Responsive Law
The Consumer's Voice in the Legal System

Comments on: Proposed Regulatory Reform Options

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California Task Force on Access Through Innovation in Legal Services

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Responsive Law thanks the California ATILS 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. We advocate for policies that expand the range of legal services available to meet people's legal needs and that loosen restrictions on who may provide assistance on legal matters so that people of all income levels can get the legal help they need. Responsive Law has commented on numerous occasions to the American Bar Association and state regulators about the role that lawyers' monopolistic behavior has played in restricting access to legal services.

The Task Force has done a good job of balancing the potential for increased access to legal services against the potential for consumer harm. Additionally, it has looked at regulation as something that needs to address specific potential harms. This is a marked contrast from many bar regulators' habit of taking regulations that were created decades ago to govern potential misconduct by lawyers and treating the regulation itself as the principle to be preserved, rather than looking at the rationale behind the regulation and seeing whether it is still the best way to address a particular regulatory objective.

As a result of this process and mindset, the Task Force has created a set of recommendations for changes to the regulatory scheme for legal services in California that are an important step toward allowing legal services to be accessed more readily by the public. **We generally support the Task Force's recommendations, with a few caveats noted in the following pages.** We are focusing our comments on four aspects of the Task Force's report: (1) restrictions on who may provide legal services; (2) the use of legal technology to provide the analytical functions of lawyers; (3) restrictions on non-lawyer ownership of law firms; and (4) restrictions on lawyer advertising.

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Consumers at All Economic Levels Cannot Afford Legal Help

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 justice gap in the United States extends from the poorest Americans across the middle class. In the World Justice Project 2017-2018 report, the United States ranks 94th out of 113 countries (tied with Cameroon, Uganda, and Zambia) in the affordability and accessibility of its civil justice system.[1] Americans cannot afford to pay lawyers for assistance with everyday legal needs even though the average American household faces a significant legal problem every year.[2] More Americans do not address their legal problems due to lack of access to justice than their peers in countries such as England and the Netherlands, where there are fewer restrictions on how legal services can be offered.[3] Small businesses also struggle with the gap in access to justice, with over half facing legal problems without legal assistance.[4]

Existing Prohibitions on Unauthorized Practice of Law Protect the Legal Industry's Status Quo and Don't Protect Consumers

UPL restrictions were purportedly enacted with the goal of public protection, but in practice they have been used primarily to protect lawyers from competition and to deny many individuals access to much needed assistance. A survey of state bar unauthorized practice committees and enforcement agencies found that most complaints

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[1] World Justice Project, *WJP Rule of Law Index 2017-2018* (2018), available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf.

[2] 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* (Samuel Estreicher & Joy Radice eds., 2015) (observing that fifty to sixty percent of low- and moderate-income American households face an average of two legal problems annually).

[3] Id.

[4] LegalShield, *Decision Analyst Survey: The Legal Needs of Small Business* (2013), available at https://www.le-galshield.com/news/legal-needs-american-families-0.

about alleged UPL are made by lawyers or the bar association itself, not by consumers.[5] Nearly 70 percent of those surveyed could not recall a single instance of serious injury to members of the public from alleged unauthorized practice in the previous year.[6] The vast majority of complaints are resolved unofficially through bar and committee investigations, pressure, and consent agreements where providers of alternative service have little choice but to go along with what is demanded or face costly litigation in which they have little chance to succeed.[7]

UPL restrictions currently prevent competent individuals and technology providers from providing legal assistance directly to consumers, for one of two reasons. First, in many cases, lawyers see anyone without a law license as a threat to their monopoly on the practice of law. A second reason for these restrictions is the paternalistic belief that if a person does not have a lawyer, it is better for the person to have no help at all than to have help from a competent person without a law license.

Given the protectionist leanings of UPL regimes, we support the Task Force's recommendations for increasing access to legal services by removing the UPL obstacles to innovation and opening the legal profession to greater investment from non-lawyers. We especially appreciate that the Task Force has endeavored to put the interests of consumers first and made its recommendations in light of the regulatory objectives that the rules of professional conduct and related lawyer regulations seek to achieve.

