

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 Legal Checkups

Date: March 22, 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 Issues Paper.

I. Executive Summary

This Issues Paper discusses the creation and dissemination of widely available legal checkup tools to help individuals identify legal needs of which they may be unaware.

The American Bar Association Commission on the Future of Legal Services¹ believes that legal checkups are an underutilized resource in efforts to expand access to legal services. Many noble efforts have been made to improve access to legal services, yet a high percentage of people with civil justice problems do not recognize that they have legal needs that require legal solutions. The availability and use of legal checkups would raise individuals' awareness of their legal needs and help them recognize when they can benefit from legal assistance.

To effectively improve access to legal services, however, legal checkups should meet fundamental standards. For that reason, this Issues Paper proposes model guidelines for legal checkups. The Commission seeks feedback on both the proposed guidelines and the use of legal checkups as a means to improve access to legal services.

II. Legal Needs

Individuals of all income levels often do not recognize when they have a legal need and, even when they do, fail to seek legal assistance. In *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*,² Professor Rebecca Sandefur detailed the scope and nature of civil justice issues that people confront. Her research shows that 46% of people are likely to address their problems themselves, 16% of people do nothing, and 16% get help from family or friends. Only 15% sought formal help. Only 16% even considered consulting a lawyer. The

¹ Information about the Commission is available at: www.ambar.org/abafutures.

² http://www.abajournal.com/files/sandefur_accessing_justice_in_the_contemporary_usa_aug2014.pdf.

Commission believes that a legal checkup tool will, on balance, advance the public interest by raising individuals' awareness of their own legal needs and promoting legal representation to avoid adverse legal consequences.

As Professor Sandefur states, "These problems emerge in people's lives at the 'intersection of civil law and everyday adversity' – they involve shelter, livelihood, debt, and the care and custody of dependent children and adults."³

Although the research does not delve into the severity of the legal problems people confront and leaves open the question of how many would benefit from formal assistance (including from a lawyer), the research does demonstrate what Richard Susskind refers to as a latent legal market.⁴ The research also shows the limitations of current efforts to reach out to those with legal needs.

III. The Value of Legal Checkups

Legal checkups are analogous to medical checkups. Sometimes a person is fully aware there is a problem, as indicated by a fever, pain, or other overt symptoms. At other times, medical issues are only discovered through blood work or other diagnostic tools. Similarly, legal issues sometimes have overt manifestations, but at other times lie dormant until the problems become acute, unavoidable, or unfixable.

Most efforts to advance the delivery of legal services, including those in the private sector, legal aid, and pro bono, focus on serving the needs of those who know they have a problem that has a legal solution. A different set of strategies is required to reach those who have a legal need but do not recognize it. Even those who recognize they have a legal need might not associate it with a legal solution.

In many instances where efforts have been made to reach out to those who are not aware that their problems have legal solutions, those efforts have not succeeded. A new set of strategies is needed. Medical-Legal Partnerships are a good example of efforts that successfully embrace that new strategy of deploying cross-disciplinary resources and expertise to bring solutions to those problems that exist at the "intersection of civil law and everyday adversity." If a child has a respiratory infection, a doctor may believe the cause is environmental, such as mold in the family's apartment. A lawyer may then help the family resolve the underlying cause of the medical condition by asserting the family's legal rights to safe housing. Similarly, at a legal clinic in a homeless shelter for veterans, a social worker may become aware that a shelter resident is having trouble getting a job.

³ Sandefur, Rebecca L. 2007. "The Importance of Doing Nothing: Everyday Problems and Responses to Inaction." Pp. 112-132 in *Transforming Lives: Law and Social Process*, edited by Pascoe Pleasence, Alexy Buck and Nigil Balmer. London: TSO: Rebecca L. Sandefur 2010: "The Impact of Counsel: An Analysis of Empirical Evidence." *Seattle Journal of Social Justice* 9 (1): 51-95.

⁴ *The Future of Law: Facing the Challenges of Information Technology*, Richard Susskind, Clarendon Press, 1996, at 273-274.

Recognition of a criminal record and referral to the legal clinic may result in expungement of that record clearing the way for potential employment.

Others may not even be aware they have a problem, let alone a problem with a legal solution. For example:

- Those who are starting a new business may incorporate without understanding the obligations for annual meetings and corporate recordkeeping. That same start-up business may not know it needs to protect the enterprise's intellectual property, leaving the company's logo at risk. Failing to comply with these requirements could result in personal financial liability.
- A divorced parent may be unaware of obligations or opportunities regarding a child's college expenses that were deferred during the divorce 15 years before.
- People may not understand the value of estate planning documents, such as powers of attorney and advance directives.

These issues and many others may surface through the use of legal checkups.

