From:	Jerimy Kirschner
To:	Entity Regulation Pilot
Subject:	[External]Comment on Entity Regulation
Date:	Wednesday, August 7, 2024 15:10:22
Attachments:	Outlook-g5poglhn.png

You don't often get email from jerimyk@jkkrlaw.com. Learn why this is important

Please put me down as highly against this proposal. This will devastate the legal profession and lead to Wal-Mart Law Offices where representation of clients are sacrificed and the independent judgment of attorneys which should be exercised for clients give way to corporate interest.

I am astonished that the bar would consider such a horrible idea.

Jerimy Kirschner, Esq.

Managing Partner

Protecting Families. Preserving Legacies.

Kirschner Rychlick, PLLC

1750 112th Avenue NE, Suite B-215

Bellevue, WA 98004

P: (425) 590-9019 ï F: (206) 538-2008

JerimyK@JKKRLaw.com

ï https://us01.z.antigena.com/l/BU6BuyDxk80aHdswHaKZqWi9P6X30LYyIA8w-YHu3sApiJUcsvQqVE4L6VR_bgXXMcNNfI0WUj-FuNWIGCUIurg2rW_CWbNYjteiPM~WoQEJO9F9mWlpo-ikVaUYHZNmWR3jeqSmKvYXAovPpa0Nm_CJJQMT_zmVJUVbByJZ0AaYA5ou

My email has changed to JerimyK@JKKRLaw.com and the firm's name has changed to Kirschner Rychlick PLLC. Please whitelist this email (mark as safe) so we do not have any interruption in communication.

Notice: This fax or email is from a law firm, Kirschner Rychlick PLLC ("JKKR"), and is intended solely for the use and review of the individual(s) to whom it is addressed. If you have received this fax or email in error, please notify the sender immediately and destroy the fax and/or delete the email from your computer.

If you are not an existing client of JKKR, it is not the intent of this fax or email to make you

a client unless it contains a specific written statement to that effect and do not disclose anything to JKKR in reply that you expect it to hold in confidence.
IRS Circular 230 Disclaimer: Any tax advice provided in this communication (including attachments) is not intended or written to be used, and it cannot be used, by the recipient or any other taxpayer (i) for the purpose of avoiding penalties that may be imposed on the recipient or any other taxpayer, or (ii) in promoting, marketing or recommending to another party a partnership or other entity, investment plan, arrangement or other transaction.

From:	Stacy Jane
To:	Entity Regulation Pilot
Subject:	[External]Comment in support of Washington pilot test of entity regulation
Date:	Thursday, August 8, 2024 14:29:58
Attachments:	i4J Letter of Support re Pilot Test of Entity Regulation in Washington.pdf

You don't often get email from [redacted] Learn why this is important

Please find our letter in support of Washington's pilot test of entity regulation attached.

Thank you,

Stacy Rupprecht Jane

Director

Innovation for Justice

James E. Rogers College of Law | THE UNIVERSITY OF ARIZONA

David Eccles School of Business | THE UNIVERSITY OF UTAH

[redacted]

Pronouns: She/Her

innovation4justice.org

info@innovation4justice.org
www.innovation4justice.org

August 8, 2024

Dear Washington Supreme Court:

Innovation for Justice appreciates the opportunity to submit this letter of support in favor of the Pilot Test of Entity Regulation being proposed by WSBA and Practice of Law Board (POLB).

Innovation for Justice (i4J) is a social justice innovation lab jointly housed at the University of Arizona James E. Rogers College of Law and the University of Utah David Eccles School of Business, committed to designing, building, and testing disruptive solutions to the civil access-to-justice crisis. Our interdisciplinary research teams engage in action-based research that exposes inequalities in the U.S. legal system to create new, replicable strategies for legal empowerment using design and systems thinking methodologies.

An estimated 93% of low-income America's life-altering civil legal issues—such as eviction, debt collection and domestic violence —receive inadequate or no civil legal assistance. The historic exclusion of low-income and other marginalized populations from access to justice perpetuates poverty cycles and system-level failures. Reform of civil legal service unauthorized practice of law (UPL) regulation presents a tipping point in the U.S. legal market, and there is both risk and opportunity. The risk: UPL reform efforts may fall short of their potential, creating new service models that embed old legal service problems into new regulation. The opportunity: to view UPL reform from the outset as a chance to radically re-imagine the pathways for connecting people with civil justice needs — particularly those systemically disinvested and historically excluded from access to justice — to civil justice problem-solving.

For the past five years, i4J has worked with and within the community to build new pathways for people other than lawyers to know and use the law, so that community members who otherwise cannot access legal help can receive advice and problem-solving help from trusted members of their community. i4J's Service Initiatives are the result of robust community engagement and intentional development by subject matter experts in Arizona and Utah. All of i4J's service Initiatives have undergone rigorous feedback and user-testing processes and are the outcome of years of lived and practiced experience in navigating legal systems from within and beyond each state's respective legal communities.

In partnership with the Arizona Supreme Court and the Utah State Courts, i4J currently oversees three active Community Legal Education (CLE) Initiatives in Arizona and

Utah which deploy reform of unauthorized practice of law regulation to train advocates who are already in community-helping roles to provide free limited-scope legal advice as "community-based justice workers." The Arizona Supreme Court was the first in the nation to authorize justice workers through unauthorized practice of law reform in January 2020, and this rapidly growing area of the civil justice ecosystem has resulted in seven authorized programs in five jurisdictions in only three and a half years. Community-based justice work is redefining how and for whom legal knowledge is accessible.

- More than 2000 DV survivors in Arizona were served by our first two Domestic Violence Legal Advocates with 562 hours of free legal help (2021-2023). Our statewide Domestic Violence Legal Advocate cohort is poised to reach approximately 3,000+ survivors in Arizona between Fall 2024 and the end of 2025.
- In the first seven months of our Medical Debt Legal Advocate Initiative, two trained justice workers provided free legal help to nearly 150 unique clients in 18 cities and 6 Utah counties. This justice work is associated with a net client debt reduction of $214,513.
- As our Housing Stability Legal Advocate Initiatives progress through their Spring 2024 launch in Arizona and Utah, we already have a waitlist for the Fall 2024 and Spring 2025 cohorts.
- Our legal advocates are predominantly BIPOC women and the community-based organizations that house them serve predominantly low-income BIPOC communities.

We see the early success of community-based justice workers in Arizona and Utah and are here to support other jurisdictions in adopting their own community-centered approaches to building the bench of community members who can know and use the law. The proposed Pilot Test of Entity Regulation would allow entities to provide legal and law-related services in Washington under time-bound, limited exemptions from the otherwise applicable rules and statutes governing entities practicing law, following Utah and Arizona in executing a plan to determine how the delivery of legal services by entities can be regulated in a manner that protects consumers and promotes broader access to legal services. Based on our work in the regulatory reform landscapes of Arizona and Utah, we believe Washington's pilot test of entity regulation provides an opportunity to meaningfully expand access to justice for low-income Washington community members. As this project unfolds in Washington, we encourage decision-makers to engage the social service and non-profit communities to understand the unmet legal needs of those they serve, as well as lived experience experts currently excluded from receiving legal help under traditional models, to ensure that new and emerging legal service do not simply embed old legal service problems into new regulation, but instead radically re-imagine the pathways for connecting people with civil justice needs — particularly those systemically disinvested and historically excluded from access to justice — to civil justice problem-solving.

We are happy to provide more information in support of this effort and wish your state continued success in innovating to advance access to justice.

Sincerely,

Stacy Rupprecht Jane

Stacy Rupprecht Jane
Director, Innovation for Justice

Resources:

- Innovation for Justice, Charting US Community-Based Justice Worker Programs (Draft, August 2024).
- The Diverse Landscape of Community-Based Justice Workers, https://iaals.du.edu/blog/diverse-landscape-community-based-justice-workers, IAALS, the Institute for the Advancement of the American Legal System (February 2024).
- Leveraging Unauthorized Practice of Law Reform to Advance Access to Justice, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4772216, Cayley Balser, Erin Weaver, Stacy Rupprecht Jane, Gabriela Elizondo-Craig, Tate Richardson, and Antonio Coronado, L.J. Soc. Justice (March 2024).
- Re-Regulating Justice: Realizing Housing Stability Through Community Legal Advocacy, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4772067, Antonio M. Coronado, Rachel Crisler, Cayley Balser, & Stacy Rupprecht Jane, ABA J. Affordable Housing (March 2024)
- Innovation for Justice Report: Leveraging Regulatory Reform to Advanced Access to Justice, https://docs.google.com/document/d/1064M_OpQwgm7CFBqlkiv9A0W_nh6QvSTr_KLG5wc1hw (January 2023).

From: Greg Siskind
To: Entity Regulation Pilot
Subject: [External]Comment on Pilot Test
Date: Friday, August 9, 2024 12:16:31
Attachments: image001.png
image002.png
image003.png

You don't often get email from [redacted]. Learn why this is important

I was pleased to learn about Washington's consideration of a pilot program to allow entities with innovative business models to enter the legal services market in your state. I am a lawyer of 34 years in Tennessee, but our firm's experience is probably not that different from many in your state. Our immigration law firm has 12 lawyers about close to 50 other staff members. While our lawyers are obviously critical, many members of our team are also crucial. One in particular is our firm's amazing chief operating officer. We hired him shortly after graduating with a classics degree from college to help us work on developing organizational systems for the firm. We discovered he had considerable talent and he's risen to running all of our firm's operations. We paid for him to get an MBA while working for us because we realized how important he was to our future success. The one thing we couldn't offer him was equity, however. And that meant we were vulnerable to losing him to another employer who could offer a stake.

We solved this problem when we spun off an AI software company and gave our employee founding shares of that new venture. But while this was a solution for this particular employee, it did raise the question of why we don't allow our other employees to participate as owners in the business? If we want the best talent to work in law firms, allowing lawyers to share the pie would be one way to do this.

Sincerely,

Greg Siskind
Attorney | **Siskind Susser, PC.**
Founder | **Visalaw.ai**
1028 Oakhaven Road
Memphis, TN 38119

www.visalaw.com | www.visalaw.ai

From: C. Olivia Irwin
To: Entity Regulation Pilot
Subject: [External]Comment
Date: Tuesday, August 13, 2024 12:15:09

You don't often get email from jetcityjustice@gmail.com. Learn why this is important

It is alarming how enamored the WSBA is with so-called "AI" services. In my opinion, reliance upon AI should be considered professional negligence, whether that is a corporate entity or a human individual is behind it, but perhaps the WSBA should begin by demonstrating how well this organization can regulate law firms as entities, first.

Love is the Law,

C. Olivia Irwin, J.D.
Attorney & Counselor-at-Law

<<<<<<<<<<<<<<<<<<<<<<<<<CONFIDENTIALITY NOTICE>>>>>>>>>>>>>>>>>>>>

Information in this message may be proprietary and/or confidential. It's intended only for the use of the individual(s) to whom this email is addressed. If you are not the intended recipient, or have received it in error, please respect the privacy of others by notifying me and deleting this e-mail from your computer. Thank you.

<<<<<<<<<<<<<<<<<<<<<<<<>>>>>>>>>>>>>>>>>>>>

From: Gillian Hadfield
To: Entity Regulation Pilot
Subject: [External]proposed pilot project for legal services regulation reform
Date: Wednesday, August 14, 2024 11:33:00

You don't often get email from [redacted] Learn why this is important

To whom it may concern:

I'm writing to provide some feedback on the proposed pilot project. For context, I hold a JD-PhD (economics) and was for 34 years a professor of law and economics, first at UC Berkeley, then USC, and most recently the University of Toronto; I have been a visiting professor at Columbia, NYU, Harvard, Chicago, and Hastings. I have testified frequently to bar associations and state supreme courts about legal regulatory reform and widely published in the area. I was heavily involved in the development and design of the Utah sandbox for entity regulation and have been actively engaged both as a scholar and as a proponent of reform for over two decades.

First, let me applaud these efforts and express my gratitude for Washington's willingness to experiment and attempt to address the enormous access to justice gap caused by our existing, overly-restrictive approaches to regulation of the legal services market. As your reform documents attest, the number one priorities are expanding access to legal help for the millions who lack access and ensuring that such help is adequately protective of the interests of the consumers of such help. A key insight is that expanding access requires greater involvement from entities in a corporate form that can recruit greater investment and innovation and develop cost-saving quality-improving technologies—that is, to allow law to benefit from the economic tools that provide higher-quality lower-cost goods and services to consumers throughout the rest of the economy. While law is indeed a noble profession, we must find ways to support those ideals AND make greater use of economic incentives, innovation and technology to address an access to justice problem that is a great stain on our profession.

Second, as to the specifics of the Washington state proposal. I commend the commitment to an evidence-based approach to reform and, I infer, to any ultimate regulatory reform that is implemented. As a social scientist I appreciate the attention to hypothesis-testing in the framing of the project. I have a question and a concern about the plan. My question is whether you are asking for hypotheses framed in terms of changing regulatory rules or hypotheses about impact on consumers. The order reads in terms of the former—but it seems to me that what you want is the latter. There are not a lot of rules to test, and indeed entities participating in this study (if I understand correctly) can't propose and test types of regulatory reform (ie how rules are relaxed, what kind of regulatory oversight is provided, etc.). The core rules that need to changed are clear: providers of legal services need to legally authorized to organize as corporations (profit and non-profit) that include non-lawyer/licensed owners and investors and managers. This is a change to Rule 5.4 (and perhaps other related rules in Washington) and the corporate practice of law doctrine. I would suggest that the hypotheses you want participants to test are about what results an entity that is currently not permitted to provide services is able to secure: how many users/consumers can the provider reach? At what cost? How does the quality of service compare to a) the quality of service the user/consumer 'enjoys' in the absence of this service (ie. for many the answer is self-help), b) the quality of service that would be provided by the average licensed legal provider they

might access and c) the quality of service that the profession ideally provides. Note that b) and c) can be quite different: in a study of errors in will-writing by licensed lawyers and will-writing non-lawyer companies in the UK, for example, it was found that the error rate was the same for these two sets of providers, and it was unfortunately high (about 25% of wills failed to implement the testator's intent.) It is critical in engaging in data-driven approaches to reform to not fall into the trap of comparing quality from potential new types of providers with the perfect lawyer who makes no mistakes, devotes unlimited time to a client's needs, and is promptly and always available. It is important to compare what reform can achieve relative to how our legal services markets actually perform.

The concern I have with the likely the success of the project is that developing high-quality and accessible alternatives to existing legal service provision requires investment and time. It involves business risk. As I think has been the experience in the (small number of) jurisdictions (including in Canada) that have tried sandboxes and pilot programs, few entrepreneurs and investors are going to engage in a pilot project where there is substantial regulatory uncertainty about whether they will be able to continue in operation at the end of the pilot. Of course all entrepreneurs and investors take the risk that their product won't pass quality or market tests. But this pilot project seems to also present them with the risk that at the end of the process, the Court or the Bar simply will decide not to move forward. The long and sad history of legal regulation reform in the U.S makes this risk very real. So I can imagine a number of the potential partners you might have in this initiative—the people you want to shoulder the costs of developing the data you need to assess reform—will simply decline to play. I would suggest you make a different offer to pilot participants: provided they pass the tests they propose for themselves as to access, cost and quality (as reviewed by independent assessors), they will be granted the right to continue to operate (exemption from prosecution or other legal liability under existing rules) even if, in the end, Washington decides not to reform its regulatory approach. That is, they will only 'lose' on their bet if they in fact harm consumers relative to their next-best options for legal help or if they fail to show they can improve access. Provided the hypotheses about benefits provided by the participants (and perhaps updated over time as everyone learns) are acceptable to the State, then the risk of harm to users/consumers is contained. I think this will be necessary to get adequate participation and innovation in the pilot.

I wish you the best of luck with this initiative, on behalf of all the people who need you to act!

Best regards,

Gillian K. Hadfield
Professor of Government and Policy
Professor of Computer Science
Johns Hopkins University
Canada CIFAR AI Chair, Vector Institute for Artificial Intelligence
Schmidt Sciences AI2050 Senior Fellow
Contact, Bio, and Publications

From:	Andrei Andreescu
To:	Entity Regulation Pilot
Subject:	[External]Feedback on Pilot Test of Entity Regulation
Date:	Thursday, August 15, 2024 12:15:32
Attachments:	Outlook-a2jkhoy1.png Outlook-qkgjditc.png Outlook-ft2nwjnb.png

You don't often get email from aandreescu@buckleylaw.net. Learn why this is important

I would like to respectfully express my disagreement with this program. While I understand the legal deserts problem that Washington faces, and support widespread access to legal services, I think that non-lawyer ownership of law firms and fee-sharing with non-lawyer corporate entities poses significant ethical dangers that far outweigh the benefits of better access to legal services. I have serious concerns that non-lawyer ownership of law firms would result in a decrease in lawyer competency and effective representation and potential ethical violations. The fact that only two states, Arizona and Utah (both politically conservative states, traditionally) adopted similar measures speaks volumes to me. Moreover, I am concerned that aggressive market forces such as large private equity firms could infiltrate the Washington legal services market if this measure becomes permanent.

Very truly yours,

Andrei Andreescu | Attorney
Direct Line: 206-957-1204
E-mail: aandreescu@buckleylaw.net
Address: 900 SW 16th St, Suite 130, Renton, WA 98057

Privileged/Confidential Information may be contained in this message. If you are not the addressee indicated in this message (or responsible for delivery of the message to such person), you may not copy or deliver this message to anyone. In such case, you should destroy this message and kindly notify the sender by reply email.

From: David Speikers
To: Entity Regulation Pilot
Subject: [External]Very worried
Date: Thursday, August 15, 2024 10:09:43

[You don't often get email from ████████ Learn why this is important at https://aka.ms/LearnAboutSenderIdentification]

Good morning,
I am a practitioner of 34 years and 24 in solo practice. Before this, I worked nine years for the public defender. I also sponsored somebody for an APR six who was successful in her first opportunity to take the bar exam.
Allowing non-lawyers to give advice in limited areas has already been established in Washington. Expanding the legal profession to non lawyers worries me. The overall quality of representation would be compromised. Why go to law school? Why take the bar exam? This would be the mentality of many people. I am sure if they were able to bypass standards, no one would want to go to law school and take the bar exam. Many of us have provided pro bono services on a regular basis. I believe if you wanted to test this project, it wouldn't need to be overseen by competent legal counsel.
One way to provide access to justice may be some type of mandate for these types of non lawyer practitioners. Perhaps setting a mandate requiring three years of pro bono services to be able to work independently thereafter.
These are my thoughts, David Speikers, bar number 19510
Sent from my iPhone

From:	Paul Woods
To:	Entity Regulation Pilot
Subject:	[External]Strongly opposed to Pilot Test of Entity Regulation
Date:	Thursday, August 15, 2024 10:11:46

You don't often get email from paul@paulwoodslawfirm.com. Learn why this is important

I have been a practicing attorney for 14 years in Washington. I am writing to **strongly oppose** the Pilot Test of Entity Regulation. To allow non-attorneys to have such control over access to legal analysis and the practice of law would be disastrous for many, many reasons. First, I must seriously question the quality of any such legal advice. We already have many, frankly, incompetent lawyers practicing in Washington State. To dumb down or outright eliminate requirements of legal training would be grossly irresponsible and disastrous, especially now that we live in an age where people can find anyone online willing to give whatever opinion they want on any subject. Misinformation is everywhere. To open up the giving of legal advice to non-lawyers now would be grossly irresponsible and would, I believe, destroy the practice of law in Washington State both by eroding trust/confidence in the industry and by increasing frivolous "legal" advice and actions taken in response to such frivolous "legal" advice.

Additionally, I must point out the analogous situation of corporations taking over the medical industry. Actual medical providers have lost control over their own practices, and medical provider's ability to realistically compete against the giant conglomerations of medical practices run by for-profit corporations has decreased to essentially nothing. The result is that patients have lost anything resembling quality or choice in the medical industry. Everything is becoming homogenized with the only emphasis being on profit for corporations. Medical providers, meanwhile, face the impossible task of trying to compete with giant, multi-practice corporations that actually run 5, 10, or 15 clinics/hospitals/practices in the area. The only realistic choice for medical providers to have a career is to join the for-profit giants.

This **cannot** be allowed to happen to the legal industry. The Pilot Test of Entity Regulation is **grossly irresponsible**, and I must give my very strongest condemnation of this project.

I recognize that there are access to justice issues in Washington State and elsewhere (indeed, I focus my legal practice primarily on representing employees in discrimination and retaliation claims), but the Pilot Test of Entity Regulation is **not** the answer. It will only lead to bad legal advice and the swift, steady decline of many attorneys' ability to independently practice law. This idea is terrible, and must be rejected.

Sincerely,
Paul Woods

Paul Woods WSBA No. 42976
The Paul Woods Law Firm, PLLC
506 Second Avenue, Suite 1400
Seattle, WA 98104
(425) 773-8109 (Phone)
(425) 523-9166 (Fax)

https://paulwoodslawfirm.com/

This e-mail is for the sole use of the intended recipient(s). It contains information that is confidential and/or legally privileged. If you believe that it has been sent to you in error, please notify the sender by reply e-mail and delete the message. Any disclosure, copying, distribution or use of this information by someone other than the intended recipient is prohibited.

From:	Virginia Clifford
To:	Entity Regulation Pilot
Subject:	[External]Pilot Project
Date:	Thursday, August 15, 2024 17:15:47

You don't often get email from [redacted] Learn why this is important

Hello,

Why not just provide funds for legal services (as in, real lawyers) in civil matters for the poor and have the State of WA take a share of the proceeds in reimbursement for fees? The lawyers would be paid a salary and handle a caseload, cases vetted by litigation attorneys for likelihood of success.

This would provide an incentive to evaluate a claim to see if the case has merit, and also assist the litigants with quality legal services.

Is there some ethical reason for the WSBA to assist this pressure to erase lawyers from the practice of law in favor of AI? Don't litigants need a professional to count on and hold accountable? Are there any actual practitioners supporting this idea?

Sincerely,

Virginia A Clifford, J.D
Law Office of Virginia A. Clifford PLLC
Respond to office@vcliffordlaw.net
360 357-3007

Mailing address as of 7/10/23 is 1910 East 4th Ave # 91 Olympia, WA 98506-4632
Office hours at 2646 R W Johnson Blvd SW #100 Tumwater, WA 98512 will be arranged for in person, phone and Zoom appointments

From:	Brazil, Marquita
To:	Entity Regulation Pilot
Cc:	ABSProgram
Subject:	[External]Innovative Business Model feedback
Date:	Friday, August 16, 2024 07:14:28
Attachments:	image001.png

You don't often get email from [redacted] Learn why this is important

Hello, I'd like to submit the following feedback for the upcoming WSBA and Practice of Law Board during the next Board of Governors meeting: Arizona has been a trailblazer in innovation and expanding access to justice for Arizonians by authorizing the Alternative Business Structure (ABS) program since 2020, with our first approved ABS in 2021. We're thrilled to announce that by September 2024, Arizona will proudly celebrate its 100th approved ABS! The positive feedback and minimal complaints from licensees underscore the success of this initiative.

The Certificate & Licensing Division at the Arizona Supreme Court welcomes the opportunity to collaborate with the Washington Supreme Court during its pilot program to foster innovative business models.

Thank you,

Marquita Brazil
Alternative Business Structure Manager
Arizona Supreme Court
Administrative Office of the Courts
1501 W. Washington, Suite 104
Phoenix, AZ 85007
[redacted]
Alternative Business Structure (azcourts.gov)

From: Martin J. Kreshon
To: Entity Regulation Pilot
Subject: [External]Test Entity Regulations
Date: Friday, August 16, 2024 08:13:47

You don't often get email from [redacted] Learn why this is important

This is a terrible idea.

Martin Kreshon
Attorney at Law
Larsen Walters PLLC
[redacted]
Direct: (206) 929-0609

NOTICE: The information contained in this email is confidential and may be subject to the attorney-client privilege. If you are not the intended recipient, you are hereby notified that any use, dissemination, distribution or copying of this email is prohibited. If you received this email in error, please immediately notify the sender by telephone at the number above.

From: Tyler Brown
To: Entity Regulation Pilot
Subject: [External]Public Comment: Pilot Test on Entity Regulation
Date: Friday, August 16, 2024 12:22:46
Attachments: Public Comment_Washington Entity Regulation.pdf

You don't often get email from [redacted] Learn why this is important

To Whom it May Concern,

Please see the attached comment.

Sincerely,

--
Ty Brown // Partner
—
[redacted]

phone: [redacted]
fax: [redacted]

8/16/2024

Re: Public Comment on Entity Regulation Pilot Program Proposal

To Whom It May Concern,

I am writing to express my enthusiastic support for the Washington State Bar Association's proposal to launch a pilot program that tests a new regulatory framework for entities with non-lawyer ownership and/or management in the legal field. As an attorney entrepreneur and CEO of a rapidly growing Alternative Business Structure operating in the Utah Sandbox, I see this initiative as a groundbreaking step toward fostering meaningful advancements in the legal industry, much like the transformative regulatory sandbox in Utah and more permanent rule changes in Arizona.

The fundamental purpose of regulations should be to protect the public's interests, not to shield legal professionals from increased competition. The standard rules of professional conduct do more of the latter. By embracing a data-driven approach, the Washington Supreme Court and Bar are demonstrating a commitment to evaluating and adapting regulatory changes based on empirical evidence rather than unfounded fears. Although the evidence from the Utah Sandbox is clear–hundreds of thousands of instances of service and no increased risk of consumer harm from non-lawyer owned entities–the fear and opposition from lawyers (especially personal injury lawyers) remains. This fear is a barrier to a permanent rule change in Utah–one that will hopefully be overcome in the next few years. The Washington Supreme Court and Bar Association will have its mettle tested when it comes time to implement more permanent rule changes based on the data that will come. If there is not a strong commitment at this stage to rewrite those rules based on a successful pilot, no matter how fierce the attorney opposition gets, this entity regulation pilot has failed before it starts.

My company (Nuttall, Brown & Coutts now better known by our dba "ZAF Legal") was among the first to be approved in the Utah Sandbox. My biggest takeaway from the last four years is that the success of the pilot is tied to the success of the entities approved and functioning in it. To ensure the success of this pilot program and to attract and sustain innovative entities/entrepreneurs, it is crucial to address two key features of the framework:

1. **Adequate Time for Development and Implementation:** Startups, by nature, face numerous challenges and uncertainties. To build and effectively implement new legal models, entities require a realistic timeframe. A minimum of seven years is essential to allow these companies to develop, refine, and prove their models. This extended period will also enable them to overcome initial hurdles and demonstrate their capacity to serve

the public effectively. Despite a quick, successful venture capital seed round, ZAF had relatively little success for the first 3.5 years. It has taken a relentless effort of repeated adaptation to get the model to work. Now, it is working and just barely starting to scale meaningfully. Had our Utah pilot not been extended from 3 years to 7 years, this success would never have materialized. In the world of disruptive innovation, an "overnight" success takes about 7 years.

2. **Regulatory Assurance for Non-Lawyer Owners/Investors:** For non-lawyer investors to commit substantial resources, they need assurance that their investments will not be jeopardized by arbitrary regulatory decisions. No investor wants to risk millions in an environment of regulatory whiplash. If an entity consistently demonstrates that its services or products benefit the public without introducing undue risk of consumer harm, it is vital that it remains operational beyond the pilot phase. Ensuring regulatory stability will foster confidence among investors and encourage significant financial commitment to legal tech innovations. This is why AZ has way outperformed UT in attracting legal tech investment despite having fewer approved entities. AZ did a better job at creating stability for investors. In every other way I can see, the Utah regulatory model is better than AZ. If WA can combine the investor stability of AZ with the more robust innovation framework of UT, the success of the WA program will be unmatched.

By incorporating these critical components into the pilot program, Washington has the potential to become a premier hub for legal technology investment and innovation. There is a high likelihood that ZAF Legal would relocate our HQ to Washington in a more stable, equally innovative legal regulatory environment. Learning from the experiences of Arizona and Utah, Washington can set a new standard in legal innovation, attracting hundreds of millions of dollars in investment and leading the way in advancing the legal profession.

Thank you for considering these points. I am excited about the opportunities this pilot program presents and look forward to witnessing the positive impact it will have on the legal industry.

Sincerely,

Ty Brown
CEO, ZAF Legal

From:	Aria Rolfes
To:	Entity Regulation Pilot
Subject:	[External]Pilot Project Support
Date:	Wednesday, August 21, 2024 18:23:33

You don't often get email from [redacted] Learn why this is important

Hello,

I just wanted to share some of my thoughts with you regarding the current Pilot Project the Supreme Court is supporting right now. As an individual that is not an attorney myself, I perceive the proposed pilot project for testing entity regulation as a pivotal advancement toward enhancing the accessibility and affordability of legal services. The current high costs and the often-intimidating nature of traditional law firms frequently hinder individuals from obtaining necessary legal assistance. This proposal seeks to permit a variety of entities, beyond conventional law firms, to deliver legal services under rigorous regulatory oversight. Such a shift has the potential to provide more cost-effective options and services that are more comprehensible and user-friendly. By evaluating these new models, the project could significantly increase the availability of legal support, particularly for those who typically cannot afford it. The emphasis on data collection and public protection ensures that any proposed changes will be meticulously analyzed and implemented in a manner that genuinely benefits those in need of legal services, while maintaining safety and quality standards. This initiative represents a progressive approach to legal system reform, aimed at better serving the public, and I offer my strong endorsement of this endeavor.

Thank you.

Aria Rolfes
Workers Comp. Paralegal
[redacted]
www.palacelaw.com

CONFIDENTIALITY NOTICE: *This e-mail is meant only for the intended recipient and may contain confidential and/or privileged information. If you have received this in error, please notify me immediately by replying to this message and delete it and any attachments from your computer. Any unauthorized dissemination, disclosure, distribution or use of information contained in this e-mail or any attachments is prohibited. This transmission shall not be construed to: (a) provide legal advice, (b) create an attorney-client relationship, or (c) include a digital or electronic signature.*

From:	Kevin Couch
To:	Entity Regulation Pilot
Subject:	[External]Pilot project
Date:	Wednesday, August 21, 2024 18:16:01

You don't often get email from [redacted] Learn why this is important

As someone who isn't a lawyer, I think this pilot project to test entity regulation is a really smart idea. Legal services can be super expensive and confusing, making it hard for regular folks like myself to get the help they need. This project could change that by letting different kinds of businesses, not just law firms, offer legal help, all while keeping a close eye on quality and ethics. It could mean more affordable and easier-to-access legal services, which would be a big win for people like me who just want straightforward support when dealing with legal issues. Thank you.

From:	Shannon Fritz
To:	Entity Regulation Pilot
Subject:	[External]Comments on Pilot Test of Entity regulation
Date:	Thursday, August 22, 2024 08:34:12

You don't often get email from [redacted] Learn why this is important

As a new lawyer fresh out of law school, I'm really excited about the proposed pilot project to test entity regulation. This project feels like a breath of fresh air in a profession that's often seen as rigid and slow to change. One of the biggest challenges I've noticed since starting is how hard it is for people to access legal help. Lawyers can be expensive, and the traditional system isn't always set up to help everyone, especially those who need it most. This pilot project offers a chance to try something new—allowing different types of entities, not just traditional law firms, to provide legal services. This could mean more affordable and accessible options for people who might otherwise be left out. For someone like me, who's just starting out, it's exciting to think about being part of a new wave of legal practice that's more in tune with what people really need today.

Plus, the project isn't just throwing ideas at the wall to see what sticks. It's all about collecting data and making decisions based on what actually works. That's something I really appreciate because it means any changes that come out of this will be well-thought-out and backed by evidence.

I also like that the project has built-in safeguards to make sure we're still upholding the ethical standards of the profession. It's reassuring to know that while we're trying new things, there's still a strong focus on doing right by our clients and maintaining the public's trust.

Overall, this pilot project feels like a great opportunity to modernize the legal field and make it more relevant to today's world. As a new lawyer, I'm all in for supporting something that could make a real difference in how we deliver legal services and help more people get the support they need.

Thank you!
Shannon Fritz

From: Zan Ross
To: Entity Regulation Pilot
Subject: [External]Proposed Pilot Project
Date: Thursday, August 22, 2024 08:03:01

As someone who isn't a lawyer, I see the proposed pilot project to test entity regulation as a crucial step towards making legal services more accessible and affordable for people like me. Legal help is often hard to access due to high costs and the intimidating nature of traditional law firms. This proposal aims to allow different types of entities, not just law firms, to offer legal services under strict oversight. This could mean more affordable options and services that are easier to understand and use. By testing these new models, the project could make legal help more available to everyone, especially those who usually can't afford it. The focus on data collection and public protection means that any changes made will be carefully considered and designed to truly benefit people who need legal services, without compromising safety or quality. This initiative represents a forward-thinking approach to reforming the legal system in a way that better serves the public, and I strongly support it.

~ Zan Ross

From: Lusine Martirosyan
To: Entity Regulation Pilot
Subject: [External]Pilot Project
Date: Friday, August 23, 2024 17:37:44

[You don't often get email from [redacted] Learn why this is important at https://aka.ms/LearnAboutSenderIdentification]

I am a paralegal working in the legal field for 4 years now, and I see the proposed pilot project to test entity regulation as a crucial step towards making legal services more accessible and affordable for people like me. Legal help is often hard to access due to high costs and the intimidating nature of traditional law firms. This proposal aims to allow different types of entities, not just law firms, to offer legal services under strict oversight. This could mean more affordable options and services that are easier to understand and use. By testing these new models, the project could make legal help more available to everyone, especially those who usually can't afford it. The focus on data collection and public protection means that any changes made will be carefully considered and designed to truly benefit people who need legal services, without compromising safety or quality. This initiative represents a forward-thinking approach to reforming the legal system in a way that better serves the public, and I strongly support it.

Best,

Lusine Martirosyan

From:	Zachary Bryant
To:	Entity Regulation Pilot
Subject:	[External]Feedback Pilot Test of Entity Regulation
Date:	Friday, August 23, 2024 08:38:21

You don't often get email from [redacted] Learn why this is important

This seems far too vague and simply seems like a solution in search of a problem. There is no good basis provided by the Bar for why they are proposing this and seems like it has been proposed by individuals with little to zero practice in actual law.

It also seems to run contrary to the mission of the Bar and further seeks to minimize and trivialize the role of an attorney.

There's no indication the types of businesses or entities that could apply, the areas of law, or any sort of structure. There are several layers of bureaucracy that seem to be involved and the potential for a not fair or equitable outcome/treatment. What could end up happening is the Bar could try to adopt this for low income access to justice, however if you only narrowly tailor it to that, there will certainly be other people that want to apply the ability/technology to other areas of law and you'll end up with an anti-trust/anti-compete lawsuit.

I ask who or what is driving this proposal? Would this mean that the Bar would allow non-lawyers and lawyers to co-own businesses in which that lawyer is utilizing their legal experience but it is not a law firm? If not, how is it equitable?

Zachary H. Bryant
Principal, Mainstay Law, LLC
TEL 206-466-8506
Mailing Address: 336 36th St., #706 Bellingham, WA, 98225, USA
Office Address by Appointment Only

This email, any attachments hereto, and any information contained herein may be legally privileged and/or confidential information intended only for the addressee(s) named herein. If you are not the intended recipient of this email, you are hereby notified that any dissemination, distribution, or copying of this email, and any attachments thereto, is strictly prohibited. If you have received this email in error, please immediately notify me by e-mail or at the number above and permanently delete the original and any copy of any email and any printout thereof.

From:	Lucian T. Pera
To:	Entity Regulation Pilot
Subject:	Proposed Washington State Pilot Test of Entity Regulation
Date:	Saturday, August 24, 2024 14:52:50
Attachments:	The Madness of the Lawyer Fee-Sharing Ban.pdf

To the WSBA and Practice of Law Board:

I am a lawyer licensed to practice and practicing in Tennessee and Arizona. I represent lawyers, law firms, clients, and others who need advice and representation concerning the rules and other law that regulate the practice of law. I spend a lot of my time lately advising lawyers and others doing innovative things in the delivery of legal services, including representing nonlawyer-owned law firms or ABSs. I currently spend a great deal of time advising startups in legal services, both ABSs and other law firms, operating all over the country.

From that background, I strongly support your favorable consideration of a "sandbox" approach to entity regulation, for two reasons.

First, in my opinion, it has the potential, at the very least, to improve access to legal services. We are in the midst of an unprecedented access-to-legal-services crisis. It's not entirely clearly why 92% of the legal needs of poor and near-poor Americans are currently unmet, and why this problem is getting worse. (Legal Services Corporation's data clearly proves this.) It's also clear that the access-to-legal-services crisis is also rampant for Americans of greater means than the poor and near-poor. What caused this crisis? That's not 100% clear, though we each have views on this. But what is clear is that the private market for legal services has failed to deliver legal services to many willing to pay for them. Those who are responsible for making the regulations that shape and regulate that market are responsible for making sure that they are not contributing to the problem, and reshaping those regulations to improve the performance of the market.

What many do not understand is that the "legal ethics rules" include a number of laws designed to regulate the marketplace. Rules like Rule 5.4 and laws like UPL prohibitions are much less about what is and is not good conduct by lawyers that helps and protects clients and more about shaping and regulating the market. In my opinion, rules and laws like these clearly limit the marketplace for legal services, and I agree with the growing body of thought that these rules limit access to legal services. They shape and distort the market, and not in a way beneficial to the public and clients.

Second, your proposal has the potential to limit, reduce or eliminate professional regulation that is unnecessary to protect clients and the public. Totally apart from the argument that pursuing the relaxation of rules and law like these will likely increase access to legal services, all the ethics rules and regulations governing the delivery of legal services should be limited to those that protect clients and the public. To the extent that rules and regulations go _beyond**_ that purpose, they are not appropriate public policy. Over the last few years of observing activities in Arizona**

under their new regulatory regime and in the Utah Sandbox, I have become convinced that prohibitions on nonlawyer ownership and sharing of fees with nonlawyers, as well as the current sweeping UPL prohibitions, are simply not justified by the need to protect clients and the public. They are simply not needed to protect the public or clients.

In thinking about one of these regulations, the prohibition on fee-sharing with nonlawyers—I've written about the truly unjustifiable inconsistency of our public policy on fee-sharing that is embedded in the ethics rules. I invite you to read my article and see if you can find a way to find a sensible policy rationale that supports the bizarre law of fee-sharing as it exists today.
https://www.americanbar.org/groups/law_practice/resources/law-practice-magazine/2024/2024-may-june/the-madness-of-the-lawyer-fee-sharing-ban/?login (A copy is also attached.) If, like me, you cannot make sense of this rule, then that conclusion supports, at the very least, your experimentation with the relaxation of that rule to see if doing so either advances access to legal services or causes harm.

When I add that conclusion that these regulations are not needed for client or public protection to my conclusion that removing these restrictions *may* improve access to legal services, that leads me to strongly favor regulatory reform in these areas.

That also leads me to strongly support your favorable consideration of a pilot test of entity regulation. The experience of Utah and Arizona also supports this. From what I understand of your proposal, it amounts to a measured, reasonable, and controlled experiment to see if these reforms work—or even if they don't measurably improve access to legal services, they do no harm. Either result would lead to a material improvement in the legal services market.

Please adopt this proposal and move the regulation of legal services forward. Everyone who cares about improving the delivery of legal services is watching and hoping for your success.

Best,

Lucian Pera

From:	Sandra Miller
To:	Entity Regulation Pilot
Subject:	[External]Support for WSBA Pilot Test of Legal Regulation
Date:	Tuesday, August 27, 2024 15:32:03
Attachments:	image002.png

You don't often get email from [redacted] Learn why this is important

Hello,

Sound Legal Aid fully supports the Pilot Test of Legal Regulation. We believe this initiative holds great promise for enhancing our ability to serve marginalized communities by providing legal services in more innovative and streamlined ways. The outcomes and practices developed through this effort will be instrumental in helping us deliver access to justice more efficiently and effectively.

Best regards,

Sandra

Sandra Miller
Executive Director

[redacted]
www.soundlegalaid.org
P.O. Box 405, Olympia, WA 98507-0405

This email may contain information that is protected by attorney-client, work product or other privileges. If you are not the intended recipient, you are notified that dissemination, use or reliance upon its contents is strictly prohibited. If you received this email in error, please contact me by reply email and then delete this email.

From:	Jessica Bednarz
To:	Entity Regulation Pilot
Subject:	[External]IAALS Written Public Comments on the WA Pilot Test of Entity Regulation Proposal
Date:	Wednesday, August 28, 2024 15:59:45
Attachments:	image001.png image002.png image003.png image004.png image005.png IAALS Written Public Comments on the WA Pilot Test of Entity Regulation Proposal 8.27.24.pdf

---

You don't often get email from [redacted] Learn why this is important

Dear WSBA and POLB Leaders,

Attached please find our written public comments in support of your pilot test of entity regulation proposal.

Thanks!

Cordially,
Jess

Jessica Bednarz | Director of Legal Services and the Profession | she, her, hers
IAALS, Institute for the Advancement of the American Legal System
University of Denver | John Moye Hall | 2060 South Gaylord Way | Denver, CO 80208
[redacted]

Unlocking Justice Innovation

August 28, 2024

Washington State Bar Association
1325 4th Ave suite 600
Seattle, WA 98101
entityregulationpilot@wsba.org

Re: Comment in Support of the Washington State Bar Association and Washington Supreme Court Practice of Law Board Pilot Test of Entity Regulation Proposal

Dear Washington State Bar Association Board of Governors and Washington Supreme Court Practice of Law Board Members,

On behalf of IAALS, the Institute for the Advancement of the American Legal System, we commend the Washington State Bar Association (WSBA) and the Washington Supreme Court Practice of Law Board (POLB) for your leadership in regulatory reform efforts in Washington.

IAALS is a national, independent research center at the University of Denver that innovates and advances solutions that make our civil justice system more just. Since 2019, IAALS has had an Unlocking Legal Regulation initiative through which it has worked with leaders in states across the country to rethink how we deliver and regulate legal services. IAALS supports the Pilot Test of Entity Regulation proposal ("the pilot project") and its data-driven approach, and we offer the following recommendations based on what we and other leaders have learned from other regulatory innovation initiatives.

We Recommend Implementing a Risk-Based, Data-Driven Regulatory Model and Expanding the Focus of the Pilot Project to Achieve its Objectives

Since 2019, IAALS has been at the forefront of efforts to rethink how we regulate the delivery of legal services and how we can create a consumer-centered regulatory system to ensure a more robust ecosystem for high-quality legal services—one that is competitive, broadly accessible, and better meets the needs of the people. From the outset of our work in this space, IAALS has believed that a risk-based, data-informed regulatory model is the best approach for achieving this goal while also mitigating consumer harm. The Utah sandbox is a good example of this approach. With their risk-based, data-driven regulatory approach, regulators in Utah have been able to collect and use data to better estimate the likelihood of events, including potential harm resulting from innovations, and to better monitor for and respond to them. Some of the innovations being tested in the Utah sandbox include:

- firms, companies, or organizations using software to practice law.
- traditional law firms taking on nonlawyer investment or ownership.
- traditional law firms and lawyers entering into profit-sharing relationships with nonlawyers.
- nonlawyer-owned entities employing lawyers to practice law.
- lawyers or firms entering joint ventures or other forms of business partnerships with nonlawyer entities or individuals to practice law.
- entities providing intermediary services to connect lawyers to consumers in new ways.
- other innovative methods or services not permitted under the traditional rules.

