To: The ABA Commission on the Future of Legal Services

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

Re: Issues on the Future of Legal Services

Date: December 20, 2014

I write as chair of the Standing Committee on the Delivery of Legal Services in response to the Commission’s issues paper and request for input. The Committee appreciates the opportunity to share its pertinent work and provide insights and further assistance to the Commission in all ways that may be helpful to the Commission.

The mission of the Committee is to maximize access to legal services and justice for moderate-income people, who do not qualify for legal aid or pro bono services, yet may lack the discretionary resources for full traditional legal services. The Committee originated in the 1970s as a special committee to examine the phenomenon at that time of legal clinics and expanded its role soon after to identify, advance and evaluate the variety of innovations designed to expand access for those with personal legal needs. In 1991, the special committee became a standing committee in order to address its mandate on an on-going basis.¹

This memo examines issues of affordability and value, engagement, uses of technology, and policy and regulatory concerns. Although some matters draw from research and analysis pertaining to the poor, please keep in mind our focus here involves those of moderate and modest means, sometimes referred to as the gap population. However, nothing in this memo should distract from the fact that 60 million people in the US live at or near the federal poverty guidelines and must depend on subsidized legal services to address the majority of their legal needs.

A. Affordability

The popular press and, to some extent, the legal profession tend to advance the notion that legal services for those of moderate incomes are inaccessible because they are unaffordable. For example, last spring The Atlantic ran an article with the headline, “Is there such a thing as an affordable lawyer?” The first sentence read, “One of the most perplexing things about our perplexing legal market is its failure to provide affordable

services to just about anyone but rich people and corporations.” The article focuses on hourly billing and high retainers, ultimately touting Rocket Lawyer and LegalZoom as the affordable options.²

There is no question that legal fees for complicated matters that are billed by the hour can be out of reach for many. However, the average annual household income in the US is about $50,000 and for a vast portion of personal legal services, fees are reasonable and affordable for those of moderate and modest means. Consider the compensation models for personal legal services.

First, contingency fees are a widely used alternative to hourly fees. The lawyer is only compensated if and when the matter results in a settlement or an award. People may conclude that their lawyer’s services are expensive, often being a third or more of the outcome, but those expenses are inherently affordable. Contingency fees are the norm for car accidents, slip and fall cases, malpractice, workers compensation and discrimination matters. Contingency fees are also found in niche legal matters like real estate tax appeals. Policy considerations prevent the use of contingency fees for domestic relations and criminal matters.³ However, contingency fees can be broadened into other practice areas and can be used in creative ways, mixed with other billing arrangements, such as a contingency applied against a minimum set fee. In some circumstances, litigation financing, either through the lawyer or third-parties, is available so that clients do not need to advance the expenses of the litigation.

Second, fee-shifting statutes and rules enable people to obtain representation for legal issues ranging from eviction defense, domestic relations matters, individual education plans and lemon law claims. Law practices built around fee-shifting are featured in the Committee’s book Reinventing the Practice of Law.⁴ The Committee believes there are hundreds of legal authorities that enable fee-shifting and plans to research and report on those statutes in an effort to encourage lawyers to pursue those cases.

Third, representation in many other matters is provided at affordable fixed fees. Fixed fees are common, if not the norm, in DUI and misdemeanor defense, immigration representation, debtors representation in Chapter 7 Bankruptcy, intellectual property issues, estate planning and document preparation and real estate transactions. In real estate conveyances, people who are selling their homes are often paying realtors tens of thousands of dollars on a commission of five or six percent, while the cost of the lawyer who advises them, assures that everything is in order and prepares the documents is often a few hundred dollars.

Next, lawyers in various settings offer a variety of reduced fee options. Millions of people are eligible to participate in prepaid or group legal insurance plans. These plans often cost less than $20 per month. Employees often arrange for the costs to be directly deducted from their pay. Plan participants can obtain a lawyer in their area, receive some common services, such as estate plans and consultations, at no charge and receive discounts on other legal matters.⁵

² http://www.theatlantic.com/business/archive/2014/05/is-there-such-a-thing-as-an-affordable-lawyer/371746/
³ ABA Model Rule 1.5(d), at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees.html
⁴ http://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productld=217246
⁵ http://www.americanbar.org/groups/group_prepaid_legal_services.html
more are eligible for non-profit lawyer referral service modest means programs, often offered through bar associations. Participating lawyers offer their services to those with incomes below specified levels at reduced rates. Some panels ask the lawyers to reduce their hourly rates, abide by set fees or cap the cost of particular legal matters.6