The idea of legal checkups is not new. Louis M. Brown, a practitioner and law professor, wrote extensively about "preventive law," the client-centric idea that lawyers should employ prophylactic measures to forestall legal problems. Between 1950 (when he wrote the textbook "Preventive Law") and 1986 (when he wrote "Lawyering Through Life: The Origin of Preventive Law"), Professor Brown designed solutions, including the legal checkup. In his 1974 book, "Manual for Periodic Legal Checkups," Brown wrote:

Clients find that the checkups are educational for them and they are alerted to a "number of legal aspects of their lives." Such things as inadequate insurance coverage for liability, failure to review a will executed many years before, failure to adopt a child who is living with a client, mixing of marital properties so as to cause problems in a decedent's estate or divorce, or failure of a person to take adequate security on a promissory note from one in whom the lender had great faith, are examples of facts which come up in a legal checkup. "The legal profession has yet to learn, and clients have yet to appreciate, that there is value in a professional diagnosis whether or not 'problems' are surfaced." [footnotes omitted]⁵

Professor Brown's vision was that a lawyer would consult with a client on a periodic basis, just as doctors conduct regular medical checkups. That lawyer would then

⁵ See pages 134 – 136 at http://www.law.ua.edu/pubs/jlp_files/issues_files/vol12/vol12art08.pdf

be in a position to provide timely representation in conjunction with life events that demand or otherwise benefit from a legal solution.

Although bar associations have periodically promoted legal checkups, sometimes in partnership with other institutions, many early initiatives have fallen into disuse. Today, some bar associations, firms (both for-profit and not-for-profit), and public interest organizations offer a variety of legal checkups. Even today's legal checkups, however, typically do not take advantage of the benefits resulting from the use of the latest technology. Although many legal checkups are online, they are rarely online tools: specifically, they do not take advantage of "expert system" technology to create branching inquiries that enable people to quickly and efficiently work through a breadth of issues from anywhere they have Internet connectivity, though there are a few notable exceptions.⁶

Legal checkups hold the promise of enabling individuals to identify legal needs of which they may be unaware and to take timely steps to address those needs. The Commission therefore believes that such checkups can be an invaluable resource in improving access to legal services.

IV. Proposed Guidelines for Legal Checkups

To make a meaningful contribution to improving access to legal services, legal checkups should meet certain fundamental standards. For that reason, this Issues Paper proposes the following guidelines for legal checkups:⁷

Guidelines:

- 1. Consumer Protection:** Because the purpose of legal checkups is to assist users in recognizing their own legal needs and possible legal solutions, legal checkup tools must be designed to protect and benefit those who use them.
- 2. Candor and Transparency:** The promotion, distribution, and content of legal checkups must not be false, misleading, or deceptive.
- 3. Substantive Quality:** Legal checkups should be created in consultation with individuals who are competent in the applicable law that the checkup addresses.

⁶ See <http://alegalcheckup.com/> and <http://www.caconsumerjustice.org/get-legal-help/other-legal-help/>

⁷ These guidelines are consistent with the Best Practice Guidelines for Legal Information Web Site Providers, developed by the ABA Elawyering Task Force. The American Bar Association House of Delegates approved these guidelines on February 10, 2003. http://www.americanbar.org/groups/law_practice/committees/elawyering-best-practices.html

- 4. Communication:** Legal checkup providers should clearly communicate to users that the quality and effectiveness of the checkup depends on the users providing full and accurate information.
- 5. Limits of Checkup:** Legal checkup providers should give users conspicuous notice that a legal checkup is primarily designed to identify legal issues, not to solve them, and is not a substitute for the advice of a lawyer.
- 6. Resources:** If a legal checkup identifies unresolved legal needs, it should direct the user to appropriate resources, such as lawyer referral services, social services, government entities, or individual practitioners.
- 7. Accessibility:**
 - a. To the extent feasible, legal checkups should be accessible to all users, including people who do not speak English and people with disabilities.
 - b. Legal checkups should be available to the public in a wide variety of venues (e.g., public libraries, domestic violence shelters, social services offices, membership organizations, etc.).
 - c. Web-based legal checkups should be available on a wide variety of electronic platforms, including mobile platforms.
 - d. The content of legal checkups, and their terms of use and privacy policies, must be accessible, written in plain language, and easy to navigate.
- 8. Jurisdiction:** Where legal checkups are state-specific, the provider should identify the relevant state law. Where legal checkups are not state-specific, but implicate state law, the provider should indicate that not all content may apply in the user's state.
- 9. Compliance with Law:** The development and administration of legal checkups must comply with all applicable law,⁸ including laws and rules regarding unauthorized practice of law.
- 10. Privacy and Security of Personal Information:** Providers of legal checkups – whether web- or paper-based – should take appropriate steps to

⁸ For example, lawyers who provide legal checkups should consider whether providing a legal checkup to a user creates a prospective client relationship under the relevant jurisdiction's version of Model Rule of Professional Conduct 1.18.

protect users' personal information from unauthorized access, use, and disclosure. Personal information should only be used for the purpose of the legal checkup and not for any other purpose without the express authorization of the user. Providers of legal checkups should not disclose any personal information without the user's informed consent and explicit agreement.

11. Provider Information: Legal checkups should include the provider's contact information (e.g., name, address, and email address) and all relevant information about the provider's identity, including legal name.

12. Dating of Material: The date on which the legal checkup was last updated should prominently appear on the legal checkup.

V. Conclusion

Despite their potential to serve as a robust tool to improve access to legal services, legal checkups have been underutilized. To truly improve access to legal services, however, legal checkups must embrace certain fundamental principles designed to assist and protect consumers. Accordingly, the Commission seeks feedback on:

1. The use of legal checkups to improve access to legal services and
2. The Proposed Guidelines for Legal Checkups (Section IV above).

The Commission on the Future of Legal Services welcomes your feedback. Should you have questions, please contact Karl Camillucci, karl.Camillucci@hklaw.com, Chair of the Legal Checkups Project Team; 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 **April 15, 2016** to:

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