We know from the activity reports shared out by the Utah Office for Legal Services Innovation, from the research conducted by the Deborah L. Rhode Center on the Legal Profession at Stanford, and from our own interim evaluation of the Utah sandbox (interim evaluation report forthcoming later this year) that the Utah sandbox is meeting its stated regulatory objective—consumers have access to a well-developed, high-quality, innovative, affordable, and competitive market for legal services—while also more than adequately protecting consumers from harm.

The WSBA and POLB Pilot Project appears to have regulatory objectives similar to the Utah Sandbox, but it appears to be limited to technology-based innovations. Given that the Utah Sandbox is meeting its regulatory objectives, we recommend that the WSBA and POLB pursue a risk-based, data-driven regulatory approach to their Pilot Project and expand the focus of the Pilot Project to include additional innovations beyond the use of technology.

John Moye Hall, 2060 South Gaylord Way, Denver, Colorado 80208
tel 303.871.6600 | fax 303.871.6610 | iaals.du.edu

We Recommend Changing the Pilot Project Objective from "Increasing Access to Justice" to "Increasing Access to Legal Services"

In the Pilot Project proposal, one of the stated objectives is to determine whether entity regulation will "increase access to justice" by enhancing access to affordable and reliable legal and law-related services consistent with protection of the public. The phrase "access to justice" means different things to different people. In the context of legal services, some people use the phrase to mean increasing access to legal services solely for the low-income population that qualifies for free legal aid services. Others use the phrase to mean increasing access to legal services for anyone who cannot currently afford or access them, not just the low-income population. This approach would include people who do not qualify for free legal aid services because they make more than 125% of the federal poverty level or $18,825 per year for an individual.

IAALS has two concerns with using the phrase "access to justice" in a regulatory objective. First, the inclusion of a seemingly ambiguous phrase such as "access to justice" in a regulatory objective will make it harder for leaders from various stakeholder groups to be on the same page, and it will also make it harder for regulators and other leaders to evaluate whether they are meeting their regulatory objectives. Second, using the phrase "access to justice" could limit the reach and impact of the Pilot Project. We know from our US Justice Needs Study and the most recent LSC Justice Gap Report that the gap in legal services extends far beyond the income eligibility line for free legal aid and well into the middle class. This Pilot Project would be most impactful if it permitted an ecosystem of models, providers, and services that target *all gaps* in legal services and not just gaps experienced by the low-income population. By changing the Pilot Project objective from "increasing access to justice" to "increasing access to legal services," the WSBA and POLB will better ensure that all stakeholders are on the same page, that regulators will be able to collect the relevant data to understand and evaluate whether the regulatory goals are being met, and that the program will maximize its potential impact.

We Recommend Establishing Program Parameters and Requirements at the Outset of the Pilot Project

As currently written, the Pilot Project proposal is vague with respect to a few important program parameters and requirements—program timeframe and fees charged to participating entities. In October

2023, IAALS invited a group of leaders from the different regulatory innovation initiatives from across the country to participate in two days of thought leadership sessions to further momentum in the regulatory innovation space, and to develop an initial set of recommendations for launching and sustaining regulatory innovation. In our soon-to-be published post-convening report—*Unlocking Legal Regulation: Lessons Learned and Recommendations for the Future*—Recommendation 5 outlines IAALS' and other regulatory innovation leaders' concerns pertaining to pilot projects generally and provides recommendations for alleviating these concerns:

> "**Recommendation 5***: Elimination of, waivers of, or changes to unauthorized practice of law and ethics rules are generally going to be more successful than pilot projects in the regulatory reform space.* For states that have had success with pilot projects in the past, a pilot project is a way to introduce innovation that is already understood and has buy-in. It also allows for quicker adoption and nimbleness, both of which are good for innovation. On the flipside, projects that include market-based models need stability to attract participants. Entities that are targeted by these reforms are less likely to invest in a pilot project than a permanent program. The word "pilot" injects uncertainty into a program, and uncertainty is scary to business owners, investors, and potential new providers, such as Allied Legal Professionals and Community Justice Workers. Starting a business or changing careers is a monetary- and time-intensive endeavor, and no one wants to invest in a program that could shutter at a moment's notice.
>
> With all of this being said, if a pilot project is the best option for gaining traction and support for innovation, it is worth the time and money to move forward with it, and many concerns can be alleviated by specifying a timeframe—a set number of years for the pilot project—at the outset of the program. The key here is to make the timeframe long enough so that the program and the entities participating in it can achieve their goals. The Utah sandbox started out as a two-year pilot project but was extended to a seven-year pilot project to ensure it had enough time to produce and collect the data needed to measure whether its objectives were being met. Timeframes should be paired with adequate funding to sustain and evaluate the programs."

John Moye Hall, 2060 South Gaylord Way, Denver, Colorado 80208
tel 303.871.6600 | fax 303.871.6610 | iaals.du.edu

In the same forthcoming report, Recommendation 6 outlines IAALS' and other regulatory innovation leaders' concerns with program fees being vague in pilot project proposals and provides recommendations for alleviating these concerns:

> ". . . . In the alternative business structures space, unreasonable registration and renewal fees can be a barrier to entry. Flat fees commensurate with the size of the company work best. Percentages of revenue, however, are disliked by entity owners and should be avoided. Fees should also be determined at the outset of a pilot project or program and not partway through it. When fees are sprung upon participants partway through the process, it forces business owners to absorb an unknown and unaccounted for expense, and it injects uncertainty into the program. And, as shared in the previous recommendation, uncertainty repels business owners and investors."

IAALS recommends that the WSBA and POLB consider these recommendations put forth by other leaders in the regulatory innovation space as the Pilot Project details continue to be fleshed out and finalized.

Conclusion

IAALS applauds and thanks the WSBA and POLB for putting forth this innovative proposal. Adapting to change is not easy, and the future will almost always be uncertain. But you have chosen a proven framework for working through these issues—entity regulation paired with data-driven decision-making—so you are building a solid foundation. IAALS is grateful for the opportunity to share our support for the Pilot Project and recommendations for building upon that foundation, and we encourage the Washington Supreme Court to approve the Pilot Project. If the WSBA, the POLB, or the Washington Supreme Court have any follow-up questions regarding our comments, we welcome the opportunity to discuss in more detail IAALS' extensive research and work in this area.

Sincerely,

Jessica Bednarz

Director of Legal Services and the Profession

From: Eloise Barshes
To: Entity Regulation Pilot
Subject: [External]WSBA Pilot Test of Legal Regulation-note of support
Date: Thursday, August 29, 2024 13:49:21

You don't often get email from [redacted] Learn why this is important

Chelan Douglas County Volunteer Attorney Services located in Wenatchee supports moving forward with the Pilot Test of Entity Regulation. There are unmet needs for legal services! Increasing ways to provide legal services, we believe, can help with greater access to justice in our community, especially for those of moderate, middle incomes.

Eloise Barshes (she/her)
Executive Director
Chelan Douglas County Volunteer Attorney Services
18 S. Mission Suite 201
Wenatchee, WA 98801
[redacted]
www.cdcvas.org
Facebook
Instagram

Mission, Vision, and Commitment Statements

20 Years of Bridging the Justice Gap-A Legacy Video

Gifts of Justice-stories from our clients

For free legal help in certain non-criminal matters for low-income people in Washington State call
CLEAR Intake and Screening line: Toll-Free 1-888-201-1014 / Seniors Toll-Free 1-888-387-7111 / 9:10am-12:25pm / Monday-Friday
Deaf, hard of hearing, speech impaired call using relay of choice

This message may contain confidential or privileged information. If this message has been sent to you in error, please alert Eloise Barshes at 509-663-2778 and delete the message from your e-mail account. Thank you.

From:	Julie Dugan
To:	Entity Regulation Pilot
Cc:	Melisa Evangelos
Subject:	[External]Support moving forward with Pilot Test of Entity Regulation
Date:	Thursday, August 29, 2024 16:35:08

You don't often get email from [redacted]. Learn why this is important

- Julie Dugan, Tacomaprobono Community Lawyers

I support moving forward with the Pilot Test of Entity Regulation –

As a new member of a civil legal aid organization, I'm continually amazed by the unmet need for access to justice in our communities. Our legal system is not built to support those that need it most.

This program can move the needle and provide a tool for greater access with the potential of supervising paralegals to perform standard filings and facilitate standard documents. We can serve more people and allow attorneys to take on more complicated representation.

While I understand there are those in the legal community that are resisting this expansion of legal providers. This is not the first profession to explore ways to provide more efficient representation in a high-risk service. Architectural services, medical services, and veterinary services, have all enacted programs to empower agents with limited authority to provide services to fill pent up need.

In the built environment pre-engineered buildings are stamped by a single architectural entity, then utilized throughout the nation to provide simple buildings like tiny homes, restrooms, classrooms. and more. This alleviates back up in permitting which is notoriously understaffed and can hamper the development and revenue of a city or county.

In veterinary services, the permitting of high volume spay neuter veterinary services was greatly contested by the old guard veterinarians, believing it would rob them of clients and revenue. Thankfully, the pet overpopulation crisis overrode their concern and low-cost high-volume services have been put in place in multiple metropolitan areas. The loss of revenue and clients never materialized, and the crisis of pet overpopulation has eased in the communities that have employed the programs.

This pilot program has the potential to serve a tremendous need and pave the way to greater access to justice in Washington.

Julie Dugan
Project Manager
Tacomaprobono Community Lawyers
621 Tacoma Ave South, Ste. 303
www.tacomaprobono.org
Fax: (253) 627-5883

PLEASE NOTE: The information in this email is confidential and may be protected by the attorney/client or work product privileges. If you are not the intended recipient of this email or believe that you have received this communication in error, please do not print, copy retransmit, disseminate, or otherwise use the information. Please alert the sender that you have received this email in error and delete the original transmission received, thank you.

From: Melisa Evangelos
To: Entity Regulation Pilot
Subject: [External]SUPPORT --- Pilot Test of Entity Regulation
Date: Friday, August 30, 2024 09:55:16

You don't often get email from [redacted] Learn why this is important

I am the Executive Director at Tacomaprobono Community Lawyers, one of the largest providers of pro bono civil legal aid services in the state. I support the pilot program to evaluate alternative delivery methods for legal services. While I recognize that opening the door to alternative delivery methods can undermine effective legal advocacy, when used carefully and with discretion, it has the potential to greatly increase access to justice for Washington citizens. In our arena, civil legal aid, empowering our LLLTs and paralegals to provide additional services to our clients, all while being supervised by our legal teams would increase the efficiency of our programs and allow us to serve more clients.

I am excited to see what projects are put forth for evaluation if this Pilot Project is allowed to proceed. Please support this project.

Melisa D. Evangelos, JD (hear name)
Executive Director/CEO
Tacomaprobono Community Lawyers
621 Tacoma Avenue South, Suite 303
Tacoma, WA 98402
Office Tel: 253-572-5134, ext. 118
[redacted]
Fax: 253-627-5883
http://www.tacomaprobono.org

PLEASE NOTE: The information within this email communication is confidential and may be protected by the attorney/client or work product privileges. If you are not the intended recipient of this email or believe that you have received this communication in error, please do not print, copy, retransmit, disseminate, or otherwise use the information. Please alert the sender that you have received this email in error and delete the original transmission received, thank you.

From:	Natalie Knowlton
To:	Entity Regulation Pilot
Cc:	Lucy Ricca
Subject:	[External]Cmt RE Entity Regulation Pilot Project
Date:	Friday, August 30, 2024 09:59:51
Attachments:	NFE-Rhode Center Letter re WA Reform Proposal-Final w atch.pdf

You don't often get email from [redacted] Learn why this is important

Dear WSBA & Practice of Law Board:

I am writing to pass along a public comment on the entity regulation pilot proposal on behalf of Professor Nora Freeman Engstrom, Co-Director of the Deborah L. Rhode Center on the Legal Profession at Stanford Law School. Please note, her comment includes an attachment to a recent piece of scholarship, and I have included that within the single file attached, for ease of distribution.

Thank you very much for your work on this important issue.

Best, Natalie

--

Natalie Anne Knowlton
Special Projects Advisor
Deborah L. Rhode Center on the Legal Profession
Stanford Law School
[redacted]

Stanford LawSchool | Deborah L. Rhode Center on the Legal Profession

Nora Freeman Engstrom
Ernest W. McFarland Professor of Law
Co-Director, Deborah L. Rhode Center on the Legal Profession

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

August 28, 2024

WSBA Board of Governors
Washington Supreme Court Practice of Law Board
c/o Washington State Bar Association
1325 Fourth Avenue
Suite 600
Seattle, WA 98101

Re: Rhode Center Comment on the Entity Regulation Pilot Project Proposal

Dear WSBA Board of Governors and Washington Supreme Court Practice of Law Board:

I am the Ernest W. McFarland Professor of Law at Stanford Law School and the Co-Director of the Deborah L. Rhode Center on the Legal Profession ("Rhode Center"), one of the largest and most influential academic centers devoted to legal ethics and access to justice in the United States. I write to provide public comment on behalf of the Rhode Center in support of the Entity Regulation Pilot Project proposed by the Washington Supreme Court's Practice of Law Board ("POLB") and the Washington State Bar Association ("WSBA").

As is increasingly well-recognized, the American civil legal system is failing to serve the vast majority of people who encounter legal problems. In approximately three-quarters of cases that make it into court, at least one side lacks a lawyer.[1] And, many cases never make it in to court at all, as Americans, priced out of the legal system, tend to simply "lump it." They fail to take any legal action, even to protect vital interests.[2]

---

[1] *See* NAT'L CTR. FOR STATE CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv (2015) (reporting that, in 75% of non-domestic relations civil cases, at least one side lacks a lawyer); NAT'L CTR. FOR STATE CTS. ET AL., FAMILY JUSTICE INITIATIVE: THE LANDSCAPE OF DOMESTIC RELATIONS CASES IN STATE COURT ii (2018) (reporting that, in domestic relations cases, "the majority of cases (72%) involved at least one self-represented party").

[2] *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & HAGUE INST. FOR INNOVATION OF LAW, JUSTICE NEEDS AND SATISFACTION IN THE UNITED STATES OF AMERICA 56-57 (2021) (reporting that "every year 56 million Americans have to deal with 260 million legal problems" and that, of this number, "120 million legal problems [] do not reach a fair resolution"); Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 446-48 (2016) (reviewing national surveys and reporting that there are "well over 100 million Americans living with civil justice problems" and that the majority take no formal legal action to address the problem); Nora Freeman Engstrom, *She Stood Up: The Life and Legacy of Deborah L. Rhode*, 74 STAN. L. REV. ONLINE 1, 8 (2021) (explaining that, each year, "tens of millions of Americans who are currently confronting a legal problem (such as an ex-spouse who is falling behind on child support, an employer

This access-to-justice crisis is complex and multi-faceted, but scholars agree that the highly restrictive professional monopoly enjoyed by American lawyers over almost all aspects of the legal services market is a significant contributing factor.[3]

Recognizing this reality, in 2020, the Conference of Chief Justices passed an important Resolution (Resolution 2), which advocates bold reform.[4] In passing the Resolution, the Chief Justices observed that "access to affordable legal services is critical in a society that has the rule of law as a foundational principle" and that "legal services are growing more expensive, time-consuming, and complex, which makes it difficult for many people to obtain necessary legal advice and assistance in adversarial proceedings involving basic human needs, such as shelter, sustenance, safety, health, and child custody."[5] Furthermore, the Justices noted that "traditional solutions to reducing the access to justice gap, such as increased funding for civil legal aid, more pro bono work, or court assistance programs . . . are not likely to resolve the gap, which is only increasing in severity."[6] Accordingly, the Conference of Chief Justices urged the consideration of "regulatory innovations that have the potential to improve the accessibility, affordability and quality of civil legal services, while ensuring necessary and appropriate protections for the public."[7]

We at the Rhode Center believe that the Pilot Project, proposed by the POLB and WSBA, offers such an innovation.

Washington has long distinguished itself as a leader in reimagining the regulation of legal services to better serve clients and consumers. The proposal before you would, on a trial basis, authorize *entities*, rather than individuals, to offer legal services. This is a key difference from the traditional regulation of legal services—and it's a departure that has the potential to pay significant dividends.[8]

---

who refuses to pay overtime, or an insurer who has denied a legitimate claim), but who are 'lump[] it,' i.e., taking no steps to protect their interests"). As specifically noted in the proposed Order, the access-to-justice crisis in not limited to indigent or low-income Americans. Instead, it reaches up the income bracket and adversely affects middle-class Americans, as well as small businesses.

[3] Nora Freeman Engstrom & David Freeman Engstrom, *The Making of the A2J Crisis*, 75 STAN. L. REV. ONLINE 146 (2024); Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans*, *in* BEYOND ELITE LAW 21, 45 (Gillian K. Hadfield & Jamie Heine eds., 2016); Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URBAN L.J. 1229 (2014).

[4] CONF. OF CHIEF JUSTICES, RESOLUTION 2 URGING CONSIDERATION OF REGULATORY INNOVATION REGARDING THE DELIVERY OF LEGAL SERVICES (2020).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See id.* (explaining that "regulatory innovations," including "the authorization and regulation of new categories of legal service providers, the consideration of alternative business structures, and the

My recent paper, *Auto Clubs and the Lost Origins of the Access-to-Justice Crisis*, which I co-authored with my former student, James Stone, and will soon publish as a Feature in the *Yale Law Journal*, offers an illustration of how entities can supply high-quality legal services to ordinary Americans.[9]

Drawing on an analysis of tens of thousands of pages of archival material, the paper turns back the clock to the early 1900s—to a time when cars were just beginning to take over the American psyche and roadways. At the time, auto clubs, familiar to us now in the form of the AAA, were very popular. There were at least 1,100 clubs operating across the country.

Like the AAA of today, the auto clubs of yore handed out maps, supplied emergency roadside assistance, replaced flat tires, and tested members' brakes and headlights. But the clubs then, unlike the AAA of today, also did something else. Back then, the clubs furnished members a wide variety of free legal services. Clubs tended to employ salaried lawyers—and these lawyers would represent members charged with driving-related crimes and also in civil claims, on both sides of the proverbial "*v*".[10] Club lawyers would offer advice, draft letters, negotiate claims—and they would also file and defend lawsuits, even through appeal.[11] Furthermore, auto clubs, as entities, did this at scale. In 1931, for example, the Chicago Motor Club handled 8,640 claims for its 65,000 members.[12]

Nor were auto clubs alone. In the course of our research, Mr. Stone and I found evidence that, in the early 1900s, auto clubs were joined by banks, trust companies, unions, trade groups, and even homeowners' organizations.[13] All of these organizations provided free or affordable legal services to individuals—an arrangement that's generally impermissible today per Washington Rule of Professional Conduct 5.4(d).[14]

---

reexamination of provisions related to the unauthorized practice of law" are promising—and that "experimentation with different approaches to regulatory innovation provides a measured approach to identify and analyze the best solutions to meeting the public's growing legal needs").

[9] Nora Freeman Engstrom & James Stone, *Auto Clubs and the Lost Origins of the Access-to-Justice Crisis*, 134 YALE L.J. __ (forthcoming 2024). A working draft of the paper is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4728564, and a copy is also appended to this submission.

[10] *Id*. at 19-28.

[11] *Id*.

[12] *Id*. at 30. These were small claims. As the Chicago Motor Club stressed in its defense of its practice against attacks from the Bar, 99.2% of claims involved damages of less than $200 ($4,500 in inflation-adjusted dollars). *Id*. at 40.

[13] *Id*. at 34.

[14] To the extent the organization is a nonprofit as some auto clubs were, Rule 5.4(d) would not necessarily outlaw the arrangement.

Just as importantly, our romp through the historical record did not uncover evidence of consumer harm.[15] Auto clubs were popular—and, *by all accounts*, they served their members with loyalty and fidelity. Indeed, in the course of our research, we uncovered one study from the era that endeavored to assess client satisfaction. It found that respondents reported greater satisfaction with the advice and assistance they received from nonlawyers and from entities (including the AAA) than from lawyers.[16]

So, what happened? As our paper details, America's auto clubs were shut down owing to the coordinated effort of the organized bar. In the early 1930s, in city after city and in state after state, bar associations sued auto clubs, insisting that the corporate practice of law constituted the unauthorized practice of law and was a no-no (even though fully licensed lawyers were the ones providing legal services).[17]

In advancing this new—and counterintuitive—interpretation of unauthorized practice of law rules, the bar offered a series of arguments. First, the bar rolled through an odd syllogism: that corporations are not natural persons entitled to practice law and so they cannot practice law through natural persons.[18] Second, bar associations surmised that lawyers working for corporate owners would not be capable of independent judgment.[19] And third, the bar argued that the arrangement imperiled clients and consumers (though here, it never brought the receipts).

As Mr. Stone and I explain in the paper, these arguments were (and are) weak:

> For starters, the only-humans-can-practice-law-corporations-are-not-humans-ergo-corporations-cannot-practice-law syllogism is almost laughable. As one commentator noted, it was akin to saying that a trucking company cannot run the business of trucking because the company cannot obtain a license to drive.
>
> Second, the bar tended to lean hard on a particular *proxy* for lawyerly independence (direct payment from the client to the lawyer), without ever establishing the proxy's essential fit. The bar never convincingly explained why, exactly, client payment to the lawyer preserves professional independence (particularly since a key component of lawyer independence is independence *from* the client). Nor did the bar grapple with the fact that, if direct payment was the *sine qua non* for lawyerly independence, in battling corporate practices, its campaign was deeply underinclusive. Even by the 1930s, for instance, plenty of lawyers worked in law firms and "owe[d] their bread and butter to the

[15] Engstrom & Stone, *supra* note 9, at 47.

[16] Charles E. Clark & Emma Corstvet, *The Lawyer and the Public: An A.A.L.S. Survey*, 47 YALE L.J. 1272, 1281 (1938).

[17] Engstrom & Stone, *supra* note 9, at 39.

[18] *Id.* at 44.

[19] *Id.* at 44-45.

> office"—and so, by rights, these lawyers, too, should have fallen outside the sanctioned (paid by the client) scheme.
>
> Third (and similarly), in arguing that the corporate practice of law *necessarily* harms consumers, the bar never distinguished myriad similar arrangements which were wholly permitted. In particular, lawyers have long been authorized to represent their corporate employer (as, apparently, lawyers' loyalty is only compromised when they are serving the corporation's members or customers, not the corporation itself). Insurance companies have long been permitted to employ lawyers to represent policyholders. Lawyers who served the indigent could be employed by intermediaries. The government could employ lawyers to represent individuals. Since the early days of the Republic, nonlawyers have long been permitted to represent themselves. Lawyers could employ nonlawyers (just not the opposite). And, lawyers could be compensated by nonclients, assuming the lawyer complied with certain requirements. It is not clear—and the bar never persuasively explained—why we worry about lawyer independence in one context and not others. . . .
>
> Finally—and tellingly—in the course of its campaign, the bar neither surfaced concrete proof of *any* auto club inflicted harm, nor grappled with the *genuine* harm that would predictably ensue by the withdrawal of the auto club's legal services.[20]

Meanwhile, in the course of our research, Mr. Stone and I also uncovered something I find startling. Alongside these flimsy arguments, the bar also argued, often quite openly, that it needed to shut down auto clubs because allowing corporations to provide legal services posed a "serious threat" to lawyers' "well-being."[21] Indeed, some bar leaders admitted that their opposition to corporate law practice really stemmed from the fact that, when auto clubs represented individuals, the clubs "reap[ed] the rewards of the performance of functions belonging to the lawyer."[22] Or, as another bar leader of the era put it: The bar needed to act to shut down auto clubs and other "corporate" legal service providers, lest the lawyer be driven "from the banquet table at which for centuries he has had a distinguished place."[23]

Nevertheless, whatever the bar's motivations or reasoning, the fact remains: In the 1930s, the bar engaged in a coordinated campaign against auto clubs and other group legal service providers. And this concerted campaign took what had been a vibrant and flourishing market for group legal services—and killed it.

---

[20] *Id*. at 44-47.

[21] *Id*. at 70 (quoting Ewell D. Moore, *The Trust Companies and the Bar Associations*, 6 ST. B. J. 58, 58 (1931)).

[22] Richard L. Merrick, *Power of Courts to Suppress Unauthorized Practice of Law*, 3 J. D.C. B. 29, 29 (1936).

[23] Sol Weiss, *Legal Entrenchments and Lay Encroachments*, 37 COMM. L.J. 19, 19-20 (1932).

Now, I cannot promise you that, if you adopt this proposal, auto club-provided legal services will make a comeback. (I doubt they will.) Nor can I promise you that the innovative law practices of tomorrow will be as successful as the innovative law practices of yesterday. I do not know what the future will hold. However, I can show you that, in the past, organizations provided legal services to individuals. And, until the bar came along to crush these providers, tens of thousands of Americans were conscientiously represented, including those who had only very small claims.

I encourage the Board of Governors to allow this proposal to proceed to the Washington Supreme Court.

Thank you for your attention and consideration.

Sincerely,

Nora Freeman Engstrom
Ernest W. McFarland Professor of Law
Co-Director, Deborah L. Rhode Center on the Legal Profession

Attachment: Nora Freeman Engstrom & James Stone, *Auto Clubs and the Lost Origins of the Access-to-Justice Crisis*, 134 YALE L.J. __ (forthcoming 2024)

Forthcoming, to be published by The Yale Law Journal
Company, Incorporated in the *Yale Law Journal*.

134 YALE L. J. __ (forthcoming 2024)

AUTO CLUBS AND THE LOST ORIGINS OF THE ACCESS-TO-JUSTICE CRISIS

Nora Freeman Engstrom & James Stone†

In the early 1900s, the country's 1,100 automobile clubs did far more than provide the roadside assistance, maps, and towing services familiar to AAA members of today. Auto clubs also provided, free to their members, a wide range of legal services. Teams of auto club lawyers defended members charged with driving-related misdemeanors and even felonies. They filed suits that, mirroring contemporary impact litigation, were expressly designed to effect policy change. And they brought and defended tens of thousands *of civil claims for vehicle-related harm. In the throes of the Great Depression, however, local bar associations abruptly turned on the clubs and filed scores of suits, accusing them of violating nascent legal ethics rules concerning the unauthorized practice of law (UPL). In state after state, the bar prevailed—and, within a few short years, auto clubs' legal departments were kaput.*

Drawing on thousands of pages of archival material, this Article recovers the lost history of America's automobile clubs, as well

† Nora Freeman Engstrom is the Ernest W. McFarland Professor of Law at Stanford Law School and Co-Director of the Deborah L. Rhode Center on the Legal Profession. A 2023 graduate of Stanford Law School, James Stone is a law clerk in the Northern District of Illinois. We are indebted to Kenneth S. Abraham, Graham Ambrose, David Freeman Engstrom, Lawrence Friedman, Robert Gordon, Bruce Green, Amalia Kessler, Bernadette Meyler, Robert L. Rabin, Lucy Ricca, Laurel A. Rigertas, David Sklansky, Todd Venook, Garrett Wen, John Fabian Witt, and Adam Zimmerman for their helpful comments on previous drafts—and to the Rhode Center Fellows, the students at the Stanford Legal Studies Workshop, and those at both the Yale Law School Faculty Workshop and the Stanford Law School Faculty Workshop for their insightful feedback. We are also grateful to the many archives and archivists who assisted us with this project. These include: Matt Hocker and Amoi Goldman of the Antique Automobile Club of America Library and Research Center, Morgan Yates of the Automobile Club of Southern California, and Eric Johnson-DeBaufre of Trinity College, as well as the staff at the Henry Ford Museum, the Stanford Law School Library, and Yale University's Special Collections Library. Finally, we are grateful to the countless court staff who helped surface vital cases' dusty files, including: James Barrett Smith in North Carolina, Andrew Smith in Rhode Island, Matt Rousey and others at the Illinois Supreme Court, and Stephanie Smith at the National Archives at Kansas City.

Electronic copy available at: https://ssrn.com/abstract=4728564

as their fateful collision with the bar. It then surveys the wreckage and shows that the collision's impact continues to reverberate throughout the legal profession and law itself. For one, we show how the bar's litigation campaign against auto clubs—as well as the era's many other group legal service providers, including banks, unions, and homeowners' associations—helped establish the so-called "inherent powers doctrine," which cemented courts (not legislators) as the ultimate arbiters of legal practice regulation. The result was a profound power shift, with the authority to regulate legal services consequentially placed in politically insulated courts, not politically accountable legislators. More practically, the bar's concerted campaign decimated a once-thriving system for the provision of group legal services to ordinary Americans, which, we argue, ultimately consigned millions of individuals with legal problems to face them alone, or not at all.

Finally, in the rise and fall of America's auto clubs, we find new, untapped evidence that contributes to a range of critical contemporary debates. In particular, our story uncovers fresh evidence to support the value of corporate practice, currently—but controversially—banned by Model Rule 5.4. In the bar's relentless campaign to shutter auto clubs, not because they harmed members but, rather, because they threatened lawyers' livelihoods, we unearth direct proof that today's UPL bans, which continue to stymie the delivery of affordable legal services, have fundamentally rotten roots. And ultimately, we show that the present-day access-to-justice crisis—a crisis that dooms the vast majority of Americans to navigate complex legal processes without any *expert assistance—isn't a product of inattention or inertia. The crisis was, rather, constructed by the legal profession of which we are a part.*

INTRODUCTION 3

I. CRUISING: THE RISE OF AMERICA'S AUTOMOBILE CLUBS 10

A. The Early Auto Landscape 11

B. The Advent of Auto Clubs 13

1. Non-legal Services 15

2. Legal Services 19

II. COLLISION: THE BAR'S TRIUMPHANT CAMPAIGN AGAINST AUTO CLUBS 31

A. The Chicago Bar Association v. The Chicago Motor Club 38

B. Broader Battles Involving Auto Clubs 42

III. PILEUP: THE BAR'S BROADER CAMPAIGN AGAINST OTHER "CORPORATE" PROVIDERS AND THE REMAKING OF LAWYER REGULATION 48

A. Courts as the Arbiters of Law Practice 49

Electronic copy available at: https://ssrn.com/abstract=4728564

B. The Supreme Court's Ultimate Intervention..................53

IV. WRECKAGE: THE LEGACY OF AMERICA'S AUTO CLUB EXPERIMENT..56
1. Auto Clubs and the Seeds of the Country's Access-to-Justice Crisis..58
2. A World Without Rule 5.4..62
3. UPL's Rotten Roots..67

CONCLUSION..73

INTRODUCTION

On January 7, 1930, a surprisingly balmy New York day just three months into the Great Depression, the American Automobile Association (AAA) convened a board meeting at the Hotel Pennsylvania to discuss a curious development.[1] A handful of AAA's local affiliates had suddenly started getting complaints about some of the services they offered their members. The complaints, though, were coming from a surprising place: Those protesting were not disgruntled *members*, but rather disgruntled *lawyers*.

On what had these local lawyers soured? Surely not the touring advice the clubs doled out to members, nor their roadside assistance, published maps, or towing services. Instead, lawyers and local bar associations had suddenly taken issue with auto clubs' *legal* departments.

It may come as a surprise that AAA affiliates even *had* legal departments. Today, after all, such departments are long forgotten. But at the time, legal work comprised a sizeable chunk of auto clubs' member services. Teams of (usually salaried) lawyers occupied entire floors of motor-club headquarters, running what amounted to bustling law firms for all things auto. Ticketed for speeding and unsure of whether to

---

[1] *Foreword* to AMERICAN AUTOMOBILE ASSOCIATION, REPORT OF ADVISORY COMMITTEE TO SPECIAL COMMITTEE ON A. A. A. LEGAL SERVICE (1931) (on file with author) [hereinafter AAA REPORT]. For the weather, see U.S. DEP'T OF COMMERCE, RECORD OF CLIMATOLOGICAL OBSERVATIONS 709, *available at* https://www.weather.gov/media/okx/Climate/CentralPark/Battery%20Place%201871_1960.pdf. We believe that AAA convened all its meetings at the Hotel Pennsylvania that week based on a *New York Times* article discussing a different AAA board meeting there the following day. *See Stock Car Racing to be Encouraged*, N.Y. TIMES, Jan. 9, 1930, at 11 [hereinafter *Stock Car*]. Although the organization is often delineated as "A.A.A.," here and throughout, we use the simpler abbreviation "AAA."

Electronic copy available at: https://ssrn.com/abstract=4728564

contest the fine? Just call your auto club lawyer for free advice. In a car accident and interested in suing the other driver for negligence? Club lawyers could settle the case or even represent you in court. Arrested for reckless driving? Club lawyers would defend you—and might even file and argue a habeas petition on your behalf. Charged after killing someone in a collision? Some clubs would even represent you for auto-related felonies, up to and including manslaughter. And eager to land a drunk driver, abusive cop, or car thief in prison? Some clubs would provide you a lawyer for your own private prosecution. All of this was covered by clubs' annual membership dues. And all of it was sparking sudden, if not yet thunderous, protest from the bar.

At that January 1930 meeting, the AAA appointed a "special committee" composed of the heads of some of its clubs' biggest legal departments to investigate.[2] The committee of ten went to work and put the finishing touches on their comprehensive report a year later, in March 1931. At that time, complaints remained a quiet murmur: Of eighty-four clubs the committee had surveyed, only four had fielded complaints from their local bar association, and only twelve reported that "individual lawyers had registered a complaint."[3] Moreover, of the few objections, "[n]one . . . seem to have been pressed after the club service was explained."[4] After all, who could argue that the clubs' legal services, once clarified, were not of value, not only to members but to the entire motoring public? Still, the fuss left the committee frustrated:

> [T]he unfavorable attitude of the bar serves to cast serious aspersion upon the ethics and legitimacy of the practices of the automobile clubs and the character and standing of the lawyers who serve them. It is intolerable that these associations, including in their membership as they do citizens of unimpeachable character and reputation, should permit their practices to be impeached as shady, or below the standards of the legal profession, without demanding that such aspersions be brought out into the open, thoroughly aired and debated in the light of day, and determined upon their merits.[5]

---

[2] *See* AAA REPORT, *supra* note 1 (Foreword).

[3] *Id*. at 6.

[4] *Id*. at 6–7.

[5] *Id*. at 7.

Electronic copy available at: https://ssrn.com/abstract=4728564

They would come to regret this invitation. Within a decade of the report's publication, local bar associations had sued auto clubs' legal departments into submission. After this onslaught, America's auto clubs could no longer represent or advise their members on legal issues in almost any capacity. Indeed, as the Chicago Motor Club put it, "[t]he sole result of the [bar]'s efforts . . . [would be] to destroy."[6] Auto clubs' legal departments, for all intents and purposes, were dead.

The bar's triumphant campaign against the clubs' legal services—driven mainly, we argue, by a Depression-induced spirit of protectionism—would reverberate far beyond the auto clubs themselves. It would obliterate a unique and socially valuable mechanism to deliver affordable legal services at scale. It would fundamentally alter the balance of power held by legislatures and courts, when it comes to defining and policing law practice. And, it would plant other doctrinal seeds that eventually sprouted and grew, resulting in the country's current, profound access-to-justice crisis. Recovering this fateful collision, this Article unearths a history that shaped—and continues to shape—the legal profession and law itself.

This Article unfolds in four Parts. Part I tells the untold story of America's auto clubs. Drawing on voluminous archival material, we detail the rough, unregulated, and often calamitous landscape early motorists faced, sketch the many non-legal services auto clubs supplied, and detail the wide array of legal services early auto clubs offered, hailed even by bar officials—the clubs' eventual foes—as "of great convenience and value to many thousands of" motorists.[7] Just as importantly, we show that the clubs supplied *serious* legal services. Not confined to speeding tickets or fender benders, auto club lawyers handled complex civil and criminal cases from trial through appeal, up to and including habeas petitions and litigation in state supreme courts. And auto clubs did all this on a massive scale. Auto clubs brought and defended *tens of thousands* of car wreck claims; they represented thousands of motorists charged with felonies; and they spearheaded prosecutions cutting to the heart of the corruption and graft that infected the early auto landscape. Stunningly, then, at a

[6] Brief and Argument for Respondent at 23, People ex rel. Chi. Bar Ass'n v. Chi. Motor Club, 199 N.E. 1 (Ill. 1935), *reh'g denied* Dec. 5, 1935 (No. 21712) [CMC Brief].

[7] E. S. WILLIAMS ET AL., *Report of Committee on Unlawful Practice of the Law*, *in* COMMITTEE AND SECTION REPORTS CONVENTION PROGRAM, THIRD ANNUAL MEETING, THE STATE BAR OF CALIFORNIA 19, at 28 (1930).

Electronic copy available at: https://ssrn.com/abstract=4728564

time when car-ownership was skyrocketing, auto clubs furnished a form of affordable and wide-ranging legal insurance to hundreds of thousands of American families.

Part II traces the clubs' fateful Depression-era collision with the bar. This Part shows that the organized bar's relationship with auto clubs cooled just as the economy tanked. And it traces how the bar crushed clubs' provision of legal services by plugging a newly-minted (and counterintuitive) position that UPL laws not only prohibit nonlawyers from practicing law; they also prohibit fully licensed *lawyers* from furnishing legal services if those lawyers happen to work in "corporate" enterprises.

Then, Part III abstracts out to nest the bar's crusade against auto clubs inside the bar's larger (and ultimately successful) campaign to restrict *many* organizations from furnishing legal assistance. We show that, in the early years of the last century, auto clubs were not alone in their provision of legal services. Numerous for-profit and nonprofit organizations were likewise providing a wide array of legal services to ordinary Americans: Banks would draft wills; unions would help injured members prosecute tort or workers' compensation claims; and homeowners even created groups to fend off efforts at home foreclosure.[8] The bar's 1930s-era campaign brought nearly all these efforts to a halt, fatefully consigning generations of Americans to seek legal services alone and on a one-off basis—or not at all.

Part III further shows how these same battles also cemented courts as the ultimate arbiters for legal practice regulation. In state after state, it was in this context that a clear articulation of what we now call the "inherent powers doctrine" was first articulated, as courts declared that they (not legislatures) had the final say over the definition and regulation of law practice. By wresting control away from more democratically accountable branches of government, the courts "staked a claim to self-regulation radically unlike that of any other profession" and created a conception of attorney regulation nearly entirely insulated from public accountability.[9] This means, concretely, that would-be innovators wishing to push the envelope in the delivery of legal services cannot just lobby the legislature or appeal to the

---

[8] For discussion of legal services offered by banks, unions, and home associations see *infra* notes 136–138 and 141, respectively.

[9] Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent Powers Doctrine*, 12 U. ARK. L. REV. 1, 4 (1989).

Electronic copy available at: https://ssrn.com/abstract=4728564

public; they must petition (lawyer dominated) courts.[10] It also means that, even as other professions have come to accept more affordable means of service delivery (e.g., nurse practitioners in the medical context), law—with its singular insulation from legislative action—has stubbornly resisted these reforms.[11]

Finally, Part IV steps back, finding in the auto clubs' story larger lessons that deepen—and, in key ways, complicate—our understanding of the country's increasingly controversial structure of legal service regulation. Fueled by a profound access-to-justice crisis that sees roughly three-quarters of civil cases pursued or defended without the assistance of counsel, scores more Americans locked out of the legal system entirely, and state courts buckling under the weight of what some dub an "adversary breakdown," many have come to conclude that the civil justice system has "reached the breaking point."[12] In the course of this

---

[10] Laurel A. Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 QUINNIPIAC L. REV. 97, 163–64 (2018) (articulating a similar point).

[11] In the majority of states, nurse practitioners have full practice authority, meaning that they can "evaluate patients; diagnose, order and interpret diagnostic tests; and initiate and manage treatments, including prescribing medications and controlled substances, under the exclusive licensure authority of the state board of nursing." AANP, State Practice Environment, https://www.aanp.org/advocacy/state/state-practice-environment (last visited Aug. 15, 2023). By contrast, the closest analog in law (in most states) is the paralegal, who is not authorized to practice law—and must, at all times, be supervised by an attorney. *See* AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT R. 5.3. For how policymakers overcame some physicians' resistance to nurse practitioners, see Heather M. Brom, *Leveraging Health Care Reform to Accelerate Nurse Practitioner Full Practice Authority*, 30 J. AM. ASSOC. NURSE PRACT. 120 (2018).

[12] The Utah Supreme Court made this "breaking point" declaration in the course of issuing Standing Order 15, which substantially revamped the regulation of the legal profession in the Beehive State. *See* Utah Supreme Court, Standing Order 15, at 1 (2020). For state court statistics, see NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv (2015) [hereinafter LANDSCAPE STUDY]. For "adversary breakdown," see Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice*, 2016 BYU L. REV. 899 (2016). The statistics in federal court (which, on a numbers-basis represent a small share of the civil litigation landscape) are somewhat better—although by no means good. *See* Judith Resnik, *Mature Aggregation and Angst: Reframing Complex Litigation by Echoing Francis McGovern's Early Insights into Remedial Innovation*, 84 LAW & CONTEMP. PROBS. 231, 238–39 (2021) ("Of some 260,000 civil cases filed annually [in the federal courts],

Electronic copy available at: https://ssrn.com/abstract=4728564

reckoning, many have *also* come to conclude that a thicket of laws that limit the provision of legal assistance contribute to the crisis and must yield.[13] And, *that*, in turn, has set off the most "dramatic reexamination" of the market for legal services "in decades."[14]

In the course of this reexamination, numerous states are either experimenting with, or weighing whether to experiment with, a flurry of possible reforms. Indeed, activity within the past five years has been dizzying.[15] Some, including Alaska, Delaware, and New Hampshire, have relaxed UPL restrictions to permit nonlawyers to assist individuals pursuing certain kinds of claims.[16] Others, including Arizona and Utah, have relaxed Model Rule 5.4 to permit some nonlawyer ownership.[17] And still others, including Colorado, Minnesota, and Oregon, have created special certification programs to

---

about twenty-five percent are brought by people without lawyers, and more than half the cases before the federal appellate courts are brought by self-represented parties."). For discussion of non-litigants, often called "lumpers," see *infra* note 249 and accompanying text.

[13] *See generally, e.g.,* SHOSHANA WEISSMAN ET AL., THE WORLD NEEDS MORE LAWYERS, REGULATORY TRANSPARENCY PROJECT OF THE FEDERALIST SOCIETY (2023); Ralph Baxter, *Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis*, 132 YALE L.J. FORUM 228 (2022); Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191 (2016); Neil M. Gorsuch, *Access to Affordable Justice: A Challenge to the Bench, Bar, and Academy*, 100 JUDICATURE 3 (2016); Petition of Arizona Task Force to Amend Rule 31 et al., (Ariz. 2020) (No. R-20-0034) [hereinafter Arizona Petition].

[14] Jessica K. Steinberg et al., *Judges and the Deregulation of the Lawyer's Monopoly*, 89 FORDHAM L. REV. 1315, 1325–27 (2021).

[15] For a helpful compilation, see generally IAALS, THE LANDSCAPE OF ALLIED LEGAL PROFESSIONAL PROGRAMS IN THE UNITED STATES (2022).