Limited scope representation, or unbundled legal services, is another model that results in reduced fees, making legal services more accessible. Unbundling emerged in the 1990s as an option for those willing to provide some portion of their legal tasks. As pro se litigation became more commonplace, unbundling emerged as a option where the DIY litigant could obtain necessary legal assistance at a more cost-effective price. In 2002, the ABA Model Rules of Professional Conduct were amended to explicitly condone limited scope representation when the client gives informed consent and the lawyer determines the limited scope to be reasonable under the circumstances.7 In 2010, the ABA conducted research that demonstrated that 70 percent of the general population was unaware of the concept of unbundled legal services, but that two-thirds of those surveyed would want to discuss unbundling as an option when addressing a legal matter with a lawyer.8 In 2013, the ABA House of Delegates approved a resolution calling on stakeholders to advance unbundling as an option and to create greater awareness of it as a method that enable more people to obtain affordable legal services.9 According to the 2014 ABA Legal Technology Survey Report, nearly half of solo and small firm practitioners provide unbundled services.10

Another option reduced fee option involves non-profit sliding-scale co-pay clinics. These small law firms accept clients with incomes above the federal poverty guidelines, but below a set percentage, such as 250 or 300 percent of the guidelines. Individuals are charged according to a sliding scale based on their incomes. Both unbundled legal services and non-profit co-pay clinics are also featured in Reinventing the Practice of Law.11

Lawyers serving those of modest means in the private sector also frequently offer various types of payment plans. Some enter into monthly payment plans. Some accept credit cards. Those representing debtors in Chapter 13 discharges include their costs as part of the debt that is repaid each month.

Many people obtain representation without additional costs as part of their insurance policies. Those who are sued as the result of a traffic accident are represented by a lawyer who is compensated by the driver’s insurance company. Similarly, those sued by a visitor who is injured

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6 http://www.americanbar.org/groups/lawyer_referral/resources/clearinghouse/modest.html
9 http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_resolution_108.authcheckdam.pdf
10 47% of solo practitioners and 43% of those in firms of 2 to 9 lawyers report providing unbundled services. 2014 ABA Legal Technology Survey Report, at IV-xii.
at a person’s home or business are provided a lawyer from their insurance. Sometimes those accused of malpractice have insurance that provides them with a lawyer.

Finally, people frequently have their legal dispute resolved or legal matters addressed through various forms of governmental services. For example, state attorneys general often bring consumer fraud complaints against businesses that result in relief, if not compensation, for victims of fraud. Victims of domestic violence often obtain orders of protection through the actions of district attorneys’ offices.

While these are narrow issues, various governmental entities are providing an array of both bricks and mortar and online legal services and resources. State secretaries of state provide online assistance for those interested in obtaining articles of incorporation and similar business start-up legal needs. State courts are providing online forms and information on a variety of legal matters. The Committee is in the process of searching the extent of these resources. In addition, self-help centers in courts and libraries have emerged to provide free legal services. The first self-help center was created in Maricopa County, Arizona in the early 1990s. In 2014, the Committee estimates there were over 500 centers across the US, serving nearly 3.7 million people per year.  

In addition, non-profit entities designed to serve the legal needs of the poor are providing online document preparation to millions of people regardless of their incomes. These free services are similar to those that are sold for hundreds of dollars by vendors of legal services.

Taking all of these alternative models of compensation into consideration, it is quite likely that the billable hour is the minority method of payment for legal services for those of moderate and modest incomes. The 2014 ABA Legal Technology Survey, for example, reports that hourly fees make up only 51 percent of the fees of solo practitioners, but 89 percent of the fees of firms with 500 or more lawyers. Since some portion of solo practitioners serve the corporate sector, we can anticipate that those lawyers are more likely to charge hourly fees and therefore those providing personal legal services are more likely to charge in alternative ways.

Regardless of the supposition, two things are clear. First, many, if not most of those of moderate and modest means have access to legal services through affordable modalities. Second, regardless of the costs of legal services, people must make decisions based on the value of those services. The value of legal services is measured by the outcome divided by the cost (Value = Outcome/Cost). When the outcome is financially tangible, this equation is straight-forward. Does the outcome exceed the cost, with all factors considered? On the other hand, outcomes for legal matters are not always financially tangible, such as child custody, the preservation of a driver’s license or even avoidance of jail time. Nevertheless, we should shift the conversation away from the “affordability” of legal services and toward the value people stand to gain. This shift is integral to the engagement of legal services, which is discussed next.

