlements to health care, education and public services.[5] Surveys of legal needs of low- and moderate-income Americans find that roughly 50%-60% of American households faced an average of two significant legal problems in the previous year. Lack of access to legal representation leads Americans to take no action to address their legal problems at rates much higher than in countries, such as England and the Netherlands, with fewer restrictions on who may provide legal advice and assistance: roughly 25%-30% compared with 5%-10%.[6]

Shockingly, the number of Americans obtaining help from a lawyer appears to be falling: a 1995 ABA study found that 29% of the poor and 39% of those of moderate means facing a serious legal problem had help from a lawyer or other legal service provider, but surveys conducted in the past ten years find that those percentages have dropped to about 15%. Conservative estimates based on census data indicate that households facing legal problems in 2012 purchased an average of only one and half hours of lawyer services per problem; this is less than half of the amount purchased in 1990. Moreover, these numbers are only the tip of the iceberg, as they represent erupted legal problems such as a child custody fight, a foreclosure or eviction, or a bankruptcy. Beneath the surface lies great demand for assistance that could avoid or minimize these legal crises before they erupt.[7]

Small businesses and entrepreneurs also face enormous hurdles in obtaining affordable legal services. They form business entities, file for trademarks and patents, take on debt or equity investment, determine their regulatory obligations, file taxes and manage contracts with customers, suppliers, franchisors and the public. A

[5] Deborah L. Rhode, Access to Justice (2005); Gillian K. Hadfield, The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law, 38 Int'l. Rev. L. & Econ. 43 (2014); Gillian K. Hadfield, Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets, Dædalus (forthcoming 2014).

[6] Hadfield and Heine, *supra*.

[7] *Id.*

2012 survey found that nearly 60% of small businesses had faced serious legal problems in the preceding two years –collections, contract review, supplier disputes, security breaches, products liability, employee theft, tax audits, employee confidentiality issues, threats of customer lawsuits, etc. Close to 60% of small businesses faced these problems without lawyer assistance. For those that did hire lawyers, the average expenditure was $7,600 – an enormous cost for a small business.[8]

This crisis in access to justice has many causes, including the complexity of American legal process, cuts to court budgets and limited legal aid funds. But a significant factor is the high cost of legal services, and the excessive degree of regulation of U.S. legal markets is a substantial factor accounting for those high prices.[9]

The depth of this crisis is such that the efforts of those involved in legal aid and pro bono work, while extremely valuable to those they serve, is not nearly sufficient to meet the legal needs of the American public. In fact, it would cost on the order of $50 billion annually just to secure one hour of legal help for all the American households with an unmet dispute-related need (compared to the under-$4 billion currently spent on such services).[10] To address legal needs of this magnitude, the legal profession needs to make major revisions to the way it provides and regulates legal services.

Fortunately, most of what the legal profession needs to do does not involve drastic new expenditures, nor need it involve significant financial pain to most of the profession. Instead, the profession needs to get out of its own way to allow service providers—both lawyers and non-lawyers—to create new business models that can better serve the modern customer base of consumers of legal services.

[8] LegalShield, *Decision Analyst Survey: The Legal Needs of Small Business* (2013), http://www.legalshield.com/about-us/pressmedia-kit/the-legal-needs-of-small-business/.
[9] Hadfield, *The Cost of Law*, *supra*; Laurel A. Rigertas, *The Legal Profession's Monopoly: Failing to Protect Consumers*, 82 Fordham L. Rev. 2683 (2014).
[10] Hadfield & Heine, *supra.*

Consumers Need Access to Legal Service Providers Other Than Lawyers

One of the biggest changes that the legal profession needs to make is to revisit the question of who may provide legal services. Vague, overbroad definitions of the practice of law unnecessarily restrict the options of consumers who need legal help. A common retort from the bar against allowing consumers to seek legal help from non-lawyer professionals is that "You wouldn't go to anyone other than a doctor if you needed brain surgery." What this argument fails to acknowledge is that, when dealing with medical issues other than surgery, consumers get help from nurse practitioners, pharmacists, physical therapists, and online resources—with the full support of the medical profession.

Consumers Will Benefit from Expanded Licensing of Non-Lawyer Professionals.

Consumers of legal services deserve at least as great a range of service providers as consumers of medical services. Licensure of intermediate service providers, with credentials less than a law degree and bar passage, is one way to fill the gap in affordable legal services. Washington State will soon license its first limited license legal technicians (LLLTs). These LLLTs will be allowed to provide services such as explaining legal documents to clients, informing clients about legal procedures, and completing pre-approved legal forms for clients.[11] LLLTs will be able to address many of the concerns faced by self-represented litigants at a more affordable price than lawyers, who often do not even offer these sorts of limited scope services. Paula Littlewood, Executive Director of the Washington State Bar Association, is a member of the Commission. We hope that the Commission will draw upon her vast experience with the implementation of Washington's LLLT rules to determine how other states may follow Washington's lead.

