

Comments on: **Issues Paper Concerning New Categories of Legal Services Providers**

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Responsive Law thanks the Commission for the opportunity to present these comments. Responsive Law is a national, nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its consumers.

Below we offer our commentary to the questions posed by the Commission regarding legal services providers (hereafter “LSP” or “LSPs”), specifically non-lawyer LSPs.

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Legal Services Providers Should Include Both Lawyers and Non-Lawyers as a Means to Close the Justice Gap.

As observed by the Commission in its paper, most low and moderate income Americans are unable to afford legal help. This gap has widened significantly and will continue to do so as legal services are becoming more expensive and pervasive. Ideas of how to fix this gap have traditionally been to increase legal aid, increase pro bono work and expand rights to publicly funded counsel. While these concepts marginally improve access to the legal system they do not go far enough to address the justice gap as they all rely on more assistance from lawyers.

In her article, “Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets,” Gillian Hadfield estimates that “U.S. lawyers would have to increase their pro bono work from an annual average of thirty hours each to over nine hundred hours each to provide some measure of assistance to all households with legal needs.”¹ Expecting lawyers to spend almost half of their annual

¹ Gillian K. Hadfield. “Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets” *Daedalus* (2014). Available at:

billable hours working for free is not realistic. Nor is the expectation that public and charitable sources would be able to cover the cost of paying lawyers to perform this work.² Therefore, other solutions must be considered.

One such solution suggested by the Commission is to broaden the definition of LSPs to include non-lawyers as well as lawyers. The Commission draws the comparison with the health care market—that the work performed by nurse practitioners *supplements* the work performed by doctors; it does not replace them. They propose that the same would be true of non-lawyer LSPs—that they would supplement, not replace, the work performed by lawyers.

In its paper the Commission outlines several different types of non-lawyer LSPs programs that have been implemented by federal courts and agencies and several state courts. Many of these programs are relatively new and therefore there is not a lot of data to support how effective they have been in reducing the justice gap. However, all of these programs do have one thing in common—they are extremely limited in scope and only permit non-lawyers to assist the public in very specific situations. For example, courthouse navigators in New York and Arizona can help unrepresented litigants to navigate the court system by offering non-legal support, and document preparers in Arizona, California and Nevada can help the public fill out forms. None of these programs permit the service providers to give legal advice or represent clients in a courtroom, which greatly limits their ability to improve the public's ability to get actual legal help. These programs are a step in the right direction; however, more needs to be done if the justice gap is to be significantly reduced.

Washington's LLLT Program Is a Step in the Right Direction But Its Requirements Are Too Stringent

Washington State is the first to explore loosening some of the strict UPL restrictions with its Limited License Legal Technician (hereafter "LLLT") program, which allows licensed technicians to provide some legal advice. It is hoped that these LLLTs will be able to help self-

<http://works.bepress.com/ghadfield/56>, at 5.

² Gillian K. Hadfield and Jamie Heine. 2015. "Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans." *The Selected Works of Gillian K. Hadfield*. Available at: <http://works.bepress.com/ghadfield/57> at 37 ("[t]he cost of just one extra hour of legal aid on each dispute-related problem per household would be on the order of \$70 billion annually...").

represented litigants at more affordable prices than lawyers and with issues that lawyers often do not take on because they are so limited in scope. However, there are significant requirements to become a LLLT in Washington and currently they can only be licensed in the area of family law.³

The Washington LLLT program has only been offered since June 2015 and, as such, it is difficult to ascertain how effective it has been to date; especially as only nine LLLTs have completed all of the requirements and have become licensed.⁴ This program may have gotten off to a slow start due to the fairly stringent requirements that the applicants have to meet, including, but not limited to: completing 45 credit hours of core curriculum through an American Bar Association-approved legal program, applicable practice area courses offered through the University of Washington School of Law, 3,000 hours of paralegal experience involving substantive legal work in any practice area under the supervision of a lawyer, and passage of the Legal Technician Exam. Whether these requirements are too much of a barrier for entry for potential LLLT applicants remains to be seen.