[16] For Alaska, see Stephen Embry, *Alaska Offers Practical Approach to A2J Crisis*, TECHLAW CROSSROADS, Dec. 6, 2022. For Delaware, see Charlie Megginson, *New Court Rule Allows Non-Lawyers to Represent Tenants in Eviction Proceedings*, DEL. LIVE, Feb. 2, 2022. For New Hampshire, see N.H. REV. STAT. ANN. § 311:2-a (2023).

[17] DAVID FREEMAN ENGSTROM ET AL., LEGAL INNOVATION AFTER REFORM: EVIDENCE FROM REGULATORY CHANGE (2022). Arizona and Utah have taken other reforms as well. *See id.* For more on these states' efforts, see Rebecca Love Kourlis & Neil M. Gorsuch, *Legal Advice Is Often Unaffordable. Here's How More People Can Get Help*, USA TODAY, Sept. 17, 2020. For more on Rule 5.4, see *infra* notes 275–294 and accompanying text.

Electronic copy available at: https://ssrn.com/abstract=4728564

permit some licensed nonlawyers to supply help.[18] Additional states, including Michigan, Texas, and North Carolina, are actively considering whether to follow suit.[19] And, in recent years, prominent nonprofits, including the NAACP, have challenged UPL laws on First Amendment grounds, contending essentially that these laws impermissibly stunt their members' vindication of rights.[20]

Yet, in the face of those efforts, the American Bar Association has been steadfast in its resistance to change. Just last year, the ABA House of Delegates overwhelmingly passed a resolution doubling down on the current (restrictive) system of lawyer regulation.[21] And, over the past eighteen months, under extraordinary pressure from organized attorney coalitions, regulatory reform initiatives in Florida and California fizzled.[22] In opposing these initiatives, the bar, of

---

[18] For Minnesota, see Nora Freeman Engstrom, *Effective Deregulation: A Look Under the Hood of State Civil Courts*, JOTWELL, Oct. 31, 2022. For the Colorado and Oregon reforms, which were both adopted in 2023, see Colorado Rule Change Announcement, https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2023/Rule%20Change%202023(06).pdf, and Oregon Rule Change Announcement, https://www.osbar.org/lp#:~:text=Similar%20to%20Nurse%20Practitioners%20in,greatest%20unmet%20need%20by%20Oregonians.

[19] Karen Sloan, *Loosened Lawyer Regulations Show Promise in Utah, Ariz., Stanford Study Says*, REUTERS, Sept. 27, 2022 (discussing Michigan and North Carolina).

[20] For litigation, initiated by Upsolve, currently pending in New York, see Nora Freeman Engstrom, *UPL, Upsolve, and the Community Provision of Legal Advice*, LEGAL AGGREGATE, Jan. 27, 2022; Bruce A. Green & David Udell, *What's Wrong With Getting a Little Free Legal Advice?*, N.Y. TIMES, Mar. 17, 2023. For the NAACP's litigation, which is currently pending in South Carolina, see Sara Merken, *NAACP Sues South Carolina Officials in New Test of Legal Practice Limits*, REUTERS, Mar. 23, 2023.

[21] AM. BAR ASS'N, RESOLUTION 402 (Aug. 2022). For further discussion of Resolution 402 which passed by a "landslide vote," see Stephen P. Younger, *The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms*, 132 YALE L.J. FORUM 259, 272–73 (2022).

[22] For California, see David Freeman Engstrom & Nora Freeman Engstrom, *Why Do Blue States Keep Prioritizing Lawyers Over Low-Income Americans?*, SLATE, Oct. 17, 2022. For Florida, see Letter of President Michael G. Tanner to The Honorable Charles T. Canady, Dec. 29, 2021, *available at* https://www.floridabar.org/news/publications/publications002/special-committee-to-improve-the-delivery-of-legal-services/#reports [hereinafter Tanner Letter]; *see also* Lyle Moran, *Florida Supreme*

Electronic copy available at: https://ssrn.com/abstract=4728564

course, insists that its motivations are pure—and that its opposition lies in the protection of the public.[23]

The auto club story, we argue, directly and powerfully informs this ongoing battle for the future of legal service delivery. In particular, we show: (1) By shuttering a once-thriving system that was providing affordable legal services to hundreds of thousands of ordinary Americans, the bar bears direct responsibility for the current access-to-justice crisis; (2) contrary to the bar's insistence, there is compelling evidence that restrictions on corporate law practice are not necessary to ensure adequate performance or to protect clients; and (3) perhaps most startlingly, the bar's ban on UPL, which continues to block the effective delivery of affordable legal services, was fashioned not out of a desire to protect the public but, rather, grew out of the bar's self-interest. In other words: The ban on nonlawyer assistance that, many believe, *fuels* our current and calamitous access-to-justice crisis, has thoroughly rotten roots.

I. CRUISING: THE RISE OF AMERICA'S AUTOMOBILE CLUBS

The automobile's invention in the late 1800s sparked profound change in the nation's technological and legal landscape.[24] As "discussions of horseflesh gave way to talk of horsepower," roads and highways needed to be built; safety measures needed to be developed; and laws needed updating, or often, wholesale invention.[25]

More broadly, as the AAA's special committee explained in its March 1931 report, the automobile reflected and reinforced a "revolutionary" social and cultural transformation.[26] As the auto roared on the scene, the individualist society of the 19th century—where "every farmer raised his own food, butchered his own meat, hewed his own

---

Court Rejects Bar Committee's Reform Proposals, Asks for Alternatives, ABA J., Mar. 22, 2022.

[23] *See infra* notes 298–299 and accompanying text.

[24] *See generally* JAMES J. FLINK, THE AUTOMOBILE AGE (1988); JOHN HEITMANN, THE AUTOMOBILE AND AMERICAN LIFE (2009); *accord* Anedith Jo Bond Nash, Death on the Highway: The Automobile Wreck in American Culture, 1920-40, at 66 (Unpublished Ph.D. Dissertation 1983) ("Adoption of the automobile provided, in microcosm, an example of the adjustments of American society to 'modern times.'").

[25] *Nags to Riches—Story of Autos*, CHI. DAILY TRIB., Apr. 18, 1959, at A2.

[26] AAA REPORT, *supra* note 1, at 2.

Electronic copy available at: https://ssrn.com/abstract=4728564

fuel and drew water from his own well or spring"—began to yield; "the individual" was "more and more merged in the group."[27] This merging, in the AAA's telling, ushered in a new "age of co-operation and corporation . . . the age of the big unit; an age when society must reckon not only with individual men, but with machines."[28]

The country's 1,100 automobile clubs not only assisted in this "revolutionary" transformation, they also reflected it.[29] Drawing on thousands of pages of previously untapped material, Subpart A provides a brief overview of the early, unregulated roads drivers travelled, while Subpart B details the extensive services auto clubs supplied.

A. The Early Auto Landscape

The American Automobile Association was founded in 1902, less than a decade after the car's invention and six years before Henry Ford introduced his "everyman's car," the Model T.[30] At the time, the auto landscape—traversed by the country's 20,000 drivers—was vastly different from that of the present day.[31]

For starters, the roads looked different. Rarely straight and often disconnected from one another, they were mostly made of dirt and became impassable when it rained or

---

[27] *Id.* at 1. In fact, even earlier, Americans sought to band together to "counter the vicissitudes of economic and social change." John Fabian Witt, *Toward A New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690 (2001) and esp. 812–15.

[28] AAA REPORT, *supra* note 1, at 2; *accord* Harvey W. Peck, *Civilization on Wheels*, 7 SOCIAL FORCES 300, 304, 306 (1928) (similarly crediting the automobile with "mitigating rural isolation" and forging new ties between urban and rural populations). Ironically, although the AAA and some contemporary observers credited the automobile with knitting people together, in the ensuing decades, many have come to see the automobile (and its follow-on developments, including the rise of highways, sprawl, and suburban living) very differently. For discussion, see, e.g., James J. Flink, *Three Stages of Automobile Consciousness*, 24 AM. QUARTERLY 451, 470–71 (1972).

[29] AAA REPORT, *supra* note 1, at 5.

[30] For the AAA's founding, see Charles C. Collins, *Automobile Club Activities: The Problem from the Standpoint of the Clubs*, 5 LAW & CONTEMP. PROBS. 3, 3 (1938). For the auto's invention, see FLINK, *supra* note 24, at 23, 25. For the Model T, see Detroit Historical Society, Encyclopedia of Detroit, https://detroithistorical.org/learn/encyclopedia-of-detroit/model-t [hereinafter Detroit Historical Society].

[31] Collins, *supra* note 30, at 3.

Electronic copy available at: https://ssrn.com/abstract=4728564

snowed.[32] Cars shared these twisting and unpaved roads with horses, and the autos' sputters and honks frequently caused the poor animals to bolt.[33]

Limited and piecemeal regulation compounded drivers' difficulties. Throughout the 1920s and 30s, drivers' license and car registration requirements were spotty.[34] Insurance mandates were mostly non-existent, and even watered-down financial responsibility laws were rare—contributing to an environment where roughly three-quarters of drivers lacked any form of liability insurance.[35] Road signs were limited. Speed limits were haphazardly posted.[36] And, there was little effort at inter-jurisdictional consistency, such that, if the driver traveled any appreciable distance, she invariably faced a "chaotic state" of "[c]onflicting municipal, state, and federal" traffic regulations.[37] In the words of one commentator: "to know the various rules applying in towns and villages through which one might drive on a hundred-mile trip required the wisdom of a legal wizard."[38]

All the above—coupled with a lack of vehicle safety equipment and pervasive driver inexperience—contributed to a scandalously high accident rate. In 1915, the fatality rate per mile traveled was over *twenty-five times* what it is today,[39]

---

[32] FLINK, *supra* note 24, at 169.

[33] FRANK B. WOODFORD, WE NEVER DRIVE ALONE: THE STORY OF THE AUTOMOBILE CLUB OF MICHIGAN 4 (1958).

[34] LEGISLATIVE BUREAU OF THE CHICAGO MOTOR CLUB, A PROPOSED UNIFORM MOTOR VEHICLE ANTI-THEFT ACT FOR ILLINOIS, at vi (1932).

[35] Only one state (Massachusetts) had any kind of compulsory insurance, and only a handful of others had "financial responsibility laws" which notoriously lacked teeth. DAVID BLANKE, HELL ON WHEELS: THE PROMISE AND PERIL OF AMERICA'S CAR CULTURE, 1900–1940, at 169–70 (2007). For a discussion of financial responsibility laws, see REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS TO THE COLUMBIA UNIVERSITY COUNSEL FOR RESEARCH IN THE SOCIAL SCIENCES 97, 207–08 (1932) [hereinafter COLUMBIA REPORT]. For insurance rates as of 1929, see *id.* at 45–46.

[36] Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years*, 1919-1941, 4 CONN. INS. L.J. 521, 526 (1998).

[37] BLANKE, *supra* note 35, at 120–22.

[38] WOODFORD, *supra* note 33, at 162.

[39] *Compare* BLANKE, *supra* note 35, at 60 (reporting 34.71 fatalities per 100 million vehicle miles traveled [VMT] in 1915), *with NHTSA Estimates for 2022 Show Roadway Fatalities Remain Flat After Two*

Electronic copy available at: https://ssrn.com/abstract=4728564

while the 1920s would see nearly a quarter million Americans killed in automobile accidents.[40] It was, as one commentator put it, "as if the explosive force and potential for violence of the great industrial manufactories had exploded out."[41]

But all these dangers and difficulties did little to dissuade throngs of American consumers from lining up to get behind the wheel. So powerful was the automobile's pull that by 1926, the majority (55.7%) of American families owned at least one vehicle,[42] and, by 1928, it was estimated that four in five American families owned at least one car.[43]

FIGURE 1

U.S. Car Sales by Year[44]

YEAR	SALES (THOUSANDS)
1910	181.0
1915	895.9
1920	1905.5
1925	3735.1

It was into this dangerous, chaotic, and rapidly changing world that auto clubs were born and flourished.

B. The Advent of Auto Clubs

In its earliest days, the AAA sought to "lobby for improved public highways, protect the legal rights of drivers,"[45] and also "to prove that [the automobile] wasn't a rich man's toy but really was a means of transportation."[46] As to how these disparate goals were achieved, the 65,000-member Chicago Motor Club, one of the original clubs to form

Years of Dramatic Increases, NHTSA.gov (Apr. 20, 2023) (reporting 1.35 fatalities per 100 million VMT in 2022).

[40] Simon, *supra* note 36, at 540.

[41] *Id.*

[42] SARAH A. SEO, POLICING THE OPEN ROAD 14 (2019).

[43] Peck, *supra* note 28, at 300.

[44] Simon, *supra* note 36, at 531.

[45] HEITMANN, *supra* note 24, at 22.

[46] Abstract of Record at 66, People ex rel. Chi. Bar Ass'n v. Chi. Motor Club, 199 N.E. 1 (Ill. 1935), *reh'g denied* Dec. 5, 1935 (No. 21712) [hereinafter Chicago Record Abstract].

Electronic copy available at: https://ssrn.com/abstract=4728564

the AAA, presents a useful example.[47] Formed in 1906, the Club spent its first few years sponsoring "hill climbs and reliability runs," seeking to prove "to a somewhat doubting public that the automobile was really a means of transportation that could be used economically."[48] Then, around 1914, as the auto's popularity grew, the Chicago Motor Club decided that the "automobile had arrived and there was no need to promote it any more."[49] With that reckoning, the Club's focus changed from promoting the automobile to "rendering service to motorists individually."[50] Other clubs at the time made similar transitions (or formed anew for that latter purpose).[51]

Club ranks soon swelled. For example, the Detroit Automobile Club went from 3,000 members in 1918 to 55,000 in 1927.[52] The Cleveland Automobile Club went from 18,000 members in 1922 to over 30,000 in 1923—a 66.7% percentage jump in just twelve months.[53] And, the Automobile Club of Southern California's membership skyrocketed from about 1,200 members in 1910 to roughly 100,000 in 1925.[54]

---

[47] *See* CMC Brief, *supra* note 6, at 8 (providing a membership estimate).

[48] Chicago Record Abstract, *supra* note 46, at 66. Founded in 1902, the Detroit Automobile Club had a similar beginning, as, early on, it sponsored "club runs" to "arouse interest in the new form of transportation." *Id.* at 8.

[49] *Id*. at 67 (testimony of Bulger).

[50] *Id*.

[51] *See* WOODFORD, *supra* note 33, at 8 (Detroit Automobile Club); Resp't's Answer, Record on Appeal at 10, Seawell v. Carolina Motor Club, Inc., 184 S.E. 540 (N.C. 1936) (No. 114) (Carolina Motor Club); *Another Year of Progress—President W. L. Valentine's Annual Report*, TOURING TOPICS, Mar. 1926, at 16 (Automobile Club of Southern California) [hereinafter, Valentine's Report].

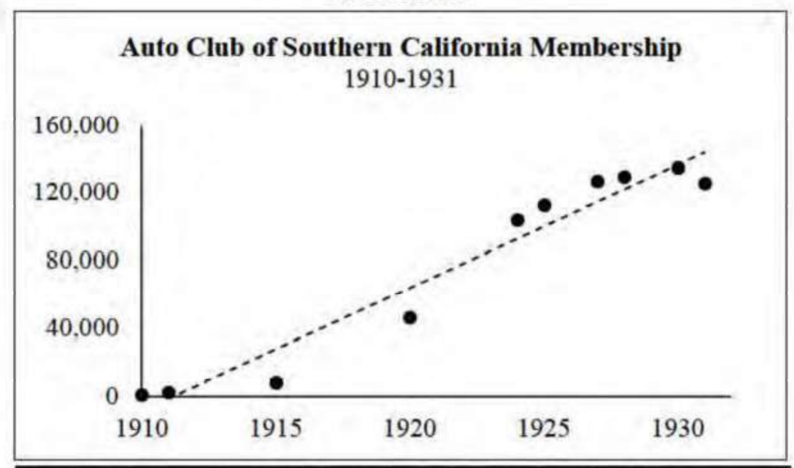
[52] WOODFORD, *supra* note 33, at 20, 25, 42.

[53] Fred H. Caley, *What Your Club Did in 1922*, OHIO MOTORIST, Apr. 1923, at 5.

[54] Valentine's Report, *supra* note 51, at 16. Importantly, although these clubs expanded to accommodate more of the motoring public, they were not uniformly welcoming. Troublingly, for instance, the Chicago Motor Club's membership was limited to whites. *See* BYLAWS OF CHICAGO MOTOR CLUB, Art. II § 1 (1922) ("Any white person over the age of eighteen years, of good moral character, may become a member of this club upon application . . . ."). For more on the deplorable history of segregation within the auto industry, see HEITMANN, *supra* note 24, at 40 and FLINK, *supra* note 24, at 127–29.

Electronic copy available at: https://ssrn.com/abstract=4728564

FIGURE 2



Source: Calculations drawn from *Annual Reports* in the March issues of 1920s *Touring Topics* publications.

1. Non-legal Services

Club services expanded just as rapidly as memberships. Different clubs varied on the particulars, but broadly speaking, clubs' activities could be classified as "general" (those services that benefitted the public) and "specific" (those geared toward members).[55]

Clubs supplied a wide range of general services. First, at a time when autos, on a per capita basis, inflicted extraordinary carnage, auto clubs engaged in a dizzying array of activities to promote vehicle safety. Clubs erected directional and warning signs at dangerous intersections and dead-end streets, installed warnings at railroad crossings, engaged in highway improvement efforts, and even constructed safety fences to keep drifting cars from plunging off roads at steep turns.[56] During storms, they furnished real-

[55] Chicago Record Abstract, *supra* note 46, at 68–69. For further discussion, see Ivan Kelso, *Legal Service by Automobile Clubs*, 9 ST. B. J. 193, 193 (1934). Some activities straddled these categories. For example, certain litigation—undertaken on behalf of individual members—was, in reality, impact litigation, as its aim was to effect systemic change. *See infra* notes 92–99 and accompanying text.

[56] Apparently, in fact, "private automobile clubs" were the "first" to erect "[t]raffic-control devices such as signposts." Peter J. Hugill, *Good Roads and the Automobile in the United States 1880-1929*, 72 GEOGRAPHICAL REV. 327, 344 (1982). *E.g.*, *What the Club Does*, AUTOMOBILE CLUB OF PHILADELPHIA MONTHLY BULLETIN, Mar. 2011, at 12 (reporting that, over the last eighteen months, the club had erected "[a]pproximately 1,500 road signs"); *see also, e.g.*,

Electronic copy available at: https://ssrn.com/abstract=4728564

time updates on road conditions.[57] They led "broken glass patrols" to rid the roadways of dangerous material.[58] And they even marshalled so-called "schoolboy patrols," hiring children—by 1930, upwards of 175,000 kids throughout the country—to stand guard at crosswalks near schools to prevent unsuspecting students from getting struck by motorists—a horrifically common occurrence.[59]

FIGURE 3

Schoolboy Patrol for the California State Automobile Association, 1926

Source: Al. B. Kerkie, *Safety and By-Products*, MOTOR LAND, Mar. 1926, at 14.

As Figure 4 shows, auto clubs eventually took to boasting that these "patrols" led to an "impressive drop" in the fatality rate of underage pedestrians.[60]

WOODFORD, *supra* note 33, at 65; *A Letter—Read the Post-Script*, OHIO MOTORIST, Dec. 1923, at 28; *FREE Truck Relief Service and Other Great Benefits of the Chicago Motor Club*, HARV. HERALD, Apr. 14, 1921, at 6; *Club Acts on Highway Hazard Near Oglesby*, MOTOR NEWS, Jan. 1930, at 24; *Elevated Highways*, MOTOR NEWS, Aug. 1929, at 18; *Club Launches Track Elevation Campaign*, MOTOR NEWS, Aug. 1929, at 6; May 15, 1933 Testimony of James E. Bulger, Comm'r's Rep. & Evidence at 77, People ex rel. Chi. Bar Ass'n v. Chi. Motor Club, 199 N.E. 1 (Ill. 1935), *reh'g denied* Dec. 5, 1935 (No. 21712) [hereinafter "Testimony of Bulger"].

[57] Chicago Record Abstract, *supra* note 46, at 70–71.

[58] *N.Y. Auto Club Starts Broken Glass Patrol*, N.Y. TIMES, Aug. 26, 1928, at 128.

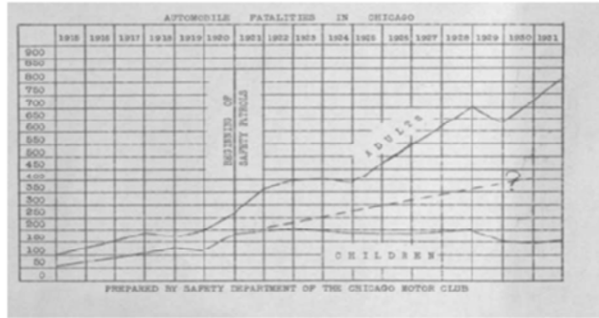
[59] WOODFORD, *supra* note 33, at 152; *Notes from Here and There*, MOTOR NEWS, Jan. 1930, at 14; *School Patrols Praised*, N.Y. TIMES, June 19, 1933, at 15. At the time, automobiles killed a startling number of children. Bill Loomis, *1900-1930: The years of driving dangerously*, DETROIT NEWS (Apr. 26, 2015) ("In the 1920s, 60 percent of automobile fatalities nationwide were children under age 9.").

[60] MILLER, GORHAM & WALES, ORGANIZATION AND ACTIVITIES, PROPOSAL OF THE CHICAGO MOTOR CLUB FOR THE REGULATION OF

Electronic copy available at: https://ssrn.com/abstract=4728564

FIGURE 4

Automotive Fatalities in Chicago by Age, 1932



Source: MILLER, GORHAM & WALES, PROPOSAL OF THE CHICAGO MOTOR CLUB FOR THE REGULATION OF ORGANIZATIONS RENDERING LEGAL SERVICE 12 (1932).

Beyond these practical safety measures, clubs engaged in extensive lobbying and legislative advocacy. They pushed for a uniform traffic code, lobbied for the construction of interstate highways, encouraged the consistent enforcement of traffic regulations, and advocated for all manner of bills, including financial responsibility laws, driver's license laws, and "the prevention of excessive taxation and other impositions upon motorists."[61] In the words of the Chicago Motor Club: "Where proposed legislation directly and seriously affects the motoring public, the Chicago Motor Club Legal Department spares no efforts to effect its enactment or defeat, as the case may be."[62]

Clubs' "special services"—i.e., the services furnished specifically to their dues-paying members—were just as significant. Like AAA members today, members back then—who paid dues of approximately $10 per year (roughly $170 in today's dollars)—were eligible for emergency roadside assistance, as clubs would tow stalled or broken-down cars free of charge, replace flat tires, and test members' brakes and headlights.[63] Clubs also supplied maps and other navigational

---

ORGANIZATIONS RENDERING LEGAL SERVICE 12 (1932) [hereinafter "PROPOSAL"]. *Accord* Nash, *supra* note 24, at 67 (discussing a decline in "[d]eath rates of children as pedestrians . . . by the early 1930s").

[61] PROPOSAL, *supra* note 60, at 9–10; *see* WOODFORD, *supra* note 33, at 163; Collins, *supra* note 30, at 6; *Auto Club Asks Mulrooney to Enforce Headlight Law*, N.Y. TIMES, Feb. 12, 1931, at 14.

[62] Statement of the Chicago Motor Club in Answer to a Report of a Sub-Committee of the Inquiry Committee of the Chicago Bar Association, (Mar. 1, 1932) [hereinafter CMC Statement], Supplement of Organization and Activities, at 6.

[63] *What Members are Saying*, MOTOR NEWS, Jan. 1930, at 16; *see also* WOODFORD, *supra* note 33, at 30; *What Members are Saying*, MOTOR NEWS, Aug. 1929, at 32. As noted, club dues averaged roughly $10.

Electronic copy available at: https://ssrn.com/abstract=4728564

resources; some went so far as to employ "pathfinders" who would "roam[] the states looking for decent roads which its members could travel."[64] Clubs published magazines, which touted club accomplishments, gave travel advice, and reported on both local and national automobile-related news.[65] And, many clubs offered members the option to purchase insurance and other forms of car protection (although, as noted, given the prevalence of uninsured motorists, it appears that the appetite for such insurance was limited).[66] The Chicago Motor Club went so far as to hire the famous Pinkerton Detective Agency to investigate any member's car theft; members' cars bore stickers indicating as much as a warning to thieves.[67]

On top of all these perks, auto clubs also offered their members a panoply of free legal services. And here, of course, is where the trouble began.

See, e.g., Am. Auto. Ass'n v. Merrick, 117 F.2d 23, 23 (D.C. Cir. 1940) ($12 for D.C.-based AAA branch); *In re* Thibodeau, 3 N.E.2d 749, 750 (Mass. 1936) ($12 for the first year, $10 thereafter for Automobile Legal Association); *Classes of Club Membership*, Friends Along the Road, June, 1927, at 30 ($10 a year for membership in Maclub of America); WOODFORD, *supra* note 33, at 209 ($10 for Detroit Auto Club); Chicago Record Abstract, *supra* note 46, at 84 ($15 for Cook County-residents and $10 for non-residents in Chicago Motor Club).

[64] *Nags to Riches—Story of Autos*, CHI. DAILY TRIB., Apr. 18, 1959, at A2; WOODFORD, *supra* note 33, at 86.

[65] *See, e.g.*, MOTOR NEWS; AUTOMOBILIST; WESTWAYS; ILLINOIS MOTORIST; FRIENDS ALONG THE ROAD. Anyone could buy the magazine, but members received them automatically. *See* MOTOR NEWS, Jan. 1930, at 2 (listing price at "20c"); *Service Contract*, AUTOMOBILIST, May 1929, at i.

[66] *See, e.g.*, Kelso, *supra* note 55, at 193 (the Automobile Club of Southern California); WOODFORD, *supra* note 33, at 99–105 (Detroit Automobile Club); Chicago Record Abstract, *supra* note 46, at 84 (Chicago Motor Club). Other clubs opted against these offerings. *E.g., Insurance Plan is Rejected*, OHIO MOTORIST, Feb. 1923, at 17 (noting that the Automobile Club of Missouri "voted unanimously against" offering such a plan). For insurance rates as of 1929, see COLUMBIA REPORT, *supra* note 35, at 45–46.

[67] Jan. 12, 1934 Testimony of Joseph Braun, Comm'r's Rep. & Evidence at 166, People ex rel. Chi. Bar Ass'n v. Chi. Motor Club, 199 N.E. 1 (Ill. 1935), *reh'g denied* Dec. 5, 1935 (No. 21712) [hereinafter "1934 Braun Testimony"].

Electronic copy available at: https://ssrn.com/abstract=4728564

2. Legal Services

Starting in their early days, most auto clubs offered a wide array of legal services. Indeed, these legal services were a prime (some said *the* prime) benefit of membership.[68]

Many auto clubs' legal departments operated like law firms, employing salaried lawyers to represent members and furnish complimentary advice.[69] Rather than bringing lawyers in-house, some clubs chose, instead, a contracting approach, giving members either an exclusive or non-exclusive list of names of attorneys to call and then footing the bill.[70] Still others, including the Chicago Motor Club, adopted a hybrid approach, allocating either a salaried or contract lawyer to the member based on the member's location. (Either way, auto club legal assistance was free to the member, beyond the member's payment of annual dues and, when necessary, court costs.)[71]

a. Legal Advice

Whether in-house or on contract, auto club lawyers gave advice on all things auto—which necessarily spanned a wide range of subjects. Indeed, one club boasted: "No possible legal question can arise from the ownership or the operation of an automobile that the legal department will not handle for the club members."[72] Likewise, the contract the Automobile

---

[68] *See* J. E. Bulger, *Handling Legal Difficulties for Members: An Interview with O. P. Lightfoot, General Counsel, Chicago Motor Club*, MOTOR NEWS, Feb. 1924, at 25 ("If the club had no other service but this [legal], I am of the firm belief that it would be well worth the price of membership."); *Automobile Associations and Clubs*, 5 TEX. B.J. 152, 152 (1942) (stating that legal services were "by far the major part of the consideration which the customer receives for his [auto club] membership fee").

[69] *See* AAA REPORT, *supra* note 1, at 1, 71; *see also* Chicago Record Abstract, *supra* note 46, at 83; Kelso, *supra* note 55, at 194–95; Dworken v. Cleveland Auto. Club, 29 Ohio N.P.(N.S.) 607, 609 (Ohio C.P. 1931).

[70] *E.g.*, *In re* Maclub of America, Inc., 3 N.E.2d 272, 273 (Mass. 1936); *In re* Thibodeau, 3 N.E.2d 749, 751 (Mass. 1936).

[71] Chicago Record Abstract, *supra* note 46, at 78, 83, 87.

[72] William M. Henry, *The Ace of Clubs*, TOURING TOPICS, Mar. 1923, at 32. Quantifying its support, the Carolina Motor Club reported that, as of April 1935, "6,150 members have been given legal advice by club attorneys." Seawell v. Carolina Motor Club, 184 S.E. 540 (N.C. 1936). Clubs also turned advice outward, publishing articles on automobile-related law for the benefit of anyone who read their magazines. *See, e.g.*, *Legal Department*, AUTOMOBILIST, May 1929, at 12 (reassuring

Electronic copy available at: https://ssrn.com/abstract=4728564

Service Association entered into with members promised: "The Association's attorneys will furnish consultation and legal advice free of charge to the Member or members of his family on any legal matter pertaining to the use, operation, ownership and transfer of an automobile."[73]

Much of this advice was preemptive, aimed at helping members avoid legal entanglements. The Automobile Club of Southern California, for example, fielded frequent calls from members who were worried that if they gave people a ride in their cars "as a matter of friendship, courtesy, or charity," they would be liable for any ensuing injuries.[74] Another club recounted that, if a member were to call "to ask whether he may drive a ten ton truck and trailer to San Antonio, Texas," the legal department would find out—even if that meant "consult[ing] . . . the motor vehicle laws of several states, and perhaps the regulations of the various state commerce commissions."[75]

Sometimes, members called auto clubs *after* arrests or accidents. Then, too, advice was on offer.[76] But when advice alone was not enough, many clubs offered members broader representation.

b. Criminal Defense

When it came to criminal defense, different clubs drew different lines. On one end of the continuum, many clubs imposed serious limits. Some, for instance, supplied only out-of-court assistance.[77] Others helped only if the charge was

---

readers that "[t]he mere fact that an automobile runs over a dog is not enough to charge the operator with negligence").

[73] Answer of Automobile Service Ass'n (Service Contract of Automobile Service Association, at ¶ 7), Rhode Island Bar Ass'n v. Auto. Serv. Ass'n, 179 A. 139 (R.I. 1935) (No. 623) [hereinafter "A.S.A. Service Contract"].

[74] David R. Faries, *Am I Liable to the Man I Carry Free?*, TOURING TOPICS, Oct. 1918, at 20.

[75] MILLER, GORHAM & WALES, ORGANIZATION AND ACTIVITIES – CHICAGO MOTOR CLUB LEGAL DEPARTMENT 6 (1932) [hereinafter "ORGANIZATION AND ACTIVITIES"].

[76] Jeanette Hamilton, *He Said I'd Find Out and I Did—And Now I Belong to Something Big*, OHIO MOTORIST, Sept. 1923, at 16 (explaining that, after an accident, an auto club would advise on who was at fault, what information to collect, and how to "fix it all up").

[77] In its 1931 report, the AAA claimed that "the majority of . . . clubs do not represent such defendants in court, but limit their service to advice only." AAA REPORT, *supra* note 1, at 12. Perhaps. But our research reveals that many of the largest clubs—including from Chicago, Detroit, D.C., Florida, Kentucky, North Carolina,

Electronic copy available at: https://ssrn.com/abstract=4728564

minor.[78] Still others carved out (and excluded) those who had been accused of certain delineated crimes.[79] The Carolina Motor Club, for instance, withheld representation if the motorist's offense grew out of the "illegal transportation of whiskey or the operation of a car while under the influence of intoxicating beverages."[80]

But, on the other end of the continuum, numerous clubs offered representation for the gamut of auto-related crimes—up to and including manslaughter.[81] And often, clubs offered soup-to-nuts representation—from arrest through acquittal or conviction, and even post-conviction relief.[82]

Pennsylvania, Rhode Island, and Southern California—offered fuller-scale representation.

[78] *E.g.,* Dworken v. Cleveland Auto. Club, 29 Ohio N.P.(N.S.) 607, 610 (Ohio C.P. 1931) (explaining that the Cleveland Auto Club would "defend members arrested in speed traps or arrested for technical violations of traffic laws"); BRAND, UNAUTHORIZED PRACTICE DECISIONS (1937) (quoting Schuur v. Detroit Auto. Club in Chancery No. 194195 (Wayne Cty Cir. Ct., Mich., 1932)) (explaining that the Detroit Auto Club assisted its members charged with "minor traffic violations") [hereinafter *Schuur*].

[79] May 15, 1933 Testimony of Joseph H. Braun, Comm'r's Rep. & Evidence at 93, People ex rel. Chi. Bar Ass'n v. Chi. Motor Club, 199 N.E. 1 (Ill. 1935), *reh'g denied* Dec. 5, 1935 (No. 21712) [hereinafter "1933 Braun Testimony"] (testifying that the Chicago Motor Club withheld representation if the motorist had been charged with DUI, a felony, or "any offense involving moral turpitude").

[80] Seawell v. Carolina Motor Club, Inc., 184 S.E. 540, 540 (N.C. 1936); People ex rel. Chicago Bar Ass'n v. Motorists' Ass'n of Ill., 188 N.E. 827, 828 (Ill. 1933) (explaining that the 50,000-member Motorists' Association of Illinois would handle all criminal matters: "Intoxication or reckless driving charges excluded"); Harrison G. Kildare, *How the Legal Department Can Help You*, KEYSTONE MOTORIST, Dec. 1928, at 18, 36 (explaining that the Keystone Automobile Club's legal department withheld representation for "charges amounting to a felony" and that, when the member was arrested for reckless driving "the department reserves the right to decline its service").

[81] *E.g.,* Yeats v. Auto. Owners Ass'n of Fla., Inc., No. 49754-C (Fla. C. C. 1934); Allin v. Motorists' Alliance of Am., 28 S.W.2d 19, 20 (Ky. Ct. App. 1930); In re Maclub of Am., 3 N.E.2d 272, 273 (Mass. 1936); Rhode Island Bar Ass'n v. Auto. Serv. Ass'n, 179 A. 139, 140 (R.I. 1935). *See also Report of Committee on Unlawful Practice of The State Bar,* 5 ST. B. J. 19, 26 (1930) [hereinafter *1930 Report*] (reporting that some auto clubs "[a]gree to 'defend . . . in all criminal proceedings which may be instituted'").

[82] Clubs also offered representation at coroner's juries after fatal accidents. (Coroner's juries were—and are—groups of jurors whom

Electronic copy available at: https://ssrn.com/abstract=4728564

Consider the Chicago Motor Club. Pictured below, the Club's nine in-house lawyers who worked on salary, who were joined by some 65 lawyers who worked for the Club on an occasional contract basis, defended members who faced a stunning 3,459 criminal charges in 1931 alone.[83]

FIGURE 5

The Chicago Motor Club's In-House Legal Department

Source: Brief and Argument of Relator Ex. D, People ex rel. Chicago Bar Ass'n v. Motorists' Ass'n of Ill., 188 N.E. 827, 828 (Ill. 1933).

These charges included some seemingly significant offenses, including involving fictitious licenses (30 members), leaving the scene of the accident (45 members), and reckless driving (84 members).[84] After a member's arrest, the member could go to a Club branch office to be assigned a clerk. That clerk would "take record" of the offense, the "time and place of trial," and the facts surrounding the incident.[85] A lawyer would then be assigned—and the lawyer would "consult[]" with the member and decide whether "an offense has been committed."[86] If, after that investigation, the lawyer concluded that the member was "guilty of the offense," the lawyer would advise the entry of a guilty plea.[87] If, on the other hand, the lawyer concluded that the member was innocent, the lawyer

---

coroners or other officers summon to assess and "render a verdict" on the cause of someone's death.) *See, e.g.,* CAL. CIV. PROC. CODE § 236.

[83] ORGANIZATION AND ACTIVITIES, *supra* note 75, at 15; Chicago Record Abstract, *supra* note 46, at 82–83. The contract lawyers were paid an average of $15 per case. The attorney would bill the club for the services given the member, on a rate agreed upon by the "downstate manager of the Chicago Motor Club." 1933 Braun Testimony, *supra* note 79, at 112–13.

[84] ORGANIZATION AND ACTIVITIES, *supra* note 75, at 15.

[85] Chicago Record Abstract, *supra* note 46, at 77.

[86] *Id.*

[87] *Id.* at 87.

Electronic copy available at: https://ssrn.com/abstract=4728564

would advise the member to contest the charge—and that the Club would furnish representation.[88] This representation frequently involved trial practice: The Chicago Motor Club reported bringing over 250 cases to trial in a single month of 1923.[89]

Clubs also engaged in habeas practices. For example, in *Cavanaugh v. Gerk* the Automobile Club of Missouri appears to have successfully filed a habeas petition before the Missouri Supreme Court to earn the release of a member incarcerated in St. Louis, after he was caught running a stop sign and driving the wrong way on a one-way street.[90] Likewise, the Keystone Auto Club instituted habeas proceedings to free nine club members who were jailed by a crooked alderman for their grave sin of "fail[ing] to blow horn at certain crossings."[91]

Meanwhile, mirroring present-day impact litigation, clubs often used the defense of misdemeanors as "test case[s]" to secure broader rights for motorists.[92] A significant but nonexclusive focus of these efforts involved speed traps. Typically run by dishonest police officers in cahoots with local magistrates, speed traps peppered certain rural areas, much to the auto clubs' dismay. When ensnared by one, the motorist (irrespective of actual guilt) would be arrested for violating a "petty and technical offense[]" and then fined, with the spoils

---

[88] *Id*. at 77.

[89] *Legal Department Report*, MOTOR NEWS, Aug. 1923, at 23.

[90] 280 S.W. 51, 51 (1926). We believe the Automobile Club of Missouri litigated this case because the counsel of record—Gustav Vahlkamp—led the Club's legal department. For the latter, see *Law Variations a Handicap*, NAT'L UNDERWRITER, Dec. 13, 1926, at 33. Both the Keystone Automobile Club and the Chicago Motor Club also litigated habeas claims. For the former, see *Nine Club Members Throw Wrench into Chester Fining Mill*, KEYSTONE MOTORIST, Mar. 1923, at 3. For the latter, see, e.g., Hal Foust, *Attack Indiana J.P. Law in War on Speed Traps*, CHI. DAILY TRIB., July 2, 1931 (discussing a case testing the constitutionality of an Indiana statute).

[91] *Nine Club Members Throw Wrench into Chester Fining Mill*, KEYSTONE MOTORIST, Mar. 1923, at 3. The habeas action won the members' release and put an end to the alderman's "fining mill." *Id.*

[92] *Middletown Club Small But Active*, KEYSTONE MOTORIST, Jan. 1923, at 16; *see also* Transcript of Record, Am. Automobile Ass'n v. Merrick, No. 7646 (D.C. Cir. 1940), at 17 [hereinafter *Merrick* Transcript]. (describing the District of Columbia Motor Club's impact litigation efforts which "succeeded in having invalidated . . . many of the laws of the 'horse and buggy' era").

Electronic copy available at: https://ssrn.com/abstract=4728564

shared by the unscrupulous officials.[93] Victimized by such schemes, the "individual motorist" was "practically helpless."[94] But the traps, the clubs found, could be curbed by litigation initiated "by an organized body, having the power of a united membership behind it."[95]

In one case, for instance, a club attorney discovered that, in a nearby town, the mayor, police officers, and prosecutor had set up a speed trap and were splitting the resulting fines, and that the state's laws entitled the mayor—who doubled as the "trial justice"—to pocket more money from a conviction than an acquittal.[96] A club attorney defended and appealed a member's case, arguing that the mayor "could not be expected to be above partiality" due to his financial incentive to find guilt.[97] The litigation and its "attendant publicity" caused the legislature to change the fee entitlements involved such that "speed traps were abolished throughout the state."[98] Both the Chicago and District of Columbia Motor Clubs went so far as to defend *non*-members in court "where the circumstances indicated that a speed trap was operating or that law enforcement officers were guilty of abuses."[99]

c. Criminal Prosecution

In the American auto frontier of the 1920s, the clubs did not just defend their members from criminal charges. They also turned the tables to investigate wrongdoing, pay rewards for the capture of car thieves and hit-and-run drivers, and

---

[93] *See* Collins, *supra* note 30, at 3.

[94] CMC Statement, *supra* note 62, at 4–5; *id*. at Supplement of Organization and Activities at 7 ("Individually they were powerless against the system, but organized into motor clubs they waged bitter warfare . . . ."); Collins, *supra* note 30, at 8 ("As individuals, they have no way of obtaining relief. The amount of money involved in any one individual case is usually small, the grievance not severe—but the interests of motorists as a class may be adversely affected.").

[95] CMC Statement, *supra* note 58, at 4–5

[96] Collins, *supra* note 30, at 4.

[97] *Id*.

[98] *Id*. (quotation omitted).

[99] Petition of Respondent for Rehearing at 2–3, People ex rel. Chi. Bar Ass'n v. Chi. Motor Club, 199 N.E. 1 (Ill. 1935), *reh'g denied* Dec. 5, 1935 (No. 21712); *Merrick* Transcript, *supra* note 92, at 17 (discussing the Club's representation of non-members where the representation would, inter alia, "promote the purposes for which [the District of Columbia Motor Club] exists").

Electronic copy available at: https://ssrn.com/abstract=4728564

sometimes even *privately prosecute* those engaged in antisocial activity.[100]

On this score, for instance, the Chicago Motor Club was given "full investigating powers" by the state's attorney's office to uncover speed traps involving crooked officers.[101] Sometimes, in fact, when it came to speed traps, the line between investigation and prosecution blurred. Consider this testimony from the Chicago Motor Club's chief lawyer, Joseph Braun, when Braun was cross-examined during a bar-initiated lawsuit:

> Q: Wouldn't you assist the State officials in prosecuting cases?
>
> A: No, we believe that is the sole duty of the State's Attorney in State cases and the City Prosecutor in City cases.
>
> Q: But you have in certain instances done that?
>
> A: Only in such cases where the motoring public as a class would be affected.[102]

While Braun downplayed the Chicago Motor Club's prosecution activity, other clubs were not so circumspect. In 1924, the Keystone Motor Club of Pennsylvania boasted that it was "ready at all times to extend its legal aid in assisting Club members to prosecute drivers of motor vehicles who have grossly violated the law."[103] Likewise, in 1935, the Carolina Motor Club declared that it had "employed the services of duly licensed attorneys to prosecute" both hit-and-

---

[100] *E.g.,* A.S.A. Contract, *supra* note 73, at ¶ 9 ("The Automobile Service Association offers a reward of Twenty-five ($25) Dollars for information leading to the arrest and conviction of any person or persons causing serious damage to a member's car and leaving the scene of such an accident without making his identity known. A Fifty ($50) Dollar reward is also provided for information leading to the arrest and conviction of any person who may steal a member's car."); *"Hit and Run" Motorists Find Evildoer's Way Stony*, L.A. TIMES, May 23, 1926, at G3 (paying between $50 and $250 as reward for information leading to the capture of hit-and-run drivers).

