

AMERICAN BAR ASSOCIATION

**STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES
STANDING COMMITTEE ON LAWYER REFERRAL AND INFORMATION
SERVICES**

**STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
STANDING COMMITTEE ON PARALEGALS**

**SPECIAL COMMITTEE ON HISPANIC LEGAL RIGHTS &
RESPONSIBILITIES**

COMMISSION ON INTEREST ON LAWYERS' TRUST ACCOUNTS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges courts and other governmental
- 2 entities, bar associations, non-profit organizations and entrepreneurial entities that make
- 3 forms for legal services available to individuals through the Internet to provide clear and
- 4 conspicuous information on how people can access a lawyer or a lawyer referral service
- 5 to provide assistance with their legal matters to prevent errors or omissions.

REPORT

This resolution is designed to expand access to legal services that are provided by lawyers in an affordable manner to those who are otherwise attempting to address their legal matters without the assistance of a lawyer and may otherwise not understand the value of the lawyer's role in providing that assistance.

Self-help legal resources first emerged 50 years ago with the publication of a book entitled "How to Avoid Probate," which helped guide people through a complicated legal system in New York on their own.¹ In the 1970s, Nolo Press emerged as a self-help legal publishing house, first providing do-it-yourself books in California and then on a national basis. The Standing Committee on the Delivery of Legal Services first charted the trend toward self-representation 30 years ago. Researching both divorce and bankruptcy cases in Maricopa County, Arizona, the Committee documented the increases in self-representation in those matters. Self-help divorces nearly doubled over six years. In 1980, 24 percent of divorce cases proceeded pro se. By 1985, that number had grown to 47 percent. Self-help bankruptcy, on the other hand, was limited, increasing from seven percent to 11 percent over that time.²

A 1992 report from the National Center for State Courts examined the incidence of divorce cases with and without lawyers in 16 US cities. In seven of those cities, at least a third of the cases proceeded without a lawyer representing either party. In none of the cities were both parties represented by a lawyer in more than half the cases.³ In the 25 years since then, domestic relations matters have transitioned from those that are primarily lawyer represented to those that are primarily self-represented. Self-representation has also increased in other areas of the law, but less substantially.

A 1998 report from the American Judicature Society and State Justice Institute speculated on the reasons for the rise of pro se litigation, including:

- Anti-lawyer sentiment;
- The cost of litigation;
- The growth in "do-it-yourself" law businesses;
- The breakdown in social institutions;

¹ Meeting the Challenge of Pro Se Litigants, American Judicature Society and the State Justice Institute, 1998, at 10-11.

² A Report on Self-Help Law: Its many perspectives, Cox and Dwyer, ABA Standing Committee on the Delivery of Legal Services, 1986, at 34.

³ Divorce Courts: Case Management, Case Characteristics, and the Pace of Litigation in 16 Urban Jurisdictions, National Center for State Courts, 1992, at 48.

- Cuts in governmental legal services appropriations; and
- Improved “customer service” by the courts.⁴

Another perspective suggests the determination of whether a person proceeds with a lawyer or through self-representation focuses on the specific types of matters and identifies the factors as:

- Affordability;
- Value;
- The complexity of the matter; and
- The consequences, including whether the outcome is with prejudice.⁵

The increased incidence of self-representation, particularly in family law matters, led to responses from various stakeholders. Based on the research from the ABA Standing Committee on the Delivery of Legal Services in the 1980s and 1990s, the district court in Maricopa County, Arizona, first dedicated a court clerk to specifically assist self-represented litigants. This model of dedicated clerks was then adopted by courts in California and Washington State. The Maricopa County court did not find this resource to be sufficient to meet the needs of self-represented litigants and subsequently redesigned a portion of its public law library to create the nation’s first court-based self-help center. The center included legal forms, how-to-do-it instructions, access to legal aid lawyers for those who qualified and folders with resumes of mediators and lawyers who were experienced in unbundled legal services. The center opened shortly before the Internet became a widely available resource and all of the documents were paper-based. That has, of course, evolved to a point where court forms and related materials are widely available online. Over the past 20 years, the self-help center model has been adopted in approximately 500 venues and serves about 3.7 million users annually.⁶

As noted above, the American Judicature Society report indicates that self-representation may have increased in part as a result of the growth in do-it-yourself law businesses. This may be a cyclical circumstance where do-it-yourself businesses have grown as a result of the increases in self-representation. Regardless of the cause and effect, these businesses, which began with self-help books in the 1960s, evolved into software and now fundamentally provide services via the Internet, have proliferated in the past 20 years.

