

## Comments on the ABA Issues Paper on the Future of Legal Services

We thank the Commission for the chance to comment on the important topics presented in the Issues Paper. For over a decade, we have each been working as attorneys for LegalZoom.com, as General Counsel and Vice President. In these roles, we have helped our company serve millions with legal needs and have fought to ensure that consumers have choices when it comes to meaningful access to legal services. We strongly believe that the work the Commission is undertaking has the potential to influence real change – change that will result in greater legal access for millions – to the models that lawyers and alternative legal providers use to serve consumers.<sup>1</sup>

Our ABA President William Hubbard said it best: we “must develop a new model to meet the needs of the underserved.” For many years now our profession has stood at a crossroads. On one side, we have made attempts to slightly modify traditional service models to meet the needs of the underserved. These attempts, while they have made progress, have regrettably fallen short of the mark. On the other side, a truly “new” model of delivering legal services has never taken root. Accordingly, the needs of the underserved have not been met, and many contend that the profession is losing ground, while technology, globalization, alternative providers and other models are stepping up and gaining ground.

The issues covered in the Commission’s paper are both self-evident and well-documented, yet we cannot point to any meaningful progress toward a solution or series of solutions to these issues. Our profession is faced with balancing multiple concerns, not the least of which is complacency in a model that has served us as lawyers (and those that could afford us) quite well for over a century. The problem is that this model has priced the benefits and protections of the law out of the reach of those in need of it most<sup>2</sup>. While the challenge of balancing the profession’s duties with the needs of the underserved might appear daunting, the time for action is now. If we truly want to help the underserved, then we must be prepared to attack these issues and approach the regulatory framework of the practice of law with open minds and an absolute focus on one group alone: the underserved consumers of legal services.

Our profession is a noble one. We defend the Constitution, prosecute criminals, guard the rights of others, protect families, and help make the entrepreneur’s dream a reality. We are trusted with weighty matters and we are expected to uphold the professional and ethical tenets of our industry. While that deserves respect, it doesn’t mean we can’t do a better job of developing new models to deliver our valuable services. In fact, it makes that change even more important. With consistent surveys showing over 80% of

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<sup>1</sup> We have used footnotes throughout to note potentially useful resources for the Commission, not as a means of appropriate citation or attribution. Should members of the Commission need any further information on any of these sources, we are happy to be of assistance.

<sup>2</sup> The World Justice Project reports that the U.S. is currently tied with Kyrgyzstan, Mongolia and Uganda in terms of the affordability and accessibility of its civil justice system (World Justice Project, Rule of Law Index 2014).

legal needs going unmet<sup>3</sup>, we must ask ourselves how a profession that provides something so important underserves so many. When consumers consistently rate their overall view of the profession as decidedly net negative<sup>4</sup>, we need to ask ourselves why we are failing to reach people in such dramatic ways. We need to stop providing reasons why change is impossible, and start taking looking hard at why so many people are asking for change. While the ABA Commission on Ethics 20/20 was a good start, this Commission must take up the mantle and lead deeper and more lasting change to the system.

A singular solution to the issues facing the legal profession does not exist. We can be assured however, that maintaining the status quo is not an option. While no two jurisdictions or professions are the same, we can look to actions taken by other regulators, legislators and professions for guidance on actions that may be useful when it comes to expanding access. The United Kingdom has completely reworked the regulatory framework for legal services, allowing new and innovative business models to emerge; the medical profession is flush with “non-doctor” service providers, and even the aviation industry has evolved to meet the needs of the everyday passenger without sacrificing safety and service levels. In the US, we can take cues and learn from each of these and more when we rethink access to the law. We need to focus on “right” regulation and not “over” or “no” regulation. We need to be bold and move forward without letting crippling “what ifs” stifle increased access. If we are to improve on our present state, then we must take serious steps toward liberalization of regulations impacting the delivery of legal services.