[101] J. L. Jenkins, *Speed Traps Swept from County Roads, Survey Reveals*, CHI. DAILY TRIB., Sept. 5, 1926, at A8.

[102] 1933 Braun Testimony, *supra* note 79, at 131.

[103] *Do Not Be Victimized*, KEYSTONE MOTORIST, Feb. 1924, at 8, 9. By 1928, the Club had retreated from that position, stating: "The Department does not assist in the prosecution of criminal cases, as prosecutions are required by law to be conducted by public officers. It will, however, assist in bringing such matters before the proper authorities." Kildare, *supra* note 80, at 36.

Electronic copy available at: https://ssrn.com/abstract=4728564

run drivers and car thieves, landing the criminal defendants in prison for a total of 108.5 and 200 years, respectively.[104]

d. Civil Cases

Automobile clubs' legal services also extended to the civil side of the docket. In this realm (as above), the clubs displayed great variation both in terms of procedures utilized and claims accepted.

In terms of procedures utilized, some clubs merely penned letters to help members resolve claims out of court.[105] Thus, the 29,000-member District of Columbia Motor Club (which, unlike the vast majority of its counterparts, staffed its civil claims department with nonlawyers) tended to assist members in the prosecution or defense of very small property damage claims—and frequently resolved those small claims by utilizing the following procedures:

> The member makes a formal report. [The District of Columbia Motor Club] then writes to the other person involved in the accident, states the amount of damages, presents the claim, and requests an answer . . . . If no response is received, [the Club] sends a follow-up letter concluding as follows: "Unless we hear from you within the coming week, we shall be obliged to advise our member that apparently no amicable settlement can be made of this matter, and to place the case in the hands of his counsel. We trust that such action will not be necessary, and that the matter may be amicably adjusted." . . . . If settlement is made, [the Club's] employee fills out release forms for signature of the proper party. If no amicable settlement can be reached, the member is so informed and advised to

[104] *See* Sept. 2, 1935 Affidavit of J.H. Monte, Record on Appeal at 25-26, Seawell v. Carolina Motor Club, Inc., 184 S.E. 540 (N.C. 1936) (No. 114) [hereinafter Seawell Record]. Among their successes, the Carolina Motor Club prosecuted a farmer who, living near a highway and apparently frustrated with increased car traffic, repeatedly placed a "block of wood . . . some 3 to 5 inches in length . . . with sharpened nails driven through it" in the road, to puncture the tires of unsuspected motorists. State v. Malpass, 127 S.E. 248, 250 (N.C. 1925). Once convicted, the farmer was sentenced to four years of road work. *Id.* at 251.

[105] This limit was imposed, for instance, by the Carolina Motor Club. *E.g., id*. at 23.

Electronic copy available at: https://ssrn.com/abstract=4728564

> get his own attorney or to proceed in the small claims court. . . .[106]

Some clubs, likewise, tended to resolve tort claims via informal arbitration rather than litigation, while many other clubs would route claims to an in-house system of arbitration only when the dispute arose between members (which, given club volumes, seems to have been a common occurrence).[107] These arbitrations, which were frequently "presided over by club members," gave the "involved motorists and their witnesses" an opportunity to "appear and testify" and tended to resolve cases efficiently, keeping "many small claims . . . out of courts."[108]

In terms of claim type, most clubs' legal departments helped members only with property damage (not personal injury) claims,[109] while some clubs engaged only in defense work.[110] On the other end of the continuum, however, some clubs went much further. Some extended their services far beyond car wrecks to supply assistance (in the words of Pennsylvania's Keystone Automobile Club) *whenever* a

---

[106] *Merrick*, 117 F.2d at 24. As noted, claim values were small; a large majority were under $25. *See Merrick* Transcript, *supra* note 92, at 14, ¶ 7.

[107] Bulger, *supra* note 68, at 24; *see, e.g., From the Secretary's Notebook: Doings of Ohio State Automobile Association Clubs*, OHIO MOTORIST, June 1923, at 20 (noting the Sandusky County Automobile Club would settle all cases between members by arbitration, and that "[a]n attorney also has been employed to give legal aid and advice to members" on both sides); Kildare, *supra* note 80, at 18 (explaining that, "[i]n controversies between [Keystone Automobile] Club members, if the contending parties request it and agree to be bound by the decision, one of the representatives of the Legal Department will act as arbiter"); *Merrick* Transcript, *supra* note 92, at 28, ¶ 10 ("In many instances, two members of [the District of Columbia Motor Club] are involved in the same accident . . . and, in those cases, an attempt is made . . . to arbitrate the claims of the members and reach an amiable settlement.").

[108] Collins, *supra* note 30, at 6.

[109] AAA REPORT, *supra* note 1, at 15 ("The majority of automobile clubs do not handle personal injury cases at all, and those which do, do so only in cases involving small amounts."); *see, e.g., Schuur*, *supra* note 78 (explaining that the Detroit Automobile Club's legal department "prosecut[ed] minor property damage claims").

[110] *See In re* Thibodeau, 3 N.E.2d 749, 751 (Mass. 1936) (explaining that the Massachusetts-based Automobile Legal Association adhered to this restriction). Some straddled these categories. *E.g.,* A.S.A. Contract, *supra* note 73 (entitling members to a full range of defense services, including in cases of personal injury—but limiting plaintiff-side work to that involving property damage claims).

Electronic copy available at: https://ssrn.com/abstract=4728564

motorist had an auto-related complaint, including with regard to "unfair treatment by mechanics, defective tires and automobile equipment, misrepresentation in the sale of an automobile, etc."[111]

When it came to car wrecks, some represented members in personal injury (PI) claims—and bona fide lawsuits—on both sides of the proverbial "v". Taking this tack, the Automobile Club of Southern California (which boasted 100,000 members) and the Cleveland Automobile Club (with its 18,000 members) included personal injury claims in their claims-adjustment practices,[112] while the Automobile Owners Association of Florida, the Motorist's Association of Illinois, and the Kentucky-based Motorist's Alliance of America clearly represented members with PI claims, both in—and more frequently out—of court.[113]

For greater insight, consider again the 65,000-member Chicago Motor Club. That Club claimed to restrict its civil practice to property-damage claims, possibly in the vain hope that, by handling only claims other lawyers would not find profitable, it would stay out of the bar's crosshairs.[114] But, for

---

[111] *Legal Department Saves Members $19,600*, KEYSTONE MOTORIST, Oct. 1927, at 6, 13 [hereinafter *Saves $19,600*].

[112] Kelso, *supra* note 55, at 195.

[113] Allin v. Motorist's Alliance of Am., Inc., 29 S.W.2d 19, 20 (Ky. 1930); People ex rel Chicago Bar Ass'n v. Motorist's Assoc' of Ill., 188 N.E. 827, 828 (Ill. 1933); Yeats v. Auto. Owners Ass'n of Fla., Inc., No. 49754-C (Fla. C. C. 1934); *see also 1930 Report, supra* note 81, at 26.

[114] 1933 Braun Testimony, *supra* note 79, at 93 ("The service is confined to property damage only . . . ."); Reply Brief and Argument for Respondent at 21, People ex rel. Chi. Bar Ass'n v. Chi. Motor Club, 199 N.E. 1 (Ill. 1935) [hereinafter "Chicago Motor Club Reply Brief"] (explaining its line-drawing while noting that "[p]ersonal injury suits are generally regarded as remunerative to lawyers").

That said, we are dubious that this limitation was consistently honored and suspect that the club engaged in at least some PI representation. Fueling our skepticism is a hard-to-reconcile mismatch: When under bar scrutiny, Joseph Braun claimed to have, for the preceding sixteen years, "devoted all of [his] time to the work of the Chicago Motor Club," 1933 Braun Testimony, *supra* note 79, at 43, but Braun is listed as counsel in multiple auto-related cases from those years involving PI claims, *see e.g.,* Schwartz v. Lindquist, 251 Ill. App. 320, 323 (Ill. App. Ct. 1929) (personal injury); Bradley v. Langdon, 270 Ill. App. 618 (Ill. App. Ct. 1933) (personal injury); McCarthy v. Fadin, 236 Ill. App. 300 (Ill. App. Ct. 1925) (personal injury); Hamann v. Lawrence, 188 N.E. 333 (Ill. 1933) (death and personal injury).

Electronic copy available at: https://ssrn.com/abstract=4728564

those mostly low-dollar property damage cases, if necessary, the Club would represent litigants up to and including appeal.[115] And, as Figure 6 demonstrates, the claim volume handled by the Chicago Motor Club's roughly ten full-time and 65 contract attorneys (who worked for the Club only sporadically) was simply staggering.[116]

FIGURE 6

Chicago Motor Club Civil Claims: 1921–31[117]

Year	Number of Civil Claims Handled
1921	3,233

Our hunch is that other clubs also did more PI work than they later let on. For example, when defending itself from the bar, the Detroit Automobile Club claimed to "prosecute minor property-damage claims" otherwise unworthy of lawyers' time. *Schuur*, *supra* note 78. But we found a reference to the club helping settle a claim for a member who, "while touring in Detroit, suffered injury due to the negligence of the Detroit United Railway Company." *Legal Department Busy Place: Automobile Thieves Brought to Time and Claims of Members Handled by Cleveland Club's New Department*, OHIO MOTORIST, Sept. 1920, at 14. The Automobile Legal Association, too, claimed to limit its legal services to *defending* members in property-damage actions. *Service Contract*, AUTOMOBILIST, July 1928, back insert. At the same time, the Association published a member testimonial thanking its attorney for "ably winning" the member's PI case as a *plaintiff*. *Letters From Our Mail Bag*, AUTOMOBILIST, July 1928, at 20.

[115] *See, e.g.*, Partridge v. Eberstein, 225 Ill. Ct. App. 209 (1922) (determining who has right-of-way at an intersection in case brought and appealed by Chicago Motor Club).

[116] For the attorneys employed on a full- or occasional basis, 1933 Braun Testimony, *supra* note 79, at 109–10. Other evidence indicates that the in-house Chicago Motor Club attorneys each handled roughly 500–1000 cases per year, and that the number of "unlitigated" claims substantially eclipsed those claims that were "pending." Bulger, *supra* note 68, at 17. These days, by comparison, most PI lawyers handle on the order of 110 cases per year, and even so-called "settlement mill" negotiators, who resolve mostly small car wreck claims, handle only 300–400 cases annually. *See* Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1492 & n.23 (2009) (collecting statistics). To be fair, auto clubs were handling mostly property damage claims, which, logically, can be processed more simply than claims involving personal injury.

[117] *What Your Dues Purchase*, MOTOR NEWS, Mar. 1922, at 15 (1921 numbers); *What Your Club Did Last Year*, MOTOR NEWS, Jan. 1924, at 37 (1923 numbers); *Rendering Legal Service: $56,969.33 Saved for Members*, MOTOR NEWS, Jan. 1925, at 16 (1924 numbers); CMC Statement, *supra* note 62, Supplement of Organization and Activities at 13 (1926–31 numbers).

Electronic copy available at: https://ssrn.com/abstract=4728564

1923	3,849
1924	4,063
1926	5,930
1927	6,319
1928	6,229
1929	6,946
1930	8,315
1931	8,640

Nor was the Chicago Motor Club an outlier. In 1925, the Detroit Automobile Club's legal department handled 3,260 claims for members.[118] In the first nine months of 1929, the Keystone Automobile Club reported that it handled "1400 damage cases."[119] In 1929, the Cleveland Automobile Club's legal department "received from 125 to 140 new cases each month."[120] In 1933, the Automobile Club of Southern California's eight attorneys handled 43,326 criminal and civil claims for individual members.[121] In 1935, the Northern California-based California State Automobile Association boasted that it "secur[ed]" amicable settlements of small damages claims in 6,419 automobile civil cases"—and that all those claims "were settled without the necessity of members going to court."[122] By 1935, the Carolina Motor Club announced that it had resolved $71,780 in property-damage claims (roughly $1.6 million in today's dollars), even though the claims department was not staffed by lawyers and only endeavored to "collect damages for members out of court."[123] And, during a twelve-month period between 1938 and 1939,

[118] WOODFORD, *supra* note 33, at 200.

[119] *Saves $19,600*, *supra* note 111, at 6. It appears that these involved both property damage and PI claims and that all the claims were resolved either by arbitration or settlement, with no lawsuits filed. Kildare, *supra* note 80, at 18.

[120] Dworken v. Cleveland Auto. Club, 29 Ohio N.P.(N.S.) 607, 611 (Ohio C.P. 1931).

[121] Kelso, *supra* note 55, at 193–94. These figures are mirrored in previous years. *See generally President's Annual Report* in March issues of WESTWAYS from the years 1926 through 1932.

[122] Arthur H. Breed, *Progress of Your Club in 1935 Shown by Report of President*, MOTOR LAND, Mar. 1936, at 13.

[123] For $71,780, see Seawell v. Carolina Motor Club, 184 S.E. 540 (N.C. 1936). For the fact that the Club's claims department was staffed by nonlawyers, see *supra* note 105.

Electronic copy available at: https://ssrn.com/abstract=4728564

the District of Columbia Motor Club (which, recall, staffed its civil claims department entirely with nonlawyers), settled an impressive 1,232 claims.[124]

Still more remarkable—in 1929, all 1,100-or-so AAA-affiliated auto clubs together handled *30,069 civil claims*.[125] In comparison, that same year, an influential study of auto accident claiming behavior surfaced only 1,494 property-damage lawsuits—total—in Philadelphia, New York City, Muncie, Terre Haute, San Francisco, San Mateo County, New Haven, rural Connecticut, Boston, and Worcester Massachusetts *combined*.[126]

II. COLLISION: THE BAR'S TRIUMPHANT CAMPAIGN AGAINST AUTO CLUBS

In the mid-1920s, as auto clubs' legal departments thrived, the seeds of their demise sprouted imperceptibly beneath their feet. The trouble came in the form of unauthorized practice of law (UPL) rules. This tangle of rules mostly gathered dust during the early years of the last

[124] *Merrick* Transcript, *supra* note 92, at 47 (Exhibit 12).

[125] AAA REPORT, *supra* note 1, at 16. In a companion piece, we explore what the clubs' unique manner of handling its members' tort cases (and the sheer volume of cases they resolved) teaches us about tort law—including its contingent evolution, its tendency to blur the boundary between fault and no-fault claim resolution, and its predisposition toward aggregate settlement. *See* Nora Freeman Engstrom & James Stone, *Auto Clubs and Tort Law Lessons* (working paper).

[126] COLUMBIA REPORT, *supra* note 35, at 258 (tabulating cases from these jurisdictions).

Electronic copy available at: https://ssrn.com/abstract=4728564

century.[127] But, by 1930, UPL rules grew to become the bar's chief preoccupation—and weapon of choice.[128]

UPL rests on a simple idea: For society's "benefit and protection," only qualified and licensed individuals should be permitted to practice law.[129] Without "preparatory study, educational qualifications, experience, [and] examination," individuals are unqualified to give legal advice, and unwitting clients could be harmed by staking their vital legal rights on those unfit to practice.[130] Furthermore, nonlawyers are not licensed. As such, they are not subject "to the same discipline

[127] *See* P.H.S., *Forward*, 5 L. & CONTEMP. PROBS. 1, 2 (1938) ("During the 20's there were occasional manifestations of interest in this subject [UPL] over widely scattered areas—but it was not until after 1929 that the present widespread movement can be said to have begun."); Stephen K. Huber, *Competition at the Bar and the Proposed Code of Professional Standard*, 57 N.C. L. REV. 559, 568 (1979) ("No more than sporadic concern about unauthorized practice was expressed prior to 1930 . . . .").

To the above, there are two important caveats. First, an ABA formal opinion published in 1925 analyzed auto clubs' legal services and concluded that clubs fell on the wrong side of the UPL line because only *individuals* could practice law—corporations could not. Accordingly: "If a lay agency is not entitled to practice law directly, it is not entitled to do so indirectly, by employing licensed attorneys to carry on that portion of its activities for it." ABA Comm. on Prof'l Ethics, Formal Op. 8 (1925). Yet, that opinion didn't initially make waves. Second, the New York Bar got in the UPL game sooner. By 1914, the New York County Lawyers' Association had created a special committee "on the unlawful practice of law by corporations or individuals (including notaries)." Julius Henry Cohen, *Unlawful Practice of the Law by Laymen and Corporations*, 22 L. STUD. HELPER 12, 12 (1914). And, by 1910, the New York Court of Appeals had on the books a case establishing: "A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it . . . ." *In re* Matter of Co-operative Law Co., 92 N.E. 15, 16 (N.Y. 1910).

[128] For timing, see AM. BAR ASS'N, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: EXECUTIVE SUMMARY 1 (1995) ("The 1930s began several decades of aggressive enforcement of UPL laws."); P.H.S., *supra* note 127, at 2 (noting that, in a book that compiled "virtually all the cases in this field, only the first 98 pages are devoted to [UPL] decisions prior to 1930 and the rest of the 828 pages contain cases" from 1930 through 1938). For the fact that the bar was preoccupied with these efforts, see, e.g., *Report of Committee on the Suppression of the Unauthorized Practice of Law*, 11 J. D.C. BAR ASS'N 34, 38 (Dec. 1936) ("[T]he subject of the suppression of the unauthorized practice of law seems to be of more importance to the Bar Association than any other single question with which it has to deal.").

[129] ABA Comm. on Prof'l Ethics, Formal Op. 8 (1925).

[130] People v. Alfani, 125 N.E. 671, 673 (1919).

Electronic copy available at: https://ssrn.com/abstract=4728564

that the lawyer is and they are not subject to the same body of rules which guides the conduct of attorneys."[131] Shorn of these safeguards, lay advocates, some say, are insufficiently regulated—and apt to cause harm.

It is, and has long been, similarly clear that *what counts* as "law practice" for purposes of UPL extends broadly. Far beyond court representation, UPL can encompass drafting legal documents, settling claims, completing forms, and furnishing advice, although the exact boundaries of what precisely qualifies as law practice remains, to this day, stubbornly under-specified.[132]

Yet, while all that was clear enough, initially, there was no restriction on duly-licensed *lawyers'* provision of legal advice—or any sense that that, too, could constitute UPL. The ABA's Canons, which initially governed the profession, contained no prohibition on what, in the 1920s, came to be known as the "corporate" practice of law and which today tends to be called group legal services, multidisciplinary practice (MDP), or nonlawyer ownership (NLO).[133] And,

---

[131] *Unauthorized Practice of Law*, Address Delivered Before the Luzerne County Bar Association on April 4, 1936 by The Honorable John W. Kephart, 17 ERIE CTY. L.J. 17, 21 (1936) [hereinafter Kephart Address].

[132] The ABA's Model Rules offer no definition. *See* AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT 5.5, Cmt. [2]. Some states do have decisions on point, but they tend to leave one wanting. *E.g.,* Rhode Island Bar Ass'n v. Auto. Serv. Ass'n, 179 A. 139, 140 (R.I. 1935) ("The practice of law is difficult to define. Perhaps it does not admit of exact definition. Whether or not it can be reduced to definition is not important to the decision of the matter before us at this time. . . . That the practice of the law is a special field reserved to lawyers duly licensed by the court, no one denies."); William R. Matheny, Chairman, Section on Professional Relations, *A Program for the Elimination of the Unauthorized Practice of the Law*, 26 ILL. B.J. 1, 11 (Sept. 1937) ("The practice of the law is incapable of exact definition."). This imprecision, some say, causes its own cascade of harms. *See generally* Lauren Sudeall, *The Overreach of Limits on "Legal Advice*," 131 YALE L.J. FORUM 637 (2022).

[133] All of these unfortunately overlapping terms refer to nonlawyer-owned organizations that employ lawyers to offer legal services directly to members or customers, rather than to the organization itself. An MDP is defined, inter alia, as an "entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to client(s) other than the organization itself." AM. BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE: REPORT TO THE HOUSE OF DELEGATES C2 (1999) [hereinafter MDP REPORT]. Group legal service plans are defined, inter alia, as "[p]lans by which legal services are rendered [t]o individual members of a group identifiable in

Electronic copy available at: https://ssrn.com/abstract=4728564

neither of the two main concerns that undergird UPL restrictions—the notion that nonlawyers are (1) unqualified and (2) unregulated—apply when the provider is, in fact, a licensed attorney.

Perhaps because there was no prohibition, in the early 1900s, these "corporate" law practices started to proliferate.[134] It was not just that auto clubs were booming. It was also that *other* new organizations also sprouted up while existing organizations expanded their services.[135] Banks started to write wills.[136] Trust companies started to administer estates.[137] And trade and protective associations started to provide their members all manner of services. These included unions that would help members assert tort or workers' compensation claims,[138] trade groups that would help members collect on unpaid debts,[139] protective corporations that would draft

---

terms of some common interest [b]y a lawyer provided . . . by [t]he group." Frank N. Bratton, *Public Warning: Clear and Present Danger: Approval of Group Legal Services*, 4 TENN. B.J. 9, 9–10 (1968) (supplying the broadly-accepted definition) (alterations included). Auto clubs would fit within the parameters of any of these overlapping categories (a corporate law practice, group legal service, MDP, or NLO-entity).

[134] Paul P. Ashley, *The Unauthorized Practice of Law*, 16 ABA J. 558, 558 (1930) ("In increasing numbers and with increasing strength corporations are invading fields long felt to be reserved to members of the legal fraternity.").

[135] *See* Henry A. Shinn, *How to Deal with the Unlawful Practice of Law*, 17 ABA J. 98, 98 (1931); Joseph L. Stern, *The Volunteer Fire Department Arrives!*, 35 OHIO L. REP. 331, 331 (1931); Sol Weiss, *Legal Entrenchments and Lay Encroachments*, 37 COMM. L.J. 19, 19–20 (1932).

[136] *E.g.,* In re E. Idaho Loan & Tr. Co., 288 P. 157 (Idaho 1930); People ex rel. Ill. St. Bar Ass'n v. People's Stock Yards St. Bank, 176 N.E. 901, 905 (Ill. 1931); In re Umble's Est., 177 A. 340, 341 (Pa. 1935).

[137] K. N. Llewellyn, *The Bar's Troubles, and Poultices—and Cures?*, 5 LAW & CONTEMP. PROBS. 104, 111 (1938); *accord In re* Otterness, 232 N.W. 318, 319 (Minn. 1930) (involving a bank that hired an attorney to, among other things, "conduct[] probate proceedings").

[138] *E.g.,* United Transp. Union v. State Bar of Mich., 401 U.S. 576, 578 (1971) (discussing the services of the Brotherhood of Railroad Trainmen—a union that, in 1930, began linking injured workers and their families with "attorneys designated by the Union as 'Legal Counsel'"); United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 219 (1967) (discussing the activities of the United Mine Workers, a union which established a legal department to help members assert workers' compensation claims in 1913).

[139] *E.g.,* Hosp. Credit Exch. v. Shapiro, 59 N.Y.S.2d 812, 813 (N.Y. Mun. Ct. 1946). *Shapiro* involved the "Hospital Credit Exchange," a

Electronic copy available at: https://ssrn.com/abstract=4728564

contracts,[140] and even neighborhood homeowners' organizations that would help members in the event of home foreclosure.[141]

As these arrangements became more and more popular—and as more and more individuals came to be served thereby—the ABA started to develop the notion that these practices, *too*, should fall under the UPL umbrella, even though fully licensed lawyers were providing such services.[142] These arrangements featured intermediaries, as the lawyer was not employed by the client directly but by the organization—e.g., the auto club, bank, trust company, union, trade group, or homeowners' association. And the existence of *that intermediary* between the lawyer and the client, the ABA started to reason, was dangerous. "A lawyer's relation to his client should be personal and the responsibility should be direct . . . ."[143] In 1928, the ABA adopted Canon 35, fatefully

---

membership corporation formed by numerous charitable hospitals in New York which employed attorneys to represent individual member hospitals in the collection of unpaid bills. Challenged on UPL grounds, the court concluded that the Exchange work was "public spirited" and "helpful" and that the attorneys employed therein were "apparently honest and efficient" but, nevertheless, the Exchange had run afoul of laws prohibiting the UPL. *See also, e.g.,* Clayton M. Davis, *The Unauthorized Practice of Law*, 5 J. B. ASS'N ST. KAN. 281, 282 (1937) (describing the "Private School's Protective Bureau, Incorporated," an organization created to "collect claims against parents of children attending private schools").

[140] *See* People ex rel. Los Angeles Bar Ass'n v. California Protective Corp., 76 Cal. App. 354 (1926). Founded in Los Angeles in 1921, the California Protective Corporation pledged to render a wide range of legal services to its dues-paying members, including drafting "contracts, wills, [and] partnership agreements." Established in 1901 in New York, the Co-operative Law Company was similar. *See* Matter of Co-operative Law Co., 92 N.E. 15 (N.Y. 1910).

[141] *See* People ex rel. Courtney v. Ass'n of Real Estate Taxpayers, 187 N.E. 823 (Ill. 1933). *Courtney* involved a nonprofit corporation organized in the midst of the Great Depression to protect homeowners from home foreclosures. Some 25,000 property owners joined, paying on average dues of $15 per year. Citing UPL, the Cook County Attorney enjoined the organization.

[142] For our theory of why the bar took this somewhat counterintuitive position, see *infra* note 145.

[143] CANONS OF PROF'L ETHICS Canon 35 (1928). *See* Allan Greenberg, *The Case Against Unauthorized Practice of Law*, 18 B.U. L. REV. 298, 304 (1938) ("The fundamental objection to a corporation hiring lawyers, however competent, to perform legal services for others is that thereby the confidential trust relationship between client and attorney, which tradition and sound common sense regard as vital, would be

Electronic copy available at: https://ssrn.com/abstract=4728564

enshrining that idea. Titled "Intermediaries," Canon 35 provided, in part:

> The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary.[144]

And, although Canon 35 created a carve-out for "[c]haritable societies rendering aid to the indigent," it contained no carve-out for nonprofits generally.[145]

---

destroyed."); John G. Jackson, *The Unauthorized Practice of the Law*, 12 NEB. L. BULL. 332, 335 (1934) "If the lawyer becomes a salaried employee of business he then owes a single and undivided duty to contribute his efforts to the advantage of that business. As a lawyer, however, he owes a duty to the court and to the public, as well as to his client. He can not consistently act in dual capacities at one and the same time.").

[144] *Id.* According to Henry Drinker, a leading ethicist of the era, in adopting Canon 35, the bar was influenced by, and drew heavily from, ABA Formal Opinion 8 regarding auto clubs, issued three years before. *See* HENRY S. DRINKER, LEGAL ETHICS 164 (1953). (For discussion of that opinion, see *supra* note 127.) Nine years later, on September 30, 1937, the ABA again amended the Canons, this time to add Canon 47, which essentially fortified Canon 35. Titled "Aiding The Unauthorized Practice of Law," that provision stated: "No lawyer shall permit his professional services, or his name to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal, or corporate."

[145] It is in some ways puzzling that the bar took aim at these intermediary relationships because, unlike lay representation (where lawyers were clearly losing out to their nonlawyer counterparts), the corporate practice of law involved the employment of lawyers. Assuming that the bar was self-interested (as we argue, in Part IV.B.3. that it was), why did the bar care how its lawyer-members got paid?

Our hunch is that the bar's opposition to corporate law practice—which predated October 1929 but became more acute as the Depression wore on—is traceable to six facts. First, the bar seemed to lump nonlawyer and corporate practice together, and it often did not distinguish between the two threats. *E.g.,* Kephart Address, *supra* note 131, at 19 ("Lay agencies and laymen are competing with the legal profession; trust companies, title and insurance companies, automobile clubs, banks, insurance adjusters, tax experts, accountants, collection agencies, notaries, real estate agents and the like from time to time have encroached on the lawyer's rights."). Second, as we explain in Part I, corporate law practices *specialized*—and in so doing, were able to

Electronic copy available at: https://ssrn.com/abstract=4728564

Soon after publishing Canon 35, in August 1930, the ABA created the "Committee on Unauthorized Practice" devoted, in large part, to investigating the potential unauthorized practice of corporate providers of legal services.[146] Very soon after that, states—enthusiastically—seized the baton.

Indeed, the very same month—March 1931—that the AAA special committee issued its report reassuring its member-organizations that "no court has thus far actually held

---

practice law at scale. Employed by an auto club, one lawyer could settle hundreds or even thousands of cases each year—and suck up a disproportionate share of business from fellow practitioners. *See* DRINKER, *supra* note 144, at 167 (stating that the bar's opposition is "believed to be" traceable to the "loss of income to the lawyers" and the fact that corporate law practices "concentrat[e] . . . service in hands of fewer lawyers"). Third, when corporations practiced law, some benefit of law practice flowed to the corporation—diluting lawyers' *exclusive* right to profit from law practice. As the D.C. Bar's Richard Merrick bluntly explained in his brief targeting the District of Columbia Motor Club: "Organizations, such as [the District of Columbia Motor Club] encroach upon the domain of the lawyer . . . and reap the rewards of the performance of functions belonging to the lawyer." Brief of Appellee, Am. Automobile Ass'n v. Merrick, No. 7646 (D.C. Cir. 1940), at 44 [hereinafter D.C. Bar *Merrick* Brief]. Fourth, the corporate practice of law undoubtedly affected lawyers' self-perception. As one scholar lamented in 1912: "Corporations have discovered that the practice of law is good business and in their effort to grasp it and conduct it upon business lines, have demoralized it as a profession." George W. Bristol, *The Passing of the Profession*, 8 YALE L.J. 590, 594 (1912). Fifth (and related to points two, three, and four), corporations that employed practitioners, could advertise at a time when other practitioners couldn't, eroding the advertising ban and disadvantaging the latter practitioners. *E.g.,* D.C. Bar *Merrick* Brief, *supra*, at 43–44. Sixth and finally, lawyers seemed to worry that they were on the edge of a precipice—and, if they didn't put a stop to corporate law practice, "corporations will continue to get bigger and better, and the lawyers who work for them will continue to prosper at the expense of their less fortunate brethren until the time will come when no lawyer can be accounted successful unless he works for one of these great business houses of the law." Richard T. Catterall, *Virginia State Bar Association Report*, 9 UNAUTHORIZED PRAC. NEWS 9, 10 (Aug. 1935); *accord* Corinne Lathrop Gilb, Self-Regulating Professions and the Public Welfare: A Case Study of the California Bar 246–47 (May 1956) (unpublished Ph.D. thesis, Radcliffe College) ("What was really at stake, for the bar, was its independent professional status. . . . Leaders of the [California] State Bar movement were independent practitioners, determined that the status and ethics of the bar were not to be those of salaried clerks.").

[146] *Report of the Special Committee on Unauthorized Practice of the Law*, 54 ANN. REP. ABA 470, 470 (1931).

Electronic copy available at: https://ssrn.com/abstract=4728564

that a corporation not for profit is prohibited . . . from practicing law," the Court of Common Pleas of Cuyahoga County did just that.[147] In an opinion that the Ohio Bar heralded as the "opening gun!" in "the War on Unauthorized Practice," the court enjoined the Cleveland Automobile Club's legal department from further activity.[148]

The remainder of Part II explores the bar's UPL-fueled, Depression-era battles against auto clubs in two steps. Subpart A zeroes in on the Chicago Bar's litigation against the 65,000-member Chicago Motor Club, while Subpart B canvasses the bar's broader anti-auto club campaign.

A. *The Chicago Bar Association v. The Chicago Motor Club*

The Chicago Bar Association's suit against the Chicago Motor Club was waged in the shadow of all the above. But the suit was also informed by two recent Illinois-specific developments.

First, like the ABA with its recent addition of Canon 35, the Chicago Bar revised its ethics code in 1928 to take account of (and restrict) new "corporate" providers. But, unlike Canon 35, the ultimate provision the Chicago Bar enacted contained an explicit carveout *protecting* auto clubs and other similar member-driven nonprofits. This, of course, led the Chicago Motor Club to believe it was in the clear.[149]

Second (and quite possibly explaining the Bar's abrupt about-face), in the years before the Bar set its sights on the Chicago Motor Club, the Illinois and Chicago bars had joined forces to target on UPL grounds a for-profit corporation: the People's Stock Yards State Bank. Sometime in the preceding years, the bank had started to draft wills for its customers and also help customers with estate administration.[150] Deploying

---

[147] *Compare* AAA REPORT, *supra* note 1, at 31 (emphasis omitted), *with* Dworken v. Cleveland Auto. Club, 1931 WL 2254, at *11 (Ohio Com. Pl. Mar. 14, 1931).

[148] *Dworken*, 1931 WL 2254, at *11. For the opinion's gleeful reception by the Ohio Bar, see *Progress of the War on Unauthorized Practice*, 34 OHIO L. REP. 223, 223–24 (1931) (celebrating "the campaign to restore the lawyer to his rights" and vowing that efforts would "not stop until it has swept on to a complete victory").

[149] Brief and Argument for Respondent Chicago State Bar at 24–26, People ex rel. Chi. Bar Ass'n v. Chi. Motor Club, 199 N.E. 1 (Ill. 1935) [hereinafter Bar Brief].

[150] *Supreme Court Prohibits Legal Advice by Bank*, CHI. DAILY TRIB., June 19, 1931, at 10; People ex rel. Ill. St. Bar Ass'n et al v. People's Stock Yards St. Bank, 176 N.E. 901, 903 (Ill. 1931).

Electronic copy available at: https://ssrn.com/abstract=4728564

its new and expanded conception of UPL, the bar sued, and, in a precedent-setting 1931 opinion, Illinois's high court concurred, stressing that, going forward, a "corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it."[151] That precedent, which applied to a for-profit corporation, raised the possibility that even nonprofits could be brought to heel.[152]

It was against that backdrop that, in 1931, the Chicago Bar Association filed suit "to restrain [the Chicago Motor Club] from engaging in the alleged practice of law and to compel it to show cause why it should not be punished for contempt of court."[153] In its defense, an indignant Chicago Motor Club offered a blizzard of arguments. First, it pointed to the Bar's sudden turnaround, contending that "a mere change of view . . . does not prove that the rules adopted in 1928 were wrong."[154]

Second, the Club argued that, although its lawyers were technically employed by the Chicago Motor Club, they were, importantly, not answerable to it. "The Club attorney's duty to the individual members," it explained, "is not in any way impaired by the fact that he is employed by the Club's membership as a whole."[155] This independence was preserved, said the Club, in part because, as the Club's chief lawyer, Joseph Braun, insisted, the Club "did not dictate the manner in which we rendered the service."[156] "When a case is assigned to a lawyer employed by the Chicago Motor Club, that lawyer has discretion to handle the matter as he thinks right and proper. *He is not told by any corporate officer what should or should not be done*."[157] Indeed, underscoring the arms-length

---

[151] *Id.* at 906–07.

[152] Partially answering that question was another case, also involving an auto club, also organized as a nonprofit, challenged by the Illinois State Bar. *See* People ex rel. Chicago Bar Ass'n v. Motorists' Ass'n of Ill., 188 N.E. 827 (Ill. 1933). Yet, though seemingly on-point, that case did not control, the Chicago Motor Club insisted, because it was "in effect a default matter" and no testimony had informed the court's determination. CMC Brief, *supra* note 6, at 12. Perhaps persuaded, in its 1935 decision, the Illinois Supreme Court cites *Motorists' Ass'n of Illinois* only once, in passing. *See* People ex rel. Chicago Bar Ass'n v. Chicago Motor Club, 199 N.E. 1 (Ill. 1935).

[153] *Chicago Motor Club*, 199 N.E. at 1.

[154] CMC Brief, *supra* note 6, at 26.

[155] CMC Statement, *supra* note 62, at 11.

[156] Chicago Record Abstract, *supra* note 46, at 85–86.

[157] CMC Brief, *supra* note 6, at 19.

Electronic copy available at: https://ssrn.com/abstract=4728564

nature between Club lawyers and management, the Club insisted that it did not, itself, profit from its direct provision of legal services. "Neither the Chicago Motor Club nor any individual connected with it receives any financial gain from the performance of the duties of the lawyers employed by it."[158]

Third, the Club maintained that its fee structure—wherein no Club lawyer "receives one penny from the member for services rendered"—served to *discourage* unethical practices, as compared to other available attorney payment mechanisms.[159] The contingent fee system, the Club explained, tempted some to "win a case at all costs," while the hourly fee tempted some to "drag a case along to the detriment of the client."[160] Meanwhile, *many* fee systems induce lawyers to render better services to some clients than others.[161] By contrast, Club lawyers were freed of all those temptations, and—paid a fixed and dependable salary—they could simply focus on "serving the members of the Club . . . conscientiously and well."[162]

Fourth and finally, the Club emphasized that it was overwhelmingly handling very small claims. (Of claims handled, some 99.2% reportedly involved damages of less than $200, which translates into roughly $4,500 in present-day dollars.[163]) "We doubt," said the Club," "whether even the neediest young attorney would consider these desirable cases."[164] Accordingly, the relevant question was not whether private lawyers offered higher-quality service than Club

---

[158] *Id*. at 15 (emphasis omitted). This contention was exaggerated, as it was also said that the provision of legal services was a prime benefit of auto club membership. *See supra* note 68 and accompanying text.

[159] CMC Brief, *supra* note 6, at 15.

[160] CMC Statement, *supra* note 62, Supplement of Organization and Activities at 17.

[161] CMC Brief, *supra* note 6, at 15.

[162] CMC Statement, *supra* note 62, Supplement of Organization and Activities at 17.

[163] *Id*. at 16.

[164] *Id*.; *see also* CMC Brief, *supra* note 6, at 20 ("The kind of practice handled by respondent's legal department would be unremunerative to lawyers in private practice.") (emphasis omitted); *id*. at 35 (stating that, in the absence of the auto club, individuals with small claims or facing minor charges would be "deprived of legal counsel and representation").

Electronic copy available at: https://ssrn.com/abstract=4728564

lawyers; it was whether the motoring public was better served by a Club lawyer than going it alone.[165]

The Chicago Bar batted away most of the Club's arguments as beside the point. It didn't matter, said the Bar, whether or not Club attorneys were "efficient, faithful, diligent and ethical in their professional conduct."[166] Nor did it matter that "many of the activities of the Chicago Motor Club, aside from the legal end, were beneficial and salutary in nature."[167] The simple fact was that the Club "has no right to practice law"—and that, by practicing law, the Club was engaging in conduct "detrimental . . . to the interests of the public at large" (though, how, exactly, was left unspecified).[168] Or, as the Bar later put it in a bulletin to members: "Regardless of the quality of the service, the relationship of attorney and client was lacking . . . ."[169]

After a public hearing before a special commissioner, wherein the Chicago Motor Club introduced copious evidence detailing its services and the Chicago Bar introduced no evidence of any kind (including not a shred of evidence concerning consumer harm), the commissioner rendered his decision.[170] His findings of fact supported the Club's key contentions. He concluded that the Club had "rendered valuable services to its members and to the communities in which it operates,"[171] and that "leading members of the Chicago bar" had been poised to testify "that each and every lawyer employed by the Chicago Motor Club legal department . . . has conducted himself in a dignified and reputable manner."[172] He also found that, when it came to handling the cases on their dockets, the lawyers exercised independent

---

[165] *See* CMC Brief, *supra* note 6, at 21 (emphasizing that "[t]he Chicago Bar Association has failed to . . . offer any plan as a substitute for the service heretofore rendered by respondent's legal department").

[166] Bar Brief, *supra* note 149, at 36–37.

[167] *The Chicago Motor Club Case*, 17 CHI. B. REC. 12, 12 (1935) [hereinafter *Chicago Case*].

[168] Bar Brief, *supra* note 149, at 40.

[169] *Chicago Case, supra* note 167, at 12.

[170] CMC Brief, *supra* note 6, at 2 ("The relator introduced no evidence.").

[171] Chicago Record Abstract, *supra* note 46, at 42, ¶ 21 (Decision of Sidney S. Pollack).

[172] *Id.* at 38, ¶ 16 (the bar stipulated to the testimony and so the witnesses were not actually called).

Electronic copy available at: https://ssrn.com/abstract=4728564

professional judgment; they had, in his words, "free reign."[173] Nonetheless, where it really counted, the Bar prevailed. Notwithstanding its usefulness, the Chicago Motor Club "has been, and is, engaged in the practice of law."[174]

The Chicago Motor Club appealed, and the case made its way to the Illinois Supreme Court. Siding with the Bar, the Court doubled down on the "fundamental principle" enshrined in Canon 35 and recently accepted in Illinois in *People's Stock Yard Bank*. "[A] corporation," said the Illinois Supreme Court, "can neither practice law nor hire lawyers to carry on the business of practicing law for it."[175] "The fact that respondent was a corporation organized not for profit does not vary the rule."[176] In short: "Legal services cannot be capitalized for the profit of laymen, corporate or otherwise, directly or indirectly, in this state."[177]

B. Broader Battles Involving Auto Clubs

In targeting—and vanquishing—its local auto club, the Chicago Bar Association was not alone. The same story would play out repeatedly throughout the country.

In 1931, the Chair of the Special Committee on Unauthorized Practice of Law of the Cuyahoga County Bar Association secured an injunction against the Cleveland Automobile Club, barring it from future legal activity.[178] The same year, the Motorists' Alliance of America, the Motorists Association Limited, the State Motorists Protective Association, the Auto Guardians, and the Metropolitan Automobile Owners Association—all Ohio-based (or branched) auto clubs—were also enjoined.[179] The California Bar Association successfully sued the Pacific Coast Automobile Association for unauthorized practice in 1932; its legal department was kaput.[180] By 1934, the Tampa Bar Association had sought injunctions against auto clubs (as well

---

[173] *Id.* at 39, ¶ 18.

[174] *Id.* at 42*,* ¶ 22.

[175] *Chicago Bar Ass'n*, 199 N.E. at 3 (quoting *People's Stock Yard Bank*, 176 N.E. 901).

[176] *Id*. at 4.

[177] *Id.*

[178] Dworken v. Cleveland Auto. Club, 29 Ohio N.P.(N.S.) 607 (Ohio C.P. 1931).

[179] Goodman v. Motorists' All. of Am., Inc., 1931 WL 2237, at *1 (Ohio Com. Pl. Oct. 1, 1931); *Case Notes*, 4 J. CLEV. B. ASS'N 3, 14 (1931).

[180] *Notes*, 7 ST. B. J. 53 (1932).

Electronic copy available at: https://ssrn.com/abstract=4728564

as banks, trust companies, and real estate firms, rental agencies, a "furniture company" and others) for UPL, whose lay practice *the Florida Law Journal* disclaimed as being "to the irreparable injury of the members of the Bar."[181] On June 4, 1935, the Missouri Bar sought an injunction against the Automobile Club of Missouri.[182] The same year, the Rhode Island Bar Association vanquished the Automobile Service Association, which had been operating in the Ocean State.[183] The following year, the Carolina Motor Club met the same fate.[184] And, in 1937, Richard L. Merrick, the head of the D.C. Bar's Unauthorized Practice Committee (and, as we will see, an outspoken UPL crusader), announced that his office was filing suits against two "so-called motor clubs": The Motorists Protective Association and the Metropolitan Motor Club, Inc.[185]

---

[181] *Tampa Bar Moves Against Unauthorized Practice of Law*, 8 FLA. L. J. 113, 136 (1934). The Tampa Bar Association obtained an injunction against the Automobile Owners Association of Florida in short order. *See* Yeats v. Auto. Owners Ass'n of Fla., Inc., No. 49754-C (Fla. C. C. 1934).

