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April 28, 2016

Katy Englehart
American Bar Association
Office of the President
321 North Clark Street
Chicago, IL. 60610

Dear Ms. Englehart:

Enclosed are the comments of the New York State Bar Association with regard to the papers issued by the Commission on the Future of Legal Services on Legal Checkups, Unregulated LSP Entities and Alternative Business Structures. Also enclosed are three President's Messages that appeared in our Association's Journal that are related to the topics discussed in the Commission's papers.

Sincerely,

David P. Miranda

DPM/kam
Enclosures

NEW YORK STATE BAR ASSOCIATION'S COMMENTS ON THE ABA COMMISSION ON THE FUTURE OF LEGAL SERVICES' ISSUES PAPERS ON LEGAL CHECKUPS, UNREGULATED LSP ENTITIES AND ALTERNATIVE BUSINESS STRUCTURES

The New York State Bar Association ("NYSBA") respectfully submits these Comments on the following three Issues Papers drafted by the ABA Commission on the Future of Legal Services (the "ABA Commission"): (1) the Issues Paper Concerning Legal Checkups dated March 22, 2016 (the "Legal Checkups IP"); (2) the Issues Paper Concerning Unregulated LSP Entities dated March 30, 2016 (the "LSP IP"); and (3) the Issues Paper Regarding Alternative Business Structures dated April 8, 2016 (the "ABS IP") (collectively, the "Issues Papers"). These Comments have been approved by the NYSBA's Executive Committee.

Once again, we applaud the efforts of the ABA Commission to develop new paradigms for addressing legal services providers in the evolving 21st Century legal market. We share the ABA Commission's desire to make legal services more accessible and affordable to the general public. We also share concerns regarding the many and varied nonlawyer legal services providers ("Nonlawyer Providers") that have sprung up in recent years, such as on-line legal matching services, on-line legal document providers, outsourcing firms, and e-discovery services.

Nevertheless, the NYSBA remains deeply concerned by the ABA Commission's approach, especially in light of Resolution 105 approved by the ABA House of Delegates (the "HOD") at the ABA's 2016 Mid-Year Meeting in San Diego. Because many of our concerns apply with equal force to all three Issues Papers, we have chosen to consolidate our comments into a single report. We address our overarching concerns first, and then address each of the specific Issues Papers.

The NYSBA's Overarching Concerns

Resolution 105 approved the Regulatory Objectives which the ABA Commission had proposed as a paradigm for court-based regulation of lawyers and Nonlawyer Providers. But it did so with a clear limitation: "[N]othing 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." This limitation (the "Non-Abrogation Clause") is set forth in Resolution 105 itself. It is consistent with the reservations the NYSBA expressed in its Comments to Resolution 105 (the "NYSBA 105 Comments"), and was the lynchpin to obtaining passage of the hotly-contested Resolution. Yet the ABA Commission gives it short shrift.

First, the LSP IP (at 7) quotes the Regulatory Objectives verbatim in the main text, but relegates the Non-Abrogation Clause to a footnote. Second, despite the HOD's reiteration of its policy opposing non-lawyer ownership of law firms, the ABA Commission waited less than two months before issuing an Issues Paper recommending that "any consideration of possible regulatory reforms should include an examination of Alternative Business Structures (ABS)," a code name for non-lawyer ownership of law firms, the very thing Resolution 105 prohibits.

These facts, and the three Issues Papers generally, raise serious questions as to whether the ABA Commission is on a course that is consistent with the dictates of the ABA HOD. Rather, the ABA Commission appears to be on a course that raises many serious concerns. The NYSBA set forth several of these concerns in the NYSBA Comments on Resolution 105, and those concerns are worth repeating here.

First, the ABA Commission continues to rely heavily on regulations adopted in other common-law jurisdictions, such as England and Wales, Australia, and parts of Canada. *See, e.g.*, ABS IP at 4-7; LSP Entities IP at 6. But in these jurisdictions, lawyers are regulated, at least in part, not by courts (as they are in the U.S.), but instead by national regulatory agencies created by a legislature. In England and Wales, for example, Parliament has created the Solicitors Regulation Authority (the "SRA"). NYSBA 105 Comments at 1; ABS IP at 5. The ABA Commission also cites to other countries (Italy, Spain, Denmark, Singapore and others), but the experience in those jurisdictions likewise has limited relevance to the United States, because all of those foreign jurisdictions have far more uniform nationwide lawyer regulation than the United States, which has generally left lawyer regulation to the individual states and territories. Methods adopted by legislatures in countries where legal services are governed by uniform national regulatory systems are of limited relevance to the U.S. system, because in the U.S. system regulations governing lawyers are adopted by courts, which have limited power and limited jurisdiction.

The current influx of Nonlawyer Providers provides a new impetus to create an appropriate definition of the unauthorized practice of law – a definition that covers most Nonlawyer Providers (though probably not all of them) and thus brings them within the authority of the courts, which historically have had the right to regulate the practice of law. If the practice of law is re-defined to include the kinds of activities that Nonlawyer Providers perform, then Nonlawyer Providers will become subject to court regulation or prohibition.

As LegalZoom has shown in its recent fight with regulators in North Carolina (and other jurisdictions), at least some Nonlawyer Providers have the resources and the resolve to wage protracted battles against efforts to regulate their conduct. *See LegalZoom Sees UPL Tide Turning After Settlement with North Carolina Bar,* ABA/BNA Lawyer's Manual on Professional Conduct, Nov. 18, 2015, at 676. The ABA Commission cannot wish that problem away, or leap past it – as its recent Issues Papers attempt to do – by suggesting that specific court-based regulations in the United States can be modeled on legislative-based regulatory systems from other countries.

