Responsive Law
The Consumer's Voice in the Legal System

Testimony on: Allowing Innovation to Meet Unmet Legal Needs

Thomas M. Gordon,
Executive Director

Testimony to the

Task Force to Expand Access to Civil Legal Services in New York

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Responsive Law thanks Chief Judge Lippman and the Task Force for the opportunity to present its testimony. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable. **Responsive Law urges the Task Force to expand the range of legal services available to New Yorkers using the legal system by recommending a broad expansion of who may provide legal services, a change in the scope of restrictions on the unauthorized practice of law, and the removal of restrictions on outside investment in law practices.**

Responsive Law would like to express its appreciation to the Chief Judge and the Task Force for their ongoing commitment to access to justice. Merely holding these hearings on an annual basis demonstrates this commitment at as high a level as we have seen from any court in the country, and the Chief Judge's public support of equal access to the law has kept attention focused on this issue.

The Task Force has already made many significant recommendations to help those who can't afford legal help. Increased funding for legal services[1] and greater participation in pro bono efforts[2] will help those whose problems can only be solved by a lawyer. Efforts to simplify court procedures[3] will help demystify the justice system for the overwhelming number of self-represented litigants.

Access to justice is a problem of both supply and demand. Demand for legal services is relatively fixed. As long as we live in a nation

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[1] The Task Force to Expand Access to Civil Legal Services in New York,
Report to the Chief Judge of the State of New York ("Task Force Report") 2012, p. 18
[2] Task Force Report 2012, pp. 32-36
[3] Task Force Report 2011, pp. 40-41

1380 Monroe St NW, #210
Washington, D.C. 20010
tom@responsivelaw.org
(202) 649-0399

governed by laws, people will need assistance in understanding those laws and solving disputes over their application. The Task Force has found that low-income New Yorkers face 1.5 million legal problems a year.[4] Courts can alleviate some of the demand for legal assistance from these people by simplifying procedures, but even if procedures are simplified, people will still face legal matters pertaining to housing, employment, family law, and consumer issues—among others—and will continue to need assistance in understanding the substantive law that pertains to their situation.

With less ability to change the demand side of the access to justice equation, we're left trying to fix the supply side. As Professor Gillian Hadfield ably pointed out in her testimony to the Task Force last year, increased funding for courts and for lawyers serving those in need can only address a small part of the supply. Extrapolating from Hadfield's calculations, every lawyer admitted to practice in New York would have to work 240 hours of pro bono per year to address all of the legal problems faced by low-income New Yorkers.[5] Looking at it another way, the annual budget to pay for lawyers to assist this group would be $7.2 billion—about three times the entire annual budget of the New York court system[6]

And, as Hadfield notes, these figures apply only to "erupted" problems. Problems for which a person recognizes the need for a lawyer are only the tip of an iceberg that includes numerous legal needs that have not yet reached crisis level.[7] Just as medical problems should not be left untreated until a patient reaches the emergency room, legal problems should not be left unaddressed until a person faces eviction, foreclosure, or other critical situations.

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[4] Summary of Testimony of Gillian Hadfield to Task Force, October 1, 2012 ("Hadfield Testimony"), p. 3, based on Task Force Report 2011 data

[5] Based on data in Hadfield Testimony, pp. 2-3: (1.5 million problems x 24 hours per problem)/150,000 lawyers = 240 hours per lawyer. Of course, the burden would be much greater for the small subset of lawyers who both are located in New York and who have competence in the areas of law where help is most needed.

[6] Based on data in Hadfield Testimony, pp. 2-3: 1.5 million problems x 24 hours/problem x $200/hour = $7.2 billion

[7] Hadfield Testimony, p. 3

Since increasing the supply of legal help using existing types of resources—that is, lawyers in existing settings—is not enough to meet demand, the only way to sufficiently increase supply is with new types of legal help. All of Responsive Law's recommendations would allow innovative models of legal service delivery to thrive, creating new, affordable avenues to legal access for those who currently have none.

Expanding Who May Provide Legal Services

Responsive Law applauds the creation of the Committee on Non-Lawyers and the Justice Gap to consider what role non-lawyers can play in providing legal services. We encourage that Committee to move rapidly toward a more expansive role for non-lawyers in the provision of legal services while not erecting excessive barriers to the provision of services by those who may already legally do so.

One well-known approach to non-lawyer assistance is the nascent model of limited-license legal technicians in Washington. As Washington has yet to license any legal technicians, it is too early to determine the effect of such licensure on legal access in the state. However, the creation of a new profession is not the only way to ensure the competence of service providers.

Many people, such as those who work in advocacy around the issues of housing or family law, already have knowledge about particular areas of the legal system that is sufficient to provide competent advice to clients. In fact, these advocates will often be more competent to provide legal advice in their field than most lawyers. Any licensure scheme for non-lawyers should take this existing expertise into account when setting the requirements to obtain a license. Requirements for classroom training, such as those proposed in Washington, may be necessary for those without any background in the areas covered. However, for those who already work in these fields, such requirements are superfluous. Furthermore, they would raise the cost of obtaining licensure, perhaps to an extent that would leave licensees unable to provide services at a price much below what a lawyer would charge.