[182] *Suit Filed Against Auto Club and Credit Association*, 6 MO. B.J. 93, 93 (June 1935).

[183] Rhode Island Bar Ass'n v. Automobile Serv. Ass'n, 179 A. 139 (R.I. 1935). Like the Chicago Motor Club, the Automobile Service Association, located in Rhode Island, had been operating without issue for twelve years, "openly and under advice from members of the Rhode Island Bar," before the state's Committee on Illegal Practice of Law abruptly changed tune in the mid-1930s. Answer of Automobile Serv. Ass'n, at 4–5, Rhode Island Bar Ass'n v. Auto. Serv. Ass'n, 179 A. 139 (R.I. 1935) (No. 623). The Northeast-based Automobile Legal Association saw the same abrupt turnaround. In 1934 and 1935, the club changed aspects of its membership advertisements in response to requests from the Boston Bar Association's Committee on the Unlawful Practice of Law and made clear to the Committee that any future "suggestions as to the conduct of the business . . . would be accepted." Report at ¶ 6, *In re* Thibodeau, 3 N.E.2d 749 (Mass. 1936) (No. 3533). Instead, they were hauled into court a year later.

[184] Seawell v. Carolina Motor Club, Inc., 184 S.E. 540, 545 (N.C. 1936)

[185] Richard L. Merrick, *Report of the Committee on the Suppression of Unauthorized Practice*, 2 J. D.C. BAR ASS'N 31, 31–32 (1937).

Reading the writing on the wall, other clubs simply capitulated and announced that they would "discontinue[e] all efforts of settlement of claims." *Report of the Committee on the Suppression of Unauthorized Practice*, 3 J. D.C. BAR ASS'N 30, 37 (1936); *accord Chicago Case*, *supra* note 167, at 12 (explaining that, in the wake of the Chicago Bar's victory against the Chicago Motor Club, "[t]he Association's Committee on Unauthorized Practice has heretofore succeeded in procuring the cessation of every other automobile and

Electronic copy available at: https://ssrn.com/abstract=4728564

These suits tended to follow a similar script. The clubs frequently pointed to their nonprofit status and the lack of evidence—or even the suggestion—of member harm.[186] Many also pointed to statutes explicitly exempting them from the reach of UPL laws.[187] Advancing something like a reliance argument, some stressed that they had spent years collaborating with their local bar association's UPL committee, making "changes . . . to conform rigidly to all ethical and legal requirements."[188] And, echoing arguments made by the Chicago Motor Club, some insisted that they specialized in very small cases that would not be accepted by conventional counsel,[189] while others pointed out that, compared to lawyers generally, club attorneys were better insulated from corrupting pressures.[190]

Bar arguments also sounded similar themes. Corporations, said the bar, are not natural persons entitled to practice law and so they cannot practice law through natural persons.[191] The bar also argued that bans on corporate law practice were necessary, as a lawyer employed by a

---

motor club from practicing law in the City of Chicago"); *Progress Made in Movement Against Unauthorized Practice*, 5 OKLA. ST. B.J. 64, 65 (1934) (reporting that the Oklahoma Auto Club and the Automobile Owner's Service Association had agreed to stop offering services that the bar deemed objectionable); *Washington State Bar Engages in Vigorous Program Against Unauthorized Practice*, 8 UNAUTHORIZED PRAC. NEWS 8, 8 (July 1935) (reporting that, in Washington: "Two automobile associations which engaged in the unauthorized practice of law when they offered to furnish counsel for any legal matter connected with the automobile, were contacted and, after negotiations with the committee, agreed to desist.").

[186] *E.g.,* Seawell Record, *supra* note 104, Brief of Defendant Appellants at 7–8.

[187] *E.g.,* Brief and Argument of Relator at 11–12, People ex rel. Chicago Bar Ass'n v. Motorists' Ass'n of Ill., 188 N.E. 827, 828 (Ill. 1933); Edward B. Bulleit, *The Automobile Clubs and the Courts*, 5 LAW & CONTEMP. PROBS. 22, 24 (1938).

[188] *E.g.,* Respondent's Answer to the Information Filed by the Attorney General, In re Thibodeau at 16; Seawell Record, *supra* note 104, Sept. 6, 1935 Affidavit of Coleman H. Roberts, Record on Appeal at 20.

[189] *E.g.,* Reply Brief of Appellant, Am. Auto. Ass'n v. Merrick, No. 7646 (D.C. Cir. 1940), at 5.

[190] *E.g.,* AAA Report, *supra* note 1, at 61 ("[T]he practice of the automobile club law departments is more free from unethical conduct than is the legal profession in general.").

[191] *See In re* Opinion of the Justices, 194 N.E. 313, 317 (Mass. 1935) (accepting this argument); Seawell v. Carolina Motor Club, Inc., 184 S.E. 540, 545–46 (N.C. 1936) (same).

Electronic copy available at: https://ssrn.com/abstract=4728564

corporation but serving an individual client would not be capable of independent judgment.[192] His loyalty would rest with the "organization rather than to the individual served," thus impairing the "delicate, personal and confidential relationship of attorney and client."[193] Another familiar complaint was that auto clubs, in effect, advertised their legal services at a time when attorneys were prohibited from engaging in such activity.[194] And, in at least one case, the bar openly argued that, if the courts did not restrict corporate law practice, it would result in the "contraction of the lawyer's field,"—and permit entities that included nonlawyer personnel to "reap the rewards of the performance of functions belonging to the lawyer."[195]

By any objective measure, the bar's arguments were weak. For starters, the only-humans-can-practice-law-corporations-are-not-humans-ergo-corporations-cannot-practice-law syllogism is almost laughable. As one commentator noted, it was akin to saying that a trucking company cannot run the business of trucking because the company cannot obtain a license to drive.[196]

Second, the bar tended to lean hard on a particular *proxy* for lawyerly independence (direct payment from the client to the lawyer), without ever establishing the proxy's essential fit. The bar never convincingly explained why, exactly, client payment to the lawyer preserves professional independence (particularly since a key component of lawyer independence is independence *from* the client).[197] Nor did the

---

[192] Grace M. Giesel, *Corporations Practicing Law through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151 (2000) (discussing this common refrain and collecting authority).

[193] *1930 Report, supra* note 81, at 27.

[194] *E.g.,* D.C. Bar *Merrick* Brief, *supra* note 145, at 43–44.

[195] *Id.* at 41, 44.

[196] Giesel, *supra* note 192, at 176 (citation omitted). Or, as Peter Zimroth tartly responded: "It is true, of course, that a corporation cannot take an oath and has no human qualities. It does not follow that the lawyers employed by the corporation are equally disabled." Peter L. Zimroth, *Group Legal Services and the Constitution*, 76 YALE L.J. 966, 973 (1967).

[197] Barlow F. Christensen, *Regulating Group Legal Services: Who Is Being Protected—Against What—and Why?*, 11 ARIZ. L. REV. 229, 237 (1969) (articulating a similar general point). For the importance of independence from one's client, see Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 34, 47 (1988); Bruce A.

Electronic copy available at: https://ssrn.com/abstract=4728564

bar grapple with the fact that, if direct payment *was* the *sine qua non* for lawyerly independence, in battling corporate practices, its campaign was deeply underinclusive. Even by the 1930s, for instance, plenty of lawyers worked in law firms and "owe[d] their bread and butter to the office"—and so, by rights, these lawyers, too, should have fallen outside the sanctioned (paid by the client) scheme.[198]

Third (and similarly), in arguing that the corporate practice of law *necessarily* harms consumers, the bar never distinguished myriad similar arrangements which were wholly permitted. In particular, lawyers have long been authorized to represent their corporate employer (as, apparently, lawyers' loyalty is only compromised when they are serving the corporation's members or customers, not the corporation itself).[199] Insurance companies have long been permitted to employ lawyers to represent policyholders.[200] Lawyers who served the indigent could be employed by intermediaries.[201]

Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 608–13 (2013).

[198] H.H. Walker Lewis, *Corporate Capacity to Practice Law—A Study in Legal Hocus Pocus*, 2 MD. L. REV. 342, 345 (1938).

[199] *E.g., In re* Otterness, 232 N.W. 318, 319 (Minn. 1930) ("There can be no objection to the hiring of an attorney on an annual salary basis by banks, other corporations, firms, or individuals, to attend to and conduct its or their legal business.").

[200] *See* Brief Before the U.S. Supreme Court of the National Lawyers' Guild as Amicus Curiae, United Mine Workers v. Ill. St. Bar Ass'n, Sept. 6, 1967, at 15 [hereinafter NLG Brief] (highlighting this inconsistency). In fact, in the early 1930s, insurers temporarily found themselves in the bar's crosshairs. But, in 1938, the insurance industry and bar reached an agreement, which permitted the insurance industry to continue its operations, including (even) its employment of lay adjusters. *See* REPORT OF THE SPECIAL COMMITTEE ON LAY ADJUSTERS, 1938 A.B.A. SEC. INS. NEGL. & COMP. L. PROC. 61 (1938). Cementing that peace, in 1950, the ABA issued Formal Opinion 282 which established that lawyers employed by insurance companies could represent insureds. The arrangement did not run afoul of Canon 35, the ABA reasoned, given the "community of interest . . . between the company and the insured growing out of the contract of insurance." We address the story of this mid-century clash between the bar and the insurance industry, and why its resolution differed from the fate of the auto clubs' legal departments, in a forthcoming piece. *See* Nora Freeman Engstrom & James Stone, *Insurance Industry Exceptionalism* (working paper).

[201] CANONS OF PROF'L ETHICS Canons 35 (1928) (excluding from the prohibition "[c]haritable societies rendering aid to the indigent"). As the Massachusetts Supreme Court intoned: "The gratuitous furnishing of legal aid to the poor and unfortunate . . . do[es] not constitute the

Electronic copy available at: https://ssrn.com/abstract=4728564

The government could employ lawyers to represent individuals.[202] Since the early days of the Republic, nonlawyers have long been permitted to represent themselves.[203] Lawyers could employ nonlawyers (just not the opposite).[204] And, lawyers could be compensated by non-clients, assuming the lawyer complied with certain requirements.[205] It is not clear—and the bar never persuasively explained—why we worry about lawyer independence in one context and not others.

Fourth, although the bar was, ostensibly, concerned that corporate law providers could advertise at a time when their lawyer counterparts couldn't, that discrepancy was hardly insoluble. As a 1931 Note in the *Harvard Law Review* explained, if the bar really was concerned about such advertising, "[t]he prohibition" on advertising, applicable to lawyers, could simply "be extended" to lawyers' corporate counterparts.[206]

Finally—and tellingly—in the course of its campaign, the bar neither surfaced concrete proof of *any* auto club-inflicted harm, nor grappled with the genuine harm that would predictably ensue by the *withdrawal* of the auto club's legal services.[207]

No matter. Whatever their merit, the arguments prevailed. In state after state, bars sued. Bars won. And auto

---

practice of law." *In re* Opinion of the Justs., 194 N.E. 313, 317–18 (Mass. 1935).

[202] Bruce A. Green, *Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1152 (2000). That said, the bar has, at times, challenged even government-run programs. *See* Brief Before the U.S. Supreme Court of NAACP and the National Office for the Rights of the Indigent as Amicus Curiae, United Mine Workers v. Ill. St. Bar Ass'n, Aug. 30, 1967, at 27–28 [hereinafter NAACP Brief] (collecting examples).

[203] *See* Faretta v. California, 422 U.S. 806, 812 (1975) (explaining that "[i]n the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation").

[204] Green, *supra* note 202, at 1153.

[205] CMC Brief, *supra* note 6, at 17–18.

[206] *The Practice of Law by Corporations*, 44 HARV. L. REV. 1114, 1116, 1118 (1931) [hereinafter 1931 Harvard Note].

[207] *E.g.*, D.C. Bar *Merrick* Brief, *supra* note 145, at 121 (dismissing the District of Columbia Auto Club's argument that, without its efforts, motorists would be deprived of legal representation by stating that this was "an argument of expediency and not of law").

Electronic copy available at: https://ssrn.com/abstract=4728564

club legal departments which, prior to the 1930s, had been providing free legal advice and full-scale legal representation to tens of thousands of individuals each year, were shuttered.[208]

III. PILEUP: THE BAR'S BROADER CAMPAIGN AGAINST OTHER "CORPORATE" PROVIDERS AND THE REMAKING OF LAWYER REGULATION

Of all the organizations caught in the bars' crosshairs, auto clubs were the largest and most prominent.[209] But they weren't alone. For example, in Cleveland, by 1932, injunctions were sought and obtained "in some eighteen suits brought to put an end to the unlawful practice of the law by different organizations and associations."[210] These suits enjoined not just auto clubs, but also "realty owners associations, title companies and banks."[211] Figures showed that, before the injunctions, the targeted organizations had a combined membership of 80,200 people.[212] After the injunctions, essentially all those people were deprived of previously-available help.

The same story played out in city after city and state after state such that, by 1936, a broad array of associations and corporations had mostly given up trying to provide legal services to their members or customers.[213] By 1938—just ten

---

[208] By 1936, Stanley Houck, Chair of the ABA's Committee on Unauthorized Practice, surveyed the litigation landscape and concluded that auto clubs were now forbidden from "render[ing] any legal service whatsoever." Stanley B. Houck, *The Courts and Unauthorized Practice*, 8 N.Y. ST. B.A. BULL. 243, 244 (1936). For how certain clubs continued to try to offer scaled-down legal services, in the shadow of court rulings, see BARLOW F. CHRISTENSEN, GROUP LEGAL SERVICES 24 (1967); Auto. Club of Mo. v. Hoffmeister, 338 S.W.2d 348, 352 (Mo. Ct. of App. 1960) (describing the restricted services of the Missouri Auto Club, which, after an earlier skirmish with the bar, had lawyers merely enter guilty pleas on the behalf of members; ultimately finding that these limited efforts still constituted UPL).

[209] *See infra* note 322 and accompanying text.

[210] John G. Jackson, *Unauthorized Practice of Law in New York State*, 4 N.Y. ST. B. A. BULL. 136, 140 (1932).

[211] *Id.*

[212] *Id.*

[213] For a contemporary accounting, see *Activities Against Unlawful Practice in the United States*, in *Minutes of the Thirty-Eighth Annual Meeting – June 5th and 6th*, 3 N.J. ST. B. ASS'N Q. 171, 180–85 (1936). Of course, some organizations (such as BRT and the United Mine Workers) persisted, although, in so doing, these organizations became battle-scarred. *See* Richard M. Markus, *Group Representation by*

Electronic copy available at: https://ssrn.com/abstract=4728564

years after Canon 35 was enacted to extend the reach of UPL laws to lawyer-provided legal services—a commentator would declare that "nothing is better settled than the proposition that a corporation cannot practice law."[214]

This Part surveys the bar's broader battles in two steps. Subpart A surfaces one clear consequence of the bar's UPL campaign against corporate providers: The determination that only courts (not politically accountable legislatures) have the authority to regulate law practice. Indeed, as we will see, in their campaign against auto clubs, some states went so far as to declare that legislation regarding law practice is subject to a remarkable asymmetry, such that statutory intervention is only constitutional when it curtails (not when it expands) access to legal services.[215] Then, Subpart B fast-forwards from the 1930s to the 1960s and 1970s to consider four cases where the U.S. Supreme Court belatedly tapped the brakes on the ABA's concerted campaign.

A. Courts as the Arbiters of Law Practice

As part of its 1930s-era push against "corporate" law practice, the organized bar did more than snuff out the competition and substantially extend the reach of UPL laws to restrict even lawyer-supplied legal services. The bar also,

---

Attorneys as Misconduct, 14 CLEV-MARSHALL L. REV. 1, 9–11 (1965) (describing the BRT's numerous—and sometimes unsuccessful—run-ins with the bar); *see, e.g., In re* O'Neill, 5 F. Supp. 465, 466 (E.D.N.Y. 1933) (censuring a lawyer for engaging with the BRT).

[214] Lewis, *supra* note 198, at 342. Reflecting on the quick consensus, in 1938, another commentator observed:

> It is a rare phenomenon is the history of jurisprudence for a body of law on a particular subject of consequence to crystallize within the short space of ten years. And yet, in even less time than that a virtually complete case has been made out against unauthorized practice of law.

Greenberg, *supra* note 143, at 314.

[215] As of 1938, a commentator canvassed existing authority and explained that courts had come to agree that, although "the legislative department" could "expressly forbid[] practice of law by corporations," the legislature was not "competent to pass laws permitting corporations . . . to practice law." Greenberg, *supra* note 143, at 300–01. *See also* Henry M. Dowling, *The Inherent Power of the Judiciary*, 21 ABA J. 635, 638 (1935) ("[W]hile the legislature may thus fix the *minimum* requirements, and forbid the admission of those lacking such, it cannot determine the *maximum* qualifications and require the acceptance of those who possess them . . . ."). For further discussion, see *infra* notes 229–230 and accompanying text.

Electronic copy available at: https://ssrn.com/abstract=4728564

consequentially, ensured that courts, not legislatures, would henceforth define—and regulate—the practice of law.[216]

It was not always thus. In fact, during the early years of the last century, the bar had lobbied legislatures to define the practice of law.[217] But that effort was stunted because state legislatures frequently demurred or, alternatively, drafted a definition that specifically authorized the activities of certain popular practitioners.[218] As Richard Merrick, the head of the D.C. Bar's Unauthorized Practice Committee, lamented in 1937: "Attempted legislation . . . prohibiting any but lawyers from engaging" in legal practice "has met with failure."[219] "[W]hen legislation comes before state legislatures," he continued, existing corporate practitioners "either defeat such measures or insert provisions excepting from the operation of those enactments particular lines of endeavor or particular agencies, such as . . . automobile clubs."[220]

---

[216] *See* Greenberg, *supra* note 143, at 314 (writing in 1938 and explaining how, over a very short period of time, "the courts assumed the right to define and regulate the practice of law, a right which they uniformly regard as inherent in them").

[217] *See* RICHARD L. ABEL, AMERICAN LAWYERS 113 (1989) (describing these efforts); Laurel A. Rigertas, *Lobbying and Litigating Against "Legal Bootleggers"—The Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 68, 92–102 (2009) (same); *see, e.g., Report of Committee on Unauthorized Practice of Law*, 1 J. B. ASS'N STATE KAN. 45, 62 (1932) (calling for legislative activity); Gilb, *supra* note 145, at 231 (describing the California Bar's unsuccessful legislative efforts in 1913, 1915, 1917, and 1921); *Jersey Anti-Propaganda Bill, Aimed at Nazism, Becomes Law*, N.Y. HERALD TRIB., Apr. 9, 1935 (describing the narrow defeat of a bill "which would have given lawyers a monopoly on semi-legal business, such as preparing wills").

[218] Henry Weihofen, *"Practice of Law" by Non-Pecuniary Corporations: A Social Utility*, 2 U. CHI. L. REV. 119, 123–24 (1934).

[219] Richard L. Merrick, *Power of Courts to Suppress Unauthorized Practice of Law*, 3 J. D.C. B. 29, 31 (1936).

[220] *Id*. at 31. Pennsylvania offers a vivid illustration. There, the bar sponsored legislation to snuff out corporate law practice, but, at the eleventh hour, an "exception" was inserted into the bill without the bar's knowledge which "enable[d] automobile clubs to have the club's counsel represent their members." *Law, Lawyers, and Courts*, 28 LUZERNE REG. REP. 521, 548 (1934). *Accord Report of the Standing Committee on Unauthorized Practice of the Law*, 58 ANNU. REP. ABA 521, 524 (1935) [hereinafter 1935 ABA Report] ("The committee has observed, with very deep regret, the highly undesirable exceptions which seem, almost inevitably, to creep into legislation."); *Why Legislate?*, 5 UNAUTHORIZED PRAC. NEWS 8, 8 (Mar. 1935) ("Legislation attempting to define the practice of law or to prohibit the

Electronic copy available at: https://ssrn.com/abstract=4728564

According to one contemporary scholar, this legislative obstinance was traceable to the fact that "there exists a strong sentiment among laymen in favor of the performance by corporations of many kinds of legal services."[221] "The layman," he explained, seems to feel that the lawyer is frequently careless and irresponsible." By contrast, in the public's view, "corporations possess many attractive advantages."[222] Echoing that sentiment, in 1930, even the President of the State Bar of California admitted: "One of the reasons why we have lay encroachments is because the public has not the largest amount of confidence in the bar."[223]

Undaunted, in the 1930s, the bar changed its strategy. Stymied for years by legislatures, in an abrupt pivot, the bar turned to courts.[224] And, once in the courts, the bar, in the

---

doing of certain acts which may constitute the practice of law is dangerous, undesirable, and ineffective. If history repeats itself, such legislation will always be burdened with exceptions in favor of lay practitioners.").

[221] I. MAURICE WORMSER, FRANKENSTEIN INCORPORATED 169 (1931).

[222] *Id.* at 170–71; *see also* Shinn, *supra* note 135, at 98–101 (describing the public's strong preference for corporate, rather than individually-provided legal services); 1931 Harvard Note, *supra* note 206, at 1116 ("[T]he public apparently approves of the execution of various legal documents by banks, trust companies, and real estate offices, as well as the practice of incorporating through companies rather than individual attorneys."); *The Law Business Needs Reorganizing*, CHI. DAILY TRIB., Mar. 1, 1928, at 10 [hereinafter "*Law Business*"] (expressing opposition to the Chicago Bar's UPL litigation against the Stock Yards Bank and stating: "[t]he ordinary man feels, and rightly, that he is in better hands when dealing with an established bank than in going to some lawyer"). For empirical support for the foregoing views, see *infra* note 293 and accompanying text.

[223] Charles A. Beardsley, *Lay Encroachments*, 14 J. AM. JUDICATURE SOC'Y 130, 132 (1930).

[224] *E.g., Report of Committee on the Suppression of the Unauthorized Practice of Law*, 11 J. D.C. BAR ASS'N 34, 36 (Dec. 1936) ("It is believed by the Committee that legislation for the suppression of unauthorized practice of law or defining what constitutes the practice of law and specifying who may engage therein is not necessary, but that the courts are safe repositories of the power to regulate the practice of law . . . and that their inherent power is ample to meet the exigencies of all occasions."); 1935 ABA Report, *supra* note 220, at 523 (reporting on a lack of legislative success and declaring that, going forward, "[l]egislation . . . is unnecessary and undesirable"); *Why Legislate?*, *supra* note 220, at 8 (explaining that, "shortly after its creation," the Committee on Unauthorized Practice determined that "legislation is undesirable" and that "[w]hat constitutes the practice of law ought to

Electronic copy available at: https://ssrn.com/abstract=4728564

reversal of all reversals, argued that it was *unconstitutional* for the legislature to define the practice of law; only courts possessed that authority.[225]

Notwithstanding the fact that, prior to this time, courts had generally agreed that legislatures were entitled "to make reasonable rules regarding admission to the bar," the courts bit.[226] Throughout the 1930s, in case after case, courts not only expanded the bounds of "authorized" law practice (now encompassing only duly licensed and *independently-employed* lawyers). Articulating a new and staggeringly broad conception of inherent powers, courts simultaneously declared that they, themselves, not only had power to regulate lawyers—they had the *sole* authority to regulate *lawyering*.[227] Thus, in 1936, Merrick of the D.C. Bar was able to declare:

> There has grown up a very general conception . . . that the highest court in a state ought to have complete and unfettered power and authority to deal with all phases of the practice of law . . . .[228]

Nowhere is this transition starker than in *In re Opinion of the Justices*.[229] There, in 1935, the Massachusetts Supreme Court not only disregarded a Massachusetts statute which had explicitly authorized auto clubs' legal services. The court also concluded that, henceforth, the practice of law would be governed by a one-way ratchet. In the court's telling: "legislation forbidding the practice of law . . . by corporations or associations . . . is permissible, but that legislation permitting the practice of law by such persons would not be

---

be left entirely to the judgment and determination of the judicial department"). For more on this pivot, see Rigertas, *supra* note 217, at 108–18.

[225] In 1936, the D.C. Bar's Richard Merrick described the shift thus: "Having met with no success in the legislative field . . . . [lawyers] resorted to the courts themselves, and here they have found the remedy for the existing evil." Merrick, *supra* note 219, at 31.

[226] Weihofen, *supra* note 218, at 124.

[227] As the D.C. Bar's Richard Merrick put it: "When resort began to be had by lawyers to the courts for the suppression of unauthorized practice of law, the term 'inherent powers' of the courts came to have a new meaning." For further discussion of this profound evolution, see Rigertas, *supra* note 217, at 69. For a broad discussion and critique, see CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 27–31 (1986); Wolfram, *supra* note 9, at 6, 16–17.

[228] Merrick, *supra* note 219, at 31–32.

[229] 194 N.E. 313 (Mass. 1935).

Electronic copy available at: https://ssrn.com/abstract=4728564

constitutionally competent."[230] Basically, said the court: As long as the legislature seeks to limit, rather than expand, the pool of available legal assistance, the legislature's activity is perfectly fine.

B. The Supreme Court's Ultimate Intervention

In the decades following its Depression-era flurry of UPL activity, the bar continued its campaign against corporate law practice. Here too, the bar mostly succeeded.

The caveat comes because, between 1963 and 1971, the Supreme Court decided four cases—*NAACP v. Button*,[231] *Brotherhood of Railroad Trainmen v. Virginia State Bar*,[232] *United Mine Workers of America District 12 v. Illinois State Bar Association*,[233] and *United Transportation Union v. State Bar of Michigan*,[234]—wherein the bar recycled its familiar arguments to crack down on corporate service providers (specifically, the NAACP and unions, respectively). Yet, in these suits, the bar, ultimately, did not prevail. In each, the case made its way to the Supreme Court, and the Court held that the First Amendment protects the right of individuals to cooperate with one another to assert their legal rights.[235]

Decided in 1967, *United Mine Workers* is arguably the most relevant. There, the Illinois Supreme Court had ruled against the United Mine Workers which had, for roughly half a century, operated a legal department staffed by a salaried lawyer who was tasked with helping union members injured or killed in coal mining accidents assert workers' compensation claims for personal injury or death.[236] On the facts, the union's case was strong. During the program's fifty-year-history, the legal department had processed almost 2,000

---

[230] *Id.* at 318. In fashioning this one-way ratchet, the Massachusetts Supreme Court was not alone. *See supra* note 215.

[231] 371 U.S. 415 (1963).

[232] 377 U.S. 1 (1964).

[233] 389 U.S. 217 (1967).

[234] 401 U.S. 576 (1971).

[235] *E.g., Bhd. of R. R. Trainmen*, 377 U.S. at 8. Auto clubs had voiced similar associational arguments decades before. *See, e.g.,* Brief for Appellant, Am. Auto. Ass'n v. Merrick, No. 7646 (D.C. Cir. 1940), at 4 ("[M]otorists as a group have a right to band themselves together and secure for themselves services in connection with automobiling which are not otherwise available."). But, when voiced by auto clubs, the argument didn't gain traction. D.C. Bar *Merrick* Brief, *supra* note 145, at 22 (forcefully dismissing the argument).

[236] Illinois State Bar Ass'n v. United Mine Workers of Am., Dist. 12, 219 N.E.2d 503, 504 (Ill. 1966).

Electronic copy available at: https://ssrn.com/abstract=4728564

claims and collected over $2 million for injured or killed workers or their families—every penny of which had gone to clients.[237]

Further—and similar to the auto club context—over the course of these 2,000 claims, there was not even a whiff of client injury or attorney misconduct. The Illinois bar identified "not one single instance of abuse, of harm to clients, of any actual disadvantage to the public or to the profession, resulting from the mere fact of the financial connection between the Union and the attorney who represents its members."[238] "[T]here was discussion of divided loyalties."[239] But there was "absolutely no indication that the theoretically imaginable divergence between the interests of union and member ever actually arose."[240]

Broader considerations also tilted in the union's favor. The Illinois Supreme Court recognized: "There can be no question of the hazards involved in coal mining, and undoubtedly the possibility exists that injured coal miners," who are deprived of legal assistance and who are "untutored in the intricacies of workmen's compensation law might accept wholly inadequate settlements."[241] There was, then, real harm that would attend the abrupt withdrawal of the union's assistance.

Yet, in a now-familiar refrain, the Illinois Supreme Court still sided with the bar to enjoin the union's activity. In that court's words: "[A]s was said in *Chicago Motor Club*, [l]egal services cannot be capitalized for the profit of laymen, corporate or otherwise, directly or indirectly, in this state."[242]

Unlike in the auto club cases of the 1930s, however, that was not the end of the matter. In the shadow of *Button* and *BRT*, the Supreme Court granted certiorari and reversed the decision of the Illinois Supreme Court:

> We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives the [union] the right to hire attorneys on a salary basis to assist

[237] NLG Brief, *supra* note 200, at 14.

[238] United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 224 (1967).

[239] *United Mine Workers*, 389 U.S. at 224.

[240] *Id.*

[241] 219 N.E. 2d at 507.

[242] *Id.* at 506.

Electronic copy available at: https://ssrn.com/abstract=4728564

its members in the assertion of their legal rights.[243]

Ultimately, the ABA had no choice but to scale back its sights. Initially, it did so grudgingly, permitting lawyers to work for lay organizations that furnished legal services "only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the service requires the allowance of such legal services."[244] The ABA, then, would comply with the Court—and give not an inch more.

Today, the governing prohibition has softened some. Instead of banning all "intermediary" arrangements, Model Rule of Professional Conduct 5.4(d) only precludes lawyers from practicing in for-profit (not nonprofit) corporations.[245] That means, in an ironic twist, if reevaluated today, most automobile clubs' legal departments would probably pass muster.[246] But, it appears, it was all too little too late. As far

---

[243] 389 U.S. 221–22.

[244] ABA CODE OF PROF'L RESPONSIBILITY, D.R. 2-103(D)(5) (1974). Excepted from the prohibition were legal aid plans, military legal assistance offices, and approved lawyer referral schemes. This grudging response to *Button* and its progeny was broadly criticized. *E.g.,* Huber, *supra* note 127, at 568 (criticizing the ABA's response to *Button* and its progeny as "recalcitrant and myopic").

[245] *See* Green, *supra* note 202, at 1142 (tracing this history). An additional coda is that, between 1937 and 1978, the ABA reached what amounted to truces (called "Statements of Principles") with numerous other professionals—including, among others, accountants, title companies, insurers, realtors, and social workers. These agreements essentially carved up legal tasks into those reserved for lawyers and those that could be handled by nonlawyer professionals. For more on these arrangements, see Quentin Johnstone, *The Unauthorized Practice Controversy, a Struggle Among Power Groups*, 4 U. KAN. L. REV. 1, 22–29 (1955); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 9–10 (1981). For a similar accord the California Bar reached with the Motor Club of Southern California, see *infra* notes 320–322 and accompanying text. Many of these agreements were rescinded in 1979, in the shadow of antitrust considerations. *See* Rhode, *supra* at 10 n.36.

[246] Some auto clubs were for-profit rather than nonprofit, and the former clubs would likely run afoul of contemporary Rule 5.4(d). *See* D. W. Burbank, *Report of Committee on Unlawful Practice of Law*, 5 ST. B. J. 335, 26 (1930) ("Automobile associations or motor clubs fall roughly into two classes, i.e. nonprofit . . . and for profit.").

Electronic copy available at: https://ssrn.com/abstract=4728564

as we can tell, for whatever reason, there has been no revival of auto club activity.[247]

IV. WRECKAGE: THE LEGACY OF AMERICA'S AUTO CLUB EXPERIMENT

This final Part steps back to assess what lessons the rise and fall of America auto clubs holds for the regulation of lawyers, lawyering, and legal assistance. Undergirding this discussion sits a critical and easily overlooked fact: Although legal service provider regulation—and its inescapably tangled discussion of Canon 35, Model Rule 5.4(d), UPL, MDPs, and NLOs—may seem academic or esoteric, it's all remarkably important. By determining who can (and cannot) supply legal help, and by prescribing how legal help can (and cannot) be supplied, the thicket of laws governing the practice of law significantly affect who can (and cannot) vindicate their rights and on what terms.

All this particularly matters today because, as noted at the outset, the United States is in the grips of a staggering access-to-justice crisis. In roughly 15 million of the 20 million cases adjudicated each year, at least one litigant proceeds pro se.[248] And, rather than try to take legal action (with a lawyer or otherwise), every year, millions more Americans lump it; even when confronting serious legal issues (including domestic violence, uninhabitable dwellings, unpaid child support, tortiously-inflicted personal injuries, or an insurer's refusal to pay a meritorious claim), most muddle through without help.[249] When individuals are on the other (defendant)

---

[247] It is a bit of a puzzle why clubs did not resume legal work. It could be that, by the time they were given the green light, other intervening developments, including compulsory liability insurance laws, the rise in first-party auto insurance coverage, some states' adoption of auto no-fault legislation, and then, starting in the 1980s, the growth of settlement mills, filled some of the vacuum that auto clubs initially left. For a discussion of many of these developments, see generally Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise,"* 61 DEPAUL L. REV. 303 (2012). Then, on the criminal side, *Gideon v. Wainwright*, decided in 1963, likely supplanted some clubs' defense work. More generally, the clubs may well have been scared off from experimentation, scarred by their blistering encounters with the bar. The upshot, though, is that, by the 1970s, the world had moved on, for better or worse, and the grounds for reviving auto club legal practices never fertilized.

[248] LANDSCAPE STUDY, *supra* note 12, at iv.

[249] *See generally* Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443 (2016) (surveying the empirical literature). For the term "lumping it," see

Electronic copy available at: https://ssrn.com/abstract=4728564

side of the "v," the story is similar. The most frequent response to small-stakes civil litigation (think, a debt collection action) is inaction—though, in this context, inaction very frequently takes the form of a default judgment, when the defendant never shows up.[250]

The depth and breadth of this crisis is finally breaking through the stasis and causing states to consider fundamental (and many believe overdue) changes to the architecture of lawyer regulation. On the menu are a range of ambitious reforms, including a relaxation of rules regarding UPL and the abolition of Rule 5.4(d) (the current analog to Canon 35). Indeed, as previously explained, some states have already made sweeping changes along one or both of these dimensions.[251]

The auto club story contributes concrete evidence to these live—and enormously consequential—debates. It does so in three steps. First, we show that the bar's battles with auto clubs and the clubs' contemporary counterparts, in large part, *built* America's current access-to-justice crisis. The crisis isn't something that just happened. Inertia isn't to blame. The blunt fact is that, by outlawing the provision of group legal services and by, in a systemic way, suing those competently providing affordable group legal services out of existence, the bar made it extraordinarily difficult for ordinary Americans to get help. Remarkably, a half-century ago, in a brief filed in the U.S. Supreme Court, the NAACP made a similar point. "Were it not for the early cases declaring group services unlawful," the NAACP reasoned, "the most prevalent form of group legal services today might be those organized by special interest groups whose members have a peculiar need for legal assistance; e.g., automobile clubs."[252]

Second, the rise and fall of America's auto clubs provides powerful evidence that challenges the necessity and utility of modern legal service restrictions—in particular, Model Rule 5.4(d), which forbids certain nonlawyer-owned entities (like the auto clubs of yore) from supplying legal assistance to the entities' members or customers.

William L.F. Felstiner, *Influences of Social Organizations on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 81 (1974).

[250] *See* Nora Freeman Engstrom & David Freeman Engstrom, *The Making of the A2J Crisis*, __ STAN. L. REV. ONLINE __ (forthcoming 2024) (charting the recent, sharp uptick in default judgments).

[251] *See supra* notes 16–19 and accompanying text.

[252] NAACP Brief, *supra* note 202, at 18.

Electronic copy available at: https://ssrn.com/abstract=4728564

Third, we provide new and startling evidence regarding the bar's underlying motivation, in restricting those who can supply help. A debate has long swirled concerning what *explains* the ban on UPL—and, indeed, in legal fights currently being waged in the Second and Fourth Circuits, the question of what motivates UPL restrictions has been hotly contested.[253] In these fights, challengers argue that the ban is self-protective, whereas the bar has long insisted that "nothing could be further from the truth."[254] Drawing on thousands of pages of contemporary evidence, we confront the question head-on and answer it squarely in the former category. We thus show that perhaps the most consequential legal services regulation—that many believe continues to stymie the provision of affordable legal services—was the cynical product of lawyers' self-interest.

1. Auto Clubs and the Seeds of the Country's Access-to-Justice Crisis

First, we argue that by vanquishing auto clubs, along with the era's other group legal service providers, the bar sowed the seeds of the present-day A2J crisis, which condemns the vast majority of those with bona fide legal needs to navigate the judicial system without any sort of professional assistance—or not at all.[255]

Now, there are numerous explanations for why so many Americans proceed pro se or, even more often, "lump

---

[253] *See infra* notes 298–299 and accompanying text.

[254] WILLIAM M. OTTERBOURG, A STUDY OF UNAUTHORIZED PRACTICE OF LAW 3 (1951). For contrary claims, see *infra* notes 300–302.

[255] Of course, numerous factors contributed to the current crisis, and it is very hard to say which factors (if any) are necessary or sufficient. *See generally* Engstrom & Engstrom, *supra* note 250. Even so, we are not the first to argue that the bar's crusade against group legal service providers bears some blame. As noted, in the 1960s, the NAACP said much the same. *See supra* note 252 and accompanying text. And Stanford's Lowell Turrentine articulated the argument in 1949:

> The simplest, most immediate way of bringing the cost of legal service within the reach of large numbers of our people is to . . . permit nonprofit organizations of all kinds, such as trade unions, fraternal orders, consumers' cooperatives, mutual automobile clubs, and business and professional associations, to employ counsel to advise and represent members in their individual affairs.

Lowell Turrentine, *Legal Service for the Lower-Income Group*, 29 OR. L. REV. 20, 29 (1949).

Electronic copy available at: https://ssrn.com/abstract=4728564

it" (i.e., fail to act).[256] Some individuals might rationally decide that asserting (or defending) what's frequently a negative-value claim is not worth the time or trouble. Some, and particularly those who have been burned in the past, distrust the legal system.[257] Some suffer from an attribution/awareness problem, insofar as they fail to recognize that they have—or are facing—a bona fide legal claim.[258] Given notorious "sewer service," some supposed defendants might not have ever been served.[259] And some, under the pull of various cognitive biases (particularly myopia and overconfidence bias) might irrationally delay taking steps to protect their interests (e.g., writing a will).[260]

But there is another well-recognized obstacle: the difficulty of obtaining legal assistance. The brute fact is that, even if an individual *were* inclined to vindicate, defend, or otherwise protect her rights, effective action frequently requires a lawyer.[261] And lawyers are hard to come by. The

---

[256] For a thoughtful romp through this literature, see generally DAVID M. ENGEL, THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON'T SUE (2016).

[257] *See generally* Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016).

[258] *See* Loyd P. Derby, *The Unauthorized Practice of Law by Laymen and Lay Associations*, 54 CALIF. L. REV. 1331, 1333 (1966) ("[M]any people are unaware of their legal rights and thus do not recognize the need for the services of an attorney.").

[259] "Sewer service is defined as failing to serve a debtor and filing a fraudulent affidavit attesting to service so that when the debtor later fails to appear in court, a default judgment is entered against him." Capela v. Armcon Corp., 2021 WL 1220680, at *4 (C.D. Cal. Feb. 19, 2021) (quotation marks and citation omitted). For discussion, see generally Adrian Gottshall, *Solving Sewer Service: Fighting Fraud with Technology*, 70 ARK. L. REV. 813 (2018).

[260] According to a 2022 survey, only one-third of Americans have a will, and persons of color are markedly less likely to have one than their white counterparts. "The most commonly selected reason among those without a will was that they plan to but haven't gotten around to it yet (43 percent)." Althea Chang-Cook, *Why People of Color Are Less Likely to Have a Will*, CONSUMER REPORTERS, Aug. 10, 2022. Even 20 percent of those with assets of at least $1 million reportedly lack estate plans. Ashlea Ebeling, *The Confusing Fallout of Dying Without a Will*, WALL ST. J., May 2, 2023.

[261] *E.g.*, David A. Hyman et al., *Medical Malpractice Litigation and the Market for Plaintiff-Side Representation: Evidence from Illinois*, 13 J. EMPIRICAL LEGAL STUDIES 603, 604, 611 (2016) (finding, in the medical malpractice context that "[h]aving a lawyer has a large impact on both the likelihood of 'winning' (i.e., receiving a positive recovery) and the amount recovered, conditional on success"). We say that

Electronic copy available at: https://ssrn.com/abstract=4728564

ones who charge by the hour or on a flat-fee basis are expensive.[262] Legal aid is overstretched and frequently unavailable.[263] And contingency fee lawyers do not demand an ex-ante out-of-pocket expenditure, but they are notoriously choosey; many will not represent those with even slam-dunk small-ball claims.[264] The upshot is that, these days, huge swaths of individuals (including those who are physically injured) are effectively locked out of the market for legal services to their obvious and serious detriment.[265]

For criminal defendants, the outlook is similar.[266] True, thanks to *Gideon v. Wainwright*, indigent criminal defendants have a nominal right to counsel, at least for trial and direct appeal.[267] But, *Gideon* only guarantees counsel to indigent

---

lawyers are frequently needed because *some* assistance is needed—and nonlawyer legal assistance is (typically) illegal.

[262] USAO Attorney's Fees Matrix, 2015-2021, https://www.justice.gov/file/1461316/download (showing that even lawyers fresh out of law school frequently charge on the order of $333 per hour).

[263] Press Release, *LSC Requests $1.5 Billion to Confront Widening Justice Gap Amid Pandemic Hardships* (Mar. 9, 2023) ("LSC's grantees must turn away 50% of eligible clients who seek civil legal services due to a lack of necessary resources.").

[264] *E.g.,* Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225, 1256 & tbl.8 (2004).

[265] *See* Robert W. Gordon, *Lawyers, the Legal Profession, & Access to Justice in the United States: A Brief History*, 103 JUDICATURE 34, 39 (2019) (discussing the fact that many would-be tort claimants with small claims cannot find counsel). For further discussion of the serious—but frequently overlooked—access-to-justice problem in the PI sphere, see Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 831–32 (2011); Nora Freeman Engstrom, *Bridging the Gap in the Justice Gap Literature*, JOTWELL, May 6, 2013.

[266] Gordon, *supra* note 265, at 40 ("Now, 55 years after *Gideon v. Wainwright*, criminal defense remains in a state of crisis.").

[267] 372 U.S. 335 (1963). There is no right for help beyond the direct appeal. Shinn v. Ramirez, 142 S. Ct. 1718, 1735 (2022). The quality of that counsel is, of course, sometimes woefully inadequate. *E.g.,* Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES, Jan. 31, 2019. Even when a misdemeanor defendant enjoys the (formal) right to counsel, he does not always get it; as of 2013, about 30 percent of indigent misdemeanor defendants never actually got a lawyer. Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1024 (2013) (citing Bureau of Justice Statistics study).