Reducing Restrictions on Who May Provide Legal Services Can Make Routine Legal Services More Affordable

Task Force Recommendation 2.0 would authorize certain regulated individuals to provide specified legal services and advice as a UPL exception. The Task Force concluded that allowing non-lawyers to advise consumers in areas where there is a critical need for more

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[5] Deborah L. Rhode & Lucy Buford Ricca, Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement, 82 Fordham L. Rev., 2587-2610 (2013-14).
[6] Id at 2595.
[7] Id. At 2592-93.

accessible legal advice would help address access to justice concerns. We agree with this recommendation and believe that allowing non-lawyers to offer limited legal services is a valuable method of increasing access to justice. Such arrangements are common in other professions. For example, nurse practitioners and physician assistants offer more affordable preventative health services than fully licensed physicians; the same can be said regarding IRS enrolled agents versus CPAs when it comes to tax services. There is no reason that this commonsense proposal should not work in the legal profession as well.

In developing regulatory standards to apply to these professionals, the state should be careful not to make the standards so burdensome as to discourage individuals from applying for or obtaining this new status. For example, Washington established its Limited License Legal Technician (LLLT) program in 2012; however, there are currently only 31 licensed LLLTs in the state.[8] This is largely due to the overly burdensome licensing requirements in effect for LLLTs., which require three semesters of classes and 3000 hours of apprenticeship under a lawyer's supervision.[9] While we agree that some minimum training may be required for a limited license, the appropriate amount is far less than what Washington requires. In short, the state should use reasonable standards that will not deter individuals from being able to provide these needed services.

Furthermore, while limited license programs provide some benefit in adding to the supply of competent legal help, additional service providers treating each legal need as a bespoke matter are not sufficient to handle the tens of millions of unmet legal needs nationwide each year. Only systemic change in how legal needs are met can possibly address this vast service gap.

Establishing a UPL Exemption for Legal Tech Services Can Help Consumers—If It Is a Safe Harbor, Rather Than a Standard

Recommendations 2.2 through 2.6 relate to legal technology services. The last decade has seen many innovations in the provision

[8] https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians (retrieved 9/23/19).
[9] Washington State Court Admission and Practice Rule 28, Regulation 3.

of legal services through technology. Companies like LegalZoom and Avvo have built markets based on the general unaffordability and inaccessibility of basic legal services to consumers. Yet, these companies have consistently faced threats to their business models through enforcement of UPL restrictions. Such enforcement actions also have the effect of deterring other technology offerings that might provide legal services on a more affordable and accessible basis than the current system is capable of providing. In general, we support the Task Force's recommendation to open the doors of the legal profession to legitimate providers of legal technology services. However, we see several potential issues with the Task Force's recommendations.

First, we are concerned that the optional regulatory scheme the Task Force is proposing would become a de facto standard. Although the UPL "safe harbor" proposed by the Task Force is voluntary, there is the distinct possibility that gaining state approval would become a de facto requirement for legal technology providers, especially if the State Bar steps up UPL enforcement against technology companies that are not approved under the safe harbor.

Second, the scope of regulation proposed—that it would apply to technologies that perform the analytical functions of an attorney—is not clear enough to yield the type of certainty necessary to foster innovation. For example, does online document preparation through LegalZoom perform the analytical functions of a lawyer? What about an online service like TIKD, to which consumers pay a fee in order to have their traffic ticket handled by a lawyer?

If technology providers are unsure whether or not their service is eligible (or expected) to apply for state approval, then the regulatory regime will not optimize innovation as desired. The Task Force should provide greater clarity about what it means by "the analytical functions of an attorney" or at least elaborate upon the regulatory principle which it intends to advance through this distinction.

Third, there are First Amendment concerns with regulating software that operates without a human intermediary between it and the customer. Over a half-century ago, lawyers from New York attempted to use their unauthorized practice of law restrictions to prevent Norman Dacey from selling the self-help book *How To Avoid Probate*, resulting in a three year legal battle that ultimately vindicated the rights of millions of Americans who chose to use this

book rather than hire a lawyer.[10] Attempts to regulate software—which is fundamentally just a ten-thousand-page version of Dacey's book written in computer code—should bear in mind the fundamental right of Americans to receive information about legal matters, even if the information consists of thousands of decision trees.