⁴ Supra note 1.

⁵ Defining the Role of Lawyers in Pro Se Litigation, *The Judges’ Journal*, Fall 2002, at 7.

⁶ Self-Help Center Census: A National Survey, ABA Standing Committee on the Delivery of Legal Services, 2014.

In addition, lawyers have adapted their delivery model to include limited scope representation, or unbundled legal services, in order to recapture a portion of that market that has been proceeding on a pro se basis.⁷ Nearly half of solo and small firm lawyers – those most likely to provide personal legal services – offer their services on an unbundled basis.⁸ Consequently, some of those who may appear to be self-represented litigants in fact receive assistance from a lawyer to the extent the litigant desires.

Seemingly, no single factor has done more to change the dynamics of the delivery of personal legal services in general and self-representation in particular over the past 20 years than technology overall and the availability of the Internet specifically. While the legal profession frequently associates technology with entrepreneurial endeavors that provide online forms and document preparation for fees, the Internet is also the conduit for distribution of legal forms and information by courts, other governmental entities such as state secretaries of state and attorneys general and federal agencies, bar associations, and non-profit organizations.⁹

Both long-established and recently-emerging authorities recognize that legal matters that seem to be straight-forward can have complex twists as a result of the specific factual circumstances and therefore legal matters that a computer has the technological capacity to accomplish can benefit from the scrutiny of a lawyer.

Texas amended its definition of the practice of law in 1999 to specifically preclude materials distributed on the Internet as long as those materials “clearly and conspicuously state that the products are not a substitute for the advice of an attorney.”¹⁰

⁷ See ABA Resolution 108 (February 2013) indicating the ABA’s support for unbundled legal services, at http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_d el_unbundling_resolution_108.authcheckdam.pdf

⁸ 2015 American Bar Association Legal Technology Survey Report, Vol. 4, Ed. Josh Poje, ABA Legal Technology Resource Center, 2015, at xii.

⁹ See, for example, Can Robots Replace Lawyers? Computers, Lawyers and the Practice of Law, Remus & Levy, Dec. 30, 2015, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2701092, where the authors write extensively about commercial vendors that provide online legal forms, but make no mention of similar forms provided by courts, governmental entities, bar associations or non-profit organizations.

¹⁰ Section 81.101(c) of the Texas Government Code states, “(c) In this chapter, the ‘practice of law’ does not include the 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. This subsection does not authorize the use of the products or similar media in violation of Chapter 83 and does not affect the applicability or enforceability of that chapter.”

A 2015 consent judgment in North Carolina determined that an online document vendor was not providing legal services in violation of the unauthorized practice of law provisions in the state if it met a series of conditions, including one requiring the vendor to “communicate to the North Carolina consumer that the forms or templates are not a substitute for the advice or services of an attorney.”¹¹

While these authorities clearly indicate it is in the public interest to require commercial vendors to inform potential customers that those customers may benefit from the advice of a lawyer, no requirements exist nor encouragement extended to help people who are using online legal documents from any source to find a lawyer.

The Standing Committee on the Delivery of Legal Services has reviewed self-help resource and online forms from the judiciaries of every state, from the secretaries of state offices of every state and from a sampling of federal agencies. These sites vary considerably in terms of their layout, content and navigation, presumably as a result of the organic nature of the emergence of the Internet and limited use of uniform templates. Critically, they vary substantially in their assistance to users who may benefit by being able to access the services of lawyers to the matters those users are pursuing.