There is no doubt that requirements to ensure the competency of non-lawyer LSPs are very important; however, these requirements also need to be reasonable. Non-lawyer LSPs should not be held to a higher standard than lawyers, which is what is happening with Washington LLLTs. Although lawyers go through more years of schooling, there are no requirements for them to take courses in the areas of law they end up actually practicing, nor are they required to log 3,000 hours under the supervision of a lawyer before being able to give legal advice to their clients.⁵ Any lawyer can hang up a shingle

³ Other practice areas for Legal Technicians are likely to expand in the next year or two. Practice areas under consideration include a focus on elder law, landlord tenant disputes, and immigration. *See* <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians>

⁴ This number is taken as of January 2, 2016. *See* <http://www.wsba.org/lllt>

⁵ Some U.S. law schools do now require that their students do get some legal work experience prior to graduating but typically this requirement is fairly minimal (i.e. 50 hours) and nothing like the 3,000 hours required of Washington LLLTs.

and start practicing the moment they are admitted into their state's bar, even if they have no experience.⁶

One reason for this apparent double standard and the more stringent standards for LLLTs is the fear that the quality of the legal advice will diminish if not delivered by lawyers. UPL laws are ostensibly intended to protect consumers against harm, either from scam artists pretending to be lawyers or from unqualified service providers. However, the former concern is generally addressed by consumer fraud laws, making UPL laws redundant for that purpose. The latter concern is increasingly mitigated by a free market in which consumers have access to extensive consumer-driven information about service providers.

The American public could receive far more help with their legal matters if regulators took a less expansive view of which services are deemed to be the practice of law, and thus restricted to lawyers (and LLLTs in Washington). Other countries with less stringent UPL regulations have had success with non-lawyer LSP programs, which in turn have enabled their citizens to have more access to legal help.

Success of LSPs Programs in Other Countries

With the exception of Washington's LLLT program, all U.S. states only permit licensed lawyers to practice law and define the "practice of law" to include nearly all legal services and advice.⁷ Additionally, ethical rules in all states (with a minor exception in the District of Columbia) prohibit non-lawyers from owning, managing or financing an organization providing legal advice or splitting fees with lawyers.⁸ This strict regulatory scheme has resulted in a system where there are no other entities besides lawyers authorized to provide legal help.

Many other countries have much more open legal systems which, in turn, provide more options for legal assistance to their citizens. These countries permit a variety of non-lawyers to provide legal help. For example, the Netherlands "has multiple legal providers,

⁶ See Hadfield, *Innovating to Improve Access*, at 10 ("lawyers operating in solo and small firm settings can also fail in many of the same ways: making mistakes, letting personality get in the way, overbilling, misleading, taking on more than they can handle, doing shoddy work").

⁷ See Hadfield, *Life in the Law-Thick World*, at 30.

⁸ *Id.*

including non-lawyer legal professionals, legal insurers..., social workers who have additional training in legal matters..., government networks of legal advisors operating as a legal ‘help desk’ through offices, websites, chat systems, telephone and email advice, providing legal information, referrals to lawyers and up to 30 minutes of individualized advice.”⁹

The legal system in England and Wales¹⁰ also permits non-lawyers to provide legal advice. They are permitted to write wills, consult on employment disputes, and manage personal injury and other types of claims out of court—all without licensing or regulation.¹¹ These non-lawyer LSPs are still subject to consumer protection and union regulations (if they are part of one). Moreover, the lack of ‘formal’ regulations does not appear to impact the quality of the legal advice given by non-lawyer LSPs in England. For example, specialist will-writers are frequently used in England and provide very similar services to those of solicitors. Surveys have shown that there are no statistically significant differences between the quality of work or satisfaction of customers of solicitors and those of specialist will-writers—further dispelling the notion that formal regulation by the courts is needed to ensure the quality of legal help.¹²

Non-lawyer help abroad is not limited to transactional matters either. England allows non-lawyers, known as “McKenzie friends,” to appear alongside litigants in some court proceedings to provide court-related assistance and guidance. Similar to the New York Housing Court Navigator program, McKenzie friends have existed in England for the past 50 years. They provide moral support, take notes, assist in the management of court papers and provide advice

⁹ *Id.* at 31-32.

