Responsive Law
The Consumer's Voice in the Legal System

Comments on: Civil Justice Strategies Task Force "New Group" Draft Recommendations

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Comments to the

Civil Justice Strategies Task Force (CJTF)

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Consumers for a Responsive Legal System ("Responsive Law") would like to thank the Civil Justice Strategies Task Force (CJTF) for the opportunity to present comments on the "New Group" Draft Recommendations.

Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible and accountable to the people.

Below, we offer the following creative solutions that have been tested in other states and other countries. We hope our recommendations provide clear action steps that the Task Force can champion to fill the justice gap and achieve true access to justice in California.

The Task Force should recommend permitting alternative business structures to address the justice gap.

In contrast to the current recommendation offered by the Task Force on alternative business structures, we urge the Task Force to recommend changes that allow outside investment for legal startups in California. California, like the rest of the country, faces a severe justice gap, where not only low-income households, but a large percentage of middle-income households as well, are unable to afford legal help.[1] Excluding alternative business practices as an

[1]"In San Diego, [CA]…the number of divorce filings involving at least one pro se litigant rose from 46% in 1992 to 77% in 2000. A review of case files involving child support issues conducted by the Administrative Office of the Courts between 1995 and 1997 show that both parties were unrepresented in child support matters 63% of the time, and that one party was unrepresented in an additional 21%. In a recent survey of pro se assistance plans submitted to the Administrative Office of the Courts by 45 of California counties, estimates of the pro se rate of family law overall averaged 67%. In the larger counties, the average was 72%. In domestic violence restraining order cases, litigants are

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option curtails California's ability to fill the justice gap and compete in the global market.

Neither pro bono assistance nor legal aid (alone or combined) will be able to meet the significant unmet need for legal services. In her article, "The Cost of Law: Promoting Access to Justice Through (Un)Corporate Practice of Law," Gillian Hadfield demonstrates that even if every American lawyer performed 130 hours of pro bono work per year, only 30 minutes of legal assistance per person would be available to address the justice gap. Based on Hadfield's research, it would take at least $50 billion per year to secure just 1 hour of legal assistance each for those whose legal needs have gone unmet. By contrast, annual Legal Services Corporation funding is currently about $3.7 billion. [2]

In the long term, the American legal profession will have to find a way to accommodate outside investment models because these alternative business structures are already in place in the global services marketplace of which American lawyers are a part. California will gain nothing from sitting on this issue and will be out of pace with the rest of the global legal marketplace.

Monitoring but not proceeding with new rules or programs related to alternative business structures, as the Task Force recommends, will cut off a real source of potential for California to fill the justice gap: legal startups. New models for providing legal services in California have been slow to develop because of the requirement that capital for innovation come only from lawyers.

There are numerous legal startups already in California with ideas for improving the way legal services are delivered but who lack access to sufficient capital to implement them. Startups bring innovation to markets. However, due to restrictions on non-lawyer

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reported to be pro se over 90% of the time." California Judicial Council Task Force on Self Represented Litigants, 2004;. Available at http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full_Report.pdf (Last visited on May 6, 2015).

[2]Hadfield, Gillian, K., The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law (October 30, 2013). International Review of Law and Economics, Forthcoming; USC CLASS Research Paper No. 13-4; USC Law Legal Studies Paper No. 13-16. Available at http://ssrn.com/abstract=2333990

investment, legal service startups that employ lawyers to provide services to the public cannot seek the investor funding that allows innovation in other fields to flourish. For these startups, it's not enough to have a business model that could reshape the legal industry—they must also contort their financial structure to avoid non-lawyer investment and fee sharing. The result: fewer choices and higher prices for consumers in California. If the rules on outside investment were relaxed or dropped, innovative California-based companies like UpCounsel, Fixed, LegalForce, Legal Shield and Trademarkia could take some of the resources they put into compliance with anachronistic fee-sharing restrictions and put them toward customer satisfaction.

Additionally, allowing outside investment would allow a new model of legal service provision to arise: the mass-market consumer law firm. Just as H&R Block has made navigating the tax code widely accessible and affordable on a national scale, a mass-market law firm could allow millions of Americans to affordably and accessibly navigate the legal system.

The economies of scale that can only be achieved by outside investment would bring the costs of legal services down. 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 and running a business.

