

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

To: ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Law Schools, Disciplinary Agencies, Individual Clients, and Client Entities

From: The ABA Commission on the Future of Legal Services

Re: For Comment: Issues Paper Concerning Unregulated LSP Entities

Date: March 31, 2016

The ABA Commission on the Future of Legal Services has not decided at this time whether to propose any resolutions concerning the issues described in this paper.

I. Executive Summary

In August 2014, the American Bar Association created the [Commission on the Future of Legal Services](#).¹ The Commission is charged with examining how legal services are delivered in the United States and recommending innovations to improve the delivery of, and the public's access to, those services. In order to advance this mandate, the Commission has studied a range of issues, which are described in detail on the Commission's [website](#).

In addition to examining how lawyers can facilitate increased access to legal services, the Commission is also studying the role that two other kinds of legal service providers (LSPs) are playing in the delivery of legal services. First, the Commission is studying judicially-authorized-and-regulated LSPs, other than lawyers, who already are delivering legal services in various United States jurisdictions.² The Commission distributed an issues paper on this topic in October 2015 and accepted public comments beyond the requested deadline of December 31, 2015.³

Second, the Commission is studying various other kinds of non-traditional LSP entities that already exist in the marketplace and are often unregulated (hereinafter, "unregulated LSP entities"). The present issues paper focuses on this second category of LSPs, with the goal of gathering data on the spectrum of services that these unregulated LSP entities

¹ The Commission consists of prominent lawyers from a wide range of practice settings as well as judges, academics, and other professionals who have important perspectives and expertise on the delivery and regulation of legal services in the United States. The Commission roster is available [here](#).

² The Commission also studied regimes for such providers that were enacted legislatively to ensure that it had a complete picture of the landscape for such professionals.

³ The October 16, 2015 issues paper expressly noted that it was not intended to address unregulated LSP entities. See Memorandum from ABA Comm'n on the Future of Legal Servs., *Issues Paper Concerning New Categories of Legal Services Providers*, 1 n.1 (Oct. 16, 2015), available at http://www.americanbar.org/content/dam/aba/images/office_president/delivery_of_legal_services_completed_evaluation.pdf. Comments received by the Commission on its October 16, 2015 issues paper are available on the Commission website. See *Comments – Legal Services Providers*, AM. BAR ASS'N http://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services/Comments1.html (last visited Mar. 29, 2016).

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provide to the public and eliciting feedback on whether the public would benefit if state judicial authorities develop new regulatory structures for these entities.⁴

The Commission believes that there are many ways to expand access to legal services and access to justice, such as through enhanced public education about the benefits of retaining lawyers' services, increased funding for legal aid offices, increased pro bono services by lawyers, the increased use of standardized and automated forms, and innovative delivery mechanisms. The Commission is actively exploring these and many other possible methods for improving access to legal services. The public, however, is increasingly looking to unregulated LSP entities as another possible solution, and the regulatory issues associated with this development should be fully explored to ensure that the public is adequately protected.

II. Access to Affordable Legal Services in the United States

Access to affordable legal services is critical in a society that depends on the rule of law. Yet legal services are growing more expensive, time-consuming, and complex. Many who need legal advice cannot afford to hire a lawyer and are forced to represent themselves. Other individuals who can afford a lawyer often do not use one because they do not recognize that their problem is a legal one or do not recognize that their problem has a legal solution. Some individuals prefer less expensive alternatives to hiring a lawyer, or a lawyer is not accessible to them.⁵ For those whose legal problems require use of the courts, but who cannot afford a lawyer, the underfunding of our court systems creates additional problems, as funding for court programs designed to assist these individuals may be cut or the programs may not be implemented in the first place.

Studies consistently reveal that low and moderate income Americans who face significant civil legal problems often lack access to a lawyer.⁶ For example, in New York State alone, "some 1.8 million litigants in civil matters" do not have representation when addressing the "core essentials of life—housing, family matters, access to health care and education, and subsistence income."⁷ Professor Deborah Rhode documents in her

⁴ The ABA Standing Committee on Professional Discipline is studying the issue of whether and how law firms as organizations should be regulated.

⁵ REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 11-13 (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478040.

⁶ See, e.g., LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW-INCOME AMERICANS (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf; Roderick B. Mathews & Juan Carlos Botero, *Access to Justice in the United States: Findings from the Newly Released Rule of Law Index of the World Justice Project*, VA. LAW. DEC. 2010, at 24, available at http://worldjusticeproject.org/sites/default/files/486481access_to_justice_in_the_united_states_virginia_lawyer_12-10.pdf; SANDEFUR, *supra* note 5.