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13 See, for example, Illinois Legal Aid Online, at http://www.illinoislegalaidonline.org/ and LegalHelp.org, at http://www.lawhelp.org/
14 Supra note 10.
B. Engagement

When we predicate our solutions to improving access to legal services on the presumption that those services are unaffordable, we misdirect our resources from solutions that are better applied to increasing engagement. The research clearly indicates the crisis involves the recognition, or lack of recognition, by people that their problems have legal solutions and decisions need to be made determining when it is of value for people to pursue those solutions.

People often site legal needs studies to demonstrate that large portions of poor and moderate income populations cannot afford legal services. However, a closer look at those studies show that there is a variety of reasons people do not turn to the justice system or lawyers when facing a problem that has a legal solution. The Legal Services Corporation’s Justice Gap Report looks at state legal needs surveys from the mid-2000s and summarizes the reasons why people with legal problems did not pursue them. Keeping in mind these are surveys of the poor, concerns about costs were rarely at the top of the lists and sometimes did not even surface. People did not pursue their legal problems because they thought nothing could be done, that they could handle the problem on their own, it was just the way things are or that they did not know where to go for help.\(^\text{15}\)

The American Bar Foundation has completed more recent research that includes people from all economic strata in a single Midwestern mid-size city. Extensive interviews probed problems but did not cast them as legal matters. Only 15 percent of those with a civil justice situation turned to an advisor for help and only eight percent turned to a lawyer. One out of 11 people with a legal issue took that issue to a lawyer. Forty-five percent of the people said there was no need for advice. Twenty-five percent said that seeking help would not make any difference and only 18 percent reported that it would cost too much.\(^\text{16}\)

Research showing that high percentages of justiciable issues are not addressed through the legal system has been consistent over more than 20 years. The most common reactions to these problems are to ignore them or address them without outside assistance. What we do not know is the extent to which the actions people take are appropriate to resolve the issues. Clearly people suffer injustices when the value of a formal resolution is not justified. However, we do not know the dimension of this situation. As a result, we need to do two things. Instead of concluding that the legal profession is not doing its job because a high percentage of people do not use the courts or lawyers to solve their problems, we need to further research the decision-making process when people are faced with problems that have legal solutions. We also need to take steps to maximize engagement.

One of the problems we have looking at engagement is the tendency to think of everyone, every potential law client, as being in the same circumstance. We can better respond to the needs of those with legal problems if we think of them on a continuum. At one end, we find those who without question are aware they have a legal issue – those who have been served with a summons, have been ticketed for a DUI or have an eviction notice posted on their door. Further

\(^{16}\) [http://www.americanbarfoundation.org/research/A2J.html](http://www.americanbarfoundation.org/research/A2J.html)
down the continuum, we have those who believe they have a problem with a legal solution, whether or not they actually do. At the other end, we have those who have a problem but do not recognize it is a problem with a legal solution.

Creating better access to those who know they have a legal issue involves processes of simplification and navigational support. In many respects, we need to develop consumer-centric systems. In terms of process, consideration should be given to removing simple matters, such as name changes, uncontested related guardianships and uncontested divorces, from the courts into administrative processes, unless due process dictates otherwise. Uniform forms should be adopted both within and between states so that technological interfaces can be maximized. Procedural audits or process mapping should be undertaken to identify and assess those points where a legal matter can be simplified from the point-of-view of the consumer. What is the process of getting a divorce, a green card, a bankruptcy? What steps does a petitioner need to take and in what sequence must this be done? How can this process be changed to make the systems less cumbersome? These steps will make legal solutions more accessible for those who self-represent and less costly for those who seek the assistance of a lawyer on either an unbundled or full-service basis.

Current mechanisms for engagement have most frequently addressed those who believe they have a problem that has a legal solution, and are therefore seeking legal help. These forms of engagement include the full variety of advertisements, lawyer referral services, innovative outreach and public sector outreach.

Historically, the legal profession has had a cultural bias against lawyer advertising. When the Supreme Court struck the ban on lawyer advertising in 1977, it did so under the presumption that advertising would create greater access to legal services. Nevertheless, many have advanced the notion that lawyer advertising is undignified, undermines the stature of lawyers and therefore creates a circumstance where people are less likely to engage them. While the legal profession has embraced something of a comfort level with advertising, or perhaps a resignation to its existence, states maintain various rules of professional conduct that limit commercial communications. These rules not only impose restrictions within individual states, but collectively they create substantial obstacles to Internet models that best operate on a national or multi-state scale. This is discussed in more detail within the analysis of technology, below.

