

## Comments on: Occupational Licensure in the Legal Profession

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Responsive Law thanks the Task Force 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 has testified on numerous occasions to the American Bar Association and to state regulators about the role that lawyers' monopolistic behavior has played in restricting access to legal services.

Submitted to the  
**Federal Trade  
Commission Economic  
Liberty Task Force**  
October 31, 2017

Although regulation of the legal profession has traditionally been the province of state regulators, the U.S. Supreme Court decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*<sup>1</sup> has made it clear that state regulatory powers are subordinate to federal antitrust regulation when such powers are improperly delegated to market participants. Many state governments have made such an improper, anticompetitive delegation of powers to state bar associations. We have outlined some of the economic impact of this anticompetitive behavior below, and we hope that the FTC will continue its vigilance in protecting consumers against such misconduct.

### **The Access to Justice Gap Is Continuing to Grow**

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 encompasses most of the middle class. The World Justice Project reports that the U.S. is tied with Egypt and Bangladesh in affordability and accessibility of its civil legal system—in the bottom quintile worldwide for this category.<sup>2</sup>

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<sup>1</sup> 574 U.S. \_\_\_, 135 S. Ct. 1101 (2015).

<sup>2</sup> World Justice Project Rule of Law Index, <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016> (2016).

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.<sup>3</sup> Surveys of legal needs of low- and moderate-income Americans find that over half 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 how legal services may be offered: roughly 25%-30% compared with 5%-10%.<sup>4</sup>

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 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. Unfortunately, close to 60% of small businesses faced these problems without lawyer assistance.

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<sup>3</sup> 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* (2014).

<sup>4</sup> 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.) (2015).

For those that did hire lawyers, the average expenditure was \$7,600—an enormous cost for a small business.<sup>5</sup>

### **The Origin and Misuse of Unauthorized Practice of Law Restrictions**

Most of the occupational licensing restriction regarding legal assistance is through the enforcement of prohibitions on the unauthorized practice of law (UPL). These prohibitions take the form of either statutes or rules issued by state supreme courts. Prohibitions on UPL were fairly rare in the United States until the 1920s, when bar members began to organize to restrict who could perform services related to law both inside and outside of courtrooms.<sup>6</sup>

Restrictions on UPL may have been enacted with the goal of public protection, but in practice they have been used primarily to protect lawyers from competition. A recent survey of state bar unauthorized practice committees and enforcement agencies found that most complaints about alleged UPL are made by lawyers or the bar association itself, not by consumers.<sup>7</sup> Nearly 70% of those surveyed could not recall a single instance of serious injury to the public from alleged unauthorized practice in the previous year.<sup>8</sup> The vast majority of complaints never result in court proceedings where enforcement actions can be supervised by state court judges – rather, they are resolved unofficially through bar and committee investigations, pressure and consent agreements.<sup>9</sup>

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<sup>5</sup> LegalShield, *Decision Analyst Survey: The Legal Needs of Small Business* (2013), <https://www.legalshield.com/news/legal-needs-american-families-0>.

<sup>6</sup> Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 5 *American Bar Foundation Research Journal*, 159-216 (1980).

<sup>7</sup> Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 *Fordham L. Rev.*, 2587-2610 (2013-14).

<sup>8</sup> *Id.* at 2595

<sup>9</sup> *Id.* at 2592-2593

### **Looser Licensing Restrictions on Legal Services Have Increased Accessibility and Affordability Without A Decline in Quality**

In instances where licensing restrictions have not been as strict as the American norm, consumers have been able to make use of a wider range of affordable legal services that have been comparable in quality to those under a stricter licensing regime.

#### *Unlicensed Will-Writers in England and Wales*

The most notable example of consumers benefiting from more permissive occupation licensing in legal services has been in England and Wales, where provision of legal services has been governed since 2007 by the Legal Services Act.<sup>10</sup> In the English model<sup>11</sup>, wills may be written by either licensed individuals and licensed business, such as solicitors or banks, or by unlicensed entities such as will-writing specialists.<sup>12</sup> The U.K.'s Legal Services Board commissioned a research study on the will-writing market in 2011.<sup>13</sup>

This study found that consumers were equally satisfied with the will-writing service provide by licensed solicitors and unlicensed will-writers.<sup>14</sup> Additionally, consumers paid less for wills from unlicensed will-writers, with twice as many paying under £50 for a will-writer as for a solicitor. Finally, an expert panel ranked the quality of the wills produced by will-writing specialists (an average score of 3.14 on a five-point scale) as nearly equal to those prepared by solicitors (with an average score of 3.30). This is consistent with a previous study that found that a non-lawyer agency was twice as likely to get

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<sup>10</sup> The model for regulation of legal services in England and Wales is worthy of emulation in many respects, only a small portion of which are addressed here. For a more detailed discussion of how the U.S. could remodel its regulatory and licensing structure for legal services based on England and Wales, see Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 65 *Hastings Law Journal*, 1191-1224 (2016).