[11] Washington Admission and Practice Rule 28(F).

Unauthorized Practice of Law Restrictions Need to Be Reformed to Serve as Consumer Protections, Not Lawyer Protections.

Aside from intermediate service providers, consumers could receive far more help with their legal matters if regulators took a less expansive view of which services are deemed to be the practice of law, and thus restricted to lawyers. In most states, restrictions on the unauthorized practice of law (UPL) are so broad and vague that they apply to anyone from financial planners to advice columnists to good Samaritans providing a friend with free advice.

UPL laws are ostensibly intended to protect consumers against harm, either from scam artists pretending to be lawyers or from unqualified service providers. The former concern is generally addressed by consumer fraud laws, making UPL laws redundant for that purpose. The latter concern is increasingly mitigated by a free market in which consumers have access to extensive consumer-driven information about service providers. In general, UPL laws are used more often to protect lawyers from competition than they are used to protect consumers from harm.[12] However, to the extent that UPL restrictions remain necessary, three principles should apply in setting their maximum reach.

First, there should be no cause of action for UPL against those who provide services for free, unless those people falsely claim to be a lawyer. Second, UPL causes of action should require a complaint from a customer and a showing of actual harm to that customer. Third, professionals should not face UPL charges for acting in the normal scope of their profession.

A Safe Harbor Provision for Document Preparation Software Would Expand the Options Available to Consumers.

In addition to these general principles, consumers could benefit from clarification to UPL laws regarding self-help websites. Publication of self-help information and forms is protected by the First Amendment and by some state constitutions as well.[13] However, despite enjoying

[12] Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 Fordham L. Rev. 2587 (2014).

[13] *See, e.g., New York County Lawyers' Ass'n v. Dacey*, 21 N.Y.2d 694, 234 N.E.2d 459 (N.Y. 1967), *aff'ing on grounds in dissenting opinion*, 283 N.Y.S.2d 984 (N.Y.

constitutional protection, online self-help publishers such as LegalZoom face UPL prosecution because they use an automated decision tree to complete forms, rather than handing a printed decision tree to a customer. Such UPL prosecutions have a chilling effect on innovators throughout the online legal industry, leaving consumers with fewer self-help options in a marketplace where hiring a lawyer is increasingly cost-prohibitive.

To remedy this problem, we urge the Commission to study the safe harbor provision in Texas's UPL statute. This provision defines UPL not to include "design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney."[14] This provision can serve as a model that will allow the growing range of innovative online self-help products to develop without the threat of unwarranted UPL action.

Loosening Restrictions on Multijurisdictional Practice Will Give Consumers Greater Choice in Selecting a Lawyer.

Another set of regulations that chills the development of online legal services is the high barrier to multijurisdictional practice by lawyers. In an era where consumers have access to nearly every other good and service through the Internet, law has lagged behind. Lowering barriers to multijurisdictional practice could be especially valuable to people in less populated states without enough lawyers to serve them, who could then have online or telephone access to lawyers nationwide.

Current restrictions on practice by out-of-state lawyers bear little relation to consumer protection. The only restrictions that should be placed on consumers' access to lawyers from another state are those that protect clients against lawyer misconduct. Thus, while it is important that an out-of-state lawyer be accountable to some regulatory body, that agency need not be in the state in which the

App. 1967); *Oregon State Bar v. Gilchrist*, 538 P.2d 913 (Or. 1975); *State Bar of Michigan v. Cramer*, 249 N.W.2d 1 (Mich. 1976); *The Florida Bar v. Brumbaugh*, 355 So.2d 1186 (Fla. 1978); *People v. Landlords Professional Services*, 215 Cal. App.3d 1599, 264 Cal. Rptr. 548 (Cal. 1989).

[14] Texas Government Code 81.101(c).

lawyer is practicing. Additionally, too much importance is placed on out-of-state lawyers taking a bar exam for an additional state in which they are practicing. The practice of law rarely calls upon knowledge memorized for the bar exam; good lawyering entails far more. Consumers may take exam passage into account when selecting a lawyer, but would be far better advised to look at a lawyer's relevant experience. In any event, states should leave consideration of such factors to the discretion of the consumer rather than completely barring access to out-of-state lawyers.

Canada's National Mobility Agreement holds lawyers accountable to their clients while allowing consumers great flexibility in the choice of a lawyer. Its provisions for temporary mobility require lawyers to have a clean disciplinary record. It also requires a lawyer's home jurisdiction to exercise disciplinary authority over the lawyer when practicing out of state. We urge the Commission to study Canada's example as a potential model for multijurisdictional practice in the United States.

Restrictions on Outside Investment in Law Practices Inhibit Innovation and Prevent Consumers from Benefiting from Economies of Scale

One of the essential changes that the profession needs to adopt is to remove the ban on outside investment in law practices. New models for providing legal services have been slow to develop because of the requirement that capital for innovation come only from lawyers. There are numerous lawyers and non-lawyers who have ideas for improving the way legal services are delivered but lack access to sufficient capital to implement them. Without outside investment, Henry Ford would have been limited to producing a few Model Ts and FedEx would be operating a mom-and-pop delivery service out of Memphis.