⁷ TASK FORCE TO EXPAND ACCESS TO JUSTICE TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 2, 3 (Nov. 2014), available at <http://nycourts.gov/accesstojusticecommission/PDF/CLS%20TaskForce%20Report%202014.pdf>. Notably, this number has decreased from 2.3 million in 2010, due to a series of access-to-justice programs launched in New York State, including the implementation of a court navigator program. *Id.* at 2.

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research that, “[a]ccording to most estimates, about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet.”⁸ As Jordan Furlong puts it, “The legal market, viewed in its entirety, is like an iceberg, 85% hidden below the surface. Lawyers have concerned themselves only with the small fraction above water. Everyone else is down there on their own, holding their breath.”⁹ As a result of these developments, the public has been increasingly turning to a growing array of unregulated legal service providers.

III. Unregulated Legal Service Providers

The market for legal services is changing dramatically and at an unprecedented pace. One significant development is the increasing involvement of non-traditional unregulated LSP entities that deliver legal or law-related services.¹⁰ These entities are proliferating due to the fast pace of technological advancements and growing consumer demand for easy access to legal services. It is difficult to measure this development precisely – either qualitatively or quantitatively – though some information is available.

First, we know that these unregulated LSP entities offer a range of services, 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; legal process insourcing and design; legal project management and process improvement; knowledge management; online dispute resolution; data analytics; and many others.¹¹

Second, available evidence suggests that this segment of the legal services market is growing, though precise data is difficult to assemble. Professor William Henderson has looked at U.S. Census data to try to measure the increased involvement of nonlawyers in the delivery of law-related services. Writing in 2013, Professor Henderson compared U.S. Census data for “law office employment” to data for “all other legal services.” He noted that since 1998, law office employment has actually shrunk while “all other legal services” have grown 8.5 percent annually and 140 percent over the whole period.¹²

⁸ DEBORAH RHODE, ACCESS TO JUSTICE 3 (2004).

⁹ Jordan Furlong, *The Incidental Lawyer*, LAW21 (Apr. 24, 2014) <http://www.law21.ca/2014/04/incidental-lawyer/>.

¹⁰ Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 99 (“The number of people who are not lawyers and are already involved in the delivery of legal or law-related services is growing rapidly.”).

¹¹ *Id.* at 99-100. Another law and technology consultant has divided them into three “relatively blurry” categories:

- “Companies assembling teams for document review or other specialized legal projects.
- Legal process outsourcers, typically involving foreign labor. [and]
- Companies specializing in predictive coding and other solutions involving technology and machine learning.”

Rachel Zahorsky & William D. Henderson, *Who’s Eating Law Firms’ Lunch?: The Legal Service Providers, Law Schools and New Grads at the Table*, 99 A.B.A. J. 32, 37 (2013).

¹² William D. Henderson, *From Big Law to Lean Law*, 38 INT’L REV. L. & ECON. 5, 12 (2013).

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Another report from 2014 discusses the explosion of the “Online Legal Services Industry,” which the report defines as virtual law firms and legal service companies delivering bundled and unbundled documents and services. This industry did not exist 10 years ago, but as of 2014, it is valued by one source at approximately \$4.1 billion.¹³ This segment has grown at an annualized rate of 10.9% over the previous five years and is projected to grow 7.7% to 5.9 billion by 2019.¹⁴

Other sources also demonstrate the growing field of unregulated LSP entities. In 2012, legal service technology companies received \$66 million in outside investments, but by 2013, that figure was \$458 million.¹⁵ One source indicates that there are well over a thousand legal tech startup companies currently in existence.¹⁶ The explosion of these entities appears to respond to marketplace demands for new approaches to solving legal problems. Indeed, many consumers are choosing these unregulated LSP entities over traditional law firms.¹⁷ In addition, there are a number of unregulated LSP entities that are delivering services directly to law firms and lawyers, such as companies that connect the public to lawyers, legal process outsourcers, and e-discovery vendors.

A. The Current Approach to Regulating Legal Services

Generally, current regulations of legal services focus primarily on lawyers. State rules of professional conduct serve as the primary means of regulation, but lawyers also are subject to a “growing number of laws, regulations, and rules (both state and federal) that govern lawyer behavior, such as the Sarbanes-Oxley Act, related Securities and Exchange Commission regulations, IRS regulations, federal and state rules of civil procedure and evidence, and data privacy and security laws.”¹⁸

For unregulated LSP entities, on the other hand, the governing law is rather simplistic. Either unregulated LSP entities are prohibited from providing services because the services constitute the practice of law or they are free to offer their services, often without the kinds of regulations that apply to lawyers.¹⁹

¹³ WILL MCKITTERICK, IBISWORLD INDUSTRY REPORT OD5638: ONLINE LEGAL SERVICES IN THE US 4 (2014).