The current state of engagement through commercial communications includes the array of media platforms, ranging from bus benches and billboards to Craigslist, YouTube and Twitter. Online branded networks have taken on a variety of shapes. We have traditional directories online that enable users to find a lawyer through a cross reference of legal subject matter, such as divorce, and geographic location. Branded networks sometimes match people seeking lawyers with participating lawyers interested in providing their representation. Sometimes these matches include fee bidding. Some branded networks drive potential clients to their website and provide participating lawyers with leads under a pay-for-lead system. Some sites enable lawyers to answer questions that viewers raise, in anticipation that the interactions will lead to engagements.

Some sites rate lawyers and enable viewers to rate and comment on the level of service. Entrepreneurs are constantly experimenting with the potential of technology to provide better engagement with those who may need a lawyer.

As lawyers continue to experiment with both tradition and technology-based advertising, the legal profession needs to have a better idea of the role of commercial communications in the engagement of legal services. The profession’s bias against advertising has limited the efforts to conduct peer-review quality research that would enable us to better understand the role of these communications. The time for that bias has passed and the legal profession needs to move forward on an analysis of these issues.

The Committee defers to the Standing Committee on Lawyer Referral and Information Services for issues on lawyer referral as a delivery mechanism and its role in engagement. However, we note here that the line between referral services and online advertisements is becoming blurred, that large amounts of venture capital seem to be going into commercial sites and that consumers have access to more information about lawyers and other legal service providers than ever before.

Some lawyers are experimenting with innovative outreach to expand engagement for those who believe they have a problem with a legal solution. For example, we have seen a handful of coffee houses over the years that facilitate a conversation with a lawyer over a cup of coffee. The casual environment is designed to reduce the anxiety of those who may find it uncomfortable going to a more traditional law office.18

Engagement for those who have or believe they have a problem with a legal solution is not limited to the marketplace. As mentioned above, the Committee has recently concluded research demonstrating the usage of public self-help centers in court houses and libraries. The research concludes that about 500 centers serve nearly 3.7 million people per year. Similarly, government entities are both providing online legal resources and, perhaps more importantly, becoming conduits to lawyers in the private sector. For example, the US Trademark and Patent Office now provides a DIY page and links viewers to the ABA directory of lawyer referral services. The site cautions that it cannot help viewers find a lawyer. This type of obstacle should make us question the very underpinning of the rule of law. Instead of prohibiting public sector entities from helping people find lawyers, perhaps we should advance policies that facilitate that, if not mandate it.

The greatest challenge to engagement involves reaching those people who have a problem, but do not recognize the problem has a legal solution. Since they are less likely to turn to legal resources, we need to recognize the touch points where people with problems turn. In the UK, the Citizens Advice Bureau is a government agency that has storefronts and online access for those experiencing problems in general. The US has the capability of replicating this resource through the repurposing of post offices. Postal service employees could serve as the public face of a system that relies on technological input to address issues such as entitlements, problems obtaining public records and even miscalculations of utility bills. The service could then have a nexus of legal services in the private sector that would drive potential clients to lawyers. A more

18 http://www.legalgrind.com/
modest outreach system, which is being employed by Call for Justice in Minnesota, involves referring callers who reach the United Way through 211 telephone calls. Operators there route callers with legal problems to Call for Justice, which then refers them to practitioners. This concept starts with the proposition that legal information is an entitlement.\textsuperscript{19}

The creation with partnerships between the legal profession and other institutions is also instrumental in the engagement of those with problems who do not know they have legal solutions. Medical-Legal partnerships are a great illustration of the potential for this model.\textsuperscript{20} For example, a child might be treated for a respiratory infection. The doctors may suspect the cause is the result of mold in the family’s apartment. A lawyer would investigate and address the issue with the landlord, removing the cause and contributing to the well-being of the family. We need to ask where else partnerships can be developed to enable people with problems to address them through legal solutions. Every institution should be examined – colleges, religious centers, community centers, governmental entities and social services of all types, for example.