Finally, we are concerned that the regulatory scheme finally approved by the state might be unduly burdensome and increase consumer costs by requiring protections that a consumer might neither need nor want to pay for. Attachment H to the Agenda Item materials considered during the July 2019 Board of Trustees meeting seem to envision a regulatory scheme that seeks ethical parity between lawyers and technology providers (except when it comes to data security, where the Task Force seems to envision higher standards applicable to technology providers than what is currently required of lawyers).

But does a consumer accessing LegalZoom really expect to have attorney-client privilege or the duty of confidentiality cover their communications with the technology platform? Will they be willing to pay the inevitable costs borne by the company in meeting such requirements if imposed? It seems a more flexible approach than ethical parity between lawyers and technology would provide the best foundation for innovation in legal services, and the ethical standards that need to be met by any technology provider should be determined on a case-by-case basis. We urge the Task Force to recommend a risk-based approach to regulating such service providers, where empirical data is used to weigh the impact of particular regulations against their benefits.

Allowing Partnerships and Investments with Non-Lawyers Is a Necessary Step for Fostering Innovation in Legal Services

Recommendations 3.1 and 3.2 of the Task Force are both proposals to modify Rule 5.4, which imposes a general prohibition of lawyers forming a partnership with or sharing a legal fee with a non-lawyer. Recommendation 3.1 would allow for the sharing of legal fees with

[10] *Dacey v. New York County Lawyers' Association, 423 F.2d 188 (2d Cir. 1970).*

non-lawyers provided, among other things, that the firm's sole purpose is providing legal services to clients. Recommendation 3.2 would essentially remove the fee-sharing restriction, and only require that the firm obtain the client's informed consent to the fee sharing. Of these options, Responsive Law prefers Recommendation 3.2, because marginal changes to Rule 5.4 will have only marginal effect on access to legal help.[11]

As the Task Force notes, Recommendation 3.1 is meant mainly to address the narrow problem of enticing technology experts to work within law firms on legal technology services by offering them an equity stake in the firm. While this is a fine proposal, it stops far short of the reform that is needed to spur innovation in the delivery of legal services. Some of the most significant "innovations" in consumer legal services today implicate the fee-sharing prohibition. For example, several states prohibited their attorneys from participating in Avvo's online client-lawyer matching service, through which consumers paid a flat fee set by Avvo for legal services provided by an attorney matched to the client through an online platform. The attorney received the fee as negotiated by Avvo, and then paid a marketing fee back to Avvo that was based on the amount of fee the attorney received for the work. Several state bar ethics committees found this arrangement to violate Rule 5.4. Avvo eventually shut down this service, yet Avvo's legal services product was precisely the sort of innovation that increases access to legal help, as it helped consumers find affordable lawyers at a fixed price through a national brand.

Allowing outside investment in law firms would allow a new model of legal service provision to arise: the mass-market consumer law firm. Just as H&R Block and TurboTax have 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 down the costs of legal services. Almost every law firm providing services to middle-income individuals and small businesses on issues such as family law, employment law, housing, and basic

[11] As the Task Force is no doubt aware, Utah is about to launch a "regulatory sandbox" to allow partnerships between lawyers and non-lawyers, while the Arizona Supreme Court is likely to repeal Rule 5.4 altogether.

corporate and business law 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, maintaining trust accounts, and collecting fees.

In addition, mass-market consumer law can be part of the solution to one of the paradoxes of the modern legal market: There are too many out-of-work or underemployed lawyers, yet too many consumers are 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.

Attorney Advertising Restrictions Should be Largely Removed

In Recommendation 3.4, the Task Force invites comments regarding whether Rules of Professional Conduct 7.1-7.5 should be revised to reflect the latest ABA model rules on attorney advertising. Responsive Law supports large-scale reform of the attorney advertising rules and believes the only restriction that should exist on attorney advertising is a prohibition against false and misleading statements in attorney advertising as found in Rule 7.1.

Advertising has an important role to play in making members of the public aware of the legal components of their problems and in serving as a valuable aggregator of legal information and resources. Under current regulatory regimes, a latent demand for legal services goes largely unmet due to myriad barriers preventing consumers from connecting with service providers and accessing the preliminary information needed to make informed decisions about the nature of their legal needs and the best avenue by which to meet them.