¹⁰ Hereafter collectively referred to as “England” (with apologies to the Welsh for omitting them in the service of brevity).

¹¹ Non-lawyers can also provide advice on immigration matters in the U.K.; however, this area is subject to regulation. See New York City Bar Committee on Professional Responsibility, *Narrowing the “Justice Gap”: Roles for Nonlawyer Practitioners* (June 2013), at 21. Available at: <http://www2.nycbar.org/pdf/report/uploads/20072450-RolesforNonlawyerPractitioners.pdf>

¹² IFF Research Ltd, *Research Report: Understanding the Consumer Experience of Will-Writing Services*, at 47, 54. Available at: http://www.legalservicesboard.org.uk/what_we_do/research/Publications/pdf/lwb_will_writing_report_final.pdf

on courtroom conduct. Most of the McKenzie friends operate in family law given that this area has the largest number of self-represented litigants whose legal needs go unmet. This service is mostly provided for free but there has been a rise of individuals who charge to be a McKenzie friend. Despite this rise, England has not seen a rise in misconduct or complaints about these service providers.¹³

Given the extremely high number of self-represented litigants in America, especially in family law cases, the Commission should also consider McKenzie friends as another non-lawyer LSP program.¹⁴ Interestingly there is very little in US law that would prohibit this type of non-lawyer assistance in a courtroom setting. Instead, it would necessitate more of a cultural shift and changing specific court rules to make them widely available. As discussed by the Commission in its paper, Arizona, New York and Washington have already started similar programs; however, all states should offer something similar to McKenzie friends if significant inroads to close the justice gap are to be made.

The more open regulatory systems of these countries and the increased number of non-lawyer sources of legal assistance allows their citizens to get legal help at rates above those seen in the U.S. despite having a similar rate of assistance by lawyers. Additionally, “greater access to diverse sources of legal help in the U.K. and the Netherlands may also provide insight into the rates at which people lump their problems rather than try to deal with them.”¹⁵ Both England and the Netherlands have much lower rates of incidents where their citizens took no action to deal with a legal problem (10% and 6% respectively; compared with 33% in the U.S.).¹⁶ “In these countries, people with legal problems are not faced with the stark choice between locating an affordable lawyer, doing nothing or

¹³ Fee-Charging McKenzie Friends. Legal Services Consumer Panel. April 2014. Available at: http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf

¹⁴ Percentage of self-represent litigants in U.S. family law cases can top 95% in some states. *See* Hadfield, *Life in the Law-Thick World*, at 29.

¹⁵ Hadfield, *Life in the Law-Thick World*, at 33-34.

¹⁶ *Id.* at 26. State surveys indicate that the rate at which poor Americans may ‘lump’ their legal problems may be closer to 50%. *See Id.* at 17.

going it alone.”¹⁷ This in turn reduces the likelihood of legal problems multiplying if no action is taken to address them and the corresponding increased burden on the legal system.¹⁸

Thus, in order to make real inroads to close the justice gap, the Commission should also consider suggesting the implementation of other non-lawyer LSP programs, similar to those employed in many European countries. The ability to implement these alternative LSP programs will necessitate narrowing the current UPL restrictions as well as opening up the restrictions of who can own, manage and finance companies providing legal advice to be able to offer affordable solutions at scale. This in turn will require regulatory reform and will also likely require shifting the creation and monitoring of legal service providers from state bar associations and judicial authorities to state legislative and executive branches.

State Legislative and Executive Branches Should Create New Categories of Legal Services Providers to Facilitate Greater Access to Justice.

The question posed by the Commission in its paper was “whether state *judicial* authorities be encouraged to create new categories of judicially authorized and regulated legal services providers to perform discrete and limited legal tasks in an effort to facilitate greater access to justice.” The response to the general sentiment of the question should be ‘yes’ for all of the reasons discussed above. However, whether this responsibility should fall solely upon the respective states’ judicial authority is another matter.