Second, as noted, despite the explicit requirements of Resolution 105 and its Non-Abrogation Clause, the ABA Commission continues to give insufficient weight to the importance of ensuring the professional independence of lawyers (which is the purpose of MR 5.4) and adhering to core values (as set forth in HOD Resolution 10). *See* NYSBA 105 Comments at 2. The Commission's continued pursuit of ABS after its many defeats in the HOD is evidence of this. We will comment more explicitly on the ABS IP below, but the ABA Commission's failure to adhere to the ABA's own oft-stated policies and the plain terms of Resolution 105 is troubling.

Third, none of the three Issues Papers suggest that Non-Lawyer Providers will be required to adhere to the high standards set by the Rules of Professional Conduct that govern lawyers. *Id.* Ensuring congruence between the professional obligations of lawyers and that of nonlawyers working with and for lawyers is already a feature of ABA Model Rule 5.3 (governing supervision of nonlawyers by lawyers and law firms) and Rule 5.7 (governing lawyers who operate or own law-related businesses), as well as the rules of the District of Columbia, the only U.S. jurisdiction allowing a form of ABS. *See* D.C. Rules of Professional Conduct 5.4(b)(2) (requiring nonlawyer owners of law firms to adhere to the Rules of Professional Conduct). The three Issues Papers divorce Nonlawyer Providers from this simple requirement, thus stripping the public of vital protections while simultaneously giving nonlawyers an enormous and unfair advantage over lawyers. The first item in the Regulatory Objectives is "Protection of the public." To achieve that objective, Nonlawyer Providers should be required to live up to at least those Rules of Professional Conduct that are designed to protect the public.

The Legal Checkups IP

In the Legal Checkups IP, the ABA Commission promotes the use of "legal checkups," in which members of the public would have their legal needs evaluated without waiting for specific legal problems to arise. "The availability and use of legal checkups," the ABA Commission says, "would raise individuals' awareness of their legal needs and help them recognize when they can benefit from legal assistance." Legal Checkups IP at 1. The NYSBA concurs that prophylactic legal checkups can be a valuable tool, and that the organized bar should promote their use.

But the crucial question is: who should perform these checkups? In discussing the work of Professor Louis M. Brown and his 1974 book, "Manual for Periodic Legal Checkups," the ABA Commission itself describes Professor Brown's "vision" as being one in which "a ***lawyer*** would consult with a client on a periodic basis, just as doctors conduct regular medical checkups." Legal Checkups IP at 3 (emphasis added). The ABA Commission goes on to describe how bar associations, law firms (both for-profit and not-for-profit), and public interest organizations already offer a variety of legal checkups, but the Commission says that these checkups are often not satisfactory because of they fail to utilize available on-line tools. *Id.* at 4. Still, the Legal Checkups IP appears to be premised initially on a model in which legal checkups are performed by *lawyers.*

That premise disappears when the IP proposes guidelines for legal checkups. The proposed guidelines refer to "legal checkup providers," and Proposed Guideline No. 5 suggests that such 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*." Legal Checkups IP at 5 (emphasis added). Proposed Guideline No. 9 then distinguishes between lawyers and nonlawyers providing these checkups, and requires that all such providers comply with UPL statutes (but not with the Rules of Professional Conduct).

Nonlawyer Providers should not be allowed to perform legal checkups unless they are actively supervised by licensed attorneys. The danger is otherwise too great that such unlicensed

and unsupervised providers will provide legal advice. A better approach, is to vigorously promote legal checkups by lawyers. Legal checkups by lawyers provide a way for private practitioners, legal services agencies, and the organized Bar to connect with potential clients. In other words, legal checkups are a tool that *lawyers* can use to identify legal problems and provide legal services to clients who might otherwise not recognize the need for legal services, and a tool that *lawyers* can use to provide peace of mind for members of the general public who can be confident after a "clean" checkup by a lawyer that they are not at risk of unanticipated legal problems.

The organized bar – including the ABA, state and local bar associations, and courts – can promote legal checkups through advertising, public forums, community outreach and on-line marketing efforts. In promulgating proposed guidelines for legal checkups, the ABA Commission should make clear that these check-ups should be performed either by lawyers directly or by nonlawyers under the supervision of lawyers. Legal checkups should not be left to unregulated and unsupervised Nonlawyer Providers. Our profession should not turn to nonlawyers to provide unsupervised legal checkups until the organized bar and the courts have first devoted substantial resources to encouraging lawyers to offer legal checkups to the public and encouraging members of the public to get legal checkups from lawyers.

The LSP IP

The stated purpose of the LSP IP is to study "non-traditional LSP entities that already exist in the marketplace and are often unregulated . . . with the goal of gathering data on the spectrum of services that these unregulated LSP entities provide to the public and eliciting feedback on whether the public would benefit if state judicial authorities develop new regulatory structures for these entities." LSP IP at 1-2. The LSP IP makes an important distinction between legal services for (a) those who either lack access to lawyers or cannot afford a lawyer (*i.e.*, indigent clients), on the one hand, and (b) those who can afford a lawyer but choose not to spend money on legal services, on the other hand. *Id.* at 2-3. As to those who cannot afford legal services, the NYSBA supports the continuing efforts by the New York court system, and by courts and legislatures throughout the country, to make lawyers and legal services available to indigent clients via pro bono representation and via funding for legal services programs. The NYSBA has also supported the use of nonlawyers who are supervised by lawyers to assist such clients, including the use of Court Advocates in Housing Court and in other branches of our Civil Courts.

