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MEMO

To: The Commission on the Future of Legal Services

From: Bill Hogan, III, Chair of the Standing Committee on the Delivery of Legal Services

Re: Issues Paper on "Unregulated Legal LSP Entities"

Date: May 2, 2016

Thank you for the opportunity to comment on the Commission's Issues Paper on Unregulated Legal LSP Entities. The mission of the Standing Committee on the Delivery of Legal Services is to expand access to lawyers and legal services for those of moderate incomes, who do not qualify for legal aid or pro bono assistance, yet lack the discretionary resources for full and traditional representation. The Committee has a long history of support for the use of technological resources to assist in and provide the delivery of legal services, including collaboration with the e-Lawyering Task Force of the Practice Management Division since its inception in 1999.

Notwithstanding the Commission's analysis of the issues contained within the paper, the Committee has several concerns about it that it believes are worth noting here.

First, the paper identifies a group of service providers as "unregulated legal service provider entities." The Committee believes it is a misnomer to state that non-traditional legal service provider entities are "often unregulated." The Commission's paper itself contradicts this notion when it states that legal service provider entities may be prohibited from providing services because the services are the practice of law, that is, the services may be in violation of state laws setting out the practice of law and governing the unauthorized practice of law. The prohibition of an entity's services would seem to take that entity out of the category of being unregulated. The Commission then concludes that if a legal service provider conducts the practice of law but that service is not the unauthorized practice of law, then there is no regulation that applies to that service. The Committee has no expertise in the application of state and federal law, but it seems unlikely that laws, such as those governing consumer protections, intellectual property or the general conduct of commerce, would not apply to legal service providers in this circumstance. Regardless of the fact that these entities are not regulated as if they were lawyers, they are by no means "unregulated."

Second, the Issues Paper indicates that state laws setting out the practice of law are "notoriously vague and circular." While this is true of a slim majority of states, nearly half of them have laws that include detailed provisions of conduct that are deemed the practice of law and when done by a non-lawyer, the unauthorized practice of law. As it pertains to legal service providers who provide document preparation services, it is worth noting that some states have a provision that prohibits the selection, drafting or completion of legal documents that affect the legal rights of another. The state provisions setting out the practice of law have been collected by the ABA Center for Professional Responsibility and posted at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf.

Next, the Issues Paper fails to define that set of entities that it seeks to regulate. Instead, it lists a series of examples, including, "automated legal document assembly for consumers, law firms, and corporate counsel; expert systems that address legal issues through a series of branching questions and answers; electronic discovery; legal process outsourcing[1]; legal process insourcing and design; legal project management and process improvement; knowledge management; online dispute resolution; data analytics;"

The Committee believes the ability to successfully regulate is dependent on the specificity of those that are being regulated. Identifying entities that are the subject of regulation by nothing more than a series of examples of functions does not enable anyone to comprehend the scope of regulation that is being proposed or anticipated.

We also note here that the Issues Paper stresses the need for public protection, indicating that a layman has difficulty understanding the quality of the services that are being provided. However, with the exception of automated document assembly and perhaps online dispute resolution, everything in the list of examples set out in the paper includes services fundamentally oriented to the sophisticated corporate consumer. Electronic discovery is a process employed to efficiently sort through a large volume of documents common to corporate litigation. Legal process outsourcing, insourcing, process improvement, knowledge management and data analytics are all the domain of BigLaw and would be rarely used by lawyers or firms providing personal legal services. In this respect, the Commission has confused apples and oranges as it seeks to extend public protection from legal service providers.

The Committee's most fundamental concern about the Issues Paper is its failure to distinguish between product and service when discussing the subjects of possible regulation. Since the Committee's focus is on personal legal services and document assembly is the main function set out in the Issues Paper that pertains to this type of practice, we look here at the role of regulating document assembly software. See Janson v. LegalZoom.com[2] for an analysis of the distinction between legal products and legal services. The case concludes that legal products, such as books, divorce kits, forms and instructions, are not within the scope of the practice of law. However, when services are added, such as document review, the endeavor becomes the practice of law. The case goes on to determine that when computer software asks a series of questions pursuant

[1] See ABA Formal Ethics Opinion 08-451 for an analysis of the ethics obligations of a lawyer when outsourcing services.

[2] http://www.jdsupra.com/legalnews/federal-court-rules-that-legalzoom-self-68785/

to the completion of legal documents, there is little or no difference between this and a lawyer asking a series of questions in order to prepare the documents. Dissemination of the software, therefore, is the practice of law and subject to the prohibitions imposed on the unauthorized practice of law.

Janson indicates that products, such as books, are a safe harbor from the unauthorized practice of law, but when entities embellish on those products by providing additional services, or when the product is so technologically advanced that it steps into the role of a lawyer, it becomes a service that can amount to the practice of law. This conclusion is complicated by different uses of the same product. For example, the same or very similar online document assembly tools can be used by a court as part of its online self-help resources, by a lawyer who provides the tool to clients under the lawyer's direction, by non-profit organizations that disseminate the document assembly at no costs to the consumer and by commercial endeavors who charge their customers for the use of the tools.

This leads us to policy issues that the Committee suggests are more immediate than entity regulation. Is it possible for automated document preparation software to be product instead of services and if so under what standards or conditions? Is the determination about whether automated document preparation software is permissible dependent in any way on the user of that software? Does it matter if it is offered to consumers by the courts, by non-profit entities, by lawyers pursuant to their representation or by commercial enterprises directly to the consumer? What is the role of free speech in the creation and distribution of document assembly software? In-so-far as entity regulation may apply, who exactly is to be regulated? Is it the stockholders, the directors, the software engineers, those in the distribution channels, and/or the retailers that provide the software?

In addition, when we look at entity regulation, we need to turn back to the fact that it runs through the path of those authorities governing the practice of law. Any effort to refocus regulation would necessarily require amendment to or dissolution of those provisions that govern the practice of law and conversely the unauthorized practice of law. Notwithstanding the fact that those authorities impose restrictions and perhaps prohibitions to some services offered by legal service providers, the imposition of entity regulation would seemingly invite additional limitations that would inhibit innovation and creativity in the use of technology to deliver legal services.

Insofar as automated document preparation is concerned, the Committee suggests an alternative to entity regulation, which is responsive to the policy questions raised above and which would increase access, make services more affordable and promote an environment of innovation. In 1997, the Texas legislature amended its definition of the practice of law to state, "(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."[3]

[3] http://www.txuplc.org/Home/applaw

The Committee is not aware of any abuses or harms resulting from this exception to the practice of law in the nearly 20 years since it passed. Consequently, the Committee encourages the Commission to advocate that the states amend their provisions regarding the practice of law to include the exception set out in Texas.

The Committee also suggests that far more thought and analysis be given to the notion of entity regulation if it is to be extended beyond the governance of law firms.