The state self-help materials from the judiciaries fall into five categories:

- A few states provide forms but no disclaimers, no advice about the benefits of obtaining counsel and no linkage to additional resources.
- Other states provide disclaimers in an effort to limit their responsibilities when users rely on their information and forms, with nothing more. For example, one state indicates: “[Court] presents this information without warranties, express or implied, regarding the information's accuracy, timeliness, or completeness. Use of the information is the sole responsibility of the user.”
- A few states take another step and inform the user that the site “cannot replace the advice of competent legal counsel licensed in the state” or that they may benefit from the assistance of a lawyer, but the sites do not provide the user with linkage to further resources.
- Most states provide users with resources for additional help. These include law librarians, self-help centers, legal aid offices and lawyer referral services. In some states this information is conspicuous, but in others it is obscure, particularly for the consumer who is not familiar with legal issues. For example, in one state, the user must go to the “self help” tab at the top of the page of the court’s website, then to the “self help center” tab on the left-hand navigation bar, then to the “lawhelp.org” tab on the left-hand navigation bar, then to the “legal assistance”

¹¹ LegalZoom.com, Inc. v. N.C. State Bar, 2015 NCBC 96

tab at the top of that page. Notwithstanding the good intentions of these courts, it is unlikely novice consumers will be able to navigate sites with code words or trade terms such as “lawhelp” when they may be looking for a tab that simply states, “find a lawyer.”

- The fifth category employed by state court websites to help those who come to their self-help resources is uncommon. It involves an explanation of the importance of consulting with a lawyer, along with conspicuous linkage. For example, the Court Assistance Office of the State of Idaho Judicial Branch states¹²:

When should I consider talking to an attorney?

The materials and assistance you receive on this web site or in your local Court Assistance Office are no substitute for talking with a lawyer. Laws and court rules are very complex. Consequently, keep in mind, even if you follow the instructions provided and use our forms you are not guaranteed to win your case.

The materials on this site are meant to help you educate yourself through the process. It is always advisable to talk to a lawyer before proceeding on your own, especially if your situation is complicated or you expect difficulties. Visit the [Idaho State Bar Lawyer Referral Service](#) to find a lawyer.

Some governmental sites provide similar narratives. For example, the US Patent and Trademark Office website includes this statement¹³:

¹² At <http://www.courtsselfhelp.idaho.gov/>

¹³ At <http://www.uspto.gov/trademarks-getting-started/using-legal-services/do-i-need-trademark-attorney>

Do I Need a Trademark Attorney?

WARNING: While an applicant *can* file his or her own trademark application, and while these videos highlight aspects of the filing process, attorneys (not associated with the USPTO) who are familiar with trademark matters represent most applicants. Some trademark owners may have valid and protected trademark rights that do not result from federal registration with the USPTO, and those marks may **not** appear in the USPTO's Trademark Electronic Search System (TESS) database. Before ever filing a trademark application, a trademark attorney can conduct a more comprehensive search for potential problems with your use of a proposed mark than you will be able to conduct in TESS. The attorney then can counsel you regarding use of the mark, recommend whether to file a trademark application, and advise you on your likelihood of success in the registration process.

The filing of a trademark application begins a legal proceeding having many legal requirements and strict time deadlines. Not all applied-for trademarks register, and filing fees are not refunded. Whether you ultimately proceed on your own behalf or a trademark attorney represents you, all substantive and procedural requirements of the Trademark Act and Trademark Rules of Procedure must be met. Should you wish to consult an attorney, you can find the names of attorneys who handle trademark matters in telephone listings or by using the attorney referral service of a state bar or local bar association (see [American Bar Association Lawyer Referral Directory](#)¹⁴). The USPTO cannot aid in the selection of an attorney, nor can the Trademark Assistance Center provide any legal advice.

On the other hand, the US Bankruptcy Court provides online forms, including one for the voluntary petition for individuals filing bankruptcy. That form includes a provision, which must be acknowledged and signed, that states, in part, “The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified lawyer.**”

Yet, neither the form nor the web page from which it is launched provide viewers with any direction on how to obtain a lawyer or any linkage to lawyers who are qualified to provide these services.¹⁴

In addition, a review of the state secretaries of state websites shows that every state provides consumers with the opportunity to fill out and/or file articles of incorporation online. Some states provide FAQ's or instructional information, but no state provides people with direction on obtaining assistance from a lawyer or linkage that helps people find one.