But as to members of the public who can afford lawyers but choose not to spend their resources on lawyers, the NYSBA is more wary. We view with some alarm the rapid growth of a wide variety of Nonlawyer Providers in recent years, which is a phenomenon noted in the LSP IP. Those Nonlawyer LSPs provide a wide variety of legal and law-related services, some of which cause more concern than others. The legal and law-related services range from e-discovery vendors and on-line document managers (less concerning) to nonlawyers who help clients complete forms, who outsource legal services to foreign nonlawyers, and who match lawyers to clients (more concerning). LSP IP at 3. However, we share the ABA Commission's concern that "the governing law [with respect to these Nonlawyer Providers] 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." *Id.* at 4.

This brings us back to the issues raised at the beginning of these comments: how can the organized bar accomplish the goal of having *courts* regulate Nonlawyer Providers? To repeat what we said earlier, rather than dwell on the failure of the effort to define the practice of law 13 years ago, as the ABA Commission does (see LSP IP at 5), we strongly urge the ABA to revisit the project with a new urgency. A new, more inclusive definition of the practice of law would better enable courts to bring the conduct discussed in the report within their supervisory ambit, and would allow courts to decide which nonlawyer activities should be left alone, which should be regulated, and which should be prohibited. Such a definition could more closely resemble that in N.Y. Judiciary Law § 484, which focuses on the specific tasks lawyers perform ("appearing as an attorney in any court or before any magistrate, or . . . preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate, wills, codicils, or other instruments affecting the disposition of property after death," etc.), rather than the more circular and unsuccessful definitions of "practice of law" noted in the LSP IP.

Unmentioned up to now in the literature and elsewhere are some critical questions. What remedies would a customer of NonLawyer Provider in the event of faulty advice? What standard of care would be applicable to its performance? Would or should NonLawyer providers be required to provide insurance coverage for the benefit of its customers; and if so, in what amounts and specific coverages? Finally, with respect to the foregoing, who is empowered to require NonLawyer Providers to be subject to the foregoing.

The ABS IP

The ABS IP troubles us the most – and not just because it directly contravenes the Non-Abrogration Clause in Resolution 105. The NYSBA has historically opposed efforts to implement nonlawyer ownership of law firms for the simple reason that it threatens the professional independence of attorneys, and pits the mandate that lawyers abide by ethical rules against the profit motive of nonlawyer owners. When the first proposal of the ABA Commission on Multidisciplinary Practice was submitted to the ABA HOD at its 1999 annual meeting, NYSBA's then-President, Thomas O. Rice, voiced our opposition to the proposal, "simply and eloquently stating that the long-term independence of our profession should not be compromised for short-term financial gain." D. Miranda, "Say No to Nonlawyer Ownership (NLO)," NYSBA Journal, January 2016 at 5. In 2000, the NYSBA Special Committee on the Law Governing Law Firm Structure and Operation, chaired by Robert MacCrate, former President of both the ABA and NYSBA, stated:

> Thus, we have considered and rejected the suggestion that rules against nonlawyer participation in the practice of law should be relaxed. We do so mindful of the fact that denying nonlawyers the ability to have a financial interest or otherwise to participate in law firm governance deprives lawyers of significant opportunities for financial gain. Nevertheless, we believe that is in the public interest that lawyers forego this opportunity." [Cited at *id.*]

Twelve years later, when the ABA Commission on Ethics 20/20 proposed permitting a limited form of nonlawyer ownership of law firms and allowing the sharing of fees with firms that have offices nonlawyer owners in jurisdictions where that is permitted, the NYSBA (along with several other state bar associations) again opposed it and the proposal was withdrawn.

The NYSBA's long-standing opposition to ABS proposals has not prevented us from fully and fairly studying the concept. Ten years after the NYSBA Special Committee report cited above, the NYSBA formed a Task Force on Nonlawyer Ownership chaired by former NYSBA President Stephen Younger. After an exhaustive study of ABS models proposed by U.S. academics, as well as by regulators in the U.K. and Australia, the Task Force voted overwhelmingly (16-1) against "any form of nonlawyer ownership at this time." Report of the NYSBA Task Force on Nonlawyer Ownership, Nov. 17, 2012 at 78. Members noted that before approving ABS for New York, "they would want to see studies [from jurisdictions where nonlawyer ownership is generally authorized] on the impact of nonlawyer ownership on access to justice, professionalism, lawyer independence, the relationship between the lawyer and the client, regulation of lawyers, and feedback from clients and 'consumers' (as the UK refers to clients)." *Id.*

The ABS IP lists a number of studies and academic articles on ABS, but all of the cited studies are inconclusive. One of the articles listed points up the need for "[m]ore and better data" on the impact of ABS structures, particularly on poor and middle-class clients. The same article notes, in response to studies by regulators in the UK and elsewhere, that "there is a danger that if regulators only make decisions based on what they can measure with specificity that they will deemphasize factors they cannot easily quantify, but may be just as, or more, important." N. Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access and Professionalism*, 29 Geo. J. Legal Ethics 60 (2016). Professor Robinson suggests that the benefits of non-lawyer ownership may be oversold: "The evidence so far does not indicate that these access [to justice] gains will be as significant for poor and moderate-income populations as some proponents suggest, and if non-lawyer ownership is seen as a substitute for other access strategies, like legal aid, such a deregulatory reform strategy could even have a detrimental effect." *Id.* at 61-62.