As for “what ifs,” they also existed in the UK. But the fears that drove the naysayers have not materialized. The Legal Services Consumer Panel in England & Wales recently released its Consumer Impact Report 2014. In it, the Panel states that since reforms, “Consumers are happier with the choice available to them. They shop around more and they’re more satisfied with value for money, perhaps due to the rise in fixed fee deals. They find it less difficult to compare lawyers and are less likely to go back to the lawyer they used for their previous transaction.” All this comes with little or no increased risk to consumers of legal services to date.

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<sup>3</sup> For one of many examples of data on unmet legal needs, see 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.) (forthcoming 2015).

<sup>4</sup> See, for example, Gallup Poll Social Series: Work and Education, Jeff Jones and Lydia Saad, August 7-10, 2014 in which survey of adults ranked view of the legal field as one of only four business with a net negative perception with a rating of -9 (negative nine) (significantly more negative responses than positive or neutral); a rating which was, unfortunately, consistent over the prior 10 years of the survey. Only the oil and gas industry and the federal government scored lower.

We would like to thank the Commission for tacking this important issue and accepting comments on its Issues Paper. While each and every goal set out has great potential to effect access, we would like to focus on the following issues presented:

### **Better service.**

When the Commission asks how our profession can better serve clients of all types, one overarching theme comes to mind: **listen to what clients are asking for**. Corporate clients are, of course, looking for better rates, but they are also looking for increased efficiency and predictability. Most law firms now recognize that these demands are here to stay, but the commitment of those firms to change is dubious in the eyes of their clients<sup>5</sup>.

Likewise, access to justice for individual consumers is a complex issue. The reasons people do not go to a lawyer for help with a legal need are varied. While we often focus on cost, that alone is not the issue. Other reasons include not realizing that the issue is legal in nature, not knowing who to go to for help, or not wanting to deal with the hassle of using the traditional in-person services of a lawyer. And in many cases, the consumer simply believes that nothing can be done, so they just give up<sup>6</sup>. The unfortunate reality is that the current regulatory climate in the U.S. exacerbates each of these factors leading to non-consumption of legal services and much of the dissatisfaction with the legal services that are consumed.

A great deal has been written about the impact of lawyer regulation on pricing of legal services. Many argue that “the states’ protection of lawyers from various potential sources of competition has significantly raised the price of legal services offered by all lawyers regardless of their earnings and the size of the firm that employs them.”<sup>7</sup> Economic studies show that legal services pricing is “plausibly characterized by monopolistic competition” and leads to higher prices. Further, various state bar studies have shown that, despite the much discussed over-supply of lawyers, new attorneys have too much debt to provide affordable legal services to poor and middle class families and individuals.<sup>8</sup> With an average debt of over \$140,000 coming out of law school, it is no wonder this issue is only getting harder to grapple with.

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<sup>5</sup> See, for example, 2014: Law Firms in transition, An Altman Weil Flash Survey noting that 93.8% of survey respondents indicated that more price competition and focus on improved practice efficiency were permanent legal market trends while client respondents indicated that viewed law firms as lacking seriousness about changing their delivery model.

<sup>6</sup> See, Documenting the Justice Gap in America, Legal Services Corporation

<sup>7</sup> See, for example, Maheshri, V., Winston, C. (2014). An exploratory study of the pricing of legal services, *International Review of Law and Economics* 38 (2014) p. 170, citing Winston, C., Crandall, R. W., & Maheshri, V. (2011). First thing we do, let’s deregulate all the lawyers. Washington, DC: Brookings Institution and Gillian Hadfield, *The Cost Of Law: Promoting Access to Justice Through the (Un)Corporate Practice Of Law*, 38 Int’l. Rev. L. & Econ. 43 (2014).

<sup>8</sup> *Final Report, Findings & Recommendations on The Impact of Law School Debt on the Delivery of Legal Services*, Illinois State Bar Association, June, 2013.