¹⁴ *Id.*

¹⁵ Joshua Kubicki, *2013 Was a Big Year for Legal Startups; 2014 Could Be Bigger*, TECH.CO (Feb. 14, 2014, 12:07 PM), <http://tech.co/2013-big-year-legal-startups-2014-bigger-2014-02>.

¹⁶ *List of Legal Startups*, ANGEL.CO, <https://angel.co/legal> (last visited Mar. 29, 2016).

¹⁷ Benjamin H. Barton, *The Lawyer’s Monopoly – What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3079 (2014) (“The upshot is that lawyers – from big law firms to solo practitioners – have started to see a slow bleed of business to nonlawyers.”); *see also* Zahorsky & Henderson, *supra* note 11; ALTMAN WEIL, INC., 2015 LAW FIRMS IN TRANSITION: AN ALTMAN WEIL FLASH SURVEY I (2015) (“Non-traditional competitors are actively taking business from law firms and the threat is growing.”), *available at* http://www.altmanweil.com/dir_docs/resource/1c789ef2-5cff-463a-863a-2248d23882a7_document.pdf.

¹⁸ Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 55 (2015) (citations omitted).

¹⁹ Although these entities are not subject to the same kinds of regulations that apply to lawyers, they are subject to federal and state consumer protection laws.

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This simplistic approach is potentially problematic for at least two reasons. First, as scholars and courts have long noted, defining the practice of law – and therefore what conduct is prohibited – is extremely difficult.²⁰ The work of the ABA Task Force on the Model Definition of the Practice of Law makes this clear: the Task Force could not draft an acceptable model definition of the practice of law and suggested that the states should develop their own definitions.²¹ These state definitions, however, are notoriously vague and circular.²² As a result, it is sometimes challenging for regulators to determine whether unregulated LSP entities and their employees are engaged in the unauthorized practice of law. Second, even if the work of a particular unregulated LSP entity or its employees does not fall under a jurisdiction’s definition of the practice of law, an entity’s services might nevertheless warrant some form of regulation beyond consumer protection laws in order to protect the public.

B. The Possible Regulation of Currently Unregulated LSP Entities

State courts have an interest in regulating the delivery of legal services, whether those services are delivered by a lawyer or a nonlawyer.²³ These courts might usefully consider whether the creation of a regulatory structure for currently unregulated LSP entities is necessary to protect the public.

One potential approach that a court may undertake is entity regulation. “Entity Regulation” is a term used to describe systems that regulate legal service entities as opposed to (or, in some cases, in addition to) the individuals who work for those entities.²⁴ In the United States, New York and New Jersey employ a simple form of entity regulation whereby law firms are subject to discipline in addition to individual lawyers.²⁵

²⁰ Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 45 (1981); *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *4 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999); *Bd. of Comm’rs of the Utah State Bar v. Petersen*, 937 P.2d 1263, 1268 (Utah 1997).

²¹ See TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT (2003), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_803.pdf; TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, AMERICAN BAR ASSOCIATION REPORT ET AL., REPORT TO THE HOUSE OF DELEGATES (2003), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/recomm.pdf>.

²² See Perlman, *supra* note 18, at 88-89.

²³ For example, as discussed above, the Washington and California courts have created courthouse facilitator programs that permit non-lawyers to provide unrepresented individuals with information about court procedures and legal forms in family law cases. New Hampshire also has a state court rule that allows nonlawyers to represent litigants in court in specific situations. See N.H. Sup. Ct. R. 20. Although these individuals do not receive a license, they are created and overseen by the courts. Similarly, the Washington Supreme Court licenses and regulates non-lawyer LPOs to select and complete real estate closing documents and non-lawyer LLLTs to provide limited legal advice on family law matters. Thus in some jurisdictions, the judicially-authorized-regulated LSP may never step foot in the courthouse.

²⁴ *Entity Regulation: Frequently Asked Questions*, NAT’L ORG. OF BAR COUNSEL 1, <http://nabc.org/docs/Global%20Resources/Entity%20Regulation/Entity.Regulation.Committee.FAQs.02-29-16.pdf> (last visited Mar. 29, 2016).