Some studies and articles do support ABS, or at least say it should be studied further. *See, e.g.*, J. McMorrow, *UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the U.S.*, Boston College Law School Legal Studies Research Paper Series No. 395, March 31, 2016 at 47 (noting that ABS "has not resulted in an immediate transformative change in the [UK] legal services industry," but suggesting further study in the U.S.). These studies and articles, however, fail to consider important facts. First, the Australian and English adaptations of ABS are predicated on the existence in those jurisdictions of a regulator that has authority to audit the performance of each ABS, and that is adequately staffed and funded to do so. This is not realistic in the U.S. because we have no national regulator and no ready source of funds to finance such an ambitious effort. Second, these foreign jurisdictions require a single specified lawyer in the organization to be responsible for ensuring that the ABS complies with all lawyer professional responsibilities, and to be penalized if it fails to do so. This would require an extreme cultural and regulatory change in the U.S., especially given the massive size and the multi-office, multi-jurisdictional nature of many U.S. law firms. Third, the

one U.S. jurisdiction that has ABS, the District of Columbia, has not demonstrated that ABS generates the benefits that ABS supporters predict will result. In short, we have seen no evidence that the U.S. has the regulatory structures in place to ensure that ABS structures would follow professional standards and core values, or that ABS will help alleviate the justice gap in this country.

As the NYSBA's 2012 Task Force report makes clear, the NYSBA remains open to further study. Still, the "burden of proof" must remain on proponents of ABS to show that nonlawyer ownership, which the ABA has repeatedly said is antithetical to core values and professional independence, is necessary to achieve wider access to justice, and that ABS both helps the public and protects it. ABS proponents also need to show that ABS structures can work in the regulatory regime we have, not just in the very different regulatory regimes of other common law jurisdictions (if indeed ABS works even in those jurisdictions – a question it is too early to answer).

Until such studies exist – and the articles we have read and cited make clear they do not yet exist – we oppose ABS. More important, so does the ABA HOD. The ABA Commission would be wise to heed this direction, and to not continue to push ABS without providing the empirical studies and regulatory backdrop needed to support it.

We remain committed to working with the ABA Commission to address the other issues it has raised, including devising an effective and practical means of addressing Nonlawyer Providers who pose the greatest risks to the public.

DAVID P. MIRANDA

Influencing the Future

Everyone here has the sense that right now is one of those moments when we are influencing the future. – Steve Jobs

As part of our initiative to involve law students in our Association, I often have the honor of addressing students at law schools throughout our state, talking about the truly noble career path they have chosen and the importance of bar association involvement in their professional careers. The students I speak to will be entering a job market that is vastly different from the one I entered more than two decades ago. Recent law graduates, in New York and throughout the nation, are not just competing with each other for work; they are competing with those who have already graduated and who are still seeking work. New lawyers, burdened by student loans and trying to make their own way in a market that no longer promises high-paying jobs upon graduation, will face a tough road ahead of them.

The sentiment shared by Steve Jobs when he predicted the explosion of laptops and how the Internet would change how our nation does business is now equally applicable to how we practice law. Today we are faced with "legal services" companies that purport to enhance your exposure on their promoted attorney websites, where a lawyer's performance and expertise is assigned a numerical value, the same as one might rate a pizza delivery guy; and legal form services, where the law is reduced to a form that just needs to be completed. Change is coming to our profession from profiteering entrepreneurs unencumbered by rules of ethical conduct and responsibility. Even in the face of change, it remains incumbent upon us as attorneys to remain guided by the rules of professional responsibility as we use new technologies.

As a legal community, both at law schools and bar associations, we spread the word on the importance of resume building, networking, and giving back to our communities while gaining valuable experience at the same time. We must work to prepare all lawyers to adjust to – and to influence – the new legal marketplace. We must encourage a thoughtful focus on navigating the decisions that promise to make a major impact on the future of our profession, like participating in and lending credibility to online services that promise to find potential clients using questionable methodologies; or worse, standing by while websites that promise to do all the legal work for consumers, without sharing the credentials of their so-called legal practitioners, continue to flourish while skirting ethics rules or waiving responsibility altogether.

Our Association, long opposed to attorney rankings, is currently studying the issue of ratings, and has found that the methodologies and results of attorney advertiser services can often be misunderstood by the general public. Search terms alone can pose a problem. If potential clients search for counsel with imprecise words describing the kind of legal bind they are concerned about, they could miss equally qualified practitioners listed under a more generic or commonly used term. That missed click would not just affect potential clients, it could have a disproportionately negative impact on a generalist lawyer with a broad practice. Worse are those services that purport to rank attorneys based on an algorithm that only the service is aware of, where attorneys can pay the service to help them "master" the system. These services proudly boast their rankings are not "pay to play" when, in reality, if you pay the services, they will "advise" you on how to "play" their system. Often, attorneys who pay for the most "advice" are ranked highest, which influences the decisions of an unknowing public. Bar associations, including ours, are increasingly receiving complaints from the public, and attorneys, about the methods used by such services.

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While attorneys at larger firms benefit from the higher profiles of their workplaces and firm websites, which are often bolstered by greater public relations resources, lawyers at solo and smaller firms are easy prey for the promises of well-funded attorney advertisers. Solo and small firm lawyers, and lawyers who work outside of major metropolitan areas, may have a much harder time penetrating the online marketplace. They are promised easy access to high-profile marketing by legal services companies that can purchase expensive Internet and media advertising due to an influx of venture capital from investors seeking a return on their investment. Venture capital is going to these companies because investors intend to make money on the backs of lawyers desperate for work and a public starving for easy answers.

The New York Rules of Professional Conduct state that attorney ratings must be unbiased and nondiscriminatory. Rule 7.1, Comment 13 states that ratings "must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service's economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated."