While the true impact of liberalizing legal services regulations on pricing remains to be seen, early evidence from the United Kingdom is positive. In the most recent Legal Service Consumer Panel Consumer Impact Report, 67% of consumers who paid for private legal work opined that they got good or very good value for money: a significant rise during the last twelve months and since the first edition of the Consumer Impact Report in 2011 (at which time only 55% of consumers held this opinion). Further, the use of fixed fees reported increased from 38% in 2012 to 46% in 2014.<sup>9</sup> While one cannot directly attribute such shifts to the implementation of the Legal Services Act 2007, the correlation is strong. The implementation of the Act itself seems to have served as a catalyst for rethinking the way many firms offer their services and consumers have benefitted. A policy shift allowing non-lawyer ownership, firm-based authorization and outcomes focused regulation could have similar impact in the US.

At the very least, the Commission should consider further simplifying and clarifying rules around limited scope representation and unbundling legal services to allow greater use of flat fee services and provide for better collaborative efforts between consumers who may be inclined to proceed without a lawyer. Unbundling has become “a crucial step in the reduction of cost possible through remote assistance” and has been recommended as a major tool in providing access to justice in other jurisdictions.<sup>10</sup> While advances have been made in working with unbundled services, the Commission should strive to promote clarity around the rules for providing such services and, in particular, examine regulatory changes that promote the ability of lawyers to work responsibly with third-party and alternative providers to increase the potential efficiencies available in unbundling legal services.

While given less attention, perhaps more important than pricing is consumer access to information. The majority of unmet legal needs among poor individuals are rooted in the fact that the individual either a) did not realize that the matter was legal in nature; or b) did not know who to look to for help. Again, evidence suggests that current regulations impeded consumers’ ability to assess their needs and who can best help them. Specifically, “[c]onsumers’ abilities to assess a lawyer’s quality would likely improve in a more competitive market for legal services that eliminated occupational licensing because more information that bears on a legal practitioner’s competence would emerge”.<sup>11</sup>

Again, early evidence from the UK suggests that liberalization of legal services does in fact help in this area as well. More people are reporting that they had a “great deal or fair amount of choice”<sup>12</sup> in choosing a lawyer, far fewer consumers reported that they find it difficult to compare providers and an increasing number of consumers are shopping around before choosing a lawyer. These are, as the Panel states

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<sup>9</sup> Consumer Impact Report 2014, Legal Services Consumer Panel, p. 21.

<sup>10</sup> *Face to Face Legal Services and Their Alternatives: Global Lessons from the Digital Revolution* – Roger Smith and Alan Paterson

<sup>11</sup> Winston, C. (2012). Deregulate the lawyers. *Milken Institute review*, 14, Second Quarter, 38-36.

<sup>12</sup> Consumer Impact Report 2014, Legal Services Consumer Panel, p. 12.

“encouraging sign that consumers are becoming more empowered.”<sup>13</sup> In the U.S., proscriptive attorney advertising rules are confusing at best and harmful to the acquisition of consumer choice at worst. The Commission should relook issues around consumer reviews of attorneys, lawyer matching services and lead generation rules that are still far too rooted in their pre-internet era origins to serve as a useful tool for consumers today. Considering the persistence of highly disturbing statistics surrounding the accessibility of useful legal information and its likely impact on potential consumers of legal services, this should be a high priority for the Commission.

While all these changes improve access to lawyers, there may be other significant benefits in expanding the provision of legal services from alternative service providers as well. While the first steps have been taken in this arena in Washington with the introduction of Limited License Legal Technicians<sup>14</sup>, there is still a great deal to explore and information to be garnered from other jurisdictions<sup>15</sup>. More importantly, the Commission should examine ways in which lawyers can work effectively and competently with non-lawyers. Such partnerships provide a great deal of potential by allowing each party to focus on what they do best. Current rules around fee-splitting and partnerships, however, make such mutually beneficial relationships unduly cumbersome and defray much of the advantage lawyers, non-lawyer partners and consumers could all reap from them.