Selecting, completing and filing forms online can be convenient and efficient for consumers. However, the consequences of making a mistake - of selecting the wrong form, of providing the wrong or incomplete information, of failing to properly follow

¹⁴ At <http://www.uscourts.gov/forms/individual-debtors/voluntary-petition-individuals-filing-bankruptcy>

through – can be grave. Sometimes these mistakes become readily obvious, where, for example, the litigant attempts to file inappropriate or mistaken forms for a divorce. Other times, the errors can lay dormant for long periods. The owner of an improperly formed corporation may not realize the problem until efforts are made to sell or dissolve the company or to become involved in litigation. Of course, an improperly or insufficiently executed will is not likely to be discovered until the testator has died and the estate is executed or challenged. Leaving decision-making about which form to use or what information to provide to the novice consumer with limited guidance on obtaining additional resources creates substantial risks on an unparalleled scale.

To illustrate this scale, recent research conducted by the American Bar Foundation shows that a substantial portion of people with justiciable problems are likely to turn to self-help remedies. Nearly half of those with legal matters (46 percent) indicated they address problems through self-help, while only 15 percent turn to an advisor or representative.¹⁵ Put another way, three times the number of people pursue their legal matters through self-help than through an advisor of any nature.

As the 1986 report from the Standing Committee on the Delivery of Legal Services concludes, “Self-help law is here to stay.”¹⁶ Yet, we have evolved to a point where self-help does not, and should not, be at the total exclusion of a lawyer. Unbundled legal services expand the affordability for those who pursue legal matters fundamentally on their own and enable those consumers to get just the resources they need as they make decisions about which forms to use, what information to provide and how to follow up for the necessary compliances.

We note here that the selection of a lawyer is an important decision. In some circumstances, those who seek a lawyer may not be best served by simply turning to a lawyer or referral service provided by a document provider. Those who seek a lawyer should conduct their own research to determine the lawyer is competent to represent the document user for a particular matter, the lawyer is independent and complies with the obligation of fidelity to the client, and the lawyer provided by a referral service has been vetted to determine his or her qualifications.

The creation of pipelines to lawyers or referral services through clear and conspicuous links from online self-help materials generated by those in all settings can improve access to affordable and trusted personal legal services in ways that are designed to limit the risk of errors that may have catastrophic consequences to the consumer. In creating such pipelines, efforts should be made to broaden access by following the ABA Standards for

¹⁵ Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study, Sandefur, American Bar Foundation, 2014, at 12, at. http://www.abajournal.com/files/sandefur_accessing_justice_in_the_contemporary_usa_aug2014.pdf

¹⁶ Supra note 2, at 71.

Language Access in Courts, adopted by the ABA House of Delegates at the 2012 Midyear Meeting.¹⁷

Respectfully Submitted,

William T. Hogan III, Chair
Standing Committee on the Delivery of Legal Services

August 2016

¹⁷ At http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on the Delivery of Legal Services

Submitted By: William T. Hogan, III, Chair, Standing Committee on the Delivery of Legal Services

1. Summary of Resolution(s). This resolution calls upon courts and other entities that provide online legal forms that are accessible by those who are self-represented to include clear and conspicuous direction on how those form users may gain access to a lawyer to provide them with assistance with their legal matters. Given the scope of self-representation and the complexity of legal matters, the resolution will enable people to have better access to the information necessary to properly complete legal forms and move forward with the resolution of their legal matters in a cost-effective manner.
2. Approval by Submitting Entity. The Standing Committee on the Delivery of Legal Services approved of this resolution on February 6, 2016.
3. Has this or a similar resolution been submitted to the House or Board previously? No
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

Resolution 108, passed by the House of Delegates at the 2013 Midyear Meeting “encourages practitioners, when appropriate, to consider limiting the scope of their representation, including the unbundling of legal services as a means of increasing access to legal services.” The resolution advances unbundled legal services.

Resolution 108, passed by the House of Delegates at the 2014 Annual Meeting “urges national, state, local and territorial bar associations and foundations; courts; law schools; legal aid organizations; and law firms to create and advance initiatives that marshal the resources of newly-admitted lawyers to meet the unmet legal needs of underserved populations in sustainable ways.” The resolution advances access to underserved populations through the use of newly-admitted lawyers who are providing unbundled legal services.

Resolution 113, passed by the House of Delegates at the 2012 Midyear Meeting adopted the ABA Standards for Language Access in the Courts. The Standards assist in creating language access services making the system of justice more fair and accessible.

