Responsive Law
The Consumer's Voice in the Legal System

Comments on: Recommended Improvements to the District of Columbia Rules on the Unauthorized Practice of Law

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Comments to the

D.C. Court of Appeals Committee on Unauthorized Practice of Law

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Consumers for a Responsive Legal System ("Responsive Law") would like to thank the Committee on Unauthorized Practice of Law (UPL) for the opportunity to present ideas for improvements to the present D.C. Court of Appeals Rule 49.

Responsive Law is a national nonprofit organization (based in the District, with a director and several board members who are active members of the D.C. Bar) working to make the civil legal system more affordable, accessible and accountable to the people.

With studies showing that 80% of the civil legal needs of low-income people go unmet, it is clear that the demand for legal assistance greatly exceeds the supply.[1] The courts can alleviate some of the demand for legal assistance by simplifying procedures for the unrepresented.[2] But even so, many will still face legal issues related to housing, employment, family law, and consumer issues—among others—and will continue to need assistance in understanding the substantive law that pertains to their situation.

Below, we offer creative solutions to the need for additional sources of legal assistance that have been tested in other states and other countries and found both helpful and consistent with the

[1] *Access to Justice: Opening the Courthouse Door* (Brennan Center for Justice, 2007), p. 6. Available at http://bit.ly/1odbHUx. Last visited February 29, 2016. The D.C. Access to Justice Commission documented the same gap in its 2008 report, *Justice for All? An Examination of the Civil Legal Needs of the District of Columbia's Low–Income Community* (finding, for example, only three percent of tenants in Landlord/Tenant Court and two percent of litigants involved in domestic violence cases were represented by counsel). Available at http://bit.ly/1Kvhtuq. Last visited February 29, 2016.

[2] The D.C. Superior Court Housing Conditions Calendar offers an example.

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longstanding goal of protection for the consumer. We hope our recommendations provide ideas the Committee can use in proposing amendments to fill the justice gap and achieve true access to justice in the District of Columbia.

The Committee should recommend changes needed to allow more people to provide legal help to consumers.

We strongly encourage the Committee to recommend the Court of Appeals revise Rule 49 so that it poses no barrier to innovations such as practice by nonprofit organizations within their mission area, programs such as the New York Navigator[3] scheme of courthouse assistance to unrepresented litigants, new forms of licensing and other innovative means of providing legal services. The Access Resolution passed in 2015 by the Conference of Chief Justices and the Conference of State Court Administrators endorsing the "aspirational goal" of 100% access to "effective assistance for essential civil legal needs" highlights the importance of experimenting with new models of delivery.[4]

District of Columbia residents, families, and small businesses can receive far more help with their legal matters if regulators take a less expansive view of which services are deemed to be the practice of law, and thus restricted to lawyers. UPL prohibitions are intended to protect consumers by assuring them that providers have a common

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[3] The New York Court Navigator program initiated by Chief Judge Jonathan Lipman is an experiment placing trained nonlawyers in Housing Court in Brooklyn and in a Civil Court consumer debt part in the Bronx. Help includes explaining court papers, filling out forms, advising on the manner of answering likely questions in court, as well as accompanying litigants in court and making statements of fact if asked—much of it out of bounds under UPL rules. For a positive early summary of litigants' and judges' views on the help provided and the difference it makes, see New York Committee on Nonlawyers and the Justice Gap, *Navigator Snapshot Report* (December 2014). Available at http://bit.ly/1QiIOwP. Last visited February 29, 2016.

[4] The resolution urged both Conferences' members "to provide leadership in achieving that goal and to work with their Access to Justice Commission or other such entities to develop a strategic plan with realistic and measurable outcomes." Available at http://bit.ly/1SQHvKf. Last visited February 29, 2016.

level of locally relevant education, competence and fitness, and also to ensure that providers are subject to the District's lawyer discipline system (provided by mandatory dues paid by bar members). Harms can arise from scam artists pretending to be lawyers or from incompetent providers.