Electronic copy available at: https://ssrn.com/abstract=4728564

individuals *who face time in custody*; if a person is met with only a fine, he is out of luck.[268]

Then, *however* the client seeks to pay, and *whatever* service an individual needs, finding a good (as opposed to shoddy) lawyer is extraordinarily difficult. Lawyer quality matters, and it also varies radically. But almost no objective information that would bear on attorney quality is publicly available.[269]

Against this dismal backdrop, auto clubs and their contemporary counterparts offer a glimpse of what could have been a radically different structure for the provision of legal services. Auto clubs, after all, accepted even very-low-dollar claims and defended members charged with even minor infractions; in so doing, they offered representation to those who, these days, very frequently go without.[270] They also mitigated the attribution/awareness problem by publicizing that some problems were legal and that some rights could be vindicated.[271] They solved the problem of lawyer selection; vetted lawyers were available, no research required. By specializing in a narrow area of practice and then developing systems to promote efficiency, they kept the cost-per-unit down.[272] And, because individuals paid annual dues for the

[268] Alabama v. Shelton, 535 U.S. 654 (2002). While such "minor" infractions (including traffic citations) might be written off as inconsequential, even minor run-ins can snowball. Thus, for instance, the failure to pay a speeding ticket can lead to license suspension and even prison time, by which point even if an appointed lawyer can swoop in, it will be cold comfort. *See, e.g.*, CAL. VEHICLE CODE § 40508(a); Ted Alcorn, *Handcuffed and Arrested for Not Paying a Traffic Ticket*, N.Y. TIMES (May 12, 2019).

[269] BARLOW F. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 35 (1970) (discussing the difficulty of lawyer selection); Engstrom, *Sunlight*, *supra* note 265, at 860–65 (reporting that, even in the Internet age, an individual in search of high-quality counsel faces nearly insurmountable challenges).

[270] *See supra* notes 163–165 and accompanying text.

[271] Murry L. Schwartz, Foreword, *Group Legal Services in Perspective*, 12 UCLA L. REV. 279, 286 (1965) ("One function of group legal services is the function of public awareness: apprising members of the group that their problems should be handled by lawyers or that they have legal rights which should be vindicated by lawyers."); NAACP Brief, *supra* note 202, at 15 (explaining that group legal service providers "inform[] the members of the group that some of their problems may be legal ones").

[272] NAACP Brief, *supra* note 202, at 15 (explaining that group legal service providers "raise[] the volume of a particular kind of work that the attorney performs, thus lowering the unit cost of the work").

Electronic copy available at: https://ssrn.com/abstract=4728564

entitlement to free legal services, the clubs operated as a kind of legal insurance—while also elegantly minimizing the moral hazard problems that otherwise inhibit such offerings.[273]

As it was, the bar won; group legal service providers lost; and legal services were, at once, unbundled and bundled. Today's legal services are *bundled*, as very few individuals have anyone to call to get immediate, expert answers to one-off legal questions. Instead, these days, attorney representation is frequently offered on something like a soup-to-nuts basis, or not at all.[274] At the same time, legal services, these days, are *unbundled* in that individuals must typically find—and compensate—a new lawyer for each legal problem they encounter. There is no such thing as a one-stop-shop for all problems auto, any more than there is a one-stop-shop for all problems financial or for all problems work.

The other critical take-away is that the current bundled and unbundled structure of legal service delivery, which fails adequately to serve so many individuals, didn't just *happen*. It isn't the product of inertia or accident. It is, rather, the fruit of the bar's active and concerted 1930s-era campaign.

2. A World Without Rule 5.4

Second, the rise and fall of American auto clubs contributes direct evidence to a consequential—and live—debate concerning whether to relax or retain Model Rule

---

[273] Generally, moral hazard is a significant problem when it comes to legal insurance because, unlike health insurance (say), an individual has more control concerning when she needs legal services. The basic notion is that a person frequently cannot control when she will get sick, but a person could theoretically "save up" her legal problems, secure legal insurance for one year, and, over the course of that year, choose to file for divorce, write a will, and file for bankruptcy.

Auto clubs mitigated this moral hazard problem because they specialized in problems that couldn't be "saved up." Like an illness, an auto collision or arrest hits suddenly. *Cf.* In re Maclub of America, Inc., 3 N.E.2d 272, 274 (Mass. 1936) (faulting an auto club for operating like legal insurance); NAACP Brief, *supra* note 202, at 21–22 (explaining the insurance concept and noting that, like insurance, the plan run by the United Mine Workers "spread[] the risk of legal fees among all its members").

[274] For auto clubs' provision of of unbundled prospective advice, see Part I.B.2.a. For current limits on the "scope of representation," see AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT R. 1.2(c). For further discussion of unbundled legal service, see Carol A. Needham, *Permitting Lawyers to Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as We Know It?*, 84 MINN. L. REV. 1315, 1334–37 (2000).

Electronic copy available at: https://ssrn.com/abstract=4728564

5.4(d), the current incarnation of the prohibition on corporate law practice initially enshrined in Canon 35.

Rule 5.4(d) operates, essentially, to bar lawyers from working for for-profit "intermediaries," whether the relationship is viewed as one that involves corporate law practice, group legal services, MDPs, or NLOs.[275] In recent years, whether to relax or retain the restriction has become one of the hottest issues in legal ethics. Two states—Utah and Arizona—have recently relaxed Rule 5.4 on the theory that it stymies innovation, stunts specialization, raises the cost of legal services, and forces clients to grope in the dark for a lawyer rather than approaching familiar firms to seek aid.[276] Yet, others are unconvinced and, echoing arguments made by the bar of yesteryear, support the restriction's retention, insisting that, if lawyers are permitted to be in the employ of nonlawyers, all sorts of mischief will follow. Unable to maintain their professional independence, lawyers will "sell out their clients, divulge client confidence, represent clients ineptly, violate solicitation rules, and disregard their public obligations."[277]

The debate made news just last year when the ABA's House of Delegates passed a resolution doubling down on its commitment to Rule 5.4. Garnering overwhelming support,

---

[275] Titled "Professional Independence of a Lawyer," ABA Model Rule of Professional Conduct 5.4(d) provides:

> (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
>
> > (1) a nonlawyer owns any interest therein . . . ;
> >
> > (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or
> >
> > (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

For the definition of MDPs and group legal service plans, see *supra* note 133.

[276] For the activity in Utah and Arizona, see *supra* notes 12, 17, and 19. For arguments, see Bradley G. Johnson, Note, *Ready or Note, Here They Come: Why the ABA Should Amend the Model Rules to Accommodate Multidisciplinary Practices*, 57 WASH. & LEE L. REV. 951, 995–97 (2000); Arizona Petition, *supra* note 13.

[277] *See* Green, *supra* note 202, at 1117 (summarizing, though critiquing, this argument); RESOLUTION 402, *supra* note 21, at 5 (offering arguments).

Electronic copy available at: https://ssrn.com/abstract=4728564

that resolution reiterated that, "[a]s officers of the court, lawyers must be independent and free from the influence of those who would compromise our ethics and the client interest," and that "[n]on-lawyer involvement" in law practice would invariably "negatively influence this independence and control."[278] This current chapter mimics a similar debate in 1999, when an ABA Commission issued a report recommending that the profession relax 5.4,[279] but just as the Commission's recommendation was gathering steam, the ABA's House of Delegates unceremoniously rejected it.[280]

Part of why the ABA says it resists Rule 5.4's relaxation relates to information—and, specifically, a lack thereof. The ABA insists that reformers bear the burden of proof and that the Rule should not be relaxed until reformers compile sufficient evidence that that move won't cause harm. Reformers need to show, in other words, that the liberalization of Rule 5.4 "will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients."[281] Echoing this theme, in 2021, the Florida Bar Board of Governors rejected a proposal to relax rules barring nonlawyer ownership, citing "the lack of data from any jurisdiction which has allowed nonlawyer ownership demonstrating that it improves or expands the delivery of legal services."[282]

Yet, even tabling the question of whether the burden is appropriately placed on those who favor Rule 5.4's relaxation (rather than on those who support the status quo), opponents' ask is deceptively difficult—and, indeed, creates a catch-22. Reformers cannot convince the ABA to relax the restriction without showing what good things happen when the restriction

---

[278] *See supra* note 21.

[279] MDP REPORT, *supra* note 133, at 1.

[280] Laurel S. Terry, *The Work of the ABA Commission on Multidisciplinary Practice in* MULTIDISCIPLINARY PRACTICES AND PARTNERSHIPS: LAWYERS, CONSULTANTS AND CLIENTS 2-4 (Stephen J. McGarry ed.). The following year, in an equally lopsided vote, the ABA's House of Delegates reiterated its opposition, declaring that "[j]urisdictions should retain and enforce laws that generally bar the practice of law by entities other than law firms." *Id*. at 2-6–2-10.

[281] *Id*. at 2-4–2-5 (quoting the House of Delegates resolution). For a recent articulation of the notion that (1) reformers bear the burden of proof, and (2) reformers should come forward with "demonstrated proof" of these practices' social utility, see Younger, *supra* note 21, at 275, 288–89.

[282] Tanner Letter, *supra* note 22.

Electronic copy available at: https://ssrn.com/abstract=4728564

is relaxed. But Rule 5.4(d) or a predecessor (including Canon 35, which dates back to 1928) has been in effect in the vast majority of states for nearly a century, meaning that the factual record for reformers to draw upon is inescapably thin.

Recently, there has been progress on the question because, as noted, Utah and Arizona have authorized some nonlawyer ownership, and a 2022 study canvassed what happened in those states in the wake of reform.[283] Generally, the study paints a positive picture, finding, inter alia, that newly "authorized entities do not appear to draw a substantially higher number of consumer complaints, as compared to their [more conventional] counterparts."[284] But, of course, the limited geographic scope of the study stunts its generalizability, while its short time horizon (the relevant reforms only came online in 2020) makes it impossible to know whether observed results are durable.[285]

Against that backdrop, the auto club story adds an important additional (and confirmatory) note. To be sure, evidence from auto clubs is not on all fours. Most auto clubs were nonprofits, and, if Rule 5.4(d) were to be relaxed, most newly minted MDPs or NLOs probably wouldn't be.[286] And, of course, auto clubs flourished in a radically different social, cultural, economic, informational, and technological environment.[287]

Still, with those important caveats, America's auto club experiment shows that, for a short time, tens of thousands

---

[283] ENGSTROM ET AL., *supra* note 17, at 9 (explaining that the study offers "a first-of-its-kind, grounded, and data-driven analysis of what regulatory reforms might achieve in the U.S. legal context").

[284] *Id*. at 7, 45–46.

[285] *See id*. at 47 (offering these caveats).

[286] *See supra* note 246 and accompanying text.

[287] Thus, we are stopping far short of saying that the resurrection of auto clubs or other 1920s-era corporate providers of legal services would somehow magically solve the current access-to-justice crisis. Indeed, while we think it's possible that, today, some corporate ownership could be beneficial, the evidence is far from conclusive, particularly since, in medicine (law's "sister profession"), early evidence indicates that corporate ownership has negatively affected the quality of care. *E.g.*, Sneha Kannan et al., *Changes in Hospital Adverse Events and Patient Outcomes Associated with Private Equity Ownership*, 330 JAMA 2365, 2365 (2023) (finding that "[p]rivate equity acquisition was associated with increased hospital-acquired adverse events"); Erin C. Fuse Brown & Mark A. Hall, *Private Equity and the Corporatization of Health Care*, 76 STAN. L. REV. (forthcoming 2024) (observing that "investors in health services often find and exploit market vulnerabilities in a manner that raises significant public policy concerns.").

Electronic copy available at: https://ssrn.com/abstract=4728564

of Americans were assisted by lawyers employed by nonlawyer-owned entities. And, although we certainly cannot say that every motorist was represented by her auto club lawyer with skill, loyalty, and fidelity, we can say the following:

(1) In rounds of litigation, the organized bar had *every reason* to surface instances of consumer harm, and, to the best we can tell, it never did.[288]

(2) At the time some auto clubs' legal departments were shuttered, the clubs' memberships were surging, suggesting that the motoring public was satisfied with the services it received.[289]

---

[288] In most states, including Illinois, the bar did not even try. *See supra* note 170; *accord* Weihofen, *supra* note 218, at 126 ("There is no complaint that the motor clubs are not handling these cases efficiently and to the satisfaction of the public.").

In this respect, auto clubs were not alone. Even in cases that shut down corporate law practices, proof of consumer harm was conspicuously absent. *See supra* note 240 (regarding the United Mine Workers); Hildebrand v. State Bar of California, 225 P.2d 508, 519 (Cal. 1950) (Traynor J., dissenting) (stating that it was "conceded" that, through the BRT's legal service program, the members of the Brotherhood were "able to secure adequate legal assistance"); *In re* O'Neill, 5 F. Supp. 465, 466 (E.D.N.Y. 1933) (censuring a lawyer for his relationship with the BRT even while stating: "As to so much of the union's activity, this court is prepared to believe that the organization was performing a valuable service to its members."); *In re* Otterness, 232 N.W. 318, 320 (Minn. 1930) (censuring a lawyer for engaging in corporate law practice, even while emphasizing that the lawyer "is a man of good reputation" and "[n]o complaint is made of any misconduct towards his clients"); *accord* Zimroth, *supra* note 196, at 968 (stating, more broadly, that "no one challenges the utility" of group legal services—only their "legality").

[289] *1930 Report*, *supra* note 81, at 27 (discussing the "mushroom growth of these organizations [auto clubs] thruout [sic] the State" of California); Charles Leviton, *Automobile Club Activities: The Problem from the Standpoint of the Bar*, 5 L. & CONTEMP. PROBS. 11, 11 (1936) (stating that, prior to the bar crackdowns, "for many years the scope of the activities of the motor clubs had been growing and expanding in services, as well as in membership"). *Cf.* Llewellyn, *supra* note 137, at 113 (observing, of the era's group legal services, "the steady drift of business is too steady, it recurs in too many fields, to permit the conclusion that the lay agencies, over the long haul, are not giving satisfaction"); Shinn, *supra* note 135, at 98 (stating that, in the 1920s, corporate law practices were growing because the American public preferred them).

Electronic copy available at: https://ssrn.com/abstract=4728564

(3) Auto club lawyers were specialists.[290] Decades of empirical evidence suggests that specialists tend to offer higher-quality legal services than their generalist counterparts.[291]

(4) It was undisputed that, at the time the auto clubs were shut down, each year, they were handling thousands of claims that other (non-club) lawyers were unwilling or unable to handle.[292]

(5) We have uncovered one study from the era that endeavored to assess client satisfaction. It reported that respondents reported greater satisfaction with the advice and assistance they received from nonlawyers and from entities (including the AAA) than from lawyers.[293]

In sum: The race is on to show what would predictably happen if more states relax longstanding restrictions on corporate law practice. The American auto club experience contributes much-needed evidence to that live and consequential debate and, in so doing, enriches reformers' efforts to re-think the structure of legal services regulation so as to "harness market forces in productive rather than protective ways."[294]

3. UPL's Rotten Roots

Lastly, the auto club story—and, more accurately, the bar's triumphant campaign against America's auto clubs—provides the most complete evidence so far assembled regarding the rotten roots of the enduring ban on the unauthorized practice of law.

The prohibition of unauthorized practice, which prevents even skilled nonlawyers from furnishing legal advice to needy Americans, undeniably limits access to legal services.

---

[290] *E.g.*, *Our Legal Department and How It Operates*, KEYSTONE MOTORIST, Mar. 1926, at 13 ("This Department is made up of a corps of attorneys who are specialists in the laws governing the automobile and the motorist.").

[291] *See* Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 94 nn.134–39 (2019) (collecting evidence).

[292] *E.g.,* CMC Brief, *supra* note 6, at 21; Kelso, *supra* note 55, at 196.

[293] Charles E. Clark & Emma Corstvet, *The Lawyer and the Public: An A.A.L.S. Survey*, 47 YALE L.J. 1272, 1281 (1938); *accord Law Business*, *supra* note 222 (writing, in 1928, that the public preferred group legal services over those offered by traditional providers).

[294] *See* Dana A. Remus, *Reconstructing Professionalism*, 51 GA. L. REV. 807, 814 (2017).

Electronic copy available at: https://ssrn.com/abstract=4728564

Partly for that reason, as noted, several states have recently relaxed UPL restrictions.[295] In other states, including Michigan, North Carolina, and Texas, reforms are under active consideration.[296] And, in two additional states—New York and South Carolina—litigants have challenged UPL restrictions as incompatible with the First Amendment.[297]

In the face of this action and agitation, the bar has remained mostly unmoved. It has continued to insist that the prohibition on unauthorized practice is justified to ensure the "integrity and competence of those who undertake to render legal services"[298] and to protect vulnerable individuals from predation by "unqualified and unscrupulous" actors.[299]

Yet, notwithstanding that lofty rhetoric, there have long been hints, murmurs, assertions, and claims that the prohibition sounds less in altruism and more in self-interest.[300]

---

[295] *See supra* notes 16 and 18 and accompanying text.

[296] *See supra* note 19.

[297] *See supra* note 20 and accompanying text.

[298] ABA, MODEL CODE OF PROF'L RESPONSIBILITY EC 3-1 (1980); *see also* People v. Alfani, 125 N.E. 671, 673 (N.Y. 1919) (explaining that UPL restrictions exist "to protect the public from ignorance, inexperience, and unscrupulousness").

[299] Brief of Appellant Letitia James, Upsolve v. James, No. 22-1345 (2d Cir. 2022), at 2–3 [hereinafter AG Upsolve Brief] (defending New York's UPL law on this basis); *see* Sudeall, *supra* note 132, at 642 ("[C]ourts and bar associations continue to rely heavily on protection of the public as the reason for the existence and enforcement of unauthorized-practice provisions."). The New York Attorney General's briefing in *Upsolve* goes so far as to claim that "no measure short of [total] prohibition would adequately protect" the "powerful and uncontroverted interests in protecting the public . . . [from] a corps of unidentified and unvetted nonlawyer advocates . . . . AG Upsolve Brief at 59, 71.

[300] *E.g.,* DRINKER, *supra* note 144, at 167 (stating that the bar's hostility to corporate law practice is traceable to the bar's objection to "loss of income to the lawyers"): Hadfield & Rhode, *supra* note 13, at 1194 (contending that the "professional regulatory model" rests, in part, in "sheer protectionism"); Green, *supra* note 197, at 618–19 (quoting a letter Robert W. Gordon supplied to the ABA stating, inter alia: "that the organized bar's resistance to new modes of practice, though often clothed in the high-minded rhetoric of protecting the ethical standards and independent judgment of the legal profession, has been to a considerable extent motivated by far less elevated desires to protect the incomes of lawyers from economic competition or their status from erosion by groups perceived as interlopers"); Rhode, *supra* note 245, at 3–10 (discussing the suspicious Depression-era timing of the bar's UPL campaign); Brief of Responsive Law as Amicus Curiae, Upsolve v. James, No. 22-1345-cv (2d Cir. 2023), at 6–10 (asserting that the legal

Electronic copy available at: https://ssrn.com/abstract=4728564

And, it's also long been understood that if the UPL ban *is* really about attorney self-interest, that's potentially a problem because—in the recent words of the DOJ's Antitrust Division—in order to withstand scrutiny, "justifications for restraints on the delivery of legal services must be rooted in the protection of the public and not in the protection of lawyers from competition."[301]

This all means that, as UPL restrictions are challenged on First Amendment grounds (and as they are subjected to the First Amendment's concomitant tiers of scrutiny), UPL restrictions may live or die on the strength of the bar's justifications for them. It also means that the bar's *motivation* in expanding and enforcing the ban on UPL is of vital, and urgent, importance. That motivation, of course, has long been questioned. But, to now, on-the-ground *proof* of ulterior motive has remained elusive. Thus, some have proceeded on the basis that restrictions on law practice are "rooted in . . . economic protectionism"—but they have mostly accepted that fact as a matter of faith.[302]

The auto club story, we suggest, supplies that direct and concrete—but heretofore missing—evidence. Above, we show that the bar's crackdown on auto clubs—part of the bar's first sustained foray into UPL enforcement—was not precipitated by revelations of consumer harm.[303] Indeed, *all* available evidence suggests that auto club members were satisfied with the services that they received.[304]

---

profession expanded and enshrined UPL laws for its own self-protection).

[301] Letter from Maggie Goodlander, Deputy Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice to North Carolina General Assembly, Feb. 13, 2023, at 2 https://www.justice.gov/atr/page/file/1587436/download. *See also* AG Upsolve Brief, *supra* note 299, at 66, 70–71 (defending New York's UPL law against a First Amendment challenge on the ground that the law is necessary to protect "vulnerable New Yorkers" from predation).

[302] *See* Brief of Gregory Beck as Amicus Curiae in Support of Appellees and Affirmance, Upsolve v. James, No. 22-1345 (2d Cir. 2022) at 7–8 (arguing that UPL restrictions were rooted in protectionism, but "were not always stated so explicitly," and largely relying instead on "'a large body of historical, economic, and sociological literature . . . [that] suggests that the primary motivation for professional licensing laws is economic self-interest.'") (quoting Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 888 (2000)).

[303] *See supra* note 288 and accompanying text.

[304] *See supra* notes 221–222, 289–293 and accompanying text.

Electronic copy available at: https://ssrn.com/abstract=4728564

Instead, the bar acted (1) in the midst of the Great Depression, which dampened consumers' demand for legal services,[305] (2) soon after the enactment of workers' compensation—a move that one bar leader complained did away with "practically all the personal injury cases,"[306] and (3) at a time when "corporate" legal service providers were rapidly expanding and "encroach[ing]" on traditional lawyer territory.[307] This particular timing, unto itself, suggests that the bar was motivated less by altruism and more by protectionism.[308]

But beyond the curious timing, further direct evidence indicates that the bar cracked down on auto clubs, not because the bar was worried about unsuspecting motorists but rather, in some large measure, because members of the bar were worried about the profession's bottom line. Notably, the California Bar Association attacked auto clubs while noting in the same breath that the bar was in a "difficult economic period"[309] and calling corporate law practice "a serious threat"

---

[305] Young B. Smith, *The Overcrowding of the Bar and What Can Be Done About it*, 7 AM. L. SCH. REV. 565, 570 (1932) ("No one can deny that, due to the abnormal economic conditions which prevail at this time, there are more lawyers than are needed to meet the abnormally low demand for legal services to-day."); *accord* Francis Martin, *The Overcrowding of the Bar*, 72 U.S. L. REV. 139, 146 (1938) ("There is not sufficient legal work available today to require the services of the thousands of lawyers who are members of our bar.").

[306] Merrick, *supra* note 219, at 30. As an empirical matter, Merrick's characterization exaggerated the effect of workers' compensation on the era's PI ecosystem. *See* Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901-1910*, 34 J. LEGAL HIST. 295, 300–03 (1990) (offering statistics by claim type).

[307] John R. Snively, *Review of Recent Activities to Eliminate Lay Encroachments*, 19 ABA J. 177, 177 (1933).

[308] JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 328 (1950) ("The bar became concerned with lay competition, largely under the spur of lawyers' economic distress; it then busied itself with attempts to suppress its lay competitors . . . ."); Huber, *supra* note 127, at 587 ("Unauthorized practice committees were born in a time of economic hardship to ensure that the profession did not lost business."); Rigertas, *supra* note 217, at 107 ("The economic times of the 1930s . . . caused a renewed discussion among the organized bar about services that . . . corporations were providing to the public."). A fair reading of the history suggests that the bar was worried about more than just its economic security. The bar also felt that its professional identity was imperiled (although, of course, it was arguably self-interest all the same). For an early articulation of the latter concern, see *supra* note 145.

[309] *An Economic Survey of the Bar*, 7 ST. B. J. 74, 74 (1932).

Electronic copy available at: https://ssrn.com/abstract=4728564

to lawyers' "well-being."[310] In 1931, the Chairman of the Cuyahoga County Bar Association Committee on the Practice of Law rallied his troops to help "eradicate[e] . . . the existing evil which actually threatens to eradicate the legal profession as a profession."[311] The same year, Jack B. Dworken, also of Ohio, who *personally* initiated several suits against auto clubs and the clubs' corporate counterparts, explained that he was waging the campaign for the "benefit" of new lawyers coming into the profession who needed work, as well as for "the thousands of men and women who will come into the profession in the future."[312] In 1934, Sol Weiss, a Member of the Committee on Unauthorized Practice, explained that the bar needed to act, lest the lawyer be driven "from the banquet table at which for centuries he has had a distinguished place."[313] In 1934, the head of the Tampa Bar warned that, absent decisive action, "the layman will soon be handling all legal matters and the profession will sink into innocuous desuetude."[314] In 1937, the Chair of the Junior Bar Conference lamented that "the average lawyer in New York City nets less than $3,000 a year," while "every year laymen are taking millions of dollars from lawyers"—and that these "encroachments" should "be stamped out by sheer force, if necessary."[315] And, that same year, an Illinois Bar leader announced that the state's UPL efforts existed "(a) for the protection of the public, and (b) for the improvement of the situation of the lawyers."[316]

In an essay, the D.C. Bar's Richard Merrick, who personally brought numerous UPL challenges and included in his brief to the D.C. Circuit the argument that the court should snuff out the District of Columbia Motor Club because it

---

[310] Ewell D. Moore, *The Trust Companies and the Bar Associations*, 6 ST. B. J. 58, 58 (1931).

[311] Stern, *supra* note 135, at 333.

[312] *An Open Letter by Jack B. Dworken*, 35 OHIO L. REP. 2, 4 (1931).

[313] Weiss, *supra* note 135, at 19.

[314] Moore, *supra* note 310, at 58.

[315] Stecher, *supra* note 307, at 608; *accord* Paul P. Ashley, *The Unauthorized Practice of Law*, 16 ABA J. 558, 559 (1930) (admitting that "perhaps . . . some of our own arguments against this corporate invasion" are economically motivated).

[316] William R. Matheny, Chairman, Section on Professional Relations, *A Program for the Elimination of the Unauthorized Practice of the Law*, 26 ILL. B.J. 1, 10 (Sept. 1937).

Electronic copy available at: https://ssrn.com/abstract=4728564

"reap[ed] the rewards of the performance of functions belonging to the lawyer,"[317] put an even finer point on it:

> When our profession was not so overcrowded as it is now and there was plenty of work for the lawyers, little thought was given by them to these gradual encroachments upon their domain. Now, however . . . this question of the practice of law by laymen and lay agencies is a serious menace . . . .
>
> What chance has the young lawyer to get a start in the practice of his profession when he has to compete with banks, real estate agents, accountants, title companies, collection agencies and the like?[318]

Nor was the bar's self-protective motivation lost on contemporaneous observers. On September 14th, 1931, for instance, just as the bar's UPL campaign was kicking off, Frederick C. Hicks, a Yale Law Librarian and Professor, observed:

> Recently, however, the subject [of UPL] has been given a new importance by the activities of corporations. So formidable a rival has forced the bar to give heed, because lawyers [a]re being touched in their most vulnerable spot, the pocket.[319]

A 1932 "gentleman's agreement" between the California Bar Association and the state's biggest auto clubs

---

[317] *Supra* note 195 and accompanying text.

[318] Merrick, *supra* note 219, at 29. Others echoed this "overcrowding" complaint, which sometimes also encompassed the concern that admission to the profession (i.e., licensure requirements) had become too lax. *E.g.,* William K. Clute, *Illegal Practice of Law by Law Agencies*, 11 MICH. ST. B.J. 263, 283 (1932) ("[T]he legitimate field of law practice is over-crowded and what is worse, it is over-run with lay intrusions having the effect of supplanting regularly licensed lawyers . . . ."); *see also supra* note 305 (collecting additional examples). With characteristic bluntness, Karl Llewellyn retorted: "The Bar complains of 'over-crowding.' This means, in horse-sense terms, 'not enough income to go around comfortably.'" Llewellyn, *supra* note 137, at 109.

[319] Frederick C. Hicks, *Practice of Law by Laymen and Lay Agencies*, 6 CONN. B.J. 31, 31–32 (1932); *see also The Legislative Monopolies Achieved by Small Business*, 48 YALE L.J. 847, 851 (1939) (observing that "[p]rofessional men deny that they engage in '. . . restraints of trade," but that they do so under the guise of their "chief legal weapon . . . the prohibition of 'corporate practice'").

Electronic copy available at: https://ssrn.com/abstract=4728564

further supports this self-protection hypothesis.[320] As part of that agreement, the California clubs agreed to drop personal injury claims, advise all members of "the advisability of employing private counsel," and restrict their property damage representation to claims that fell below "the maximum amount . . . of the small claims court."[321] Criminal defense was no different: the Club could only assist in "cases where the amount involved is so small that individuals will feel they would be forced to pay the fine rather than the employ an attorney."[322] In other words, as long as the California auto clubs didn't take cases that would be profitable for lawyers to handle, the California State Bar had no concern.

CONCLUSION

In 1930, D. W. Burbank, a member of the California Bar Association's newly formed committee on the unauthorized practice of law, admitted that automobile clubs "come into more intimate contact with a larger percentage of the public generally than do any of the other lay agencies under investigation."[323] The clubs' broad reach, he warned, counseled "great caution . . . since any action taken may react with the greater force, for good or evil, in the future relations of the bar and the public."[324]

As we have shown, Burbank's caution was neither widely held nor long felt. In the 1930s, displaying exceptional determination, the bar extinguished not just auto clubs, but also corporate legal service providers of every stripe. And the bar did so while relying on an empty formalism—a syllogistic and counterintuitive conception of corporate UPL that was barely a decade old and was, astonishingly, supported by not a shred of evidence showing that the threatened harm the bar was so aggressively guarding against had ever *actually* materialized.

---

[320] *Message from the President*, 7 ST. B. J. 274, 278 (1932).

[321] *State Bar Agreements*, 41 J. ST. B. CAL. 139, 141 (1966).

[322] *Id.* at 142. Similarly suspicious is the fact that, throughout the period, the bar retained its carve-out for legal-aid societies. CANONS OF PROF'L ETHICS Canon 35 (1928) (outlawing lawyer intermediaries while stating: "Charitable societies rendering aid to the indigent are not deemed such intermediaries"). This hypocrisy was not lost on contemporary observers. *E.g.,* Henry Weihofen, *Practice of Law by Motor Clubs—Useful but Forbidden*, 3 U. CHI. L. REV. 296, 300 (1936) (noting the inconsistency of holding that legal aid societies can employ lawyers to represent third parties but that motor clubs can't).

[323] Burbank, *supra* note 246, at 26.

[324] *Id.*

Electronic copy available at: https://ssrn.com/abstract=4728564

More remarkable still, over the ensuing decades, this expansive conception of UPL, forged in—and out—of economic desperation, has more-or-less endured, consigning scores of Americans with legal problems to address them alone, or not at all. Indeed, this broad conception of UPL has taken *such* a firm hold that, beyond just limiting the availability of legal help to a scandalous degree, it has also limited our imaginations for the forms legal services can take. So impoverished is our conception, that, in recent decades, few have stopped to ask a question that one scholar posed back in 1934:

> Why is it that individuals may band together to provide themselves with cheaper insurance, cheaper groceries, higher wages, better prices, easier credit, lower taxes, better health—everything except better or cheaper legal advice and aid?[325]

Perhaps, inspired by the auto club experiment—and fortified with fresh evidence concerning the value of group legal services and the antisocial origins of restrictions on unauthorized practice—it is time for scholars and policymakers to ask that question anew.

---

[325] Weihofen, *supra* note 218, at 138.

Electronic copy available at: https://ssrn.com/abstract=4728564

From:	Tamara Garrison
To:	Entity Regulation Pilot
Cc:	[redacted]; Nancy Hawkins; "Boaz Weintraub"
Subject:	[External]WSBA Family Law Section Response to the POLB Data Driven Entity Regulation Report and Proposed Order
Date:	Friday, August 30, 2024 10:35:35
Attachments:	image001.png image002.png image003.png image004.png image005.png image006.png FLEC Letter to BOG and SCJA.pdf

You don't often get email from [redacted] Learn why this is important

Good morning,

Please see the attached letter from the WSBA Family Law Section in response to the POLB Data Driven Entity Regulation Report and Proposed Order. Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Tamara Garrison, J.D.

Attorney

This email and attachments (if any) may contain material that is confidential, privileged and/or attorney work product for the sole use of the intended recipient. Any review, reliance or distribution by others or forwarding without express permission is strictly prohibited. If you are not the intended recipient, please contact the sender and delete all copies. Thank you.

Family Law Section

Family Law Section of the Washington State Bar Association

August 28, 2024

<u>FLEC Officers</u>
Tamara Garrison
Chair - Seattle

Kimberly Loges
Secretary - Seattle

Shelley Brandt
Treasurer - Olympia

Nancy Hawkins
BOG Liaison -Seattle

Board of Governors
Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539

Washington State Superior Court Judges Association
PO Box 41170
Olympia, WA 98504-1170

Re: WSBA Practice of Law Board's Data Driven Entity Regulation Report and Proposed Order

Dear Board of Governors and Washington State Superior Court Judges Association:

On behalf of the Washington State Bar Association Family Law Section Executive Committee (FLEC), we write to express our position on the Data Driven Entity Regulation report and proposed Order. While we acknowledge the considerable efforts of Michael Cherry and the Practice of Law Board, and recognize improvements from earlier versions, we still have significant concerns that require addressing.

We support efforts to regulate unlicensed legal practice and improve legal service delivery to "legal deserts," however, the entity assessment and regulation program as currently proposed raises several critical issues:

1. Entity Assessment and Regulation:

The proposal uses vague terms such as "innovative business model." In Utah, this meant a program that allowed disbarred or suspended lawyers to participate in licensed entities. By using terms such as a "suitable individual," it is not clear whether the current proposal in Washington would allow disbarred or suspended lawyers to perform those duties. If so, we strongly oppose this. These individuals, having already violated licensing regulations and rules, should be barred from any involvement in such entities. Our existing disciplinary system is insufficient to manage the risks they pose.

Although each applicant must designate a compliance officer responsible for ensuring the entity's adherence to the court's order and ethical standards, no legal qualifications are required for this role. here, too, the person must merely be determined to be "suitable." The entity has full discretion to

appoint a non-lawyer[1] if deemed appropriate. However, entrusting such responsibilities to a non-lawyer without legal management authority over the quality of legal services, confidentiality issues, and potential conflicts of interest, poses a de facto undue risk of harm to the public. That risk is further increased by the proposal's failure to identify any criteria by which entities will be chosen.

2. Program Costs:

The financial implications of this program are concerning and unclear. Based on Utah's experience, where budgeted funds were quickly depleted, we anticipate significant costs for proper supervision, compliance monitoring, and potential disciplinary actions. This would require specialized staff and possibly a separate board.

The proposed entity license fees would only partially cover these costs. The remainder would likely come from mandatory fees paid by Washington's legal professionals. This may be required under the "taxicab" provisions also being considered. It is anticipated that the use of mandatory fees would likely be opposed by licensed legal professionals, who may justifiably oppose this use of their funds, especially given that these new entities could become their competitors.

3. Consumer Information Security and Confidentiality:

Family law cases often involve highly sensitive information. The data collection necessary to assess these new entities' performance and address complaints poses significant privacy risks. While the POLB report advocates for a "safe and managed environment," achieving this is challenging but crucial.

Recent research shows that even anonymized data can be de-anonymized using machine learning techniques. Referencing concerns raised in similar contexts[2],

> *Usage of data*
>
> *Privacy impacts data use far beyond consumers' understanding. Consumers may sign up for an app, not realizing that the app is using account data for purposes far broader than necessary for immediate use.*
>
> *Data sharing and sale*
>
> *Privacy policies can often be challenging to understand and may seem vague or unclear to consumers. As a result, people may not always be aware of how businesses collect, use, and share their personal information. Sometimes, this can lead to their data being sold or shared with third parties without their knowledge or consent. This issue is further exacerbated by the increasing use of automated systems and algorithms in data processing, which can make it even more challenging for individuals to keep track of how their data is being handled.*

---

[1] It is the intent by referencing "non lawyer" that only licensed attorneys be authorized to head these entities. Whether LLLT's are included should be determined by the Washington State Supreme Court after consideration of the limited scope of legal services that can be provided by LLLT's.

[2] **Transformative technologies (AI) challenges and principles of regulation**
Data Regulation Platform ***August 5, 2024***

> *Anonymisation does not equal privacy*
>
> *The privacy of public data is usually protected through anonymisation. Identifiable things such as names, phone numbers, and email addresses are stripped out. Data sets are altered to be less precise, and "noise" is introduced to the data. However, anonymisation may not always equate to privacy. Researchers have developed a machine-learning model that estimates how individuals can be re-identified from an anonymised data set by entering their zip code, gender, and date of birth*

Robust safeguards must be implemented against data breaches, unauthorized access, and misuse of information beyond consumers' understanding or consent.

4. Complaint Reporting and Processing:

The current WSBA discipline system is designed for licensed legal professionals. However, these new entities will include non-lawyerS (SEE FOOTNOTE 1) not subject to this system. The proposal lacks a clear method for disciplining these individuals, potentially leaving the WSBA unable to adequately supervise all entity members.

This disconnect between public expectations of WSBA-approved entities and the reality of limited oversight is problematic. To protect the public, we must develop a way to subject all entity staff and owners to our discipline system, regardless of their professional status.

5. Reporting Requirements:

We advocate for frequent, transparent reporting - at least quarterly, if not monthly. While this may increase administrative burdens and costs, it is essential for public protection and transparency. These reports should provide a balanced view, including financial costs and consumer complaints, rather than simply promoting the regulatory scheme.

Conclusion:

Given these significant concerns, we urge you to reconsider or substantially modify the implementation of the Data Driven Entity Regulation program. We believe that further consultation with practicing attorneys, especially those in family law, is crucial to developing a system that genuinely enhances legal services without imposing undue risks or burdens.

We welcome the opportunity for further dialogue on this matter and offer our expertise to help find solutions that benefit and protect both the legal profession and the public.

Sincerely,

Tamara Garrison

Tamara Garrison
Chair
WSBA Family Law Section Executive Committee (FLEC)

From: Keil A. Larsen
To: Entity Regulation Pilot
Subject: [External]Pilot Test of Entity Regulation - Feedback
Date: Monday, September 2, 2024 10:59:53

You don't often get email from klarsen@larsenwalters.com. Learn why this is important

Dear WSBA, the Practice of Law Board and the Washington Supreme Court,

The Washington State Bar Association's proposed Pilot Test of Entity Regulation to allow business entities to practice law in Washington should be rejected.

The profession of law is one of the oldest known to civilization, involving the most sacred confidence between two people. The loss of the individual personal representation involved by corporations practicing law is so serious to society that it is against public policy.

From the earliest times the attorney has been placed in a position of trust and confidence. The attorney is often considered an officer of the court and has been subjected to close examinations of their qualifications, both educational as well as ethical, before admittance to the bar. Upon admittance, the attorney must take an oath before a judge of this state and solemnly swear to uphold the law and abide by the Rules of Professional Conduct. The reason why strict qualifications and this oath are required for admittance to the bar is to protect the public. How will a corporation take this oath? Will each officer, agent, employee, and shareholder of the corporation be required to take this oath in front of a judge in our state? If not, why would the Court and the WSBA allow a nameless body of individuals engage in the practice of law without these protections?

Practice of law by corporations stifles the sacred relationship between attorney and client. Corporations are not interested in expanding access to justice, they are only interested in maximizing their shareholder value and their duty to their shareholders; rather than an attorney whose primary duty is to the client. Although the proponents of this pilot program focus on areas of law involving disenfranchised individuals and mainly focus on immigration matters, those areas of law are not going to be where these business entities are satisfied limiting their focus. We are already seeing the impacts of corporations offering templates of legal documents for download on the web and artificial intelligence which can draft "contracts" for use by individuals for business dealings. Often uninformed individuals are trusting these resources and are entering into legally binding agreements without the benefit of individual legal counsel.

We also see the prevalence of the unauthorized practice of law by corporations when real estate agents, business brokers and other non-lawyers, provide legal counsel and drafting of legal documents to their clients, and then the clients are left with ambiguous or unenforceable agreements.

WSBA's own statement in favor of this pilot says that "Online companies and innovative business models are already delivering legal services to the public and will undoubtedly expand in prevalence and sophistication in the coming years." Why isn't the WSBA doing more to regulate the unauthorized practice of law in our state instead of throwing up its hands and resigning itself to its own ineffectiveness.

Per the WSBA, "the pilot would allow entities to provide legal and law-related services in Washington under time-bound, limited exemptions from the otherwise applicable rules and statutes governing entities practicing law." This proposed pilot seems vague without many details and creates more questions than it does answers.

How will the WSBA ensure that non-lawyer officers place the needs of the client above the needs of the corporation's shareholders? How will the WSBA regulate the practice of law by these corporations who are located in other jurisdictions? How will the WSBA determine which business entities are qualified to provide these services? How will competency, confidentiality, and ethical obligations be measured and enforced? How will the WSBA determine what legal services may or may not be performed? Will a corporation be allowed to appear in court? Will a corporation be permitted to sit on the Supreme Court of Washington?

How will the WSBA punish a corporation for the breach of the confidential relationship between the attorney and client or other ethical violations? Simply taking away the right for a particular corporation to engage in the practice of law is not sufficient because the corporation can just create a subsidiary or affiliate and resume its activities under a different guise.

Historically, only individuals licensed by the Washington Supreme Court have been allowed to own law firms, share legal fees, and practice law in the state of Washington and Washington has long opposed the practice of law by a corporation as set forth in *State ex rel. Lundin v. Merchs.' Protective Corp.*, 105 Wash. 12, 177 P. 694 (1919).

"*The practice of law is a personal right, and, that the public may not be imposed upon by the unworthy, the law requires that those engaged in the practice shall be [a person] of good moral character and with certain qualifications and a degree of learning to be ascertained by the agents, not of the courts, but of the whole people speaking through the legislative body. The right to practice law attaches to the individual and dies with [the person]. It cannot be made a subject of business to be sheltered under the cloak of a corporation having marketable shares descendible under the laws of inheritance. One engaged in the practice of law is subject to personal discipline for misconduct and to penalties for violating the ethics of the profession that could not possibly attach to a corporate body*"

This pilot program will not be good for Washington State residents and will not provide the access to justice that the WSBA believes. It will, however, increase the possibility of bad and harmful behavior and legal advice and tarnish the sanctity of the legal profession by allowing

the corporate greed for profits to overshadow the attorney’s duty to the client.

Please reject this pilot program to protect the citizens of Washington State.

Regards,

Keil A. Larsen
WSBA # 43895
Attorney at Law
LARSEN WALTERS PLLC
11120 NE 2nd Street, Suite 100, Bellevue, WA 98004
klarsen@larsenwalters.com
Direct 206-953-9633

NOTICE: The information contained in this email is confidential and may be subject to the attorney-client privilege. If you are not the intended recipient, you are hereby notified that any use, dissemination, distribution or copying of this email is prohibited. If you received this email in error, please immediately notify the sender by telephone at the number above.

From:	Jayne Reardon
To:	Entity Regulation Pilot
Subject:	[External]Comments to proposal
Date:	Tuesday, September 3, 2024 13:22:10
Attachments:	Comments--WA entity reg.pdf

You don't often get email from [redacted] Learn why this is important

Dear WSBA,

Attached please find my comments on your entity regulation proposal.