5. If this is a late report, what urgency exists which requires action at this meeting of

the House? N/A

6. Status of Legislation. (If applicable) N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Implementation will involve three methods. First, the sponsors will reach out to organizations of entities that provide online legal documents, including the courts and other governmental units and bar associations, and encourage them to advocate for the implementation of the policy with their constituents. Second, the sponsors will reach out to secondary sources and advance use online legal documents, such as self-help centers, and encourage their advocacy for necessary changes. Finally, the sponsors will create and circulate examples of those entities that advance the use of lawyers and provide clear and conspicuous links to those resources.
8. Cost to the Association. (Both direct and indirect costs) No direct costs will result from this policy. Indirect costs will be from volunteer and staff resources that already exist within the ABA. No additional indirect costs will be incurred.
9. Disclosure of Interest. (If applicable) None
10. Referrals. The resolution has been circulated to the following entities, seeking their insights:
 - Standing Committee on Lawyer Referral and Information Service
 - Standing Committee on Group and Prepaid Legal Services
 - Standing Committee on Legal Aid and Indigent Defendants
 - Standing Committee on Pro Bono & Public Service
 - Standing Committee on Legal Assistance for Military Personnel
 - Commission on Homelessness & Poverty
 - Solo, Small Firm and General Practice Division
 - Law Practice Division
 - Section of Family Law
 - Business Law Section
 - Section of Real Property, Trust and Estate Law
 - Judicial Division
 - Standing Committee on Ethics and Professional Responsibility
 - Standing Committee on Specialization
 - Standing Committee on Professional Discipline
 - Standing Committee on Professionalism
 - Standing Committee on Client Protection
 - Standing Committee on Bar Activities and Services
 - Committee on Disaster Response and Preparedness
 - Young Lawyers Division

Law Student Division
Standing Committee on Paralegals
Standing Committee on Technology & Information Systems
Commission on Domestic & Sexual Violence
Commission on Interest on Lawyers' Trust Accounts
Commission on Immigration
Commission on Sexual Orientation and Gender Identity
Section of Dispute Resolution
Government and Public Sector Lawyers Division
Section of State and Local Government Law
Forum on Affordable Housing and Community Development Law
Commission on Hispanic Legal Rights & Responsibilities

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Will Hornsby
Staff Counsel
ABA Standing Committee on the Delivery of Legal Services
321 N. Clark Street
Chicago, IL 60654
312/988-5761
will.hornsby@americanbar.org

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

William T. Hogan, III
Nelson Mullins
1 Post Office Sq., 30th Floor
Boston, MA 02109-2106
617/573-4701
bill.hogan@nelsonmullins.com

EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls upon courts and other entities that provide online legal forms that are accessible by those who are self-represented to include clear and conspicuous direction on how those form users may gain access to a lawyer to provide them with assistance with their legal matters. Given the scope of self-representation and the complexity of legal matters, the resolution will enable people to have better access to the information necessary to properly complete legal forms and move forward with the resolution of their legal matters in a cost-effective manner.

2. Summary of the Issue that the Resolution Addresses

Courts and other governmental entities, bar associations, non-profit organizations and entrepreneurial entities are providing online legal documents that enable self-represented people to advance their legal matters. Often the sites providing these materials do not offer users the information or resources necessary to enable them to be assured they are proceeding in a proper manner. Even when links are provided to resources such as lawyer referral services, those links are often not conspicuous, limiting the ability of users to find lawyers who would be able to assist them.

3. Please Explain How the Proposed Policy Position will address the issue

Urging entities that provide online legal documents to include clear and conspicuous links to lawyers provides a pipeline to those who have doubts about their decision-making when attempting to use the forms. At the modest end, the policy enhances the convenience of those making use of the forms and expands access to affordable legal services. At an outer end, the policy will protect consumers of legal services from mistakes they may make that would undermine their efforts and lead to adverse consequences.

4. Summary of Minority Views

The Section of Family Law states that it was not consulted in the development of the solutions included in this Resolution. The Section opposes the Resolution and Report in their present form and urges their withdrawal at this time. The Section believes that the Resolution and Report fail to address many issues specific to the needs of and dangers to the public in decision-making and drafting of documents with legal consequences in family law cases.