The burden of discovering which ratings are legitimate and which ones are inflated, or paid for, unfairly falls on the shoulders of unsuspecting consumers. While these services refer to themselves as innovators, they may end up subverting the very premise of the profession they claim to be promoting. If ratings are the result of a pay-to-play scheme, where more money means a higher ranking, the profession and the public will suffer.

Equally troubling is the proliferation of sites that promise to do all the work a lawyer can do, for a small fee. It's true that some legal work may require filling out a relatively simple form and asking a competent person to review it. But if, for example, business partners find out they set up their small business the wrong way, with a form for the wrong type of entity or with the wrong information, they may not know until it's too late to recover from the damage. Knowing the right form to complete and the nuances of the information contained in it is crucial. Or if, for example, a power of attorney form used in a transaction is outdated or incorrect, the entire underlying transaction could be null and void. A consumer saving a few dollars by downloading a form could be out hundreds of thousands of dollars. Consumers have no recourse to hold accountable the company they paid for the legal service, as many of these online outfits claim to not provide legal advice.

Our Association is taking action to protect our profession and the public that we serve. Our Committee on Attorney Professionalism, and a new working group I recently appointed, are reviewing these issues to provide guidance to attorneys whose experience and expertise are independently recognized by third parties, or their peers, in accordance with the Rules of Professional Conduct. Meanwhile, we are embracing evolving technology and maximizing traditional communications, as we recognize just how crucial it is for our members to increase efficiency in both how they work and how they make meaningful connections with clients.

To enhance the work of our members, NYSBA offers tools such as Surrogate's Forms online, powered by HotDocs.® The service offers a fully automated, and vetted, set of official probate forms, as promulgated by the Office of Court Administration (OCA) and used by various Surrogate's Courts throughout the state. To connect licensed attorneys with potential clients in an efficient and accessible way, we offer the Lawyer Referral and Information Service (LRIS), which serves 44 counties in New York. Our non-attorney LRIS counselors do not offer legal advice but direct callers to real lawyers or the most appropriate community organizations or resources to address their situation.

The preamble to the New York Rules of Professional Conduct states that as lawyers we share a responsibility to "further the public's understanding of and confidence in the rule of law and the justice system" because our "legal institutions depend on popular participation and support to maintain their authority." For our system of law to maintain its integrity, and its authority, we must be a part of the solution, individually as practitioners and as an Association. We cannot leave the job of informing the public and addressing its legal problems to companies, staffed and funded by nonlawyers, that have only a financial stake in the transaction. The Rules of Professional Conduct tell us that we have a moral and ethical obligation toward the client in need and the future of our profession itself. When we reduce the law to nothing more than an easy download with no guidance, it is not just the profession that loses. It is the consuming public – people with real problems who need real help – that stands to lose the most of all. Our Bar Association, and our 74,000 members, must use the collective strength of our voices to influence the future of our profession. ■

DAVID P. MIRANDA

Say No to Nonlawyer Ownership (NLO)

The law is a treasured legacy. The bar is heir to that legacy. And we attorneys are custodians of that inheritance. It is our awesome privilege to preserve that bequest as we received it, autonomous, passionate and committed to the public interest. The solutions we forge today will paint the picture of what our profession is to become and what our legacy will be. Let then our bequest to the next generation of attorneys and to society be an independent profession, improved but undiminished, free and unfettered, respected and renewed.

NYSBA President Thomas O. Rice to ABA House of Delegates, August 1999

Early in my career, I had the good fortune and privilege of serving as the NYSBA Young Lawyers Section delegate to the American Bar Association House of Delegates. As a young attorney, I was given the opportunity to be part of discussions on important issues affecting our profession on a national level and to work with and learn from the great leaders in our New York delegation. Although my involvement with the bar association required taking precious time away from my new law practice and family, I returned from these meetings rejuvenated and proud of my profession, and excited about my career in the law.

Around that time, the ABA appointed a Commission on Multidisciplinary Practice (MDP) to study the issue of professional service firms owned by nonlawyers (NLOs) adding the provision of legal services to their mix. The ABA Commission issued a report proposing that entities owned or controlled by nonlawyers be allowed to engage in multidisciplinary practice with lawyers and that appropriate changes be made to the rules of ethics and professional responsibility. In response, NYSBA's House of Delegates adopted a resolution opposing such changes in the absence of a sufficient demonstration that these were in the best interests of clients and society and would not undermine or dilute the integrity of the delivery of legal services by the legal profession.

When the MDP report was submitted to the ABA House at its 1999 annual meeting, the New York State Bar Association, led by its then-President Thomas O. Rice, voiced its opposition to the proposal. President Rice addressed the ABA House, simply and eloquently stating that long-term independence of our profession should not be compromised for short-term financial gain. He had laid out his case in his first President's Message, published in the July-August *Journal.* In it he noted that proponents of business expansion plans cannot be permitted to make market-based proposals that allow businesses to dictate how law is practiced. Claimed increases in efficiency cannot be allowed to preempt a lawyer's duty to a client. Our highest priority must be to advance the profession's duties to society by preserving uncompromised loyalty to client interests. NYSBA and other likeminded bar associations around the country voted down the ABA Commission's MDP proposal.

Our Association also undertook a study of the issue. In 2000, the NYSBA Special Committee on the Law Governing Firm Structure and Operation, chaired by Robert MacCrate, former president of both the ABA and the NYSBA, issued its comprehensive report. The report concluded,

> Thus, we have considered and rejected the suggestion that rules against nonlawyer participation in the practice of law should be relaxed. We do so mindful of the fact that denying nonlawyers the ability to have a financial interest or otherwise to participate in law firm governance deprives lawyers of significant opportunities for financial gain. Nevertheless, we believe that it is in the public interest that lawyers forgo this opportunity.