²⁵ *Id.*

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Other countries use a more robust form of entity regulation.²⁶ For example, some countries conduct routine audits of law firms to determine whether they have appropriate procedures in place regarding the timely “provision of services, avoidance of careless errors, adequate documentation of fee terms and billing, timely recognition and resolution of conflicts of interest, sound records management, adequate supervision of practitioners and staff, and prevention of trust account violations.”²⁷ This kind of system is used in England and New South Wales, and evidence suggests that these forms of entity regulation may reduce ethics complaints and malpractice claims.²⁸

Entity regulation offers a number of potential advantages. First, “entity regulation encourages regulators to devote resources to (1) improving the management and culture of the [entity] as a whole and (2) preventing . . . public harm, rather than focusing on individual conduct and discipline after-the fact.”²⁹ Second, entity regulation means that everyone at the company has a stake in compliance since entity discipline affects all company employees.³⁰ Third, “entity regulation could remove the potential unfairness of holding one [employee] in a firm responsible for system failures where others in the firm, or the firm itself could just as well be made accountable.”³¹ Fourth, entity regulation avoids the problem of identifying the individual who committed the alleged misconduct.³² Studies of entity regulation in Australia demonstrate that it has reduced the number of complaints made against law-practice entities and improved law practice management.³³

Courts in the U.S. might consider entity-based regulation for LSPs that are currently unregulated. If they do so, they can be guided by the Model Regulatory Objectives for the Provision of Legal Services, which were adopted by the ABA House of Delegates in February 2016. The Model Regulatory Objectives are:

²⁶ *Id.* at 2-3.

²⁷ Ted Schneyer, *Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice*, 2009 J. PROF. LAW. 13, 32.

²⁸ See Christine Parker, Tahlia Gordon & Steve Mark, *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J. L. & SOC’Y 466 (2010) (Eng.); Steve Mark, *Views from an Australian Regulator*, 2009 J. PROF. LAW. 45; see also John Briton & Scott McLean, *Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era*, 11 LEGAL ETHICS 241 (2008) (Eng.) (discussing Queensland’s similar program). The ABA Commission on Ethics 20/20 considered proactive entity regulation. See Memorandum from Jamie S. Gorelick & Michael Traynor, Co-Chairs, ABA Comm’n on Ethics, to ABA Entities, Courts, Bar Associations, Law Schools, and Individuals (Dec. 28, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111228_summary_of_ethics_20_20_mission_actions_december_2011_final.authcheckdam.pdf. Currently, the ABA Standing Committee on Professional Discipline is studying the issue of whether and how law firms as organizations should be regulated. This paper is seeking comments only on whether and how unregulated LSP entities should be regulated.

²⁹ *Entity Regulation: Frequently Asked Questions*, *supra* note 24, at 13.

³⁰ *Id.*

³¹ *Id.* at 14.

³² *Id.*

³³ *Id.*

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- A. Protection of the public
- B. Advancement of the administration of justice and the rule of law
- C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems
- D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections
- E. Delivery of affordable and accessible legal services
- F. Efficient, competent, and ethical delivery of legal services
- G. Protection of privileged and confidential information
- H. Independence of professional judgment
- I. Accessible civil remedies for negligence and breach of other duties owed, and disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs
- J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system.³⁴

Using the Model Regulatory Objectives as guidance, state courts could undertake to determine if regulation of unregulated LSP entities is appropriate. For example, a state court might decide to impose regulations on companies that offer automated document assembly to the public. Such services are arguably “credence goods” (i.e. the quality is difficult for laymen to measure or assess), and many of the products that they offer – wills, powers of attorney, business formation documents to name a few – have critical legal effects.³⁵ In contrast, a court might determine that an entity offering legal process outsourcing services does not need to be regulated, because such entities typically operate under the supervision of lawyers and are not offering their services directly to the public.

IV. Conclusion

³⁴ See ABA House of Delegate Resolution 105 (Feb. 2016), available at <http://www.americanbar.org/content/dam/aba/images/abanews/2016mymres/105.pdf>. The Resolution went on to state, “that nothing contained in this Resolution abrogates in any manner existing ABA policy prohibiting non lawyer ownership of law firms or the core values adopted by the House of Delegates.” *Id.*

³⁵ For suggestions on how such entities might be regulated, see Perlman, *supra* note 18, at 99-107. Any regulation in this area must be consistent with the First Amendment.

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The Commission is interested in receiving: (1) data and evidence about currently unregulated LSP entities, including the types of entities that currently exist, the extent to which any public protection issues have emerged as a result of the operation of those LSPs, and the extent to which any particular types of LSP entities should be subject to new regulatory structures; and (2) information concerning any efforts to regulate these LSP entities. The Commission also seeks input on whether state judicial authorities should be encouraged to regulate currently unregulated LSP entities and, if so, what form those regulations should take.

The Co-Chairs of the Regulatory Opportunities Project Team, Paula Littlewood and Chief Justice Barbara Madsen, welcome your feedback. Should you have questions, please contact Paula Littlewood at paulal@wsba.org; the Commission's Chair, Judy Perry Martinez, jpmartinez6@gmail.com; and the Commission's Vice Chair, Andrew Perlman, aperlman@suffolk.edu. We are eager to receive and incorporate your input. Any responses to the questions posed in this paper, as well as any comments on related issues, should be directed by Thursday, April 28 to:

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Comments received may be posted to the Commission's website.