

Comments on: **ABA Resolution 115—Studying Innovative Regulatory Approaches to Access to Civil Legal Services**

Tom Gordon
Executive Director,
Responsive Law

Comments to the
American Bar Association House of Delegates

February 11, 2020

Responsive Law thanks the House of Delegates for the opportunity to present its comments in support of ABA Resolution 115. Responsive Law is a national, nonprofit, consumer organization working to make the civil legal system more affordable, accessible, and accountable to the public.

We believe this resolution is not nearly aggressive enough in attacking the regulatory barriers that are keeping people from affordable legal help. If the ABA were to vote down even such an incremental call for reform, it would signal that it has no interest in solving the systemic problems preventing access to justice, and will continue to prioritize its role as a trade association ahead of any commitment to the public.

Three and a half years ago, the ABA's Commission on the Future of Legal Services concluded two years of study by issuing recommendations very similar to those in Resolution 115. That commission urged courts to "consider regulatory innovations in the area of legal services delivery."

We criticized the Future Commission for being too timid in its recommendations. The Commission found that the "legal profession's resistance to change hinders additional innovations" that would increase access to legal help. Nevertheless, its recommendation was not to urge courts to reform the regulations that hindered access, but merely to urge courts to *consider* doing so.

Resolution 115 has similarly modest ambitions. It doesn't recommend that the ABA change any model rules. It doesn't ask jurisdictions to change their rules. It merely encourages jurisdictions to *consider* regulatory innovation and to collect and assess data.

Encouraging regulators to consider regulatory innovation and to collect and assess data should not be a controversial proposition. It's

just asking regulators to do their job. However, some opponents of this resolution would prefer that regulators act like stubborn toddlers with their hands over their ears, shouting “Nah-Nah-Nah! I’m not listening!” when faced with the prospect of hearing something they don’t want to hear.

As lawyers, we should know better than anyone the importance of giving ideas a fair hearing and reviewing evidence before rendering a judgment. Opponents of innovation in the regulation of lawyers have based their opposition on the inaccurate claim that there is no evidence to support such reforms. However, with the opportunity to review such evidence, they are now claiming that they don’t need to see any evidence, since their minds are already made up.

Opponents have also frequently cited the ABA’s longstanding opposition to non-lawyer ownership of law firms as a non-negotiable core value of the profession. But the fee-sharing prohibitions of Rule 5.4 are not themselves a value of the profession; they are just a means of protecting the core value of lawyers’ professional independence.

If there are other ways of protecting lawyers’ independence that would increase access to justice, the profession should adopt them. It is irresponsible to refuse to even *consider* new regulations because one has substituted promotion of the current regulations for promotion of the values those regulations are intended to protect.

ABA President Judy Perry Martinez wrote in this month’s *ABA Journal*, “The ultimate purpose of regulation is not to protect the livelihoods of lawyers but to advance the administration of justice. Some would suggest that if we don’t have justice or public protection as our goal, we potentially put our self-regulation at risk.”

We agree with President Martinez and others that if the bar continues to put protection of the economic status quo ahead of the broader interests of the public, it will forfeit its moral—and perhaps legal—power to regulate the profession.

We urge the House of Delegates to encourage lawyer regulators to act in the public interest ahead of the self-interest of a subset of the profession, and to approve Resolution 115.