Twelve years later, the ABA Commission on Ethics 20/20 proposed a limited form of nonlawyer ownership of law firms and the sharing of fees with firms that have offices in jurisdictions where nonlawyer ownership is permitted. After substantial opposition from many state bar associations, including ours, the proposal was withdrawn. Again our Association studied the issue, when then-President Vincent Doyle III formed a committee, chaired by past President Stephen Younger, to take a fresh look; the committee

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affirmed the findings of the MacCrate Report.

Yet, the ABA continues to pursue nonlawyer ownership of law firms. The ABA Commission on the Future of Legal Services has asked ABA delegates to adopt proposed model regulatory objectives at the ABA House of Delegates Meeting in February 2016, to "identify and implement regulations related to legal services beyond the traditional regulation of the legal profession."

If approved, the Commission would likely propose amendments to Model Rule 5.4 to allow lawyers and law firms to share legal fees with nonlawyers, who could hold a financial interest in the practice, in the delivery of both legal and nonlegal services.

We have some evidence of how nonlawyer ownership can work from a regulatory standpoint. Australia, whose practitioners are primarily small firms and solos, has set up a structure called incorporated legal practices, with each state setting up rules governing the practices in its jurisdiction. Each entity's legal practitioner director is ultimately responsible for managing the legal services provided and for reporting any misconduct by the practice, its employees or directors. It is difficult to see how well this self-reporting works because of the legal practitioner director's vested interest in the entity.

In the U.K., change came about because of a perceived lack of competition among firms and what had been called a crisis of confidence in the legal system. The U.K. established a national non-governmental regulator of all groups that regulate the legal profession. There are concerns about the top-down structure of legal regulation and the layers of bureaucracy it creates. Also, the regulations permit law shops in shopping areas, similar to tax preparation shops that proliferate in the United States during tax season.

In our own country, only the District of Columbia has allowed nonlawyer ownership of law firms. For 25 years, D.C.'s version of Model Rule 5.4 has allowed nonlawyers to hold a financial or managerial interest in a partnership with a lawyer. The nonlawyer may perform services that help the firm provide legal services to clients and must abide by the Rules of Professional Conduct. However, it is not widely used because a lawyer practicing outside of D.C. would almost certainly run afoul of rules in other states.

The ABA's latest proposal regarding nonlawyer ownership of law firms cites the need to improve delivery of and access to legal services and driving forces such as technology, globalization and market pressures. The ABA has proposed a series of "Model Regulatory Objectives" to create a framework within which the variety of types and delivery methods of legal services can be regulated.

It has been argued that any attorney with a bank loan is beholden to corporate interests, but an attorney's banker doesn't control the clients accepted or the cases pursued. Nonlawyer ownership of law firms creates a whole new set of fiduciary responsibilities, which have nothing to do with clients or their interests. Investors want to see a profit; shareholders are owed a fiduciary duty. Of course all attorneys need to make a living, but professional judgment should not be compromised by the need to hit certain quarterly goals.

The MacCrate Report still rings true. It noted that any nonlegal entity likely to be attracted to making such an investment would want to be financially dominant in the law firm, and it is reasonable "to assume that financial dominance confers control, either through outright ownership, or through the functional equivalent of outright ownership." Such investment would impose a duty on the principals of the law firm to operate it for the "financial benefit of the investors." Outside investment would create a minefield for lawyers, between legal ethics and independence on the one hand, and investors on the other. As the MacCrate Report noted, "this financial aspect of nonlawyer control of legal practice presents considerable risks to the legal system and the justice system," urging "the greatest caution" about permitting a "dominant nonlegal participant to influence the professional judgment of lawyers and to pass on matters of legal professional ethics." Even so-called passive investment in law firms is problematic. Nonlawyer owners might view "their" law firm as yet another profit center and would be less likely to encourage pro bono or public interest work because there would be no return. The financial objectives of nonlawyer management would be in perpetual competition with lawyers' professional ethics and independent judgments, which are in the best interests of legal clients and the legal system.

First and foremost, lawyers have a duty and responsibility to serve their clients. The attorney-client relationship forms an inviolable bond, and the attorney-client privilege, the hallmark of that relationship, is a seal that under the Rules of Professional Conduct cannot be broken. There simply is no such connection, no such code of professional responsibility in the business world.

We are a proud, strong, and noble profession; we are sworn in as officers of the court, part of a legal system that our society relies on for justice and fairness. Yes, our profession will change, but change should not be determined by profit-seeking entrepreneurs unencumbered by rules of ethical conduct and responsibility. It is incumbent upon us as attorneys and as representatives of the organized bar to remain guided by the Rules of Professional Conduct in our pursuit of ethical and responsible ways to use the new technologies to help us better connect with and serve our clients.

Of course we charge for our services; it's how we make a living, pay our employees, support our families, fund access to justice programs, and so on. That doesn't mean the law is just another business – nor should it be. ■

DAVID P. MIRANDA

Lawyers Must Protect the Public We Serve

"Do the Public Good."

– Motto of the New York State Bar Association

The Real Justice Gap

When we discuss the lack of availability of legal services to those who need them, often referred to as the "justice gap," we generally think of it in the context of providing pro bono legal services to the poor. However, the public, lawyers and the organized bar are faced with another, perhaps more difficult, gap – non-lawyer entrepreneurs attempting to make a profit on the backs of solo and small firm attorneys seeking work, and a public that wants easy answers to legal issues.

Increasingly our profession and the public we serve are threatened by non-lawyer "legal services" businesses that not only demean the profession, but also diminish the complexity and nuances of providing competent and effective legal services and reduce the attorney-client relationship to an online form that needs to be completed. Although these services claim to be innovative, they subvert the fundamental principles of our profession.