The typical American faces three obstacles in getting professional help for their legal problems: (1) recognizing that the problem has a legal component; (2) seeing the value of a lawyer in resolving that problem; and (3) knowing how find a lawyer who can help.

Advertising can help consumers surmount all of these obstacles and permitting a wider range of advertising would raise awareness among consumers that their problems may have a legal component and that lawyers can help them with those problems. By maintaining Rule 7.1's prohibition on false or misleading communications, while eliminating other advertising restrictions on useful information such as specializations, consumers can receive more information about lawyers and better access legal services.

The Interest of Consumers Should Be the Overriding Concern in Advancing These Proposals

The Task Force did an excellent job of recognizing that the state bar's mission is to protect the public and that by maintaining a system where so many in need of legal assistance go without, the state bar is failing in this mission. In the first few days of the comment period, the state bar received hundreds of comments from lawyers opposing the Task Force proposals and urging the bar the maintain the regulatory status quo.[12] As an organization that represents the interests of consumers in the legal system, Responsive Law strongly urges the bar to move forward with these much needed reforms, even if protectionist or paternalistic lawyers object. Especially in light of the 2018 bifurcation of the state bar's regulatory and trade association functions, we do not think that opposition to the proposals from the legal profession should be the basis for opposition to the Task Force's recommendations.

Indeed, the Task Force's recommendations present an opportunity for lawyers to be more effective and potentially more profitable, if lawyers embrace the inevitable changes coming to the legal profession instead of resisting and hanging on to tradition. Lawyers have a lot to offer the public beyond their licenses. If legal service from lawyers cannot compete with legal service from technology or non-lawyers, then we must question the significance of a law license in the first place. But what is more likely to happen is that lawyers will develop new and more effective ways to deliver routine legal

[12] The reported 420 comments received in the first week after the proposal's release (Sam Skolnik, "California Bar Swamped by Comments Opposing Ethics Rule Changes," Bloomberg Law, August 6, 2019) represent less than 0.2% of the California bar.

services, while at the same time increasing their ability to offer more bespoke services when there is a need to do so.

For example, one of the concerns expressed by lawyers is a fear of small law firms getting acquired by large companies. As an acquisition of a private company is a voluntary matter, to the extent this happens, it will be because lawyers choose to have their firms acquired. No doubt, many will do so, as they would prefer to be employees of a company spending most of their week practicing law than being small business owners chasing billable hours.[13]

Some lawyers also warn that allowing non-lawyer investment will result in the loss of lawyers' independent judgment and a resulting degradation of the profession. However, there is no evidence that this has happened in jurisdictions that have already adopted similar reforms. These protests also incorrectly assume that non-lawyers are more likely to exert undue pressure on lawyers than lawyers are 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.

In today's economy, there are many services that touch upon critical areas of consumers' lives where we accept that the service provider will provide quality service, even though there may be a financial motivation not to do so. We often entrust our most precious resources and relationships to such services—for example, online platforms that help parents find babysitters and childcare providers. The care providers may split their fee with the online platforms, yet parents never worry about undue corporate influence on their babysitter or whether their babysitter is putting the company's interests ahead of the interests of their child. If we're not concerned about corporate pressure on teenage babysitters watching our children, then why should we believe that lawyers—who have been trained in legal ethics and are required by rules of professional

[13] Presumably, those who prefer the latter would have opted to pursue an MBA, rather than a JD.

conduct to act in their clients' interest—would crumble under the corporate pressure applied by their employer?

Conclusion

As the work of the Task Force has acknowledged, the access to justice crisis in America is growing and will not improve without some systemic changes to the way lawyers are regulated. It is notable that although California is the state with the second largest number of attorneys in the country, the access to justice problem is no less acute in California than in other U.S. states.

Given the recent reformulation of the State Bar as an entity with only regulatory and public protection missions, we hope the timing is right in California for the State Bar to implement the Task Force's recommendations. Doing so will benefit consumers looking for legal help, and will also allow lawyers to serve those clients more efficiently, while practicing at the top of their licenses.