Of course, we need to be mindful that listening to wants and needs of consumers is just the first step. Henry Ford famously stated “If I had asked people what they wanted, they would have said faster horses.” What we need is to listen to what the consumer really wants deep down – like Ford did. He was able to look past the cry for faster horses and come up with a way to get people what they *really* wanted – a more reliable and faster means of transportation. Likewise, the profession needs to look past a cry for “cheaper lawyers” or “more *pro bono*” and instead focus on what the legal consumer really wants: predictable and cost-effective ways to understand and take care of their simple and more complex legal needs. A part of that is educating the public on what their legal needs are. Most people are unaware of the benefits and protections of the law. If we want to serve them better, we need to make the law less of a black box and make it easier to understand.

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<sup>13</sup> Consumer Impact Report 2014, Legal Services Consumer Panel, p. 17.

<sup>14</sup> See Washington Admission and Practice Rule 28(F)

<sup>15</sup> See for example, the recent licensing of paralegals in Ontario by the Law Society of Upper Canada, the use of (and proposed regulation of) McKenzie Friends in the UK and the licensing of Conveyancers in the UK. The Canadian bar has undertaken a fairly thorough assessment of similar issues recently and has a great deal of material on the topic available to the public.

## **Alternative providers and regulatory innovations.**

A number of the issues addressed above clearly touch on alternative providers and regulatory innovations. The Commission asks whether access to legal services can be improved if the pool of available providers is expanded to include people without a full law license. The answer to this is almost certainly yes. The Legal Services Consumer Panel reports that the average McKenzie friend<sup>16</sup> charges an hourly rate of 35-60 GBP<sup>17</sup>. Compared to privately-funded family law work (where many McKenzie friends assist) at 99 GBP per hour, the savings can be dramatic<sup>18</sup>. Likewise, consumers using will-writing companies in the UK were likely to pay 50-100 GBP for a single will compared 75-100 GBP for a will from a financial services provider or 100-200 GBP for a solicitor. Of course, low cost is not the only indicator of access to justice. The services must provide a quality end product as well. In this particular study, the best scores in an assessment completed by an expert panel went to the wills drafted by a bank or affiliate group followed closely by specialist will providers and solicitors<sup>19</sup>. Notably, the allowance of non-solicitor wills drafters not only brought down prices, but also improved quality.

In the US, self-help books have been around for decades, and alternative providers have served millions of consumers with typical legal needs. The Commission should consider a model that allows consumers to easily and ethically pair self-help services with the advice and consultation of a licensed attorney.

## **Ownership interest in law firms.**

Experience in other jurisdictions suggests that allowing non-lawyers to participate in the provision of legal services drives down cost, increases consumer awareness and (at times) actually improves the quality of the legal services received. There are, however, understandable concerns around the protection of consumers of legal services. We do not recommend complete deregulation of the legal services industry as there is not currently sufficient evidence that suggests the risks associated with such a shift would yield benefits warranting those risks. We do, however, believe that firm/entity-based authorization and the allowance of non-lawyer ownership do warrant serious consideration.

As noted above, there have been promising early results stemming from the implementation of the Legal Services Act 2007 in England and Wales. Further, ABS applicants are exactly the types of firms the SRA hoped would apply when they implemented the system. Nearly a third of ABSs are new entrants to the market, and

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<sup>16</sup> A McKenzie friend is a person who assists a litigant in person in court. This person does not need to be legally qualified. [http://en.wikipedia.org/wiki/McKenzie\\_friend](http://en.wikipedia.org/wiki/McKenzie_friend)

<sup>17</sup> [http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/2014%2004%2017%20MKF\\_Final.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf)

<sup>18</sup> <https://research.legalservicesboard.org.uk/analysis/supply/charging/>

<sup>19</sup> [http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/ConsumerPanel\\_WillwritingReport\\_Final.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf)

many of these firms have made significant changes related to how the business is financed and the attraction of new investment. These businesses are not just changing how they are financed, but are also exploring new ways of providing legal services with those funds. According to an SRA survey, the most common areas of investment are technology, marketing and changes to the way legal services are delivered, with over 20 percent of respondents stating that they now offer different and/or additional services to their clients. These firms are also bringing in non-lawyer partners and reaching customers online at rates far greater than traditional firms - over 90% of ABSs have an online presence vs. just over 50% of traditional firms in the UK. With this ability to provide legal services in new ways also comes the ability to offer other, related services, and with it a richer customer experience. All of these changes are good for consumers of legal services.