The New York State Bar Association and our profession have worked hard to help address the real justice gap for the poor and underserved. We make great efforts, working with our sister bars, pro bono legal service organizations and the courts to help address legal needs of the poor in this state. Our Association has three new staff members whose responsibilities include the promotion and coordination of pro bono activities, and we're partnering with the ABA to provide a justice portal to find new ways to deliver limited scope pro bono legal services via the Internet and email. We have taken the lead in looking to establish a statewide justice center in Albany to help coordinate and facilitate pro bono activities statewide. We also continue our longstanding and steadfast advocacy for increases in our state's budget to fully fund the judiciary and for legal services initiatives.

But there is also the second "justice gap" for lower and middle income New Yorkers with some resources to pay for legal services. This gap is frustrating because many attorneys, especially those who are newly admitted or who practice as solos or in small firms, report difficulty finding new ways to connect with clients. Along with other bar associations, NYSBA is working on enhancing our lawyer referral service to provide support to all attorneys, focusing on solo and small firms.

The legal profession and the organized bar must use the collective strength of their resources and expertise to address this issue. We must work together to support struggling attorneys and connect them with a public that seeks access to affordable legal services. Some argue we should let our profession be co-opted by the influx of venture capitalists and internet entrepreneurs purporting to "market" legal services without being encumbered by rules of professional conduct or the various laws that apply to our profession. Each year hundreds of millions of dollars of venture capital are poured into non-lawyer legal service technology companies; well over 1,000 legal tech start-up companies are selling legal services to the public, and their numbers are growing.

These companies started on the fringe of what might be considered legal services by offering legal forms that customers could purchase and complete themselves, or easy-to-use electronic databases where listings of attorney contact information could be found. They have attracted millions of dollars of venture capital, not to help close the justice gap for the poor, but to profit from consumers who can afford to pay for legal services. Operating mostly unfettered, they have blossomed into marketing machines for legal services and legal advice, furnishing attorneys for legal services. Two of the most aggressive and well-funded of these companies are LegalZoom and Avvo.

LegalZoom began as a legal forms service and is now offering attorney consultations and legal plans. For about $10 a month, consumers can sign a contract for unlimited 30-minute attorney consultations on new or "unique" legal matters. It also offers fixed-rate services

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such as a $39 living will with review by a "document specialist" or a $149 estate plan bundle that includes a year's worth of "attorney advice." It is not a law firm, but it has thousands of attorneys willing to pay for the referrals they receive.

Avvo started as an attorney directory and rating service. It now furnishes lawyers for a fee. Lawyers who agree to work to Avvo's terms and conditions will be referred to perform document review or start-to-finish services. Avvo has recently launched a free legal forms service, with the option to click a button and chat for a fee with a practicing attorney. The consumer pays Avvo directly; Avvo holds the money until the work is completed and Avvo then deposits the money into the attorney's Avvo account, taking back what it calls a "marketing fee."

These new practices raise many concerns: compliance with laws regulating legal advertising; the line drawn between "marketing" and "fee-splitting"; can a non-lawyer corporation provide legal services; is it permissible for a business to act as a referral service; can a business charge fees to refer clients to lawyers?

Businesses Advertising Legal Services

The well-funded marketing campaigns of non-lawyer legal service businesses employ a tone that is both bold and deliberately vague. They offer legal services. They are simply facilitators so attorneys and clients can find each other. They furnish legal help. They do not furnish legal help. They give legal advice. They do not give legal advice. They create one impression to an unknowing public. They include disclaimers for the regulators.

LegalZoom provides a small-print disclaimer on its site, "We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies." Its marketing campaign aims to create a very different impression: "Whatever your legal need, we have an answer. Let us help you protect all that matters easily and affordably" and "LLC Documents Created by Top Attorneys – Up-to-Date Legal Documents. Our attorneys continually maintain our documents to be up to date with the latest legal requirements in each state."

Avvo's website features: "Fixed-fee legal services. Choose your lawyer. Choose your service. Satisfaction guaranteed." "Free Q&A with Attorneys." "Every 5 seconds someone gets free legal advice from Avvo." Its tagline: "Legal. Easier."

This advertising if used by a lawyer, or to market a law firm, might put the lawyer on the wrong side of the Rules of Professional Conduct.

For example, Rule 7.1(a) "Advertising" states: "(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: (1) contains statements or claims that are false, deceptive or misleading." Thus, advertising that is not false violates this Rule if it is deceptive or misleading.

Rule 8.4(a), entitled "Misconduct," states: "A lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Consequently, if advertising is deceptive or misleading, responsibility falls on the attorney.

These businesses claim the Rules of Professional Conduct do not apply to them because they are non-lawyer corporations, not law firms. However, even if they are correct, New York's Judiciary Law § 495, prohibiting non-lawyer corporations from furnishing legal services, clearly applies.

Judiciary Law § 495

No Corporation Shall Furnish Attorneys or Counsel

There is some debate about whether what these businesses are doing constitutes the unauthorized practice of law. By their own account, they have licensed attorneys that perform the legal work. They purport to maintain an arm's length distance from the actual attorney performing the actual representation, but their business collects the fee and controls its distribution.

Several options for fixed-fee services are offered: document provision only; document service with review by a non-lawyer "document specialist" of unknown experience; more expensive attorney review. However, as noted above, these businesses imply in their advertising and promotions that they are offering legal services.

