Responsive Law
The Consumer's Voice in the Legal System

Comments on: Issues Paper Concerning Unregulated Legal Service Providers

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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 consumers. Responsive Law is concerned that additional regulations of non-lawyer legal service providers (LSPs) would stifle the innovation in a still-developing industry that could further open the legal system to ordinary Americans.

Bars and Courts Should Not Regulate LSPs Who Compete with Lawyers

Responsive Law submitted comments on the Commission's previous issue paper regarding new categories of LSPs in which we urged the committee to recommend that new categories of LSPs be allowed to operate, but objected that it would be neither proper nor beneficial for bars or courts to regulate these providers. We renew that objection today.

Any non-lawyer LSP is, by definition, in competition with lawyer LSPs—also known as "lawyers." For the bar or courts to regulate these LSPs is therefore an inherent conflict of interest that will resolve itself to the detriment of consumers. Faced with the choice of allowing non-lawyers to compete with lawyers, the bar has continually chosen to insulate itself from competition rather than allow non-lawyers to provide legal services.

One need look no further than the Washington State Bar Association's conduct in the creation of a licensing regime for limited license legal technicians (LLLTs) to see an example of this protectionism. In 2001, the Washington Supreme Court created a Practice of Law Board to make recommendations regarding non-lawyer LSPs. The state bar board of governors twice voted against

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rule proposals from the Practice of Law Board and the court further delayed action at the request of the bar before finally approving licensing rules in 2012.[1] Those rules set a ridiculously high bar for LLLTs to gain their license, including two years of education, 3000 hours of lawyer supervision, and passage of an exam.[2] It's little wonder, then, that 15 years after the program was first conceived, there are only ten licensed LLLTs in the entire state of Washington.[3]

Keep in mind that the WSBA directed this level of obstruction at a program that the state supreme court supported. If the ABA House of Delegates were to approve a recommendation from the Commission to create a regulatory regime for other types of LSPs, and if a state supreme court implemented those recommendations, we could expect similar obstruction from that state's bar and might see a handful of licensees available to serve the public sometime in the 2030s. The public's legal needs are numerous and immediate, and it is unacceptable to make them wait for over a decade for a minuscule addition to the LSP marketplace.

Allowing the bar to exercise its protectionist instincts is not only problematic from an access to justice perspective; it also runs afoul of antitrust laws. The Supreme Court's decision last year in *North Carolina Board of Dental Examiners v. Federal Trade Commission* makes clear that when a controlling number of the decision makers on a state licensing board are active participants in the occupation the board regulates, the board can invoke state-action immunity from antitrust laws only if it is subject to active supervision by the state.[4] The current governance structure of most state bars leave

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[1] Robert Ambrogi, "Washington state moves around UPL, using legal technicians to help close the justice gap," *ABA Journal*, January 2015, http://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the (retrieved April 28, 2016).

[2] Wash. Rev. Code Ann. Pt. 1, Admission & Practice R. 28(E)

[3] http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians/Directory (retrieved April 28, 2016)

[4] *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

them open to antitrust action, for which *Dental Examiners* makes it clear they would not receive state action immunity.[5]

Being Unregulated By Courts Is Not the Same as Being Completely Unregulated

The Commission's issue paper refers to "unregulated" LSPs 24 times. With the exception of a single footnote, it fails to note that these "unregulated" entities are subject to a wide array of regulation. As Gillian Hadfield and Deborah Rhode note in a recent law review article,

> "The Federal Trade Commission and state departments of consumer affairs, for example, monitor and take action against misleading advertising. State and federal antitrust authorities can investigate, enjoin, and sanction anti-competitive conduct. Consumers can sue, individually and in class actions, for violations of many of these and other statutory rules, as well as contract and tort laws."[6]

When the Commission refers to "unregulated" LSPs, what it mean is that these LSPs are not subject to the additional regulations that apply to lawyers and—perhaps more frightening to the bar—that they are also not subject to regulation *by* lawyers.

Before recommending additional regulations governing a patchwork of different types of service providers, proponents of additional regulation need to demonstrate a need for additional consumer

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[5] For a full discussion of the implications of *Dental Examiners* on anticompetitive regulatory action by the bars, see Responsive Law's Comments to the State Bar of California Governance in the Public Interest Task Force on Consumer Protection in the Wake of the *Dental Examiners* Decision, http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000014653.pdf (retrieved April 28, 2016).