<sup>11</sup> With apologies to the Welsh for omitting them, we'll call this the English model, for the sake of brevity.

<sup>12</sup> IFF Research, *Research Report: Understanding the Consumer Experience of Will-Writing Services* (2011).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 47-49

a positive financial result in a welfare benefit case as a solicitor, and four times more likely to get a positive result in employment cases.<sup>15</sup>

#### *Lay Real Estate Settlement Services in the United States*

In the United States, studies of the impact of UPL restrictions on the legal services market have been hindered by the near-uniformity of states in prohibiting non-lawyers from offering services that have traditionally offered by lawyers. However, one notable set of data comes from real-estate closing services. In many states, real estate closings must be performed by a lawyer. However, as the FTC itself has noted, studies have indicated that when lay settlement services are permitted, they provide their services at a much lower price than lawyers.<sup>16</sup> A survey in Virginia found that lay settlement services cost over 40% less than lawyer services.<sup>17</sup> Additionally, when lay service providers are permitted, the price of lawyers' services decreases due to competition. Similarly, an evidentiary hearing by the New Jersey Supreme Court found that competition with lay settlement providers led to a 35% decrease in the cost of settlement lawyers for buyers and a 50% decrease in their cost for sellers.<sup>18</sup>

#### *Interstate Mobility in Canada and Australia<sup>19</sup>*

In addition to preventing consumers from choosing among lawyer and non-lawyer service providers, licensing restrictions also limit consumer choice among lawyers. The ability of lawyers to practice across state lines is severely curtailed by the high bar that most

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<sup>15</sup> Richard Moorhead, Alan Paterson & Avrom Sherr, *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 *Law and Society Rev.* 765-808 (2003).

<sup>16</sup> *Brief of Federal Trade Commission in Re: Opinion No. 2003-2 of the UPL Advisory Opinion*, Case No. S03U1451 (GA 2003).

<sup>17</sup> Media General, *Residential Real Estate Closing Cost Survey*, Sept. 1996 at 5 (as cited in: FTC Brief *Re: Opinion No. 2003-2*, *supra* note 16, at 10).

<sup>18</sup> *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 654 A.2d 1344 (N.J. 1995).

<sup>19</sup> The information in this section is explored at substantial length in James W. Jones, et al, *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?*, 30 *Geo. J. Legal Ethics* 125 (2017).

states set for allowing out-of-state lawyers to provide their services. Lawyers may, if they meet a set of regulatory hurdles, practice temporarily in another state. However, establishing an ongoing practice in another state requires admission to that state's bar, often including passage of the state's bar exam. Since a bar exam and prep courses cost thousands of dollars and the process takes several months to complete, this is too burdensome for most lawyers.

In contrast, Canada and Australia allow nearly unlimited practice across provincial and territorial boundaries. Both countries are federal systems, like the U.S., with the practice of law regulated by the provincial and territorial governments. However, by instituting interprovincial agreements, both countries have made the services of lawyers nationwide available to residents of even the smallest provinces and territories. This is a marked contrast to the United States, where a resident of South Dakota has access to only the 760 practicing lawyers in the state.<sup>20</sup> Of those 760, only a handful may practice in any particular area of law. Allowing other state's lawyers to provide assistance in those areas would give the average South Dakotan the options they've come to expect in a national economy where most services are available with the click of a mouse.

### Other Sources

We would be remiss not to share two additional pieces of research with the Task Force. Gillian Hadfield's *The Cost of Law* outlines the scope of the access to justice problem and how regulatory reform is needed to fix it.<sup>21</sup> *First Thing We Do, Let's Deregulate All the Lawyers*, by Clifford Winston, Vikram Maheshri, and Robert Crandall, examines the economics of lawyer licensing and regulation from theoretical and empirical perspectives, including the social costs and misallocation of labor resulting from the lawyer monopoly.<sup>22</sup>

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<sup>20</sup> Bureau of Labor Statistics, Occupational Employment Statistics Map (2016), [https://www.bls.gov/oes/current/map\\_changer.htm](https://www.bls.gov/oes/current/map_changer.htm)

<sup>21</sup> Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 Int'l. Rev. L. and Econ. 43-63 (2014).

<sup>22</sup> Clifford Winston, Robert W. Candrall & Vikram Maheshri, *First Thing We Do, Let's Deregulate All the Lawyers*, Brookings Institution Press (2011).