Finally, engagement can be advanced through gaming. Tens of millions of people are active in online games of all sorts, including Massively Multiplayer Online Games (MMOGs). In the 1990s, the US Army was having a difficult time recruiting. It turned to online games that embedded recruiting information with great success.\textsuperscript{21} Games are often centered on interactive problem-solving, such as World without Oil. A few lawyers are experimenting with online games to advance engagement. These efforts have substantial potential and should be supported, explored and evaluated.

C. Uses of Technology

The Committee encourages the Commission to reach out to the Law Practice Division’s e-Lawyering Task Force for detailed information about the status of technology for aspects of legal service. I also provide the following observations from the Committee’s work.

Technology is often viewed as a disruptive agent that fundamentally changes the status quo, replacing the incumbents with insurgents. The Committee, however, is focused more on technology as a tool that facilitates lawyers to provide their personal legal services faster, cheaper and more efficiently. While the Committee is dedicated to exploration of technologies, it is cautious about the potential of the Internet as a client-facing tool in the marketplace.

The Internet is no longer new and its use as a tool for legal services now extends back a generation. Today’s law students do not remember a time when the Internet did not exist. The first law firm websites were posted in 1994. Since then, we have seen the emergence of broadband, a dominate search engine, interactive social media and the infusion of hundreds of millions of dollars of venture capital into the legal services marketplace. It may be a good time to take a step back and see where we are, assess what is working and move forward strategically rather than with the unbounded enthusiasm that some advance. For our discussion here, we

\textsuperscript{19} http://callforjustice.org/
\textsuperscript{20} http://medical-legalpartnership.org/
\textsuperscript{21} http://www.americasarmy.com/
breakdown the use of technology into three categories: client development, delivery of services and practice management.

The entrepreneurial community has, and continues to, experiment with online resources designed to enhance client development. While it is safe to say that law firm websites and online directories have substantially replaced print directories, we need to look at how people find their lawyers in order to get a clear idea of the potential for technology in this area.

In 1990, 2000 and 2010, the ABA conducted various surveys designed to determine how people would find a lawyer if they needed one. Remarkably, in each of those surveys, 80 percent of the respondents reported they would find a lawyer through a trusted source, e.g. a family member, friend, work associate or a lawyer they knew. Twenty percent would turn to an impersonal source, which in the earlier research was primarily the Yellow Pages and in the later research was divided between print directories and online searches.

The Committee sponsored the 2010 research and included a section asking respondents how likely they were to use various types of online resources. Not more than half of the people were likely to use any of the resources to help them find a lawyer.Nearly half indicated they would turn to question and answer sites and rating sites, while very few reported they would turn to social media resources such as Facebook or Twitter. Based on the survey, the Committee concluded that people were looking for two factors when looking for a lawyer – value and trust.22

In a 2014 national survey, people were asked, “Before hiring an attorney, which of the following would you be most likely to use to research and compare the credentials of different attorneys?”

The Internet was the most common response, with 38 percent. Conversely, nearly two-thirds of the public would turn to other resources to “research and compare the credentials of different attorneys.”

To be sure the branded networks mentioned above have the potential to reach millions and perhaps tens of millions of people each year. Yet there is little evidence to date that they are profitable or that they are causing a shift on the paradigm of how people find their lawyers. The Committee encourages the organized bar to track developments in the use of technology for client development. Specific issues that need to be examined include the lawyer’s return on investment in various models, such as pay-per-lead, matching services and Q&A sites. Can branded networks not only provide a ROI for the participating lawyers, but also sustain their own existence at a profit without causing the ultimate client of legal services to pay a premium? The ABA researched the economics of the Yellow Pages in the 1990s and found that one-third of the participating lawyers lost money or did no more than break even. The midpoint on ROI was three to one, but the mean was nine to one. This indicated that the Yellow Pages were highly productive for a small group of lawyers, which was probably lawyers practicing personal injury law.23 A similar assessment of the Internet as an advertising tool for personal legal service lawyers would be of substantial value.

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22 Supra note 8.
Those who write about the role of technology in the delivery of legal services rarely parse out the distinction between corporate services and personal services. For example, John McGinnis recent wrote an article entitled, “Machines v. Lawyers,” where he sets out a series of legal functions that are and will be replaced by computers. Only two of the five functions he discusses really apply to personal legal services. One function is online legal research, which Lexis has provided since the 1970s. The other is online document preparation, which is extensively used in legal aid and government settings.24 Richard Susskind’s most recent book, “Tomorrow’s Lawyer,” sets out a series of emerging new jobs involving technology and the law, but only one or two of them pertain to personal legal services.