[6] Gillian K. Hadfield and Deborah Rhode, "How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering," February 16, 2016, *Hastings Law Journal*, forthcoming, pp. 7-8, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733382 (retrieved April 28, 2016).

protection measures. In other words, are consumers facing harm from service providers under the current regulatory system?

There is No Evidence of Substantial Harm to Consumers From Existing Non-Lawyer LSPs

Most models of non-lawyer LSPs have existed for several years without substantial harm to consumers, and with customer satisfaction levels equal to or better than those of lawyers.

In the United States, there are several examples of non-lawyer LSPs, that have helped consumers resolve their legal issues. As Commission vice-chair Andrew Perlman has noted, "more than one million consumers have used LegalZoom in the last ten years alone, and there is no reliable evidence of incompetence."[7] Call for Action uses a national network of more than 1200 non-lawyer volunteers to help people resolve consumer complaints. It has been operating since 1963 with no record of consumer harm.[8] Harvard's Small Claims Advisory Service has been using undergraduate students—without lawyer supervision—to help guide people through Massachusetts small claims courts. It has operated since 1973 without any record of consumer harm.[9]

Similarly, in England and Wales, there has been a robust market of non-lawyer LSPs for decades, in both litigation and legal advice. McKenzie Friends provide moral support, take notes, assist in the management of court papers and provide advice on courtroom conduct, and may charge a fee for their services. They have operated for nearly 50 years, with a recent report finding that there was "no evidence of [consumer detriment] occurring on any scale."[10] More broadly, the U.K.'s Citizens Advice has used non-lawyer volunteers to

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[7] Andrew Perlman, "Towards the Law of Legal Services," 37 *Cardozo L. Rev.* 49, 107 (2015).
[8] http://callforaction.org/volunteer-info/ (retrieved April 28, 2016).
[9] http://masmallclaims.org/about.html (retrieved April 28, 2016).
[10] Legal Services Consumer Panel, "Fee Charging McKenzie Friends," p. 5, (April 2014) http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf (retrieved April 28, 2016)

provide advice on legal and other matters to tens millions of people for over 75 years[11], and has a 97% consumer satisfaction rating.[12]

In contrast to these records of consumer satisfaction, lawyers have a consumer satisfaction rating of 76%[13], with one lawyer discipline complaint filed annually for every 14 lawyers.[14] Especially when compared to the already highly regulated lawyer LSPs, non-lawyer LSPs do not appear to have a consumer protection problem.

Additional Regulation of Non-Lawyer LSPs Would Create Serious Legal and Policy Problems

The Commission's Issue Paper fails to define non-lawyer LSPs, lumping several categories of service provider together in one category. We believe there are three broad categories of non-lawyer LSPs. Even if LSPs necessitated additional consumer protection, the regulation of each of these categories of non-lawyer LSPs would be fraught with legal and policy pitfalls.

The first category of providers is legal software publishers. This includes companies, such as Nolo and Shake, that provide software allowing users to create legal documents without human intervention. Richard Granat (who serves on the Responsive Law

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[11] Citizens Advice, "Our annual report and accounts 2014/15," p. 5, https://www.citizensadvice.org.uk/Global/Public/About%20us/Annual%20report/Citizens-Advice-annual-report-2014-15.pdf (retrieved April 28, 2016).

[12] "Client satisfaction with the Citizens Advice service" (2014), https://www.citizensadvice.org.uk/Global/Migrated_Documents/corporate/client-satisfaction-2.pdf (retrieved April 28, 2016).

[13] ABA Section of Litigation, "Public Perception of Lawyers: Consumer Research Findings," p. 19 (April 2002), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/public_perception_of_lawyers_2002.authcheckdam.pdf (retrieved April 28, 2016).

[14] ABA Center for Professional Responsibility, "Survey on Lawyer Discipline Systems, " p. 2 (January 2016) http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_%20IA_2014_%20sold_results.authcheckdam.pdf (retrieved April 28, 2016).

board of directors) has written a comprehensive letter to the Commission outlining the problems of additional regulation for these providers.[15] We echo the concerns he outlines there. In particular, he notes that these providers are engaging in pure speech in the form of computer code, and thus should enjoy full First Amendment protection.[16] There is no more reason for Nolo's software to be regulated than its print publications.