Even if these businesses are not in violation of our ethics rules, they may be in violation of N.Y. Judiciary Law § 495(1) which provides:

> No corporation or voluntary association shall . . . (c) . . . render legal services or advice, nor (d) furnish attorneys or counsel, nor (e) render legal services of any kind in actions or proceedings of any nature or in any other way or manner, nor (f) assume in any other manner to be entitled to practice law, . . . nor (h) advertise that either alone or together with or by or through any person whether or not a duly and regularly admitted attorney-at-law, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel.

If these businesses are found to be "rendering legal services or advice" or "furnishing attorneys or counsel," then they would be in violation of this section. If not, it would seem that New York's broader false advertising laws would be implicated.

Fee Splitting with Non-lawyers

These businesses often offer fixed-rate, flat-fee consultations and services, as well as hourly based fee plans. For example, consumers seeking services through Avvo go to the company website and are steered toward a list of attorneys in their geographic and practice area.

After an introductory discussion between the consumer and the lawyer, if the lawyer is hired, the company immediately collects the fee, retaining the entire fee until the representation is completed. Pricing depends on the service the client wants, and the company's cut depends on the cost of the legal service. After the representation has ended,

the company transfers the balance of the payment into the attorney's assigned account and, at the same time, directly withdraws its "marketing" fee.

A lawyer may pay a business for advertising; however, fee-splitting violates Rule 5.4, entitled "Professional Independence of a Lawyer." This Rule states: "A lawyer or law firm shall not share legal fees with a non-lawyer."

A recent NYSBA Ethics Opinion, No. 1081, from January of this year, discussed the topic, where lawyers were employees of the non-lawyer company:

> Rule 5.4 contains a number of provisions intended to ensure the professional independence of a lawyer. . . . Rule 5.4(a) provides that a lawyer "shall not share legal fees with a nonlawyer". . . . If the Company's clients are paying the Company for legal services rendered by the inquirers, then the inquirers would be violating Rule 5.4(a).

Avvo and other companies reject the idea that they are engaging in fee-splitting, claiming that they are merely charging a marketing fee.

For example, Avvo claims it "is not referring people to a particular lawyer"; the client makes the choice. However, the choices are limited to those attorneys in a particular geographic area who have agreed to pay Avvo's "marketing" fee if they take on a representation. However, since Avvo rates all lawyers, regardless of whether any individual lawyer consents to the service, there is an implication that all lawyers are on the list of available attorneys.

There are two important factors when considering the ethics of fee-splitting in New York. First, does the marketing fee increase depend on the dollar value of the representation? Second, are these fees more like referral fees than marketing fees?

NYSBA Ethics Opinion No. 976 discussed the issue regarding an arrangement between a law firm and a non-legal service provider in relation to mortgage related referrals, where the fee paid, at least in part, would be based on success:

> The firm may legitimately provide benefits to the Company for marketing and lien services, but if the benefits are also to reward referrals, then it is difficult to harmonize the arrangement with Rule 7.2(a).

Rule 7.2(a), cited in the opinion, states:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client . . . .

Significantly, Comment [1] to this Rule adds:

> [1] [L]awyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that would violate Rule 7.3 if engaged in by a lawyer.

The opinion also notes the existence of Judiciary Law § 482, which states:

> It shall be unlawful for an attorney to employ any person for the purpose of soliciting or aiding, assisting or abetting in the solicitation of legal business or the procurement through solicitation either directly or indirectly of a retainer, written or oral, or of any agreement authorizing the attorney to perform or render legal services.

This law survived a challenge in *People v. Hankin*, 182 Misc. 2d 1003 (Sup. Ct., App. Term 1999), where the court ruled the statute did not unconstitutionally restrict commercial speech.

NYSBA Ethics Opinion No. 887 also clarified Rule 7.2, stating that the Rule prohibits a lawyer from offering bonus compensation to an employee who is a non-lawyer marketer "based on referrals of particular matters . . . [or] . . . the profitability of the firm or the department for which the employee markets if such profits are substantially related to the employee's marketing efforts." In other words, marketing fees cannot be paid based on the dollar value of a representation or per representation that an attorney gets through the marketer. As for referrals, Rule 7.2(b) limits approved lawyer referral programs, including legal aid, public defender office or military legal assistance office; or a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule. Notably, for-profit corporate entities are not included among authorized law referral providers.

Impact on the Public and the Profession

The Rules of Professional Conduct are in place not to protect lawyers, but the public from unscrupulous lawyers who fail to meet the highest standards that we expect from officers of the court and defenders of justice. The Judiciary Law is in place to prevent unregulated non-lawyers from preying on an unknowing public.

Non-lawyers are not required to adhere to the Rules of Professional Conduct or the core principles of our profession. They are not bound by our ethics rules. They do not check for conflicts of interest. They do not have a duty of competent advocacy. They do not go to law school or pass the bar exam. They are not officers of the court.

Our Rules of Professional Conduct reflect the core values of our profession and they are designed to protect the public we are all privileged and licensed to serve. As attorneys we are sworn in as officers of the court, part of a legal system that our society relies on for justice and fairness. In our country, lawyers must complete a rigorous education just to be permitted to sit for a bar exam. Our system of examination to test knowledge and competency, determination of character and fitness, and adherence to a prescribed set of rules of professional conduct throughout an attorney's tenure not only serves to protect the public from untrained and unscrupulous would-be practitioners, but also far surpasses what is required to start a business.

Change to our profession should not come from profit-seeking entrepreneurs unencumbered by rules of ethical conduct and responsibility. It remains incumbent on us as attorneys and the organized bar to remain guided by rules of professional responsibility to find ethical and responsible ways to use new technologies to help attorneys better connect with and serve their clients. ■