There are, however, viable alternatives. The former concern can be addressed by prosecution for violation of consumer fraud laws, making UPL enforcement (through committee investigation, hearing and opinion, or by court proceeding if necessary, enforced through the court's contempt power) redundant for that purpose. Concern that customers have assistance from sources whose knowledge and skill have been independently and locally verified, is increasingly mitigated by commonalities in legal doctrine (and instant availability of legal reference materials), and by an information marketplace in which consumers have access to extensive consumer-driven factual and evaluative details about service providers.

Regulatory objectives for a new rule.

Broad rules are poorly suited to harmonize the competing needs for increased access to sources of legal help and protecting consumers. Narrower rules (or, broader exemptions) will allow the committee and the court to adapt to innovative forms of assistance.[5] To the extent that UPL restrictions remain necessary, three principles should apply in setting their maximum reach.

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[5] The ABA established a commission in 2002 that attempted but failed to arrive at a definition of the practice of law, as the proposed broad definition (embracing any form of giving legal advice, even including help with forms) with only a limited number of exceptions for nonlawyer work drew fire from critics who thought it needlessly limited access to valuable services. Despite its own task force's failure to do so, the ABA still recommended each state protect consumers by defining the practice generally, while giving consideration to expanded nonlawyer work only where competence and accountability could be assured. Lish Whitson, ABA Task Force on the Model Definition of the Practice of Law, *Report* (2003). Available at http://bit.ly/1QerUTR. Last visited February 29, 2016. On the problems of broad definitions, see Cristina L. Underwood, "Balancing Consumer Interests In A Digital Age: A New Approach to Regulating the Unauthorized Practice of Law." *Washington Law Review,* 79 (2004), pp. 437-470.

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.[6]

Second, UPL causes of action should require a complaint from a customer and a showing of actual harm to that customer.[7]

Third, professionals (e.g., certified public accountants) should not face UPL charges for acting in the normal scope of their profession.

A UPL rule based on these principles would allow consumers to benefit from a broad continuum of services. However, if the committee is not inclined to take such a far-reaching approach to narrowing the rule towards the goal of 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.

Allow an exception for services by nonlawyer staff at nonprofit organizations.

The trend in the present rule towards allowing legal assistance by law students and by attorneys without active D.C. Bar admission when their work is done at nonprofits should be further expanded to include nonlawyers.

The present rule is a sensible acknowledgement of the important role played by long-established and expert nonprofit organizations in the District in providing assistance with a range of legal matters—as documented in the Access to Justice Commission's studies of sources of legal help for those with low incomes.

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[6] The present Rule 49 covers legal assistance regardless of whether a fee is involved. See Commentary to Rule 49 (b)(2) (providing that although "payment of a fee is often a strong indication of an attorney-client relationship, it is not essential").

[7] A 2013 survey of UPL enforcement nationwide found complaints from lawyers predominated, over two-thirds of enforcement authorities could not recall an instance of serious public harm in the past year, and court opinions rarely discussed evidence of injury. Deborah L. Rhode and Lucy Buford Ricca, "Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement." *Fordham Law Review*, 82 (2014), pp. 2587-2610.

Responsive Law believes the risk of harm is low when nonprofits provide legal assistance in a substantive area consistent with their mission. Thus, a housing nonprofit and its non-lawyer employees could give legal advice regarding landlord-tenant law; a nonprofit centered on needs of the homeless could assist people with questions about benefits and shelter; a nonprofit knowledgeable about child health and human development could advise families on their questions about regulations and services protecting their special needs children.

Thus we urge expanding the narrow exception in the current rule (allowing practice only by those nonlawyers who are law graduates already admitted elsewhere or with D.C. admission pending, who serve for free those of low income, and are under supervision of an active D.C. Bar member who takes responsibility for them).