Regulation of the Legal Industry by Lawyers Creates Antitrust Concerns

“The U.S. stands largely alone in the world in terms of the extraordinary extent to which the bar and judiciary wield exclusive authority for shaping the cost and market structure of legal goods and services.”¹⁹ Even though the supreme courts of most states

¹⁷ *Id.* at 34.

¹⁸ *Id.* at 18 (referencing Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Judicable Problems Experienced by Canadians* (2007)).

¹⁹ *Id.* at 37.

determine what constitutes the “practice of law” and the corresponding rules of how it should be conducted, in practice, most delegate these decisions to the state bar associations.²⁰ Therefore, the regulation of the U.S. legal market is primarily controlled by lawyers themselves, which raises significant antitrust concerns.

The U.S. Supreme Court ruled last year in *North Carolina State Board of Dental Examiners v. FTC* that state regulatory agencies, if controlled by members of the professions they oversee and operating without any active supervision by the state, are subject to antitrust laws. The Supreme Court recognized that allowing any body of professionals to regulate its own industry creates a tangible threat of antitrust violations when the professionals act in ways that further their own interests.

In the realm of the law we have seen that state bars’ enforcement of unauthorized practice of law restrictions allow only attorneys (and LLLTs in Washington) to provide legal advice. These strict restrictions have created a monopoly where lawyers’ interests are served at the expense of the public by increasing prices and limiting consumer choice. Moreover, no matter how well-intentioned the lawyers and judges regulating the legal system are, acting in the public’s best interest is not possible under the current regulatory scheme as “the regulatory providers themselves are insulated from competition from other regulators who might devise alternative approaches to regulating legal markets.”²¹

State supreme court oversight is an improvement over bar oversight, but for oversight to be most effective, it needs to come from the elected branches of government. The legislative and executive branches are best positioned to provide oversight over these agencies so that they are not self-policing. The health care profession traditionally enjoyed self-governance but its reform has been mainly through legislative means, both at the federal and state level.

Governance by the Legislative and Executive Branches Does Not Violate the Separation of Powers

Historically, bars and state supreme courts have pushed back when legislatures have attempted to expand the right to practice law

²⁰ Hadfield, *Innovating to Improve Access*, at 3.

²¹ *Id.*

beyond just lawyers, asserting violations of the separation of powers and the courts' authority to regulate the practice of law.²² However, very few non-lawyer LSP programs, especially those offered in other countries, are truly practicing law. The reason for this is simple; most of what non-lawyer LSPs do is navigation of the complexities of the legal system and dealing with routine matters. In practice, they are simply employing common sense, applying their knowledge of the system, and converting complex legalese into layman terms. Unfortunately, given the broad UPL restrictions in the U.S., any one of these fairly innocuous actions could be deemed as delivering legal advice and subject to punishment—typically from the bar; not the courts.

Both England and the Netherlands have managed to strike the balance of having greater access to legal assistance by permitting non-lawyers to provide legal advice but still restricting actual representation in courts to licensed lawyers.²³ The Washington LLLT program follows a similar course. It allows LLLTs to give legal advice, help certain litigants prepare for court hearings but it does not permit them to represent clients in court. However, there is still a huge need to help self-represented litigants actually in the courtroom.

Conclusion

The non-lawyer LSP programs outlined by the Commission in its Issues Paper are a good start on the road to improved access to justice for Americans. While we applaud the Commission on its analysis, we urge it to go further. The legal industry is just that—an industry. One that needs to be governed by state legislature and executive branches, not by potentially self-interested lawyers, if new, innovative solutions are going to occur. The definition of what it is to practice law also needs to change and UPL regulations modified so that greater access to legal help from multiple sources, not just lawyers, is available to the public. The justice gap in America is so big and the country is so dependent on the rule of law that without making these changes its citizens' right to due process will be fundamentally impaired.

²² *Id.*

²³ Hadfield, *Life in the Law-Thick World*, at 31.