In addition, mass-market consumer law can be the solution to one of the paradoxes of the modern legal market: too many out-of-work lawyers, yet too many consumers unable to afford a lawyer. Mass-market consumer law firms could provide the training ground for many of the thousands of newly-minted lawyers who have no visible path to entering the profession. Many recent law school graduates would welcome the ability to work at a national, regional, or state based firm with a steady paycheck, internal training on lawyering skills, and opportunities for internal advancement.

Lastly, we would like to emphasize that—contrary to the Task Force's "wait and see" recommendation—there is already sufficient

information about the impact of alternative business structures. Australia's Legal Profession Act was enacted in 2001. Thus the Task Force should look to Australia as an example of how to leverage alternative business structures to address the access to justice gap.

One of the best examples of how outside investment has increased access to justice is the Australian firm Slater & Gordon, which has used outside investment to provide affordable access to the legal system across all of Australia. Slater & Gordon has been able to invest in a specially trained call center staff that triages the legal problems of any Australian who calls their national number. The call center staff is then able to 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 and legal aid offices. 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 rate for Australians of modest means.[3]

The Australian model provides sufficient protection to justify the Task Force recommending alternative business structures to the State Bar. If regulated appropriately, as Australia has done, outside investment would present no risk to California's legal profession's core values and also reduce the risk to clients of unethical behavior.

Others have expressed concerns about financial pressure on firms that have outside investment. Sole practitioners, however, are also under pressure to pay their bills and lawyers at large firms are under pressure to make their hours. Thus financial pressure alone, if outside investment were allowed, would not incite unethical behavior. The Australian model, nevertheless, has a devised an effective system to counteract unethical behavior for firms who have outside investment. The Australian model has protected professional independence by requiring that such firms designate one of their

[3] 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. Available at http://www.nationalmagazine.ca/Articles/January-February-2014-Issue/How-to-make-a-law-firm-float.aspx (Last visited May 11, 2015).

lawyers as a Legal Practitioner Director who is responsible and liable for any violations of lawyers' ethical duties.[4]

In conclusion, consumers already benefit from innovations such as unbundled legal services and online legal services that were unthinkable a decade or two ago. Allowing outside investments for legal startups would provide California with an abundance of new entities addressing the access to justice gap. Thus, we urge the Task Force to recommend that the State Bar develop rules allowing outside investment in law practices.

The Task Force should recommend allowing more people other than lawyers to provide legal help to consumers.

Given the Task Force's laudable intent to recommend adoption of limited license legal technicians (LLLTs) and the Navigator program, we strongly encourage that the Task Force recommend revision of the unauthorized practice of law (UPL) statute so that it better allows for models like LLLTs, the Navigator program, and other innovative means of providing legal services.

Aside from intermediate service providers, California 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. 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.

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[4] For an overview of Australia's legislation/policies that governs incorporated legal practices and mandates a Legal Practitioner Director, see http://www.americanbar.org/content/dam/aba/events/international_law/2013/08/section-of-international-law-at-the-aba-s-2013-annual-meeting/AlternativeBusinessStructures.authcheckdam.pdf. For an overview of the structure of the Board of Slater & Gordon and the role of the independent directors, see the Directors' Protocol, and 2006-2007 and 2007-2008 Annual Reports, available at www.slatergordon.com.au

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 UPL statute based on these principles would allow consumers to benefit from a broad continuum of services. However, if the Task Force is not inclined to take such a far-reaching approach to increasing the range of legal service providers, it can still take steps to permit or improve the provision of three specific types of legal help beyond lawyers.

1) Create a Safe Harbor for Document Preparation

Many people use books and online services to get access to self-help forms; Americans spend $10 million each year on self help legal software.[5] However, companies providing these forms live under a sword of Damocles labeled "UPL," wondering whether an overzealous prosecutor or bar counsel will attempt to put them out of business for engaging in the unauthorized practice of law. To protect the rights of consumers to read about the law and engage in informed self-help, the Task Force should recommend the California State Bar look to Texas for inspiration regarding a UPL safe harbor provision. The Texas statute excludes from UPL the following: "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."[6] Californian consumers of legal services deserve at least as great a range of service providers as consumers in Texas.

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[5]Greg Miller, A Turf War of Professionals vs. Software, L.A. TIMES, Oct. 21, 1998, at A1.