Whether assisting others for a fee or for free, a nonprofit is a fiduciary with a mission to deliver quality services and improve the community. There is no profit motive that might lead a for-profit company to use nonlawyer service providers as a revenue generator without considering the consumer interest. In addition, the nonprofit has a reputational interest in providing competent services, lest their grants and donations dry up as a result of a scandal. The intriguing possibility is that new nonprofit organizations, freed of UPL limitations, could prove to be the developers or incubators of far more efficient practices than hitherto seen in the legal services sector.

If stronger oversight is needed, the proper approach is not regulation of individuals but of the entity, for example to assure its legal activity was within its area of staff expertise.[8]

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[8] For a thoughtful discussion of the possibility of releasing non-profit legal serving entities from almost all regulation (and the possibility of licensing of organizations), see Richard Zorza, "An Introductory Exploration of Five Broad New Ideas on How to Cut Through the Access to Justice-Commercialization-Deregulation Conundrum." Forthcoming in *Georgetown Journal of Legal Ethics*. Abstract available at http://bit.ly/1S0hybB. Last visited February 29, 2016. See also Deborah L. Rhode and Amanda K. Packel, "Ethics and Nonprofits." *Stanford Social Innovation Review*, 9 (2009). Available at http://bit.ly/1S0i49z. Last visited February 29, 2016.

Allow services modeled after McKenzie Friends in the U.K.

The committee should also recommend allowing trial programs of private, potentially fee-based assistance as the U.K. does for McKenzie Friends. Similar to the New York Court Navigators, these are non-lawyers that provide court-related assistance and guidance. Spurred in part by declining funding for civil legal aid, and with an affirmative decision in the *McKenzie* case in 1970, the judiciary recognized a litigant's right to reasonable assistance from a "McKenzie Friend" who may provide moral support, take notes, help with case papers, and quietly give advice on any aspect of the conduct of the case. McKenzie Friends have no right to act as advocates, though many do address the court at the invitation of the judge when it seems useful. They are unregulated, but chiefly assist low-income litigants in family law matters since that is the area of greatest unmet legal need. Though traditionally assisting as unpaid solo volunteers, some have started charging and organizing in firms. There are no education, training or certification requirements but courts have a monitoring role since McKenzie Friends submit a short CV or other statement setting out relevant experience to inform judges' decisions permitting litigants to be assisted by the McKenzie Friend. But despite fears of greater potential for victimization as McKenzie Friends increasingly charge fees, observers report no increase in misconduct or complaints.

The committee could take note that the U.K. plans to recognize the McKenzie Friends as a feature of their evolving legal services market. Moreover, the U.K. 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 U.K. experience is evidence that concern with fee-charging non-lawyers is overstated. The District should amend Rule 49 to allow at least experiments with use of non-lawyers, even fee-charging ones, for tasks now included within the practice of law and reserved for attorneys, building on the successful U.K. demonstration.[9]

[9] For a positive recent review of the role of McKenzie Friends in the U.K., see Legal Services Consumer Panel, *Fee-Charging McKenzie Friends* (2014).

Clear the way for experimenting in the District with regulating, not prohibiting, non-attorney practice, such as the Washington state limited license.

The Washington Supreme Court has adopted a rule allowing licensing of a new category of legal practitioners. Admission and Practice Rule 28, the limited practice rule for Limited License Legal Technicians (LLLTs), opened the door for licensed individuals who are not lawyers but who meet education and supervised practicum requirements and pass an examination, to advise and assist fee-paying clients in approved practice areas of law.[10] The first approved practice area is domestic relations. LLLTs may explain legal documents to clients, inform clients about legal procedures and complete 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 and other states are taking a close look at the Washington experience, and an evaluation study is under way funded by the Public Welfare Foundation (that also includes the New York Court Navigator program).

The District could move forward with Rule 49 amendments that benefit from the lessons Washington has learned during its adoption of LLLT licensing, including crafting a less restrictive ownership model. Washington requires lawyers working in a firm with LLLTs to own a majority of the practice. With this restriction in place, LLLTs are prohibited from forming many types of businesses that could prove beneficial to consumers. For example, an existing firm owned and operated solely by LLLTs might wish to expand its services to include those restricted to 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 committee should

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Available at http://bit.ly/1uMi2kT. Last visited February 29, 2016. The authors point out (p. 22) the important threshold difference, that in the U.K., "General legal advice is not a reserved activity under the Legal Services Act 2007. This means that anyone is free to offer such advice without restrictions."