In addition, there is no data to suggest that entities receiving an ABS license have any greater issues with professional ethics or responsibility than lawyers in traditional practices. Similarly, no data has been reported suggesting that law firms with non-lawyer partners in Washington DC experience greater issues in compliance with professional ethics. In fact, experience in Australia suggests that firms forced to conduct a self-assessment for compliance with entity-based regulation are actually the subjects of fewer client complaints<sup>20</sup>. While ABSs in the UK are still in their infancy, the experience to date suggests that similar results are coming to fruition there.

External investment into law firms is a prerequisite to innovation. The current model of 100% attorney ownership in a partnership structure provides very little incentive to actually invest and innovate. This is especially true among the solo and small law firm, where deep investment often yields to making mortgage payments, saving for a child's education and even retaining revenue for leaner times. Deep investment around systems, software and knowledge management – which all have the potential to make the small firm more efficient at providing services to the underserved – are the tools of investors, not partners. If the Commission is serious about developing new models, then it must consider the benefit of outside investment to the consumer, and not just focus on the potential for ethical problems. With entity-based regulation, the organized bar can ensure high quality and ethics while still allowing investment into a solution that takes care of the needs of the underserved.

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<sup>20</sup> Tahlia Gordon, Steve A. Mark, and Christine Parker, "Regulating Law Firm Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in NSW", J.L. & Soc. (2010), Legal Studies Research Paper No. 453.

**Insights from other fields.** What insights might the legal profession gain from innovations in other professions, industries, or disciplines? While there are several that come to mind, we would like to focus on two – medicine and aviation.

Insights from Medicine. The practice of medicine, like law, requires great attention to detail and a steady ethical compass. When we look at how medicine is practiced, and how that practice has evolved over the last several decades, a comparison to law is easy to envision. When you think of the choices in receiving medical services, there are a myriad of options, from self-help (like a drug store or a pharmacy) to limited telephone advice (like many health plans offer) to non-professional services (like getting a vaccination or flu shot) to simple minute clinics staffed primarily with “non-doctors” to full-service clinics and large hospitals with trauma centers. The medical industry has a service continuum that can work for most patients.

Think about the last time you went in for a medical checkup, or maybe to see if you had more than just a common cold. There were undoubtedly a number of medical service providers that helped you on your path before you saw a physician (if you saw one at all). Who takes your temperature, weight and blood pressure? Not a doctor. Who takes x-rays, or draws blood samples? Generally, not a doctor. At times, complex advice and recommendation can even come from a nurse practitioner or a physician’s assistant. For those times when a doctor does provide the advice, it is typically just a few minutes of his or her time – the whole process is made more efficient because other “non-doctors” (clinicians, lab technicians, nurses, and assistants) have all been allowed to do their jobs – all with a goal of assisting the physician and allowing him or her to practice more efficiently. And at times, these other providers may help the patient determine that a trip to the physician is not even necessary.

In addition, the medical profession has benefited from the use of standardized procedures and checklists when it comes to many procedures. While some firms might have intake forms and some standards for service delivery, we should look to medicine for insights into how we can increase our service levels without adding unnecessary costs. The book *The Checklist Manifesto* does a great job of laying out the benefits of professionals banding together and coming up with best practices and allowing those practices to be replicated throughout an industry.

In the past when we have heard others in our profession make the analogy of law to medicine, it is not generally in a positive way. Instead, the analogy is used as a warning against self-help or to non-attorney providers of legal services; the equivalence of doing a simple legal document with performing brain surgery on one’s self. While there are many complicated legal issues that arise, we have to understand that there are also some simple and highly-repeatable legal solutions that do not require a “bespoke” solution. Not all medical procedures are brain surgery, and not all legal services are complex.