[6] Section 81.101 of the Texas Government code. Available at http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.81.htm#81.101 (Last visited May, 7, 2015). For the full text of Texas' statute and case law defining the practice of law, see here: http://www.txuplc.org/Home/applaw

2) Improve Upon Washington's Model for LLLTs

We appreciate that the Task Force intends to recommend the LLLT model from Washington. LLLTs in Washington will be able to provide services such as explaining legal documents to clients, informing clients about legal procedures, and completing pre-approved legal forms for clients. LLLTs address many of the concerns faced by self-represented parties at a more affordable price than lawyers, who often do not even offer these sorts of limited scope services. California, however, is uniquely positioned to benefit from the lessons Washington has learned during their adoption of LLLT licensing.

The Task Force should specifically recommend altering the Washington model in two ways: crafting a less restrictive ownership model and improving the financial structure. The LLLT model in Washington prohibits a majority ownership by LLLTs (meaning lawyers in a partnership with LLLTs must own a majority of the practice). With these restrictions in place, LLLTs are prohibited from forming many types of businesses that could prove beneficial to the consumer. For example, an existing legal service provider owned and operated solely by LLLTs might wish to expand its services to include those that can only be provided by lawyers. However, short of giving majority ownership to a newly hired lawyer and naming them chair of the firm, there would be no way to do so. These restrictions run counter to the goal of access to justice; thus the Task Force should recommend a model for LLLT practice that does not include such ownership restrictions.

3) Allow Services Modeled After McKenzie Friends in England and Wales

Lastly, we applaud the Task Force for recommending the adopting of programs like the New York Housing Court Navigator program; the Navigator program is a great example of solution that utilizes non-lawyers in a way that addresses the significant gap in legal representation. However, the Task Force should also recommend allowing private, potentially fee-based programs as the UK does for "McKenzie friends."

McKenzie friends, similar to navigators, are non-lawyers that provide court-related assistance and guidance. McKenzie friends have existed in the UK for the past 50 years. They provide moral support, take notes, assist in the management of court papers and provide advice on courtroom conduct. Most of the McKenzie friends operate in family law given that this area has the largest number of self-represented litigants whose legal needs go unmet. This service is mostly provided for free but there has been a rise of individuals who charge to be a McKenzie friend. Despite this rise, the UK has not seen a rise in misconduct or complaints about these service providers. The Task Force should take note that the UK plans to recognize the McKenzie friends as a feature of their evolving legal services market. Moreover, the UK plans to also officially market the McKenzie friends as one of many resources available to litigants, to outline what constitutes unfair commercial practices specifically for McKenzie friends and will begin to encourage McKenzie Friends to join a trade association for the purposes of self-regulation. The UK model is evidence that the concern with fee-charging non-lawyers is overstated. California should strongly consider embracing the use of non-lawyers, even fee-charging ones, to the extent that the UK has done.[7]

The Task Force should recommend that California take the lead and loosen their restrictions on multi-jurisdictional practice by entering into a multi-state compact to address access to justice gaps.

The Task Force should recommend that California launch a compact with other states to allow for multi-jurisdictional practice as a way to creatively address access to justice gaps. Multijurisdictional practice will largely benefit California consumers by allowing greater competition in the provision of legal services and more lawyers and law firms to realize scale economies.

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[7] Fee-Charging McKenzie Friends. *Legal Services Consumer Panel.* April 2014. Available at http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf (Last visited May 6, 2015).

Current domestic models are protectionist and restrict consumer choice by allowing them to retain lawyers only within their jurisdiction. The only restrictions that should be placed on a consumer's access to lawyers from another state are those that protect them against misconduct and malpractice. Although it is important that out-of-state attorneys be accountable to some regulatory body, there is no reason that such an agency must be based in the state they are practicing in.

Permanent mobility makes it possible for lawyers to provide their services across the country, while remaining subject to the disciplinary authorities in each jurisdiction in which they regularly practice. This would allow California consumers to have access to a nationwide market of lawyers who will be accountable to them.

California should specifically look to Canada to improve rules and allow for multijurisdictional practice. Canada's National Mobility Agreement (NMA) 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. The NMA further protects clients by requiring liability and misappropriation of funds insurance coverage for temporary mobility. Similarly, California should adopt a provision that allowed states to require out-of-state lawyers to be covered for malpractice to the same extent as home-state lawyers. By working with an initial small group of states to establish an attorney mobility compact, California could become a more attractive market for lawyers while simultaneously serving as a leader in access to justice. We believe the Task Force should recommend further study of Canada's NMA and how California could take the lead in implementing a similar program.

The recommendations that the Task Force has already made are a good start on the road to improved access to justice for Californians. While we applaud the Task Force on its current set of recommendations, we urge it to make the additional recommendations we've outlined above to creatively fill the justice gap in California.