[10] Washington Supreme Court Rule 28. Available at http://1.usa.gov/1nReFNX. Last visited February 29, 2016.

recommend rules changes that envision a model for LLLT practice that does not include such ownership restrictions.[11]

Create a safe harbor for document preparation.

Many people use books and online services to get access to self-help forms; Americans spend millions each year on self-help legal software.[12] However, companies providing these forms live under a sword of Damocles, wondering whether a complaint could put them out of business for engaging in the unauthorized practice of law.[13]

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[11] The general subject of ownership restrictions is an important topic that deserves concentrated study by the court and the D.C. Bar, as there is general agreement that the present limits on alternative business structures are a key barrier to attracting capital needed for innovation that can drive efficiency in legal service delivery. New models for providing legal services have been foreclosed since capital for innovation may come only from lawyers because of the rules against non-lawyer participation in the financing, ownership and management of law businesses. This aspect of the regulation of unauthorized practice is found in Rule 5.4 of the D.C. Rules of Professional Conduct. States generally ban legal services delivered by for-profit organizations not wholly owned or managed by lawyers. The District is unique in allowing attorney practice in a partnership or entity that includes non-lawyer owners or managers, but the rule includes significant restrictions. The non-lawyers must provide professional services to assist in legal work; the firm must do solely legal work; lawyers must take responsibility for the work of the non-lawyers; and the non-lawyers must agree to be bound by lawyers' ethical obligations. For a comprehensive treatment, see Gillian K. Hadfield, "The Cost of Law: Promoting Access to Justice Through the (un)Corporate Practice of Law." *International Review of Law and Economics,* 43 (2014), pp. 43-63 (concluding that "[e]liminating restrictions on the corporate practice of law can significantly improve the access ordinary Americans have to legal help in a law-thick world."). Available at http://bit.ly/21eB8GR. Last visited February 29, 2016.

[12] The estimate was $10 million spent annually almost two decades ago, surely more now. The state of Texas brought early challenges under its UPL rules against Nolo Press and Quicken Family Lawyer, as described by Greg Miller, "A Turf War of Professionals vs. Software, " *Los Angeles Times*, Oct. 21, 1998, at A1. Available at http://lat.ms/1NXoJdz. Last visited February 29, 2016.

[13] The present Rule 49 includes in law practice "providing advice or counsel" on preparing "any written document containing legal argument or interpretation of law for filing in any court." Online self-help software typically includes questions guiding the user in adding their facts on forms that may be filed in court such as wills or divorce petitions.

To protect the rights of consumers to read about the law and engage in informed self-help (bolstered now by many websites offering evaluations of law-related software products), the Committee should recommend the court 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."[14] Washington, D.C. consumers of legal services deserve assurance that the courts and bar will not try to deny them access to these useful, cost-effective services.

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We applaud the committee for soliciting views on improvements in Rule 49. Others' comments we have seen in preparation suggest adjustments to the existing exceptions that will expand somewhat the practice by inactive members of the D.C. Bar, recent graduates and those licensed elsewhere. But we urge the committee also to pass on to the court the additional recommendations we've outlined above—to adopt a new framework of regulatory principles or at least to expand exceptions for nonlawyers in nonprofits, to enable an experiment with the U.S. equivalent of McKenzie Friends, to consider a limited license along the lines of the Washington state model, and to create a safe-harbor for document preparation.

These are innovations with demonstrated promise to creatively fill the justice gap in the District. Responsive Law and its distinguished advisors have a wealth of further knowledge on these and related topics, and we would welcome a chance to assist the committee in its further work.

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[14] *Texas Government Code* § 81.101. Available at http://bit.ly/1K3vYpC. Last visited February 29, 2016.