The ban on outside investment has also prevented consumers from benefiting from the economies of scale that other industries employ. Almost every law firm providing services to middle-income individuals is a small business of no more than a dozen attorneys. A large national firm specializing in these issues could provide standardized training to the attorneys it works with, perform quality control on services offered to clients, and let lawyers focus on

practicing law rather than finding clients. Economies of scale would bring the costs of legal services down, while creating opportunities for attorneys fresh out of law school. Angel investors could actually act on a great proposal for a new legal services model, and bring it into reality. Under current regulations, none of this can happen. Rules intended to protect consumers from unscrupulous lawyers are actually making it harder to connect them with good ones.

The ban on fee sharing was adopted with the noble intent of insulating lawyers from external financial pressures that could cause them to act unethically. However, this logic incorrectly assumes that non-lawyers are more likely to exert such pressure than lawyers themselves. In reality, lawyers already have financial incentives that may conflict with their clients' best interests. For instance, solo practitioners are under pressure to pay their bills, and lawyers at large firms are under pressure to meet their required billable hours, both of which can lead to padding of a client's legal bills. It is either ignorant or arrogant to claim that outside investment in a law practice exposes lawyers to a new type of ethical danger.

We urge the Commission to look to Australia's model for outside investment, which has been operating successfully since 2001. Perhaps the best example of how consumers can benefit from the innovation and economies of scale made available through outside investment is the Australian firm Slater & Gordon, which in 2007 became the world's first publicly traded law firm. Potential clients start off their experience at Slaters by calling the firm, where specially trained call center staff will triage their legal problems and decide which of the lawyers in the firm's 30 practice areas the client should be directed to. This alone is a major improvement over the process for finding legal help in the U.S., where finding the right lawyer involves phone calls or in-person visits to multiple law firms. Because of its size (70,000 to 80,000 inquiries per year), the firm is able to gather sufficient data to set flat fees at an affordable level while still making a profit. Slaters is also able to use non-lawyer expertise to run the back-end of the business more efficiently, freeing lawyers to practice law. And because of the number of

lawyers it employs, the firm is able to offer those lawyers varying career paths that lead to less burnout.[15]

As we noted in the beginning of these comments, the legal profession as its currently structured does not have enough resources to handle all the legal problems that Americans face. While some of these problems require bespoke solutions, many are suitable for mass-market services. Leveraging the economies of scale that outside investment facilitates is a way of allowing consumers to afford the expertise of a lawyer for the everyday legal matters they face.

In addition, the legal profession has been struggling with underemployment among its newest members. Mass-market consumer law firms—which are only possible through outside investment—could provide the training ground for many of these newly-minted lawyers. Many recent law school graduates would welcome the ability to work at a Slaters-style call center with a steady paycheck, internal training on lawyering skills, and opportunities for internal advancement. Mass-market consumer law can be the solution to the paradox of the modern legal market, where there are too many out-of-work lawyers, yet too many consumers unable to afford a lawyer.

A Clients' Bill of Rights Would Inform and Protect Consumers

While the previous recommendations to the panel involve regulators of the legal profession reducing some of the burden they impose, we'd also like to address an area where an additional regulation could benefit consumers. We urge the Commission to consider requiring lawyers to follow a Clients' Bill of Rights. Clients are often poorly informed about the rights they enjoy when then retain a lawyer. Responsive Law has created a list of ten essential rights every consumer should have and be aware of from the moment she decides to hire a lawyer through the conclusion of that lawyer's representation.

Many of these rights are already guaranteed by law. Others are ones that a client, like any other customer in a free market, can insist upon as a condition of hiring a particular lawyer. Responsive Law believes

[15] For a more detailed description of this business model, see Mitch Kowalski, "How to Make a Law Firm Float," CBA National Magazine (January-February 2014).

that both clients and lawyers are best served when clients are aware of these rights. Therefore, states should require that lawyers present a written copy of the Client Bill of Rights to a client before beginning a representation. New York State has a similar requirement that lawyers post a copy of that state's Client Bill of Rights in their offices.[16] We have submitted a copy of our policy paper on this topic along with our comments as a resource for the Commission.

Conclusion

The legal profession is at a crossroads. Consumers are finding it increasingly difficult to find affordable legal help and lawyers are paralyzed by regulations that prevent them from either providing that help themselves or allowing others to do so. The profession has two choices. It can double down on its current course of resisting innovation and find itself increasingly irrelevant, as consumers are forced to solve their legal problems either on their own or with help that exists in a gray market. Alternatively, the profession can get out of its own way and share in the benefits of a largely untapped legal market, while simultaneously making great strides in closing the access to justice gap. We believe the decision is clear, and hope that the existence of this Commission is evidence that the profession is moving in the right direction.

[16] 22 NYCRR §1210.1