Notwithstanding a limited focus on the use of technology in the delivery of legal services, it seems likely there is untapped potential, but somewhat like client development, we have not measured that potential nor seen it fully realized over the past several years. We need to know the degree to which governmental online legal services, such as articles of incorporation from secretary of states’ offices, are being used. We need to know the extent to which document preparation platforms, that are offered through legal aid or nonprofit entities, such as A2J, are relied upon. We need to understand more about why online dispute resolution has not more effectively reached those with small claims. In the private sector, why is it that personal legal services lawyers have not employed intake diagnostics that enable them to reduce the time to screen potential clients? Why have these lawyers not used technology for preventive law examinations? Why have virtual law practices not prospered at a time when people in rural areas are sometimes a hundred miles from the nearest lawyer?25 We need to frame the questions, take stock of the current circumstances and conduct research that enables us to create a strategy that uses technology for improved delivery of legal services.

Technology enables lawyers who provide personal legal services to work more efficiently through better practice management. Private vendors appear to serve this market with some success. For example, Clio has grown exponentially in the past few years. Nevertheless, other options can be advanced to maximize the use of technology in this area. Law schools should be encouraged to provide practice management courses, perhaps collaboratively with business colleges. To assure courses are offered and students enroll, issues of practice management should be included on bar examinations. Several state and some local bars now have practice management advisors.26 They are highly skilled in the use of technology and provide both CLE programming and hands-on assistance for personal legal services lawyers interested in implementing technology-based practice management systems. Every lawyer should have access to professional unbiased practice management assistance at a reasonable cost.

Technology should be neither viewed as a threat or a panacea. The experiences over the past several decades have demonstrate it is neither. Nevertheless, it mandates further exploration, analysis and experimentation. This cannot be done effectively without recognition that personal legal services have particular aspects that separate them from corporate and institutional

25 Supra note 10, finding that 7% of survey respondents report maintaining a virtual law office.
practices and that the functions of personal legal services need be broken out into client development, delivery and practice management to create clarity for the application of technologies.

D. Policy and Regulatory Matters

The Committee has worked extensive with policy issues that have related to the delivery of legal services over the past several years, going back to the 1990s, when it advanced standard for hotline services. More recent issues involve aspects of limited scope representation, collaborative models for sustainable practices and client development. The Committee has also advanced a Blueprint Project, designed to better enable access through efficiencies resulting from policy changes.27

The Committee, joined by eight other entities, led a resolution through the House of Delegates at the 2013 Midyear Meeting, calling on practitioners to consider the use of limited scope representation, calling on stakeholders to assure that lawyers who limit the scope of representation do so fully consistent with professional obligations and calling on all those involved to inform the public of their option to obtain limited scope representation. That resolution and report is at


and fully sets out the circumstances and benefits of unbundled legal services to those of modest and moderate means. Since the unanimous adoption of this resolution, the Committee has worked on implementation and continues its dedication to this delivery method. The Committee tracks state rules of professional conduct and procedure that better enable lawyers to unbundle with clarity of the appropriate processes.

Earlier this year, the Committee updated and issued a white paper on state policies that enable lawyers to limit the scope of their representation.28 The collection of rules is designed to assist states to move forward with their own policies that expand access. Two specific issues restrict the willingness of lawyers to provide these services. First, some states require lawyers to identify themselves when preparing documents on behalf of a client who receives limited scope representation. This may provide a chilling effect because the concern of lawyers that judges will require them to provide additional services, such as court appearances. Second, some states do not enable unbundling lawyer to withdraw from court matters without leave of court, which may be at the discretion of the judge. These issues should be examined in more detail and, where appropriate, the ABA should advocate model rules that accommodate limited scope representation beyond the current provisions of the Rules of Professional Conduct.

At the 2014 Annual Meeting, the Committee joined the Legal Access Job Corps Task Force in sponsoring a resolution calling upon the legal profession, the law schools, and the courts to advance projects that assist newly-admitted lawyers expand access to underserved populations in

27 http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/blueprints_for_better_access.html
sustainable ways. The House of Delegates passed that resolution unanimously also. Law firm incubators are discussed in the report and are a model advanced by the Committee. These programs, which are often affiliated with law schools, provide support and resources to newly-admitted lawyers interested in developing private practices that focus service on those of low and moderate incomes in sustainable ways. The Committee encourages an examination of this model and the development and promotion of policies that make is scalable so that the programs can accommodate a larger percentage of the thousands of newly-admitted lawyers who are not assumed with the legal marketplace each year.