Thank you for your leadership on this issue,

Jayne

Jayne R. Reardon
Partner & Deputy General Counsel

FisherBroyles, LLP
[redacted]
[redacted]

www.fisherbroyles.com

ATLANTA | AUSTIN | BOSTON | CHARLOTTE | CHICAGO | CINCINNATI | CLEVELAND | COLUMBUS | DALLAS | DENVER | DETROIT | HOUSTON | LONDON | LOS ANGELES | MIAMI | NAPLES | NEW YORK | PALO ALTO | PHILADELPHIA | PRINCETON | SALT LAKE CITY | SEATTLE | WASHINGTON, DC

The information contained in this e-mail message is only for the personal and confidential use of the intended recipient(s). If you have received this communication in error, please notify us immediately by e-mail, and delete the original message.

TO: The Washington State Bar Association and the Practice of Law Board
FROM: Jayne R. Reardon
DATE: September 3, 2024
RE: Entity Regulation Pilot Proposal

I write in strong favor and support of the pilot project on entity regulation. I commend the Washington State Bar Association and the Practice of Law Board for their leadership and thoughtfulness in developing and presenting this pilot project. The draft order appears measured, data-driven, and designed to include perspectives and expertise beyond those of a traditional holder of a *juris doctor* degree as well as the perspectives and needs of the consumers of legal services.

Background

By way of background, I am a partner and Deputy General Counsel in the law firm FisherBroyles LLP. I am an experienced litigator and practitioner of dispute resolution. For the past twenty-five years, my practice has concentrated on legal ethics and professionalism. Previously, I served as Executive Director of the Illinois Supreme Court Commission on Professionalism and as counsel to the Review Board of the Illinois Attorney Registration and Disciplinary Commission. I have extensive experience in the application of attorney regulations.

I have co-authored books on legal professionalism published by the American Bar Association and I have written a number of scholarly articles in the area of legal ethics and regulations. I regularly make presentations to bar associations, judges, and law firms on matters of legal ethics, professional responsibility, and the law governing lawyers in the United States and internationally. I am an active member of national, state, and local bar associations and was appointed to serve as Chair of the American Bar Association's Standing Committee on Professionalism for three successive terms.

The Proposal is Consistent with Professionalism and the Responsibility of Self-Governance

The proposed pilot program on entity regulation is measured, responsible, and consistent with the mandates of a self-regulated profession ensconced in the Preamble to Washington's Rules of Professional Conduct. Washington's Preamble, virtually identical to the Preamble to the Model Rules of Professional Conduct, provides a rationale and guardrails for self-governance of the legal profession, noting the close relationship between the profession and the processes of government and law enforcement and the goal of maintaining the legal profession's independence from government domination. "An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent upon government for the right to practice." Preamble [11]

And the Preamble instructs that in terms of regulation, we bear the responsibility to regulate in the public interest—not our own self-interest:

> The legal profession's relative autonomy carries with it special responsibilities of self-government. ***The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.*** *. . .* Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves. Preamble [12]

(Emphasis added.)

The public clearly has an interest in having access to reliable and affordable legal services. They currently do not. The embarrassing access to justice gap affecting individuals, small businesses and many others is well-documented in multi-national, national, and state surveys. We are not certain whether and to what extent the current attorney regulations contribute to the access to justice problem, but we have the professional obligation to find out. And the pilot project is designed to do just that.

The Pilot Proposal is Measured and Data-Driven

Historically, hubris and inertia have contributed to the reluctance and refusal to consider whether as a legal profession we are doing all we can and should be doing to provide more legal services to members of our public—including by engaging people with adjacent proficiencies and professionalism to help. And by changing attorney regulations to allow innovation. Meanwhile, all around us, emerging technologies are changing the lives of consumers and the practice of law. It would be irresponsible to continue to ignore or fail to explore the possibilities that technology, or a model that includes the expertise of individuals outside the traditional lawyer realm, could allow us to gain efficiencies and reach more people who could benefit from legal services but do not currently receive them.

The proposed pilot process is measured, data-driven and time-bound to two years for the collection and analysis of data which would then inform the basis of a recommendation to the Court.

This pilot proposal opens the door to technology companies or other applicants that may not hold a *juris doctor* degree but believe they can provide services to benefit Washingtonians. Perhaps they already are doing so *sub rosa,* outside the current regulatory framework. Importantly, each applicant would need to designate one person to serve as compliance officer, ensuring all personnel in the entity, lawyers and other professionals, abide by the Rules of Professional Conduct except as to the specific regulation being tested.

Conclusion

The controlled conditions laid out in the pilot proposal protect the public and the ethics of our profession while considering regulatory improvements. It should be a national blueprint for other states to follow.

From:	Adam Tenenbaum
To:	Entity Regulation Pilot
Subject:	[External]Entity Regulation Pilot Project
Date:	Wednesday, September 4, 2024 08:58:54

You don't often get email from [redacted] Learn why this is important

Hello,

I saw that the WSBA is considering a new pilot project around entity regulation to explore expanding access to legal services (https://www.wsba.org/about-wsba/entity-regulation-pilot). While I don't have any specific feedback, I am curious to learn more about this and am interested in the data as this progresses. As someone who runs a Paralegal Program at a Community College in the State, I have a strong interest in access to legal services and training nonlawyers to work in a support role. I'm a believer in expanding access to legal services in WA and think partnership with institutions such as where I teach is essential and that we should be included in the discussion. Essentially, how can programs such as ours work with WSBA to expand the availability of access to legal services in WA? I think there are a lot of opportunities for collaboration.

Happy to chat further as this progresses.

Best,
Adam

--
Adam Tenenbaum
Professor, Paralegal
[redacted]
(w) adamtenenbaum.com
(o) Paralegal LibGuide

From: Arthur Lachman
To: Entity Regulation Pilot
Subject: [External]Statement in Support of WSBA Entity Regulation Pilot
Date: Thursday, September 5, 2024 17:28:11

You don't often get email from artlachman@lawasart.com. Learn why this is important

WSBA Board of Governors:

I write in support of the proposed pilot program for entity regulation in Washington. I have previously served as Chair of the WSBA Rules of Professional Conduct Committee (now the Committee on Professional Ethics), as well as on multiple WSBA committees and task forces. I am also former president of the Association of Professional Responsibility Lawyers, and former co-chair of its Future of Lawyering Committee. I had the good fortune to work closely with WSBA Executive Director Paula Littlewood on legal regulatory reform issues before and since her untimely passing in 2020, and I couldn't be more pleased to see her vision of entity regulation being moved forward here with this proposal pilot.

Based on my experience working on reform efforts in several states, I strongly believe that the delivery of legal services needs to be regulated differently in order to achieve a proper balance between access to affordable legal help on the one hand and protecting consumers from harm on the other. Current UPL laws and principles here and in most other states adopted in the 1930s are simply too restrictive, and are often aimed at speculative rather than real risks of harm. The proposed pilot is aimed at developing experience and data about where risks of harm actually exist, and evaluating the form of regulation that will minimize those risks. Given the well documented difficulty of low- and middle- income people in obtaining affordable legal services, not to mention the rapid changes in technology now taking place, rethinking legal services regulation and UPL is crucial in our 21st Century world. I also believe that results of the pilot could well support much needed changes to lawyer regulation as well, including the easing of overly restrictive prohibitions in RPC 5.4 on multidisciplinary law practice and RPC 5.5 on multijurisdictional law practice, which have also the effect of reducing access to affordable legal assistance in my view.

The proposed pilot represents a cautious and conservative approach to evaluating potential regulatory reform in Washington. As we have learned from recent changes to the advertising and solicitation ethics rules (in which I was actively involved), even substantial easing of restrictions designed to improve legal services access, combined with reasonable regulation in light of actual rather than speculative risks, will help consumers, not hurt them.

In short, it is long past time to give entity regulation a try in Washington. It properly seeks to reregulate legal services delivery in our state, not to deregulate it. I wholeheartedly support this proposal.

Thank you,

Arthur J. Lachman, Attorney At Law
WSBA #18962
18409 29th Ave NE
Lake Forest Park, WA 98155
206-295-7667
artlachman@lawasart.com

From:	Austin Brittenham
To:	Entity Regulation Pilot
Subject:	[External]2nd Chair Input
Date:	Thursday, September 5, 2024 08:21:11
Attachments:	Outlook-5pyx2ysi.png WSBA Input.docx

You don't often get email from [redacted] Learn why this is important

WSBA -

Thank you for welcoming feedback on the entity regulation pilot. My name is Austin Brittenham. I'm the owner of 2nd Chair, a company that makes AI tools for lawyers. However, we've wanted to expand into the access to justice space by partnering with bar associations A2J commissions to deliver services. To this end, we've explored partnership relationships with other bar associations.

Please see my attached letter on the proposal.

--
Austin Brittenham
CoFounder
2nd Chair

WSBA -

Thank you for welcoming feedback on the entity regulation pilot. My name is Austin Brittenham. I'm the owner of 2nd Chair, a company that makes AI tools for lawyers. However, we've wanted to expand into the access to justice space by partnering with bar associations A2J commissions to deliver services. To this end, we've explored partnership relationships with other bar associations.

Short Summary

This experimental phase is critical for testing the expansion of legal services for persons who have not been able to have their legal needs met by law firms. Due to price, language difficulties, or fear, whole collections of people do not have their legal needs met. New technologies may solve these problems, but vendors either wrongfully or appropriately fear the Unlicensed Practice of Law (UPL). Further, and rightfully, Bar Associations should be suspicious of both new vendors, and new technologies, to ensure the protection of those who use legal or legal adjacent products. Further, often the middle income and low income portions of a community have less sophistication, and the Bars should rightfully protect these consumers of legal services and legal technology.

This testing period allows vendors to test new deliveries without fear, and for the WSBA to monitor the safety and efficacy of these new deliveries.

The Technology

Our technology allows users to use an AI (named David) on documents securely, but, importantly, it generates citations to the underlying locations the model pulled from. One exploration we pursued involved ingesting all the current website information, policy handbooks, and statutes, that an access to justice commission made available to pro se litigants. In testing, a user can ask a question like "how do I get determine paternity in my state?" and the AI generates a novel response, synthesized from the statues, policy handbooks, and step by step guides already produced through the legal information of the commission. Importantly, the pro se litigants can then click the citations to see the exact files, pages, paragraphs, and sentences, that the AI used to answer that users question. In this way, these users can pull the right form, explore further if they have questions, and verify the answer is right.

Technology like this is critical for the delivery of justice. For instance, a lawyer on the same set of data could just ask the AI to draft a memo that explains how to establish paternity in the state. However, a pro se litigant may not have the appropriate reading level to understand a legal memo prepared by an AI. Further, if that person does not speak English at all, or very well, AI outputs designed for lawyers may produce difficulties. If a pro se litigant generates an output with our AI, our users can ask for document reproduced in another language beside English, or reexplained at a less sophisticated reading level (e.g. "David AI, I don't understand how to figure out paternity. Can you reexplain at a high school reading level?”).

The Coming Capabilities

The current use case is designed to very clearly use technology to better facilitate to the providing of legal information. That is, today our AI does not give legal advice. Instead, it only reassembles the legal information that the litigants already have access to, and parcels and delivers it to

users in a way that is intuitive. It operates as an assistant as the pro se litigants do their own legal research, on their own legal issues. It does not give them legal advice.

However, some access to justice commissions, and some judges in the State of Washington, have accessed for capabilities of our AI that 2nd Chair has been reluctant to build. For instance, courts in your state have asked for the ability to auto populate forms. In this theory of product, pro se litigants would answer intake forms, and our AI would use a template brief, but populate the brief template with the unique facts of the litigant, given the intake form.

Further, courts in your state have asked for an AI that helps talk to pro se litigants about the elements of a claim, which facts from the pro se litigant help support or establish those claims, and for the AI to have a telos that guides the user to an outcome. Less theoretical, imagine a pro se litigant working through a thorny divorce he earnestly believes that he has a 4th amendment due process claim against his wife because she alleges that he broke the law, and that assertion should have merit on their divorce proceedings. His argument is that this allocation violates his right to probable cause. Reads of this letter will understand that there is a series of legal mistakes here. But a pro se litigant mixing bodies of law, and failure to understand the steps or process of a court case, is quite common. Courts have asked for an AI, described previously in this paragraph – one that could help teach the law to the litigant, help them to understand their conflation of portions of the law, and help them arrive at the conclusion that incorrect legal argument should be abandoned. That is, an AI with a teleos that guides pro se litigants through the legal process. To be clear, this example is not fictious, I sat next to this exact kind of person on a recent flight into Seattle.

Conclusion

This entity regulation period would give companies like mine more curiosity to pursue providing services directly to customers. Previously the regulatory environment did not justify the business decision. For instance, we could make tools for lawyers and not risk any unlicensed practice to law objections. While courts have wished for products we could build, the uncertainty of delivering the technology to the customers was a disincentive. This pilot represents a clear regulatory signal that unlocks the business demand that we believe exists, but had deprioritized for more certain customers and products.

I welcome any subsequent curiosity about how we can support pro se litigants, or how our technology can support the lawyers and legal workers of the State of Washington, at my email:

Thank you for your time,

Austin Brittenham
Ceo
2nd Chair

From: Tom Gordon
To: Entity Regulation Pilot
Subject: [External]Re: Entity Regulation Proposal Comments
Date: Thursday, September 5, 2024 13:08:53

You don't often get email from [redacted] Learn why this is important

I'm also including a link to the comments in case the document is getting caught in a spam filter:
https://us01.z.antigena.com/l/9S_umlTYvCg85PMbwauUcMQr2SeLNxDxLyVLaNJAHBrcrT-yjhDcppqByGQQ36iOKjxuMMuQ3lsURnFG~4G0_JAjXOcAJRLMj0xqL_mERk4sWvnDsLENgBs3hXdmHH_l~v5W-a6g5SKQZFAYoFiuZOEmj6wxEpLzRYp_uJWnZ9BLIzhyzPrjEFP-do-TCX1JvKSlpeUejbaPKliYUQ4aiDe14TZoD5CgkpeZjAZvrek6_rEUm8zl7MAUG4XoUMXAtWi9u9nXoXueUUQ3bnwY--~Rly_xlLYS7yh5EuXlGaEg~FJ

From: Tom Gordon
Sent: Thursday, September 5, 2024 3:23 PM
To: entityregulationpilot@wsba.org <entityregulationpilot@wsba.org>
Subject: Entity Regulation Proposal Comments

I am resending this as I did not get an auto-response when I emailed it on Monday, but received an auto-response a few minutes ago to an email trying to confirm receipt of Monday's email. Apologies if you are receiving this twice!

Best,
Tom

> Begin forwarded message:
>
> **From:** Tom Gordon [redacted]
> **Subject: Entity Regulation Proposal Comments**
> **Date:** September 2, 2024 at 9:58:36 AM EDT
> **To:** entityregulationpilot@wsba.org
>
> Please find attached Responsive Law's comments on the WSBA/Practice of Law Board proposal for entity regulation.
>
> Best regards,
>
> Tom Gordon
> Executive Director
> Responsive Law
> www.responsivelaw.org
> [redacted]
> Twitter: @ResponsiveLaw

Comments on: Proposed Pilot Program for Entity Regulation

Tom Gordon
Executive Director,
Responsive Law

Submitted to the

Washington State Bar Association Board of Governors

September 2, 2024

Responsive Law thanks the Board of Governors 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. We advocate for policies that expand how and by whom legal services may be provided so that people of all income levels can get the legal help they need. We support the proposed entity regulation pilot program proposal to facilitate safe and affordable access to the legal help for Washingtonians at all income levels.

Low- and Middle-Income Consumers Cannot Afford Legal Help at Any Level

The growing access to justice crisis in the United States extends from the poorest Americans to those of modest means and beyond, encompassing most of the middle class. In a World Justice Project 2023 report, the United States ranked 117th out of 142 countries in affordability and accessibility of its civil justice system.[1] Americans cannot afford assistance with everyday legal needs despite the fact that the average household will face a significant legal problem every year.[2]

[1] World Justice Project, *WJP Rule of Law Index 2023*, https://worldjusticeproject.org/rule-of-law-index/factors/2023/United%20States/Civil%20Justice.

[2] Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans in Beyond Elite Law: Access to Civil Justice for Americans of Average Means* (Samuel Estreicher & Joy Radice eds., 2015) (observing that fifty to sixty percent of low- and moderate-income American households face an average of two legal problems annually).

1380 Monroe St NW, #210
Washington, D.C. 20010

The Current System of Regulation Has Exacerbated the Justice Gap While Early Data About Regulatory Reform Is Positive

The current legal services model has done more to expand the justice gap than to close it. Modern restrictions on unauthorized practice of law and non-lawyer ownership of law firms were born a century ago, leading to an explosion in the scope of services that may only be provided by lawyers.[4]

One could consider the past hundred years to be an experiment in how well these restrictions have served the public. Recent data from this experiment include an average lawyer price in Washington of $288 dollars per hour.[5] At this rate, a Washingtonian making $100,000 per year would have to work nearly a whole day to pay for one hour of a lawyer's time.[6]

The hundred-year experiment with our current regulatory system has demonstrated that such a system has a high degree of opaqueness in shopping for legal services and prohibitive costs even when one can find a lawyer. It is a clear disaster for consumers. In contrast, when jurisdictions have begun to reverse some of the conditions of the hundred-year experiment, there have been positive results.

In England and Wales, a study found that non-lawyer will-writing specialists drafted wills of comparable quality to those drafted by solicitors and did so at a lower price.[7] And in Utah, while the legal regulatory sandbox has only been active for four years, it has

---

[4] Engstrom, Nora Freeman and Stone, James, Auto Clubs and the Lost Origins of the Access-to-Justice Crisis (February 16, 2024), forthcoming in Yale Law Journal, https://ssrn.com/abstract=4728564.
[5] Data from Clio Legal Trends report, available at https://www.clio.com/resources/legal-trends/compare-lawyer-rates/wa/.
[6] Over a 2000-hour year, this equates to $50/hr. Applying a 20% effective tax rate (combining federal income tax and FICA), leaves $40/hr. At this hourly rate, it would take 7.2 hours to bring home $288.
[7] IFF Research, *Research Report: Understanding the Consumer Experience of Will-writing Services* (2011), https://www.sra.org.uk/globalassets/documents/consumer-reports/lsb-will-writing-reports.pdf.

provided over 76,000 legal services with a mere nine(!) harm-related consumer complaints.[8]

Allowing Non-Lawyer Ownership is a Necessary Condition for Making Legal Help Affordable

Allowing non-lawyer ownership is a necessary condition to fill the gap in providing adequate legal help. Just as H&R Block and TurboTax have made navigating the tax code widely accessible and affordable on a national scale, a mass-market law firm could allow millions of people to affordably and accessibly navigate the legal system. The economies of scale that can only be achieved by outside investment would bring down the costs of legal services.

Almost every law firm providing services to middle-income individuals and small businesses on issues such as family law, employment law, housing, and basic corporate and business law is a small business of no more than a dozen attorneys. A large statewide firm specializing in these issues could provide standardized training to the attorneys it works with, perform quality control on services offered to clients, and let lawyers focus on practicing law rather than finding clients, maintaining trust accounts, and collecting fees.

Opponents of eliminating ownership restrictions have cited the importance of protecting lawyers' professional independence. But ownership restrictions are not a good means of protecting that value. Lawyers' professional independence is already protected by other provisions of the Rules of Professional Conduct.

Additionally, the frequent argument that non-lawyers would exercise improper influence over lawyers in their employ simultaneously overstates and understates lawyers' ethical propriety. It assumes that lawyers are saints with no possible motivation to exercise undue pressure on subordinate lawyers to act against their clients' best interests (e.g., padding of hours, pressure to settle a contingency-fee case). At the same time, it assumes that lawyers have so little commitment to their professional obligations

---

[8] Utah Innovation Office Activity Report, January 2024, https://utahinnovationoffice.org/wp-content/uploads/2024/03/January-2024-Activity-Report.pdf.

that they would ignore all their obligations to their clients if pressured by a non-lawyer employer.

The Proposal Is a Cautious Step to Gather Data, not a Radical Restructuring of Regulation

It is important to emphasize how small a step this proposal is. Other jurisdictions, such as England and Wales, Australia, and Arizona, have abolished or made major reforms to restrictions on who may provide legal services and under what ownership model they may be provided.

The proposal being considered here would leave the current regulatory structure in place for almost every legal services provider in the state. The only exceptions would be the small number of closely monitored providers who would operate in the pilot program.

The Pilot Program Provides an Additional Degree of Consumer Protection by Regulating Both Firms and Individual Lawyers

Consumers of legal services offered through pilot program participants will be better protected than those using traditional law firms.

The current regulatory structure for lawyers governs individual lawyers, but not the businesses through which they provide services. As a result, while consumers are protected from the incompetence or misconduct of their individual lawyers, they are not protected from systemic problems that may exist at a law firm.

In contrast, consumers using a company in the pilot program will be protected by two sets of regulations. As mentioned above, the existing Rules of Professional Conduct (except for restrictions on fee sharing and UPL) would still apply. In addition, companies in the pilot program would be regulated in a way that is common in other industries—although new to law—with the new regulator working proactively to enforce regulatory standards and protect consumers.

Additionally, the proposal mandates the collection of data from pilot program participants so that regulators can focus on *how* consumers might be harmed and can formulate plans to combat those harms with innovative, flexible solutions. This is a welcome change from

the traditional, mechanistic, rules-based approach focused purely on technical compliance rather than actual consumer outcomes.

Finally, participation in the pilot program will be dependent upon approval by regulators. Applicants engaging in activities that regulators find unacceptably risky to consumers will not be allowed to provide services at all.

An Excessively Cautious Approach to the Pilot Program Could Limit the Ability to Evaluate It

Safeguarding consumers is an important priority. However, program administrators should be careful not to be so cautious in implementing it that they fail to generate meaningful data. Ensuring enough participants will require that the risk tolerance in approving participants not be unnecessarily low. It will also require that regulatory and financial barriers to entry for companies be set high enough to protect consumers and offset the cost of administering the program, but not so high as to discourage participation.

Similarly, setting unreasonable expectations for the pilot program's performance could unfairly kill the program before it has a chance to show its value. A pilot program by itself cannot solve the access to justice crisis. However, data from such a program can reveal a path to reforms that could do so. In evaluating the success of the pilot program, the question to be asked should not be, "Have a few innovative legal service providers undone a century of harm to consumers in just a few years?" It should be, "Does the data from this experiment show the potential for a new regulatory model to expand access to reliable, affordable legal help?"

Conclusion

Our current access to justice crisis has its roots in regulations established by a lawyer cartel a century ago. The data from the last hundred years clearly shows that these regulations do more to restrict consumer access to legal help than they do to protect the rare consumer who can afford legal services. In short, the current regulatory system has failed consumers and we need to explore other options. **We urge the Board of Governors to recommend the pilot program proposal to the Washington Supreme Court and urge the Court to approve it.**

From:	Matthew Burnett
To:	Entity Regulation Pilot
Cc:	Rebecca Sandefur; Nikole Nelson; Jim Sandman
Subject:	[External]Frontline Justice Submission Regarding the Washington State Pilot Test of Entity Regulation
Date:	Thursday, September 12, 2024 17:55:39
Attachments:	Frontline Justice Submission on the WA Pilot Test of Entity Regulation 9.12.24.pdf

You don't often get email from [redacted] Learn why this is important

Dear Washington State Bar and Washington Supreme Court Practice of Law Board,

On behalf of Frontline Justice, please find attached our comments regarding the Washington State Pilot Test of Entity Regulation. Should you have any questions or requests, please don't hesitate to reach out.

Kind regards,

Matthew Burnett, JD
Co-Founder and Senior Advisor, Frontline Justice

Nikole Nelson, JD
Founding CEO, Frontline Justice

Rebecca L. Sandefur, PhD
Co-Founder and Co-Chair, Frontline Justice

James Sandman, JD
Senior Advisor and National Leadership Council Chair, Frontline Justice

September 12, 2024

Sent via email

TO: Washington Supreme Court Practice of Law Board

RE: Public Comment on the Proposed Washington State Pilot Test of Entity Regulation

Thank you for the opportunity to submit public comments regarding the *Washington State Pilot Test of Entity Regulation* (hereinafter the Pilot). We applaud the Washington Supreme Court's Practice of Law Board (POLB) for proposing entity regulation in Washington State as an opportunity to increase access to justice for all Washingtonians. We write on behalf of Frontline Justice,[1] a national organization working to advance justice workers who are not licensed attorneys as an evidence-based and scalable solution to addressing our nation's access to civil justice crisis. Justice workers are trained and trusted individuals working in communities to help people resolve their legal problems and advance just solutions at scale by providing targeted legal advice and representation in their communities. We are a nonpartisan organization, and our National Leadership Council represents a broad range of diverse perspectives,[2] all united to ensure equal access to justice for all.

As outlined below, the evidence is abundantly clear: unless we expand access to legal advice and representation beyond lawyer-only solutions, justice problems will continue to overwhelm individual Americans and their communities and effective solutions will be impossible to scale.[3] Our submission focuses on two parts: Part I explores existing empirical evidence on the access to justice crisis, current regulatory reform efforts, and the limits of technology and regulatory innovations to address this crisis. Part II makes recommendations to the Washington State Bar Association Practice

---

[1] The authors of this submission are Matthew Burnett, JD, Co-Founder and Senior Advisor, Frontline Justice; Senior Program Officer, Access to Justice Research Initiative, American Bar Foundation; Visiting Scholar, Justice Futures Project, Arizona State University; and Adjunct Professor of Law, Georgetown University Law Center. Nikole Nelson, JD, Founding CEO, Frontline Justice. Rebecca L. Sandefur, PhD, Co-Founder and Co-Chair, Frontline Justice; Professor and Director, Sanford School of Social and Family Dynamics, Arizona State University; Faculty Fellow, American Bar Foundation. James Sandman, JD, Senior Advisor and National Leadership Council Chair, Frontline Justice; Distinguished Lecturer and Senior Consultant to the Future of the Profession Initiative, the University of Pennsylvania Carey Law School; President Emeritus, Legal Services Corporation. Learn more about Frontline Justice at https://www.frontlinejustice.org.

[2] https://www.frontlinejustice.org/#team

[3] Burnett, Matthew, and Rebecca L. Sandefur. "*Designing Just Solutions at Scale: Lawyerless Legal Services and Evidence-Based Regulation*." Public Law 19, no. 102, 2022. https://www.portaldeperiodicos.idp.edu.br/direitopublico/article/view/6604/2692

of Law Board and the Washington Supreme Court based on this evidence.

Part I: Evidence on the Access to Justice Crisis and Opportunities to Increase Access to Justice through Regulatory and Technology Innovation

i. Recognizing the Enormity of the Access to Civil Justice Crisis in the US and Washington State

Our nation faces an access to civil justice crisis of extraordinary scale. Each year, Americans will experience 150 million to 250 million new civil justice problems, many involving basic human needs like having a safe place to live, making a dignified living, and caring for those who depend on them.[4] As many as 120 million of those problems will go unresolved, with consequences like eviction, homelessness, lost wages and benefits, separated families, and impaired health. The access to justice crisis affects every group in society; however, evidence clearly shows that it disproportionately impacts those with low-incomes and people of color. Washington State is no exception. In Washington State, 7 in 10 low-income households face at least one significant legal problem each year and, on average, experience more than nine legal problems for which the vast majority will not get the legal support they need.[5] According to the National Center for Access to Justice's Justice Index, there are less than 300 legal aid attorneys serving the entire State, which represents only 1.73 civil legal aid attorneys per 10,000 poor people.[6]

For many years in the United States, access to justice has been understood as access to courts and lawyers, and access to justice efforts have been focused on expanding access to lawyers by calling for increased funding for civil legal aid, incentivizing pro bono work, and advocating for a civil right to counsel. While these solutions have a part to play, the reality is that at the same time that the American legal profession has quadrupled in size over the last 50 years, all evidence suggests that this crisis has only gotten worse. The most recent study of low-income people's civil justice experiences by the Legal Services Corporation found that this group of vulnerable Americans received legal help for *less than 10% of their civil justice issues*.[7] According to the World Justice Project's Rule

---

[4] IAALS & HiiL, Justice Needs and Satisfaction in the United States of America (2021), https://iaals.du.edu/sites/default/files/documents/publications/justice-needs-and-satisfaction-us.pdf. Rebecca Sandefur & James Teufel, Assessing America's Access to Civil Justice Crisis, 11 U.C. Irvine L. Rev 753 (2020).

[5] 2015 Washington State Civil Legal Needs Study Update (2015), https://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf

[6] National Center for Access to Justice, Justice Index, https://ncaj.org/state-rankings/justice-index/attorney-access

[7] Legal Services Corporation, The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans (2022), https://justicegap.lsc.gov/resource/2022-justice-gap-report/

of Law Index, the United States ranks 115 out of 142 countries measured for accessibility and affordability of civil justice, which places it in the *bottom quarter* of all countries measured and *last* among high-income countries.[8] Americans deserve better. To meet the magnitude of this crisis, we must look beyond lawyer-only solutions.

ii. Promising Reform Efforts to Increase Access to Justice and Evidence of their Effectiveness

Among the leaders in responding to this crisis are state supreme courts. Recognizing just how acute is the access to justice crisis and the challenges of existing legal aid and pro bono models to adequately scale to address the need, state supreme courts in Alaska, Arizona, Utah, and Texas have already granted or are proposing to grant waivers of unauthorized practice of law restrictions to permit justice workers to provide legal services. In 2022, the Alaska Supreme Court approved a waiver that permits community justice workers trained and supervised by Alaska Legal Services Corporation, the state's primary provider of civil legal aid, to provide legal advice and represent their clients in court.[9] These justice workers are trained to provide targeted legal services in the areas of SNAP benefits, end-of-life planning, debt, domestic violence, and Indian Child Welfare Act matters.[10] ALSC has enrolled over 400 Community Justice Workers, who have handled hundreds of cases with a 100 percent client success rate.[11] The Supreme Court of Arizona in 2019[12] authorized a program that "empower[s] non-lawyer advocates to provide trauma-informed, limited-scope legal advice to domestic violence survivors. These justice workers help survivors navigate the legal system to obtain child support, spousal maintenance, and fair and equitable property and debt divisions."[13] In 2023, the Arizona State Supreme Court also granted a waiver[14] to permit trained Housing Stability Legal Advocates to assist low-income people facing eviction.

In a model similar to the proposed Washington State Pilot, in Utah the state Supreme Court oversees a legal services regulatory Sandbox, a regulatory innovation that enables justice workers to deliver legal services to meet Utahans' justice needs, including programs assisting people with legal issues surrounding medical debt, criminal records expungement, domestic violence, and end of life

---

[8] World Justice Project, 2023 Rule of Law Index, https://worldjusticeproject.org/rule-of-law-index/country/2022/United%20States/Civil%20Justice/

[9] Alaska Bar Rule 43.5 https://courts.alaska.gov/rules/docs/bar.pdf#page=47

[10] https://www.alsc-law.org/community-justice-worker-program/

[11] https://judicature.duke.edu/articles/outside-the-box-how-states-are-increasing-access-to-justice-through-evidence-based-regulation-of-the-practice-of-law/

[12] https://www.innovation4justice.org/research/service/dvla

[13] https://docs.google.com/document/d/1G3QqXB8Y5nz4la_kRChxtBLJz3A_J3AodjiZ457PMvs/edit, p. 51

[14] *Id*. at 52

planning.[15] Over more than three years, these and other entities in Utah's legal services regulatory Sandbox have delivered over 75,000 legal services, with no evidence of material consumer harm.[16] Indeed, fewer than 10 harm-related complaints have been received by this regulator during those three years, and all have been resolved to the satisfaction of both the involved consumer and the regulator.[17]

As part of New York State's Housing Court Answers Navigators Pilot Project, trained volunteer nonlawyer Navigators assisted low-income tenants in Brooklyn Housing Court by helping tenants answer landlord petitions for nonpayment of rent.[18] "Litigants assisted by Housing Court Answers Navigators asserted more than twice as many defenses as litigants who received no assistance."[19] As a result, "tenants assisted by Housing Court Answers Navigator were 87 percent more likely than unassisted tenants to have their defenses recognized and addressed by the court."[20] "For instance, judges ordered landlords to make needed repairs about 50 percent more often in Navigator-assisted cases."[21] In the eviction context, the University Settlement Navigators Pilot Project employed trained caseworkers (employees of a nonprofit organization) to operate in Brooklyn Housing Court, working with litigants from case inception to resolution. Encouragingly, "[i]n cases assisted by these University Settlement Navigators, *zero percent of tenants experienced eviction from their homes* by a marshal." [Emphasis added.] [22]

In addition to state reforms, the federal government routinely allows representation by justice workers who are not attorneys in a wide range of administrative hearings and has done so for decades. For immigration hearings, over 2,000 federally accredited immigration representatives deal with all sorts of legal matters faced by their clients, including client representation in immigration court and before the Board of Immigration Appeals.[23] Indeed, many of these services are provided by religious, community, and social services organizations, which are authorized by the U.S. Executive Office for Immigration Review to offer legal advice and representation through staff who are not

---

[15] The Office of Legal Services Innovation, Authorized Entities, at https://utahinnovationoffice.org/authorized-entities/
[16] The Office of Legal Services Innovation, Activity Report: January 2024 (February 20, 2024) at https://utahinnovationoffice.org/wp-content/uploads/2024/03/January-2024-Activity-Report.pdf
[17] *Id.*
[18] Rebecca L. Sandefur & Thomas M. Clarke, Roles Beyond Lawyers, Summary, Recommendations and Research Report of An Evaluation of the New York City Court Navigators Program and its Three Pilot Projects, 4 (Dec. 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2949038
[19] *Id.* at 4.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 5.
[23] Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 STAN. J. C.R. & C.L. 283 (2020) at 290.

attorneys.[24] To take another example, as with many federal agencies, the Social Security Administration advises claimants appealing determinations of their right to representation, but it does not require that those representatives be licensed attorneys.[25] Indeed, the U.S. Department of Justice Office of Access to Justice and its Legal Aid Interagency Roundtable (LAIR) recently published a report on "Access to Justice in Federal Administrative Proceedings: Nonlawyer Assistance and Other Strategies," which outlines the significant scope of activity by non-lawyers across federal agencies.[26]

In short, a growing body of evidence suggests that nonlawyer justice worker programs are both safe and effective, and the proposed Washington State Pilot would enable these powerful models. The consistent finding across this research is that specialization and experience, rather than formal legal training, are the critical factors in ensuring effective representation in routine matters that come before these fora,[27] and that such representation by justice workers is as or more effective than lawyers.[28] Finally, evidence suggests that unlike lawyer-only models, justice workers have the potential to scale to meet the civil justice needs of everyday Americans.

iii. The Limits of Technology in Addressing the Access to Justice Crisis

The current Washington State Pilot proposal foregrounds technology innovation as a key opportunity to increase access to justice. While this may be true for higher-income individuals, evidence suggests that legal technology innovations are unlikely to increase access to justice for people with low incomes for three reasons: 1) barriers to technology access, including hardware and broadband internet access; 2) literacy barriers, including both reading and English language literacy; and 3) most consumer-facing technology is not responsive to the legal needs of low-income individuals in the United States.[29]

---

[24] *Recognized Organizations and Accredited Representatives Roster by State and City*, U.S. Dep. Justice, https://www.justice.gov/eoir/recognized-organizations-and-accredited-representatives-rosterstate-and-city

[25] Herbert M. Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work* 113 (1998), at 113; *see also* Social Security Administration, *Your Right to Representation* (2020), https://www.ssa.gov/pubs/EN-05-10075.pdf

[26] https://www.justice.gov/d9/2023-12/2023%20Legal%20Aid%20Interagency%20Roundtable%20Report-508.pdf

[27] See, e.g. Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 STAN. J. C.R. & C.L. 283 (2020) Herbert M. Kritzer, *Legal advocacy: Lawyers and nonlawyers at work*. University of Michigan Press, 1998. Hazel Genn and Yvette Genn. *The effectiveness of representation at tribunals*. London: Lord Chancellor's Department, 1989

[28] *See, e.g.* Regulating Will-Writing, 2011, https://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf. Richard Moorehead et. al, *Quality and cost: final report on the contracting of Civil, Non-Family Advice and Assistance Pilot*. The Stationary Office, 2001.

[29] Rebecca L. Sandefur, Legal Tech for Nonlawyers: Report of the Survey of US Legal Technologies (2019). https://americanbarfoundation.org/wp-content/uploads/2023/04/report_us_digital_legal_tech_for_nonlawyers.pdf

Evidence about some of the limits of technology comes from a study of consumer-facing legal technologies. This project identified over 320 digital tools available to assist people in responding to justice issues. The kinds of justice issues people most commonly have were not well matched to types of justice issues served by the tools. While surveys of legal need routinely find that common justice problems involve money, housing, and care of dependents, fewer than a third of existing tools provided assistance in those areas.[30] Using the tools requires internet access, which many Americans do have. However, a substantial minority of Americans (particularly in rural areas) do not and must rely on smart phones to access web-based applications, often enduring slow connection speeds and incurring data costs in order to do so. Americans with low incomes and people of color are more likely to be smart-phone dependent.[31] Another challenge is making tools accessible to people who cannot read English. One in seven American adults is functionally illiterate, unable to navigate text-based interfaces, which is what most tools are. The reliance on text can also exclude the visually impaired. Most tools were provided only in English, excluding the millions of Americans for whom English is not a language in which they feel comfortable communicating. As with internet access, these exclusions fall more heavily on precisely the same groups who are unable to use traditional lawyers' services.[32] The study concluded that many of the tools would often be inaccessible or ineffective for the "same groups often unable to access traditional lawyer assistance," particularly poor people.[33]

A challenge faced by all solutions, technological or human, is illustrated in the research demonstrating that people typically do not see their civil justice issues as legal, and so do not seek "legal" help for those issues.[34] Research demonstrates that effective assistance meets people where they are with help that is timely, showing up when they need it, targeted to the specific problems they have, transparent about costs and options, and from a trustworthy source.[35] Technology can assist in meeting these requirements of effective help, but it will not likely be effective as a centerpiece.

Despite the fact that technology can be a barrier to many low-income and excluded individuals who are most likely to suffer from the access to justice crisis, we believe that it does have a critical role to play in the hands of frontline justice workers, making their work more efficient and

---

[30] Id. at 7.
[31] *Id.* at 12.
[32] *Id.* at 13,14.
[33] *Id.* at 3.
[34] Rebecca L. Sandefur, What we know and need to know about the legal needs of the public, *SCL Rev.* 67 (2015) at 443, 444, 449.
[35] Matthew Burnett and Rebecca L. Sandefur, Designing Just Solutions at Scale: Lawyerless Legal Services and Evidence-Based Regulation. *Direito Público*, *19*(102) (2022) at 112-113.

effective.[36] In fact, Frontline Justice has recently received funding[37] to explore technology-based solutions (including GenAI) to empower justice workers, and would welcome the opportunity to partner with Washington State legal aid providers and community-based organizations under the proposed Pilot or other reform efforts to further expand this approach.

iv. The Limits of Existing Regulatory Reform Efforts in Addressing the Access to Justice Crisis

As discussed above, while the access to justice crisis deepens, jurisdictions are exploring ways to re-regulate the delivery of legal services. These efforts are often justified by seeking to increase access to justice. Current reform projects essentially follow two routes: One removes restrictions on who and what can practice law, and the other permits people who are not lawyers and organizations that are not law firms to control or profit from law practice (for example, through Alternative Business Structures or ABS). The first route directly expands access to justice through sources of meaningful legal assistance by increasing both the scale of the justice workforce and the scope of what justice workers are authorized to do. The impact of the second route is indirect: outside investment would permit law firms to expand into technology and take advantage of economies of scale to produce commodified legal services at reduced cost to consumers. Existing empirical evidence supports the first approach: lawyerless legal services can and do expand access to justice. Evidence for increasing access to justice with the second, particularly for low and middle-income people and including examples in the US (e.g. Arizona) and outside the US (e.g. the United Kingdom), is mixed at best.

Market-based reforms encourage activity that thrives in markets: fee-generating services. Almost half of the services (45.6 percent) that have been delivered in Utah's sandbox have been business law services. While the "people law" services delivered in the sandbox include immigration, veterans' benefits, end-of-life planning, accident/injury, and marriage and family issues,[38] Utah's experiment has not been successful at recruiting more than a handful of nonprofit organizations to participate.[39] Utah's experience illustrates the limitations of market-based reforms for increasing

---

[36] *See e.g.* Tanina Rostain, Techno-Optimism & Access to the Legal System, Daedalus, Vol. 148, Issue 1, Pp.93-97. https://direct.mit.edu/daed/article/148/1/93/27257/Techno-Optimism-amp-Access-to-the-Legal-System

[37] https://www.frontlinejustice.org/news/frontline-justice-to-develop-tech-enabled-innovations-that-empower-economic-mobility

[38] Off. of Legal Servs. Innovation, Utah Sup. Ct., Innovation Office Activity Report: January 2024, at 1, 4 and 5 (2023), https://utahinnovationoffice.org/wp-content/uploads/2024/03/January-2024-Activity-Report.pdf. *See* also David Freeman Engstrom, et al., Legal Innovation After Reform: Evidence from Regulatory Change 41 (2022) (finding that most entities authorized in Utah (and Arizona) are primarily serving individual consumers and small businesses).

[39] See Utah Office of Legal Services Innovation, "Authorized Entities." https://utahinnovationoffice.org/authorized-entities/

access to justice: the consumer segments who most benefit from the new services are businesses and individual consumers who can afford to pay fees for service, with less assistance for low and middle-income populations.

Other states have focused regulatory innovations more squarely on access to justice. As we described above, Alaska's model authorizes a legal services organization to train and deploy justice workers to assist low-income people. Arizona has authorized nonprofits to train justice workers and provide services in the areas of medical debt, housing stability, and domestic violence.[40] Texas has recently proposed reforms focused on access to justice by authorizing Licensed Court-Access Assistants (LCAAs).[41] To practice in this model, applicants must be sponsored by approved nonprofit organizations, successfully complete an approved training program, and pass a criminal background check. If licensed by the state bar, they are eligible to practice under the supervision of an attorney at the sponsoring nonprofit organization. They may "provide in a civil justice court suit legal services on which they have been trained."[42] Their communications with clients are protected by privilege.[43] LCAAs cannot charge their clients fees, but they may be paid by their sponsoring organizations. Sponsoring organizations must require LCAAs to participate in continuing education and report to the Bar any misconduct or incompetence. They must also report the number of clients served by LCAAs and any other requested information.

The design of the LCAA program in many ways parallels accredited immigration representatives working in federal proceedings nationally, who must be sponsored by approved immigration nonprofits and fulfill training requirements. While LCAAs cannot charge clients fees, sponsoring organizations may be able to do so, again paralleling work in the immigration space. Depending on how the LCAA program is implemented, the Texas program could be administered in an evidence-based way, informed by the data collected from the approved organizations by the Bar.

Part II: Recommendations

1) *Minimize application and reporting burdens for nonprofit legal aid and community-based organizations for the Pilot and approve a standalone rule authorizing community justice workers.*

---

[40] Matthew Burnett and Rebecca L. Sandefur 2024 "A People-Centered Approach to Designing and Evaluating Community Justice Worker Programs in the United States," *Fordham Urban Law Journal* 51 at 1526 and 1527. See also Innovation 4 Justice, "Community Legal Education," https://www.innovation4justice.org/

[41] https://fingfx.thomsonreuters.com/gfx/legaldocs/zdpxxwxyjpx/Texas%20Supreme%20Court%20Preliminary%20Approval%20Order.pdf

[42] *Id.* p. 19.