The second category of providers is legal document preparers. This includes online services such as LegalZoom, as well as bricks-and-mortar providers. The main part of these LSPs' offering is to use questionnaires—whether written or as part of decision-tree software—to allow customers to complete their own legal forms. However, they also have a service component, insofar as they proofread documents for technical errors, such as unwanted blanks, unusual formatting, and misspellings. The forms and software creating the documents are protected speech, just as they are for pure software publishers. The additional services that these companies provide, although they have often drawn the attention of UPL enforcement authorities, are purely ministerial and no more need additional regulation than a typing service. Put more simply, if neither publishing software nor providing editing and proofreading services need additional regulation individually, then the combination of the two does not need additional regulation either.

The final category of LSPs is providers of legal advice. This includes professionals such as LLLTs, as well as advice givers such as Call for Action, Harvard Small Claims Advisory Service, or the UK's Citizen Advice and McKenzie Friends. The services these LSPs provide may not be as standardized as those offered by the other categories of providers. This has led some to suggest that these types of LSPs may be more in need of regulation.[17] However, giving advice is speech, even in an occupational context, so action to limit these providers

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[15] Richard Granat, Letter to Commission, April 15, 2016.

[16] Id. at 4.

[17] See, e.g., Perlman, *supra* note 7, at 93-94.

might need to pass constitutional strict scrutiny to allay First Amendment concerns.[18]

In addition to the legal problems enumerated above, there are policy-based reasons to proceed with caution in imposing additional regulations. First, additional regulation would be unwieldy to such an extent that it would deter new service providers from forming, thus depriving consumers of a broad range of potential new services. The low number of LLLTs that have applied for licensing in Washington is one manifestation of the deterrent effect of over-regulation. The problems of additional regulation would be even greater for online LSPs, which would have to comply with dozens of state regulations (unless a federal regulatory scheme were to emerge). Faced with such a prospect, online providers might very well move offshore, leaving consumers with less protection than they receive under existing consumer protection laws.

Also, any new regulation proposed for any of these categories would have to not only distinguish among the existing models of LSPs, but also would need to be applicable to new types of LSP that might arise in the future. The Commission's issue paper fails to acknowledge that different types of regulations would need to be designed for different types of LSPs. Any attempt to shoehorn all non-lawyer LSPs into one set of regulations would be a poor fit for most existing LSPs, and an even worse fit for LSPs that haven't yet been conceived.

Entity Regulation Does Not Make Sense in the Context of Non-Lawyer LSPs

The Commission mentions entity regulation as a model to consider for non-lawyer LSPs. Entity regulation has generally been applied in the context of alternative business structures as a way of ensuring that lawyers' ethical obligations are not subverted by non-lawyer ownership. Its core concept is to shift regulation from individuals to businesses. Thus, while there's nothing about entity regulation that couldn't theoretically apply to non-lawyer LSPs, its usefulness would

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[18] Paul Sherman, "Occupational Speech and the First Amendment," 128 Harv. L. Rev. F. 183 (2015); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

be secondary to a determination of who can and cannot provide services to the public.

Conclusion

The Commission has taken on a large task in trying to address the wide range of non-lawyer LSPs and how they should be regulated. Ultimately, though, the task of regulating lawyers' competitors should not fall to lawyers. Any specific recommendations the ABA might make in this area would be viewed as seen as anti-competitive, protectionist, and guild protecting. **We therefore urge that the Commission make no specific recommendations about how to regulate non-lawyer LSPs.**

Additionally, **we urge the Commission to open up the legal profession to competition by affirming the right of non-lawyer LSPs to exist**. One way it could do so is by recommending a reform of unauthorized practice of law definitions so that the unauthorized practice of law only applies to falsely holding oneself out as a lawyer. Any broader definition of unauthorized practice is beyond the proper authority of the bar.

The privilege of lawyer self-regulation is already on thin ice after the *Dental Examiners* case. For lawyers to attempt to extend that privilege to include regulation of others would not only be inappropriate; it would be a signal to antitrust authorities that the legal profession is not capable of handling that privilege. Rather than trying to extend its regulatory reach, the profession should demonstrate that it is capable of exercising discretion by acknowledging the limits of its regulatory reach.