The rules of professional conduct governing the communications of legal service, generically known as the “advertising rules,” are designed and intended to strike the balance between enabling the free flow of information and protecting consumers against misrepresentation and overreaching. The use of technology for client development constantly brings that balance into question and requires an on-going examination of the rules and their underlying policies.

In 2012, the Committee appeared before the Commission on Ethics 20/20 and submitted a letter advocating specific changes to the Model Rules governing client development. That letter is at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/abastandingcommitteeondeliveryoflegalservices_revisedproposaltechnologyandclientdevelopment.authcheckdam.pdf. First, the Committee advocated that Rule 7.1 be amended to specifically indicate it imposes restrictions on Commercial Speech, consistent with constitutional doctrine and the First Amendment. The Commission did not embrace this recommendation.

Second, the Committee advocated that Rule 7.2(b) be stricken. In short, this rule prohibits lawyers from paying to participate in for-profit lawyer referral services that are not approved by the state (and very few states have a process to approve for-profit services). As stated in the letter to the Commission:

> The Committee does not take this request lightly, but believes it is justified and necessary because: (1) Rule 7.2(b) serves no purpose that is not otherwise effectively served by other rules; (2) the Rule fails to define terms that do not have universally accepted definitions; (3) the Rule fails to reflect the use of technology to broaden access to legal services for those needing representation for personal legal services; and (4) the prohibition set out in the Rule is contradicted within its own comments.

The Standing Committee on Lawyer Referral and Information Services strongly objected to the Committee’s recommendation and the Commission made no changes to MR 7.2(b).

Third, the Committee recommended that the comment to Rule 7.3 define the term “solicitation.” Even though the Commission did not embrace the definition set out by the Committee, it did amend the comment to include a reasonable definition that, most importantly, clarifies that a lawyer’s response to an invitation for information does not fall within the realm of a solicitation.

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30 http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main.html
Many states are of the opinion that the ABA Model Rules governing client development do not sufficiently protect consumers and impose restrictions beyond those advocated by the ABA. This has created a patchwork matrix that confounds the ability of technological outreach that is maximized by economy of scale and most efficiently operated on a national basis. Even if the ABA does nothing more to amend it rules to improve access to legal services, that access would be advanced if the ABA more actively advocated that states adopt the Model Rules governing client development.

Other Model Rules and comments impose limitations to access for personal legal services. In order of the Rules these include the following:

- Rule 1.1, Comment [5] requires inquiry into the factual elements of the problem in order for a lawyer to provide competent representation. This duty to inquire contradicts MR 1.2(c), which enables a lawyer to limit the scope of representation. If, for example, a lawyer limits the scope of representation to online document preparation, the system does not accommodate an inquiry into the facts and would therefore be a violation of MR 1.1.

- Rule 1.3, Comment [1] requires a lawyer act with “zeal in advocacy upon the client’s behalf.” Interestingly, this comment indicates the lawyer “must” act with zeal. The term “must” is otherwise reserved for use within the black letter rules. Again the obligation is inconsistent with unbundled practices and the use of technology to deliver services.

- Rule 4.2 addresses the lawyer’s obligation when communicating with a person represented by counsel. The Rule does not address the circumstance where the opposing party has engaged a lawyer to provide limited scope representation.

- Rule 5.5(b)(1) states that a lawyer may not establish “a systematic or continuous presence” in jurisdiction where a lawyer is not admitted. Technology is a-jurisdictional and even the ubiquitous website could be deemed a systematic presence.

- Rule 8.5(b)(2) imposes the disciplinary authority in the jurisdiction of the “predominant effect of the conduct” under the choice of laws determination, where no matter is pending before a tribunal. If a law firm in one state maintains a website, hosted by a server in another state, seen and acted on by a client in a third state, where is the “predominant effect”?