Any licensing scheme should also be careful not to accidentally prohibit services that are currently available. For example, housing advocates who currently provide information about family court

proceedings or financial advisors who provide assistance with consumer debt issues should not be required to get additional certification to continue providing their services. Otherwise, the loss of service providers due to additional licensing requirements would potentially offset the additional services that are made available.

Ensuring that UPL Restrictions Are Used Only To Protect Consumers

No discussion of allowing non-lawyers to perform legal services would be complete without discussing the impact of statutes prohibiting the unauthorized practice of law. The stated justification for UPL laws is generally twofold: protecting consumers from people fraudulently presenting themselves as lawyers, and protecting consumers from incompetent services. To the extent that UPL laws serve to protect lawyers from competition, consumers suffer as a result of less competition and higher fees for services.

UPL laws should be amended to clarify that they are meant to protect consumers from fraud, not to protect lawyers from competition. Responsive Law recommends that two provisions be added to New York's UPL laws. First, there should be no cause of action for UPL against those who provide services for free, unless those people falsely claim to be a lawyer. People and organizations providing free information, advice, and services are a valuable resource to those without access to the legal system, and those people and organizations should not have their actions discouraged by UPL restrictions. On the contrary, social service agencies, and even individual good Samaritans should be encouraged to provide legal help to those who need it. There is little motive for such organizations to give poor advice. Furthermore, even legal help that does not rise to the level of that provided by a competent lawyer is still more useful than no legal advice at all, which is what most people can afford.

Second, UPL causes of action should require a complaint from a customer and a finding of actual harm to that customer. This finding of actual harm cannot be based merely on the fact that someone paid a non-lawyer to provide services; it must be based on harm caused by the services themselves. Without such a requirement, UPL laws can be used to protect lawyers from competition, rather than to

protect consumers from incompetence. Many non-lawyer innovators in delivering legal services—both online and bricks-and-mortar—cite UPL prosecutions as one of the main obstacles to their businesses. With a requirement-of-harm provision added to UPL law, these providers of innovative law-related services will be able to provide affordable services to customers without fear of running afoul of UPL laws, so long as their services provide value to their customers.

Allowing Outside Investment in Law Practices

An increase in the supply of legal help need not come only from non-lawyers. There may be ways for lawyers in the private sector to deliver their services more efficiently, bringing the cost of a lawyer within the means of even lower income New Yorkers.

Unfortunately, prohibitions on fee sharing between lawyers and non-lawyers have prevented much of the innovation that could result in more affordable legal services. There are numerous lawyers and non-lawyers who have ideas for improving the way legal services are delivered but who lack access to sufficient capital to implement those ideas. Without outside investment, Henry Ford would have been limited to producing a few Model Ts and FedEx would be operating a mom-and-pop delivery service out of Memphis. Entrepreneurship brings innovation to markets, but without outside investment entrepreneurship is stifled.

The justification for the prohibition on fee sharing is that it will bring undue influence on lawyers to put financial concerns ahead of the welfare of their clients. This justification unfairly assumes that financial pressure is unique to firms with outside investors. Sole practitioners are under pressure to pay their bills and lawyers at large firms are under pressure to meet their required billable hours. Outside investment would, at worst, change the source of financial pressure. It would not create such pressure where none exists.

Regardless of the financial setup of their firm, lawyers are still expected to adhere to the Rules of Professional Conduct and to deal with their clients ethically in the face of financial or other outside influence. The experience of other countries that allow outside investment, such as the United Kingdom and Australia, demonstrates that it is not the ethical trap that many American lawyers fear. For

example in Australian law firms with non-lawyer partners, the Australian rules of professional conduct protect professional independence by making lawyer partners in such firms responsible for ensuring compliance with ethics rules and liable for any violations of lawyers' ethical duties.[8] Neither Australia nor the UK has reported any increase in unethical behavior by lawyers in firms receiving outside investment.

Conclusion

Access to justice requires more than just access to lawyers. The innovative solutions that will address the unmet need for civil legal services statewide will only be possible if the regulations governing the delivery of legal services and the business of law are brought into the 21st century. Allowing innovators to create new services and new service models will not only benefit lower-income New Yorkers, but also will help address the unmet needs of middle-income New Yorkers, most of whom are also unable to afford meaningful access to the legal system.

Through the work of this Task Force and Chief Judge Lippman's leadership, New York is already recognized as a leader in the access to justice movement. We hope that the Task Force will recommend the reforms we propose, and thus continue to lead the way in implementing the bold changes that are necessary to ensure an accessible, affordable, and accountable legal system.

[8] Legal Profession Act of 2004 (Australia), Sec. 168. (Available at http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/index.html.)