Of course, law and medicine are different, so there is only so much an analogy can do. But one thing we would like to call the Commission’s attention to is what is referred to in



the business world as “the tone at the top.” When we take a look at the medical profession, it has largely embraced alternative providers and recognized the benefit that they bring to consumers of medical services. When corner drug stores started giving flu shots, we didn’t see state medical boards or the AMA suing or blogging about the “unlicensed practice of medicine.” Instead, we know one simple truth; that when more people are vaccinated against the flu, the population is healthier and more protected from sickness.

One other insight is the way that medicine is embracing new technologies, like predictive and cognitive computing (the most well-known is IBM’s Watson). In the same way that the medical profession is just starting to benefit from these software systems, we need to be prepared to accept them into law. We know that this type of computing is coming to law,<sup>21</sup> and our profession should be looking at how we can best use this technology to further bridge the justice gap.

Insights from Aviation. While the medical profession has deep correlation to legal practice, there are other areas that are less obvious. Consider how air travel has changed. At one time it was considered a luxury in the same way that many think of law. Only the rich could truly benefit. With the addition of low-cost airlines, and more specifically, with the advent of the regional carrier, we see more and more people – the formerly underserved – able to take to the skies and travel.

We all know that Southwest Airlines was a true pioneer in delivering air travel to the masses. The strategy of its founder, Herb Kelleher was not to go after the business of other airlines, but to look at the bus, car and train traveler, and provide those travelers an affordable option to fly. He standardized his aircraft and procedures and removed the frills that most passengers didn’t want to subsidize. The result was a revolution in air travel. With 85% of legal needs going unmet, a great deal of our focus as a profession should be on those who are not yet consuming our services. We should be asking why that is and how what changes could open up the much discussed latent market for legal services.

Also, with the rise of more long-haul aircraft in the 1960s and 1970s, the regional airline industry evolved. From the small, loud propeller aircraft with a no-brand carrier, they now exist as distinct sub-brands of most major carriers and fly sophisticated regional jet aircraft. The take-away here is not about the plane or the passenger, but about the pilot. According to the Air Line Pilots Association, as cited in the BLS 2010 Occupational Outlook Handbook, a captain for a regional airline earns approximately \$55,000 per year, while at a major airline they average approximately \$135,000 per year.<sup>22</sup> The interesting fact is that the aviation license that both pilots have is basically identical! Many had the same training, the same background, and the same opportunities. The only difference is really their career path and sometimes a bit of luck in how they progressed through the ranks.

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<sup>21</sup> <http://www.americanlawyer.com/id=1202664266769/Emerging-Technology-Shapes-Future-of-Law?slreturn=20141119165724>

<sup>22</sup> <http://work.chron.com/airline-pilot-salary-comparison-7917.html>

The insight for law is really what to do with the number of attorneys that are unemployed or under-employed right now. Many of these lawyers would jump at the chance to make a decent living serving clients instead of waiting around for the traditional Biglaw market to bounce back. But they are being held back by staggering law school debt, a lack opportunity, experience and resources to start their own business, and most of all, no real business model that will allow them to work in a collective environment where their main job is just providing legal advice and consultation (as opposed to marketing, accounting, branding and making rain for their practice). In a model operated by a business entity, like the one described above, there would be another model for lawyer employment.

### **Conclusion.**

The legal profession in the US has held itself out as incapable of change for far too long. When viewed in the context of the efforts of other jurisdictions and industries it is disheartening to see how little progress we have made in tackling the issues in our paradoxical market that somehow manages to be both underserved and oversupplied. There is good news in the fact that we now have more data to go on from these outside sources and more technological and entrepreneurial potential than anywhere in the world. The time to act and enable change is now. Our profession and the people who depend on it deserve nothing less. We are encouraged that the ABA and this Commission have taken up the mantle of change and we are confident that new models will be developed, implemented and succeed.

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<sup>23</sup> The opinions expressed herein are those of the authors and may not represent the views of any affiliated organization.