The Committee is well aware of developments in the UK and Australia and recommendations by the Canadian Bar Association to relax the prohibition on non-lawyer ownership of law firms. While it is quite possible that access to personal legal services may be enhanced by an infusion of capital into the practice of law, it is important to understand that the creation of alternative business structures are not as simple as amending Model Rule 5.4. Non-lawyer ownership would also implicate the morass of state statutes and case law defining the practice of law and conversely providing direction on that which is the unauthorized practice of law.31

31 See for example the state definitions of the practice of law, at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf
In 2013, the Committee coordinated an Enterprise Grant project that became known as the Blueprint Project. The project is designed to create an on-going conversation about policies, processes and procedures designed to create efficiencies and otherwise maximized the abilities of personal legal service practitioners to provide accessible services to those of moderate and modest means. The project has identified a series of issues under five categories: organization of practice, financial strategies, networks and pipelines, collaborative problem-solving and re-modeling. Approximately 25 specific issues are being advanced through this project, ranging from topics such as crowd-funding for legal services to gaming to outsourcing paralegals. The Committee anticipates using the Blueprint platform for policy development into the foreseeable future.32

E. Recommendations

Based on this analysis, the Committee makes the following recommendations to the Commission:

1. Affordability
   - The organized bar should stress the affordability of various types of personal legal services, including contingency fee services, shifted fees, fixed fees, reduced fees, and payment systems.
   - Lawyers who provide personal legal services should be encouraged to charge for services in ways other than by the hour.
   - The bar should make efforts to inform potential clients about the value of legal services, and advance the idea that value = outcome/costs.
   - The public should be better informed about legal services provided by governmental entities, including both on and off line.
   - Lawyers should broadly offer unbundled legal services and clients should be informed of those opportunities.

2. Engagement
   - The organized bar should promote research that examines the decision-making processes when people of all economic demographics are faced with problems that have legal solutions.
   - Efforts to improve engagement should address people in different circumstances differently, including those who know they have a legal matter, those who believe they have a legal matter and those who know they have a problem but may not associate it with a legal solution.
   - All stakeholders should be encouraged to simplify and create consumer-centric systems.

32 Supra note 27.
• When due process can be otherwise protected, routine uncontested matters should be moved from judicial to administrative functions.

• Processes in the courts and other legal forums should be process-mapped to determine how the steps cannot be simplified and responsive to the needs of the people using those systems.

• Uniforms forms should be developed, both within a state and, when possible, across state boundaries, to facilitate technological processing in more cost-effective and efficient ways.

• Both public and private outreach endeavors designed to expand resources to those who believe they have a problem with a legal solution should be assessed and, where effective, should be advanced and replicated.

• Everyone should have access to publically-available information that enables them to determine whether they have a problem with a legal solution. This information should be available both online and across the counter.

• Innovative methods of outreach to identify legal needs and provide personal legal services should be advanced.

• Pipelines between the non-profit legal community and the marketplace should be encouraged.

• Governmental entities that address issues related to legal matters should be mandated to provide people who come to them with information about how to determine if they can benefit from a lawyer and, if so, how to find a lawyer.

• The legal profession should partner with institutions that interact with people who may have problems with legal solutions, such as medical-legal partnerships.

• Online games should be explored as a possible method of assisting people to understand when they have a problem with a legal solution.

3. Technology

• The legal profession should focus on technology as a resource to better facilitate personal legal services and not as disruptive agent designed to replace lawyers.

• Branded networks that drive potential clients to lawyers should be assessed to determine their economic viability, their value to participating lawyers and their ultimate costs to clients.

• The role of technology as a tool in the delivery of legal services needs to be further examined. We need to frame the questions, take stock of the current circumstances and conduct research that enables us to create a strategy that uses technology for improved delivery of legal services.
• Resources to advance the use of technology for practice management should be advanced both within the marketplace and through practice management advisors within the organized bar.

4. Policies
• Unbundled legal services should be analyzed and, where appropriate, advanced.
• Law firm incubators should be analyzed and, where appropriate, advanced in ways that are sustainable and scalable.
• The Rules of Professional Conduct that impact the delivery of legal services both through technology and otherwise should be assessed and revised in ways that encourage accessibility.
• The ABA should take efforts to encourage the states to adopt the Model Rules of Professional Conduct that pertain to client development.
• Proposals contemplating alternative business structures and non-lawyer ownership of law firms should consider the full range of policy changes, including changes to UPL statutes, necessary to effectively achieve this goal.
• The ABA should maintain a central location for the ongoing discussion of changes to policies, procedures and processes designed to improve access to personal legal services.

5. Concluding Recommendation

The ABA should create an ongoing commission that is charged with the implementation of the recommendations resulting from this Commission and that examines on an ongoing basis issues pertaining to the futures of legal services and of the legal profession. The commission should include representatives from sectors outside of the legal profession, such as economists, demographers, design engineers and business management experts. The Board should fund and staff the commission at a level commensurate with its importance to the ongoing well-being of the ABA and the legal profession as a whole.

Thank you for the opportunity to express these thoughts.