[43] *Id* p. 21.

Community-based and nonprofit organizations face near-constant resource challenges, and often do not have the capacity to compile extensive data about their work. Attracting these organizations into a regulatory sandbox is challenging, as Utah's experience has demonstrated. Application fees would be a barrier for these organizations, as could the application process itself if it requires potential participants to compile and provide information they do not routinely collect. Application and reporting processes should make it as easy as possible for nonprofit and community-based organizations to participate.

In addition to the Pilot, we strongly recommend that the Washington Supreme Court and State Bar work closely with legal aid and other community-based organizations to authorize a standalone rule authorizing community justice workers. As described above, the evidence is abundantly clear that justice workers without a law license (or other high-barrier credentials, such as two and four-year degrees) can and do already provide safe and effective legal services. Washington State should follow the lead of Alaska, Texas, and other states in endorsing this model of scalable legal services delivery without delay and irrespective of other regulatory reform measures in order to address the immediate and growing access to justice crisis.

2) *Conduct outreach and provide support for nonprofit entrants.*

Utah's experience demonstrates the need to engage in intentional efforts to recruit these kinds of organizations to participate. It also demonstrates the need to consider what supports these kinds of organizations would require in order to participate, such as assistance in complying with reporting requirements. Experiences in other states have shown that leadership and engagement by legal aid and other community-based organizations necessarily centers regulatory reforms on access to justice as opposed to market-based solutions that are likely to have little impact on low-income communities.

3) *De-center the focus on technology, instead focusing on people-centered justice solutions that approach problems as people understand them.*

Technology can be a valuable tool in assisting people in accessing justice, but it will be more effective as an aid than a solution. As the evidence provided above suggests, existing technology solutions alone have done little to move the needle on addressing the access to justice crisis. Solutions instead need to focus on people-centered approaches that meet people where they are and are timely, targeted, trusted, and transparent.

4) *Learn from regulatory reforms where there is or will be evidence of impact for low-income and excluded communities (e.g. AK, TX, and state and federal agency proceedings).*

The activity underway in Alaska and that proposed in Texas, as well as state and federal administrative proceedings (e.g. immigration, social security, veterans' benefits, and more), provide incredible opportunities to learn about what kinds of programs and services are effective at providing help to marginalized communities that is sustainable over time and has the potential for scaling up to meet vast unmet legal need. Frontline Justice and its partners in these states stand ready to support Washington's efforts.

5) Provide dedicated funding for research and data collection.

A solid evidence base from the US and other jurisdictions shows that these programs can be safe and effective at providing access to justice for people. Nonetheless, we can learn more about how to do this work well and to do it better from what happens in Washington State. The inception of the Pilot and other new programs in Washington offers a critical opportunity to embed research and data collection into the DNA of these programs, so that stakeholders can learn in real-time about how these projects are working and how they may be made more effective.

Sincerely,

Matthew Burnett
Co-Founder and Senior Advisor
Frontline Justice

Nikole Nelson
CEO
Frontline Justice

Rebecca Sandefur
Co-Founder and Co-Chair
Frontline Justice

James Sandman
National Leadership Council Chair and Senior Advisor
Frontline Justice

Officers and Directors
Sophia M. Palmer, **President, 2024-25**
Scott Semrau, **President-Elect, 2024-25**
Theresa Ahern, **Treasurer**
Mark Alexander, **Secretary**
Richard L. Bartholomew, **Legislative Liaison**
Douglas P. Becker, **Webmaster**

Board of Directors
Jennifer Apitz
Cameron J. Fleury
Monique Gilson-Moreau
Ezra Glanzer
Todd Howard
Roy N. Martin
Rhea Rolfe
Amir John Showrai
April Thomas

September 12, 2024

Re: Pilot Project for Legal Regulatory Reform

To the Washington State Supreme Court Justices, and the WSBA Board of Governors, via entityregulationpilot@wsba.org.

On behalf of the Domestic Relations Attorneys of Washington (DRAW), an association of over 550 family law attorneys established in 2018, the following points, questions, considerations, and recommendations are offered regarding the Practice of Law Board's proposed order for a pilot project for legal regulatory reform. While we acknowledge the significant amount of work that has gone into this proposal, we continue to have significant concerns, and due to these concerns, DRAW respectfully opposes the Legal Regulatory Sandbox as more fully discussed below.

Framework for Data-Driven Legal Regulatory Reform

The proposed order essentially refers to a law review article written by its Chair Emeritus as its "Framework." For the most part, it repeats the POLB's previous "Blueprint" from February 2022. One salutary change is the proposed order's language requiring compliance with ethical rules, which was one of the points made in DRAW President Rhea Rolfe's 3/7/23 letter to the Supreme Court (see Appendix A, p. 2).

The immediate concern with the Framework is the lack of specificity. The Framework does not contain descriptions of what the Pilot Project will actually do, other than collect and analyze data. The Framework provides a simple theoretical framework for analyzing data, rather than a practical, specific framework for how the Project will be run. While that is important, it is insufficient to authorize licensing non-attorney Entities to provide legal services to the public. The Framework does not describe what the Project will consist of. Moreover, the Project will be reliant on data that is itself the confidential property of clients. From that data, the Project hopes to determine what the Project should include and how it should be run. In effect, the Project proposes to build the plane while in flight with passengers aboard. That poses an unacceptable risk to the public.

To address the risk, the Framework (pp. 3-4) offers assurance that:

> [T]o examine the hypothesis, the proposers of the reform design and conduct a study, including data collection, to examine the potential impact of the reform. The study should be conducted in a safe and managed environment, such as a 'sandbox' or 'regulatory lab,' to ensure no one is harmed or any harms are quickly mitigated. A sandbox or lab is a method of putting appropriate processes around the framework to manage its use.
>
> But regardless of the name, a lab (or a sandbox) is nothing more than a safe environment or a set of guardrails consisting of protocols or rules from managing the use of the framework.

However, the framework does not describe what guardrails, protocols, or rules are being considered. For example, the Framework acknowledges the problems with data gathering, but does not address how it will handle them. Foremost, it does not state that the Entities who provide services will be prohibited from using client data for any other purpose than serving the client (i.e., client confidentiality.) In fact, the implication is that Entities would be allowed to collect data for their own purposes. Such data has substantial monetary value, as the Framework acknowledges. It states "And others [legal service providers] may be looking at ways to monetize data to reduce the costs of legal services." (Framework, pp. 15-16). That is a roundabout way of saying the data could be used for profit. There is no benefit to clients in allowing corporations to mine and sell their confidential information. The Framework acknowledges that "anonymizing" client data has significant problems. However, it fails to address any alternatives. The issue of client confidentiality deserves much more development than is provided in the Framework. Specific plans need to be examined.

The Framework creates a false sense of urgency, implying that the cautious approach of past reforms can now be foreshortened. However, there is a good reason legal reform is slow–it affects the property, freedom and rights of the public. It should not get any less scrutiny than the introduction of a new drug, which receives much testing in the lab and on animals before human trials begin. As the Framework points out, very little hard data is available. As such, the collective experience of practicing attorneys is the best source of information. That has not been sufficiently pursued. Any assumption that attorneys would "protect their turf" is belied by the enormous contribution of volunteer work they do for the benefit of the public. They are a resource worth using.

Proposed Order

The language of the Proposed Order is not specific. As written, the proposal amounts to an open grant of authority to the Pilot Project to figure things out as they go. The order's title "Entity Regulation" gives little notice that the order will result in the delivery of legal services by non-attorneys to members of the public (hopefully in limited numbers) in the Pilot stage, without

additional review by anyone other than POLB and possibly WSBA staff. There are no specifics on the structure and operation of the Project. Instead, the Proposed Order directs the Project to authorize Entities to provide to the public such legal services as are later defined by the Project and under terms and conditions as are later defined by the Project. This may be acceptable in many technology and business environments where the motto is "prototype, then iterate," but not in high-consequence fields such as medicine or the law until after extensive investigation and development has been done. That is why serious legal reform (and none are more serious than the proposal under consideration) takes substantial time.

Allowing each entity to designate a compliance officer may facilitate communications, but it doesn't address the questions of what authority and duties the compliance officer would have, the independence of the compliance officer, and who, if anyone, would be liable for malpractice. Attorneys are personally responsible, but what would prevent a for-profit entity from simply dissolving or changing the corporate name to evade liability? Even if a licensed attorney is designated as supervisor or as a compliance person, a for-profit corporation could hire a token attorney, expecting them to be a firewall against liability.

Nationally, support for legal sandbox experiments such as proposed here has dwindled.

> The year 2020, known to most for global pandemic shutdowns, also heralded leaps and bounds in legal regulatory reforms. Utah . . . and Arizona . . . approved extraordinary changes to the regulation of legal practice. Both states loosened the bans on nonlawyer ownership of legal practices and the practice of law by nonlawyers. Further, the Conference of Chief Justices issued a resolution . . . urging states to consider regulatory innovations regarding the delivery of legal services, and the ABA approved a limited resolution . . . encouraging consideration of regulatory innovation. Even Justice Neil Gorsuch weighed . . . in with his support for regulatory innovation.
>
> This year [2022], on the other hand, has been more challenging. California's Closing the Justice Gap Working Group . . . , of which one of us [Lucy Ricca] was a member, was tasked with drafting a report to the State Bar's Board of Trustees on what a California regulatory sandbox might look like. But the group became a punching bag of several of its own lawyer members as well as powerful members of the state legislature. The group was finally shuttered this past summer when those legislators forbade the Bar, or any group formed by the Bar, to work on anything having to do with reform of ownership or unauthorized practice rules. . . . The ban also stopped any further work on paraprofessional licensing, a subject already addressed by a different working group that had completed and submitted its report.
>
> Regulatory reform hit snags nationally, too. At its summer meeting, the ABA House of Delegates passed a non-binding resolution discouraging states from considering changes to the rules around nonlawyer ownership and investment. . . . Although other states, including Washington and Michigan, continue to consider regulatory solutions to the

> justice gap, the once-substantial momentum for legal services reform seems to have stalled.
>
> Ricca, Lucy and Ambrose, Graham. *The High Highs and Low Lows of Legal Regulatory Reform*, https://law.stanford.edu/2022/10/17/the-high-highs-and-low-lows-of-legal-regulatory-reform-333-2/ at p. 2 (citations omitted)

There is good reason for these trends. Protecting the public is the overlooked factor in even limited proposals to use the public as guinea pigs, to the benefit of large corporations looking to capitalize on the important ideal of Access to Justice. That message appeared to be the overriding concern in the 12/7/21 letter from the two Chairs of the California Legislature's Judiciary Committees, in response to California's similar legislative sandbox proposal, attached as Appendix B. Their letter is worth reading in full.

Additionally, there is evidence that Utah's sandbox effort has not met the intent of the Utah Supreme Court in addressing Utah's access to justice problem in the areas of consumer credit, marriage/family law, and misdemeanor criminal cases where only 7% of Alternate Service Providers handled those types of legal matters. See Eisenberg, J., "The Sandbox," Utah Bar Journal, Nov/Dec 2022, pg 18. (attached to Appendix A). "Of the 93% of legal matters handled so far by Sandbox entities, the vast majority have been in the areas of business law, military and veteran's benefits, accident/injury claims, and trusts and estates." *Id.* These are areas where attorneys are plentiful. *Id.*

The POLB proposal does not claim that it will promote access to justice for those in financial need. The Framework (p. 22) acknowledged that:

> The most interesting and valuable regulatory reform projects in the POLB's opinion would be those that reduce the access-to-justice gap. . . . Here, the POLB punted when creating the framework. It did not try to develop its own instrument to measure changes to the access to justice gap.

It instead cited as a tool an "algorithm" developed elsewhere as a conceptual approach to come up with ways to address the gap. That idea could certainly be addressed during an evaluation and recommendation regarding the proposal, but not before the public begins receiving services. In addition, any assumption that lower costs via "innovative technologies" to the Entities will result in lower fees charged to clients is unsupported.

Some of the key questions left unanswered by the pilot project proposal so far include:

- How potential Entities are considered qualified to provide legal services to the public and who makes that determination.
- What standards of learning and ethics will be applied to the *people* who will deliver the legal services to the public.

- Who the target market is and what benefits are expected. If the program is intended to benefit low-income households, how that goal will be promoted and measured. Are lower costs assumed or somehow mandated? Are there any benefits for clients other than lower costs?
- What the program costs and staffing requirements are expected to be, either near term or long term. What the plans are to cover costs beyond what licensing fees cover. This has proven to be a serious problem in Utah.
- What enforcement mechanisms are planned, including staffing and costs.
- What distinctions will be made, if any, to the range of services and standard of care provided by Entities that differ from attorneys.
- What the impact on the current justice system and practitioners is expected to be.
- How disputes between Entities and WSBA will be handled.
- What WSBA's potential consequences and liabilities would be.
- How the phrase "data driven" will be applied; for example, who will develop the definitions for the data and analyze the results? Will experts be needed?
- Who are the likely and potential Entities interested in a license to practice law?
- How much the "timebound" licenses are expected to cost.
- Are the Entities themselves going to be the primary source of funding? Many reforms to laws have been compromised when the enforcing agency becomes a "captive" of the industry being regulated.
- How will the POLB enforce the rules and regulations under the pilot program and framework when it fails to enforce the current rules against unauthorized practice of law?

Recommendations

The Washington Supreme Court, WSBA, the POLB, and attorney volunteers have made significant strides in the past few years to improve access to justice. Plain language forms, alternative lawyer licensing, Court Facilitators, washingtonlawhelp.org, and greater access online to statutes, court decisions, and court rules are only a few. This Court has left a lasting legacy. But there is always room for improvement. At the present time, the Pilot Project needs far more development, and Washington consumers would be better served if:

1. The Pilot Program should not proceed until the above issues are resolved and a clear picture of what is being proposed is developed.
2. The participation of the WSBA sections and other interested bar associations should be required (or waived in writing), including participation in executive sessions of the POLB and all other discussions and receipt of all information related to the program. An opportunity for review after decisions have been made and documents are drafted is insufficient; there needs to be actual participation in the decision-making process. People who have spent their careers delivering legal services can provide essential insights and feedback. It should not be left entirely to the POLB and the Entities themselves.
3. A global estimate of costs and the source of funding should be specified and supported before any commitment to take action.

4. The unauthorized practice of law should be made a *per se* violation of Washington's Consumer Protection Act, as proposed many years ago by then-Assistant Attorney General Doug Walsh.
5. WSBA's Advisory Opinion 2223, which prohibits mediators who are attorneys from helping mediation parties draft family law orders which reflect their agreement, should be rescinded or revised.

Respectfully,

Sophia M Palmer

Sophia M. Palmer
President
Domestic Relations Attorneys of Washington

Encl.

cc: WSBA Board of Governors
Superior Court Judges Association
P.O. Box 41170
Olympia, WA 98504-1170

APPENDIX A

Board of Directors
Rhea J. Rolfe, **President, 2023-24**
Theresa Ahern, **Treasurer**
Mark Alexander, **Secretary**
Richard L. Bartholomew, **Legislative Liaison**
Douglas P. Becker, **Webmaster**
Lisa E. Brewer
Cameron J. Fleury

E: president@draw.legal

Board of Directors
Monique Gilson-Moreau
Ezra Glanzer
Todd Howard
Roy N. Martin
Sophia M. Palmer
Scott P. Semrau
Amir John Showrai
April L. Thomas

March 7, 2023

(sent via email)

Washington State Supreme Court
415 12th Ave SW W
Olympia, WA 98504
E: supreme@courts.wa.gov

Re: *Blueprint for Regulatory Sandbox in Washington State*

Dear Justices:

This letter serves as the official position of the Domestic Relations Attorneys of Washington, and its nearly 600 members regarding continuing work on the Blueprint for Regulatory Sandbox (hereinafter "RS") in Washington State.

First we would like to acknowledge the great amount of time and effort the Practice of Law Board – and Mr. Cherry specifically – has put into this issue. However, we cannot endorse any ongoing work on the RS proposal for the following reasons.

Access to Justice will not be improved by allowing entities to provide legal services by non-lawyers. The current proposal commences the complete deregulation of legal services in Washington. While such a move is supposedly designed to make the legal marketplace more competitive by driving down hourly rates and making legal services more available in certain areas of law, it will not protect consumers and does not address the gap in access to justice. At a recent BOG presentation, Mr. Cherry conceded that the main purpose of the RS is not to provide access to justice, but rather to generate revenue from entities participating in the RS, providing resources that can then fund other access to justice initiatives. The POLB's own Blueprint says: "Such a regulatory scheme *may* help address the access to justice gap…." (emphasis added).

The RS focuses on innovation in the practice of law –not access to justice. Innovation can be good, but misleading when packaged and sold as access to justice. This proposal mainly benefits venture capitalists and large entities that will offer legal services by non-lawyers. The goal of these entities is profit. It does not help consumers in Washington State and does not benefit the legal profession.

The current Washington proposal does not require the entities in the RS to deliver services to low-income consumers in need of legal help. DRAW understands that Utah, where the first legal RS started, is currently discussing whether to require future RS entities to have non-profit status to ensure meeting the Utah Bar's access to justice goals. The Washington proposal has no such requirement.

The POLB's proposal appears to assert that it is using the scientific method to analyze the product of RS initiatives but fails to establish a baseline of the access to justice problem in Washington that will be solved by the RS. No amount of alleged scientific method analysis will compensate for a failure to identify areas where the access to justice gap is most severe, and establishing a current baseline of access to justice metrics from which to measure. What are the actual numbers right now? Without this basic first step, the RS will never be able credibly to claim it is narrowing the access to justice gap.

Not enough work has been done to proceed in any specific direction. The apparent assumption is that unguided innovation by non-lawyer entrepreneurs will identify what access to justice needs exist and their best solutions. That is raw experimentation using the public as test subjects. It does not help consumers in Washington State and does not assist the legal profession.

The Public Will Be Unprotected. The proposal now before you will allow companies like Amazon (or others), if approved, to offer mass legal services, with little to no regulation and no clear answer or framework on how these entities can or will be disciplined for malpractice or ethics violations. For example, disbarred or suspended lawyers are not prohibited from owning an entity that would, under the RS proposal, allow them to practice law in Washington. It gets worse. There is no training requirement. There is no education requirement. There are no fiduciary or ethical requirements. Whereas business entities have a primary obligation to their shareholders, lawyers and law firms have a primary obligation to their clients. This proposal fails to protect the public in general, the specific clients, and arguably makes all education and ethical requirements for lawyers unnecessary. For example, a licensed attorney can voluntarily resign their bar membership and start a company run by non-lawyers with no RPC restrictions in place, where profits are the main driver of the business. By avoiding the costly regulatory structure that the RPCs impose on lawyers, they may charge a little less, but will have higher margins.

During his March 4, 2023, presentation to the BOG, Mr. Cherry talked about the role venture capitalists will play to ensure the RS's success, and how important it is for "stakeholders" (i.e., entities that want to exploit the deregulation) to have a clear process for authorization to operate within the RS. Venture capitalists have one main goal: to earn the highest profits possible; and if high quality legal work, performed ethically at the RPC standards that now exist, needs to be sacrificed on that altar, then so be it. Protecting the public will be the nuisance they put up with, versus the standard of care and the goal of the services rendered.

DRAW is concerned that if Washington allows an RS framework to be permitted, that will only increase the number of unregulated entities practicing law in addition to the already

unprosecuted unlawful practice of law ("UPL") that currently occurs. Mr. Cherry provided anecdotal evidence that prosecutors around the state refuse to charge and prosecute UPL cases unless "harm" can be proven, despite there being no "harm" element contained in the statute. DRAW questions whether complete deregulation of the practice of law serves as the solution to the problem of failure to prosecute UPL cases. DRAW submits that the response to a failure to act to prevent this harmful and illegal activity should not be to throw our collective hands up and deregulate.

The costs are unsustainable. Utah Bar Executive Director Elizabeth Wright reports the Utah RS has run out of money. The initial grants and funding received by the Utah Supreme Court have been exhausted, and they have now asked the Utah Bar to pay the costs to operate their RS. At a recent WSBA BOG meeting, Director Wright estimated the Utah Bar's annual RS operating costs at $650,000. No clear estimate of costs to operate in Washington has been provided, but Utah reportedly has over 7,000 licensed attorneys and a population of 3.38 million. In contrast, there are 26,210 active attorneys in Washington state out of 33,565 WSBA-licensed lawyers, and a population of 7.79 million.

Of 47 approved Alternative Service Providers in Utah, three had been audited, with one audit underway, as of November 2022. *See* Eisenberg, pg. 18. Only 26 of 47 entities were reporting data. *Id.* Enforcement of the RS rules and regulations costs money, and we have no idea what it will cost to operate in Washington and no clear estimate of cost has been provided. The failure to audit such organizations may suffer the same fate as the failure to prosecute practice of law violations.

Utah's RS constitutes an unsustainable model. So far, no viable proposal exists for how an RS would be funded in Washington, contrary to GR 25(b)(2)(E)'s requirement that the recommended program, including the costs of regulation, be financially self-supporting within a reasonable period of time. Mr. Cherry stated there would need to be a board, that would consist of "volunteers". He did not define or explain what qualifies one to serve on the board, what constitutes a conflict of interest that prevents volunteers from serving, what legal training one needs to serve on such a board, what functions the board would serve, and how any conflicts of interests of these volunteers would be addressed (once defined). We understand that many questions remain unanswered at this stage but believe that this proposal's prospects do not warrant further pursuit. The costs already outweigh the speculative benefits.

Further Concerns: Legal deregulation experiments are proceeding elsewhere, focused on access to justice goals. The reports of their progress are conflicting and incomplete.

A review of the Utah RS was published in the Utah Bar Journal in December 2022 (attached). Numerous concerns related to the Utah experience have been identified. These include:

- Vendors focusing services on unanticipated areas of the law, such as personal injury, estate planning, and business law, which are already well served by attorneys.
- Lack of focus on access to justice.
- Lack of empirical data regarding the causes of the access to justice problem and how they would be solved by deregulation.
- Lack of study of the empirical harms that could be caused by legal deregulation, including the lack of fiduciary duty to clients and the incentive to cut the costs of providing services to increase profits.
- Lack of study of changes to the current rules covering attorneys that could address access to justice concerns.
- Over-reliance on limited metrics of harm (i.e., consumer complaints only) to measure the impact on the public.

This proposal seriously calls into question why lawyers themselves should be regulated. If an entity can provide legal services with no code of conduct, no legal training or education, ongoing or otherwise, why require individual attorneys to attend law school or fulfill ongoing CLE requirements? There is no distinction between what legal services offered by an RS entity and a licensed attorney would be.

In short, having a two-tier system has been tried many times and failed, despite the best of intentions. This is especially true now, when for-profit entities are involved. Does this mean that a licensed attorney in Washington can use the Fourteenth Amendment to protest discipline for unethical actions when no such requirement exists for the RS entities?

The closest DRAW has seen to an RS model that has worked in limited circumstances is the Department of Justice's Executive Office of Immigration Review (the administrative immigration court system). It involves non-profit Recognized Organizations with Accredited Representatives who can provide only limited immigration-related legal services through the Recognized Organizations for whom they work. In short, they cannot set up shop for profit on their own.[1]

The deregulation proposed by the POLB Blueprint has significant monetary benefit to those invested in or working at entities that may later be RS participants. There is no discussion of what the POLB Board has done and will do to avoid conflicts of interest.

Washington consumers should not be guinea pigs for this experiment. Access to Justice presents real and pressing issues in Washington. Rather than throw untested, exorbitantly expensive experiments at the problem, the POLB should examine how best to deliver services to those who need them most. That issue does not seem to be analyzed in the POLB Blueprint.

[1] See generally: https://www.justice.gov/eoir/can-someone-represent-you-eoir

Thank you for your consideration and attention to our concerns.

Very truly yours,

DOMESTIC RELATIONS ATTORNEYS OF WASHINGTON

Rhea J. Rolfe (Mar 7, 2023 18:47 PST)

Rhea J. Rolfe
President

cc: Michael Cherry, Chair, Practice of Law Board
cc: Washington State Bar Association, Board of Governors
cc: Washington State Association for Justice
cc: Washington State Bar Association, Family Law Section
cc: Washington State Bar Association, Elder Law Section
cc: Washington State Bar Association, Real Property Probate and Trust Section
cc: Washington State Bar Association, Antitrust, Consumer Protection, and Unfair Business Practices Section
cc: Washington State Bar Association, Creditor Debtor Rights Section
cc: Washington State Bar Association, Juvenile Law Section
cc: Washington State Bar Association, Solo and Small Practice Section
cc: Washington State Bar Association, Low Bono Section
cc: Washington State Bar Association, Labor and Employment Law Section
cc: Washington State Bar Association, Animal Law Section

Commentary

The Sandbox

by Jeffrey D. Eisenberg

Introduction

In January, the Utah Association of Justice asked me to chair a committee to investigate the "Sandbox" experiment and evaluate whether suggestions should be made for it that would benefit consumers. I have studied information about the Sandbox project available online, and literature concerning the United Kingdom's legal deregulation project. I've met with former Utah Supreme Court Justice Constandinos Himonas, John Lund, the Office for Legal Services Innovation (OLSI)'s Chairman of the Board, and Sue Crismon, OLSI's Executive Director. I've talked to numerous present and former Bar Commissioners and Officers.

The purpose of this article is to inform the Bar of developments related to the Sandbox, to raise concerns about aspects of the project, and to offer ideas about how the Bar and supreme court can better work together.

What is the Sandbox?

Article VIII, Section 4 of the Utah Constitution provides: "The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law." I've learned that the Utah Supreme Court and some in the Utah Legislature disagree about the extent to which the court can or should expand its regulatory power to cover businesses controlled by non-lawyers. The creation of the Sandbox indicates that the court assumes it has plenary authority to do so.

In August 2018, the Utah Supreme Court established a Work Group on Regulatory Reform (the Work Group). In August 2019, the Work Group submitted a report, NARROWING THE ACCESS TO JUSTICE GAP BY REIMAGINING REGULATION. In August 2020, under Order 15, the court established a new program, the "Sandbox" to test new models of legal service delivery in the hopes of making legal services more accessible and more affordable to underserved populations and in under resourced practice areas. Sandbox experiments include non-lawyer controlled and managed entities. Utah Supreme Court Standing Order No. 15, August 14, 2020, https://www.utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2020/08/FINAL-Utah-Supreme-Court-Standing-Order-No.-15.pdf. The court also created the Utah Office of Legal Services Innovation (OLSI) to evaluate, recommend, and regulate businesses providing "nontraditional" legal services (Sandbox entities) and to design and implement systems to test whether these services were harming consumers. The OLSI was also given responsibility to report empirical data to the court about whether Sandbox provider services were harming consumers. The original project was authorized for two years; last year, the court extended it for an additional five years. Utah Supreme Court Press Notifications, ***Utah Supreme Court to Extend Regulatory Sandbox to Seven Years*** (May 3, 2021).

Standing Order 15 begins with: "The access-to-justice crisis across the globe, the United States, and Utah has reached the breaking point.... The overarching goal of this reform is to improve access to justice." Standing Order No. 15, 1, 7. In this and other communications issued by the court, the Work Group, and OLSI, it has been stressed that most citizens are currently unrepresented by a lawyer in areas such as: debt collection enforcement, divorce and domestic law, landlord-tenant proceedings, and misdemeanor criminal cases.

The regulatory requirements of Sandbox entities differ from those of bar licensed attorneys in several critical ways. First, non-lawyers who own manage or work for Sandbox entities are exempt from compliance with the Utah Rules of Professional Conduct and are not subject to discipline for violations of those

JEFFREY D. EISENBERG is a practicing trial lawyer with more than thirty years' experience representing consumers in product liability, professional malpractice, insurance bad faith, civil rights, sexual abuse, catastrophic injury and wrongful death cases. He now practices at Eisenberg, Lowrance, Lundell, Lofgren.

duties. *See* Office of Legal Services Innovation, ***Interested Applicants: Eligibility (6)***, https:utahinnovationoffice.org/sandbox/interested/ (last accessed Oct. 14, 2022). Second, Sandbox entities can, in some cases, share legal fees with non-lawyers, including investors. *Id.*, ***Frequently Asked Questions***, https:utahinnovationsoffice.org/sandbox/frequently-asked-questions/. Third, persons in the Sandbox who are not lawyers or paralegals can provide legal services under certain circumstances and not all Sandbox projects are lawyer led or involve lawyers as some part of the business model. Office of Legal Services Innovation Letter to Utah State Bar Regulatory Reform Committee 4 (Feb. 23, 2021), http://utahinnovationoffice.org/knowledge-center/ Resources/Press Releases/ Letter to Bar Committee -February 2021.pdf. Last, I can find no indication that the court is requiring all Sandbox entities, or non lawyer personnel that own, control, or manage such entities, to act as fiduciaries.

What does OLSI data show?

OLSI's August 2022 Sandbox Activity Report provides some insight into the programs approved in the Sandbox and the types of legal services being provided. Of the forty-seven approved Alternative Service Providers (ASP), twenty-six are reporting data to OLSI. OLSI reports that over 27,000 legal services have been provided to over 20,000 unduplicated clients. Over 3,300 legal services were delivered by non-lawyers. There have only been three "audits" completed of sandbox entities, and one in progress. OLSI and the court have not released information about the audit process to allow the bar or public to evaluate the rigor or efficacy of any audits.

Although the Work Group and court identified consumer credit, marriage/family law, and misdemeanor criminal cases as the main areas where there is an "access to justice" gap, to date these represent only 7% of the legal matters provided by ASPs in the Sandbox. Of the remaining 93% of legal matters handled so far by Sandbox entities, the vast majority have been in the areas of business law, military and veteran's benefits, accident/injury claims, and trusts and estates.

I've spoken to many lawyers who misunderstand several aspects of the Sandbox project. First, many lawyers have assumed that businesses can only operate in the Sandbox if lawyers own the majority interest in the business. In fact, some approved Sandbox entities are majority owned by non-lawyers.

Second, many lawyers assume that the court is only approving Sandbox projects in areas of law which have been underserved by Bar licensed lawyers and law firms. In fact, many Sandbox entities and projects are delivering services in areas where lawyers are plentiful, even ubiquitous, including, personal injury, estate planning, business and corporate legal advice and entity formation.

Third, some lawyers assume that to have their projects approved, Sandbox applicants must promise to deliver services to low-income consumers in need of legal help. But some approved applicants have not made that commitment, and it is not required to enter the Sandbox. Office of Legal Services Innovation Letter to Utah State Bar Regulatory Reform Committee 2–3 (Feb. 23, 2021), https://utahinnovationoffice.org/wp-content/uploads/2021/04/Open-Letter-to-Bar-Committee-Feb-2021.pdf.

Where is the Sandbox Headed?

In Order 15, the court stated, "we will never volunteer ourselves across the access-to-justice divide and what is needed is market-based, far-reaching reform focused on opening the legal market to new providers, business models, and service options." Utah Supreme Court Standing Order No. 15, 2 (Aug. 14, 2020), https://www.utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2020/08/FINAL-Utah-Supreme-Court-Standing-Order-No.-15.pdf. The court has increasingly made clear that the goal is to make all legal services more affordable by opening competition between traditional law firms and providers that partner with non-lawyers or are owned by corporate interests.

Recent evidence indicates the court's working hypothesis is that deregulation of legal services should continue to expand and will be beneficial for consumers. In its recent grant application to the Stand Together Foundation, the court wrote,

> **Lawyers themselves,** who have a monopoly on legal-service delivery, face numerous capital restrictions, advertising, and marketing restrictions, **expensive training requirements, and other rules that keep them from testing innovations** that might provide significant access-to-justice benefits. Beyond this restrictiveness, **the current regulatory approach imagines hypothetical harms to consumers that have not been empirically verified.**

(Emphasis added.)

There are additional clues that more expansive deregulation

proposals will be presented by OLSI as the Sandbox moves forward. In September 2022, scholars from Stanford Law school published an "early assessment" of regulatory reform in the Utah Sandbox and Arizona. One of the principal authors is Lucy Ricca, OLSI's founding Executive Director and a member of its Executive Committee. The report concludes, "[I]t is still early days of this brave new world of regulatory reform," but "the legal innovation that is emerging in Utah, which appears more multi-faceted and diverse than in Arizona, might be even more so if the [S]andbox reforms were framed as ***permanent*** regulatory changes." David Freeman Engstrom, Lucy Ricca, et al., Legal Innovation After Reform: Evidence from Regulatory Change, 47 (Sept. 2022), https://law.stanford.edu/wp-content/uploads/2022/09/SLS-CLP-Regulatory-Reform-REPORTExecSum-9.26.pdf.

It is not clear how much "deregulation" the court will approve. However, the benefits of deregulation need to be carefully considered against the risks posed to consumers. Those risks, described by the court as "imagine[d] hypothetical harms" are being ignored or dismissed too lightly.

Expanding Court Powers?

It now appears the court is seeking to exercise its broad powers by asking that lawyers licensed by the Utah Bar pay the costs of the operating the Sandbox. The court recently asked the Bar to take over funding operations of OLSI. If the Bar won't do so, it has been advised that the court will consider divesting the Bar of its regulatory powers and taking over regulation directly. If this happens, will the court do what the Bar would not – require lawyers to fund the Sandbox experiment out of Bar members' mandatory licensing fees?

Instead of the court's proposal to tax members of the Bar twice – first to regulate themselves, and second, to regulate non-lawyer practices in the Sandbox – why shouldn't the court make the for-profit businesses approved in the Sandbox pay fees to operate its regulatory arm?

Whose Deregulation is it Anyway?

In the court's recent grant application to the "Stand Together Foundation," a nonprofit founded by libertarian entrepreneur Charles Koch, which seeks nearly a half million dollars, it states:

> One driving force behind the access-to-justice crisis is how states currently regulate the practice of law. **Outmoded regulations severely constrain courts, nonprofits, and for-profit organizations from innovating** in ways that would significantly increase both the availability and affordability of legal services and reduce demands on the courts.

(Emphasis added).

Could fiduciary duty and Utah's Rules of Professional Conduct be the "outmoded regulations" being dispensed of? The court does not require most Sandbox entities to act as fiduciaries nor are they required to comply with the Rules of Professional Conduct. And Sandbox entities can do what bar licensed lawyers and firms cannot – share fees with non-lawyers.

While lawyers employed by Sandbox entities must still comply with their ethical responsibilities, the business has a duty only to its shareholders. Will non-lawyer owners and/or investors adopt a "hands off" approach to the management and delivery of legal services, allowing the non-attorney employees it hires to provide services without direction? As anyone who has worked for a for-profit business knows, the people signing the paychecks have great say in making the rules. How will the Sandbox regulators ever know when a lawyer's independence is compromised? It's concerning that currently, the approach of the court and OLSI is (paraphrasing) "we will look at results, not the details of how each Sandbox business operates." Office of Legal Services Innovation Letter to Utah State Bar Regulatory Reform Committee 3 (Feb. 23, 2021), https://utahinnovationoffice.org/wp-content/uploads/2021/04/Open-Letter-to-Bar-Committee-Feb-2021.pdf.

If the court permits non-lawyers to operate legal service businesses, unencumbered by the licensure, fiduciary, ethical and regulatory enforcement requirements that attorneys must adhere to, does the court believe that the fiduciary duties and ethical requirements now imposed on lawyers are unnecessary?

At present, with different rules for lawyers and non-legal providers, the playing field appears stacked against members of the Bar. And the protection provided to consumers by fiduciary responsibilities, ethical rules, continuous legal education for legal providers, and an office that can investigate, adjudicate and punish those who take advantage of legal clients seems to be receding, if not going away entirely. The court needs to clarify whether its goal is to significantly deregulate the practice of law and allow non lawyer businesses in all facets of law to compete with lawyers and firms. If that's the plan, to date the court and OLSI have not been clear about it. And the court needs to also tell the Bar how it will regulate non lawyer entities to keep the consumer safe.

Is Deregulation a good thing for Consumers?

The court's hypothesis appears to be that deregulation is good for consumers. But there is little data to support the claimed benefits of a deregulated legal system and potential for harms in a

ClydeSnow
ATTORNEYS AT LAW
Clyde Snow Welcomes Two Associates to Its Salt Lake City Office.

Robert W. DeBirk -
Mr. DeBirk's practice includes water, natural resources and environmental law. Mr. DeBirk assisted the Department of Public Utilities with water law and water quality matters. Mr. DeBirk also assisted Salt Lake City in land use and planning items ranging from updating groundwater source and watershed protective ordinances to creating assistance programs for low-income residents.

Landon S. Troester -
Mr. Troester's practice focuses on Business Transactions, Securities, Trust & Estate Planning, and Bankruptcy matters. As a law student, Mr. Troester was a Fellow for the Pro Bono Initiative at the S.J. Quinney College of Law, and assisted in the creation of several reports on the demand for legal services for low- and middle-income Utahns. He also co-authored a report on prisoners' civil legal needs in the Utah prison system.

ClydeSnow

loosely regulated system. As a plaintiff 's lawyer I have represented ordinary consumers for more than thirty years. For the past sixteen years, I have been a Board Member of the Public Justice Foundation, a national public interest law firm dedicated to helping consumers. Experience tells me that fiduciary laws, ethical rules, and enforcement for wrongdoers are critical to protect consumers who do not understand the complexities of the law and the legal process and must therefore place great trust in their providers.

Non-fiduciary business owners and their non-lawyer personnel have no obligation to put a client's interests on equal footing with the interests of the business and its investors. A business operating in a deregulated market has incentives to employ time tested business practices to increase profits. Most businesses focus on aggressively reducing expenses. Legal services are not products. In a service market like law, many nonfiduciary businesses will be motivated to hire less experienced, less skilled, and less trained staff and/or to replace staff with software and algorithmic decision making. Therefore, the real or imagined benefits of opening legal practice to non-fiduciary businesses in a deregulated market may come at a high cost to consumers. That's especially true if there is no specific training requirement for the non- lawyer investors, owners, managers, or staff of managed entities operating in the Sandbox.

In many areas of law such as personal injury, property loss, estate planning and probate, family law, criminal law, and legal services for businesses large and small, a lawyer's skill and judgement that comes with experience and training are critical. Legal consumers whose legal services are pushed down to less skilled or trained employees, or to an automated process, could suffer severe or even catastrophic life consequences. Starting in law school and in yearly CLE, lawyers are taught about their fiduciary duties and what is required when representing clients. A violation of these duties can result in the lawyer's license being suspended or revoked, which most lawyers take very seriously. Private investors and non- lawyer managers have not received that training and do not face the same severe consequences for breaching their duties.

Should ordinary consumers who need legal services be forced to settle for "caveat emptor"? The consumer risks of a caveat emptor market may be acceptable when buying a toaster. But when a client has sustained, for example, a life changing commercial or personal injury, a serious family law problem or when a small business is faced with a game changing legal challenge, "caveat emptor" does not seem to be an appropriate model.

Those in charge of OLSI, have said that there is "no empirical data" validating the benefits of fiduciary duties for legal providers. I believe the question should be reversed: Does the OLSI have robust and valid data to demonstrate that eliminating or reducing regulation of legal services won't harm legal services consumers? If so, this needs to be shared.

We need only look at deregulation of the real estate and banking sector leading up to the Great Recession of 2008, the loose regulation of the stock market prior to the Crash of 1929 or here in Utah, to the poorly regulated penny stock market prior to the 1990s to see that deregulation in areas where the consumer must trust service professionals carries big risks. In 2022, trillions have been lost – many by small investors – due to speculation in largely unregulated cryptocurrency market. I am skeptical about what deregulation will bring for the consumer.

Does deregulation increase access to justice?

Sandbox proponents and the court have cited to the United Kingdom's Legal Service Act (LSA) as a deregulation success story. The LSA, passed in 2007, was intended to introduce more competition into the UK legal market by creating alternative business structures (ABS), subject to streamlined and less restrictive regulatory constraints, to compete with traditional lawyer owned firms. ABS allow solicitors to form partnerships with non-lawyers, accept outside investment, and operate under external ownership.

Reports on the LSA results have been mixed, but recent analysis after fifteen years of program operation, suggest that the program has been less than a smashing success. In fact, a recent report authored by U.K. Legal Services Board has found that as of 2020, stakeholders felt that the scale of the legal access challenge "is at least as great today, if not greater" than when the LSA was put into place. Legal Services Board, The State of Legal Services 2020: A Reflection of Ten Years of Regulation 22.

Some analysts believe that deregulation may merely increase the number of providers without improving access or reducing cost, and they attribute this to the fact that a shortage of legal providers is not the primary reason consumers don't connect with lawyers to solve their legal problems.

In August 2022, two professors from George Mason's and Texas A&M's law schools published an analysis of deregulation of legal services. "The [deregulation] competition paradigm is theoretically flawed because it fails to fully account for market failures .... Merely increasing the number and types of legal services providers cannot make legal markets more efficient. ... Deregulation alone is insufficient and may in fact exacerbate existing market failures."

Nuno Garoupa & Milan Markovic, *Deregulation and the Lawyers' Cartel*, U. Pa. J. Int'l Law, Vol 43:4, 935–936, 2022.

They then state:

> Well-meaning observers often speak and write as though access to justice is only an issue for the poor "and assume that poor people desire lawyers' services but cannot obtain them because those services are so very expensive. ... [T]he picture is much more complex.... [C]oncerns about cost play only a small role in people's decisions not to turn to lawyers or to courts." ... Deregulation alone fails to confront the market failures that are endemic in the consumer segment.

Id. at 986, 989 (quoting Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 Wis. L. Rev. 101, 117 (2013) (first alteration in original)).

The recently published Stanford Study, mentioned above, reports that the evidence that the LSA is increasing consumer assess is weak:

> [T]he evidence is ambiguous as to whether and how [the LSA's] innovation is increasing access and/or benefiting consumers .... The impact of the [LSA's] reforms on access to justice for low-income people is unclear.... there exists little rigorous research exploring the impact of the reforms on access to justice among indigent and low-income persons. ... [T]he simple fact is that significant unmet legal needs persist even after a decade of [the LSAS's] implementation.

David Freeman Engstrom, Lucy Ricca, et al., Legal Innovation After Reform: Evidence from Regulatory Change, 20–21 (Sept. 2022), https://law.stanford.edu/wp-content/uploads/2022/09/SLS-CLP-Regulatory-Reform-REPORTExecSum-9.26.pdf.

Given the above, the assumption that deregulation will solve the "access to justice gap" should not be taken as a given. The court should incorporate lessons learned from similar projects, encourage debate, and open access to all points of view to study the problem and its solutions.

Give its limited financial assets, the Utah Supreme Court should take a hard look at focusing the Sandbox project to the areas where legal experiments are clearly intended ease the access to justice gap rather than pursue a broad deregulation agenda with all its attendant risks. The Bar and the court could also pursue

other solutions to improve legal access, such as simplifying litigation of smaller claims through streamlined low cost arbitration and mediation, strengthening consumer protection laws, andexpanding small claims court and better informing the public of how to use it.

Will the Court have Valid Metrics to Determine Whether Sandbox entities Are Providing Competent, High-Quality Results for Consumers?

OLSI contends it has or will soon have metrics to accurately determine whether Sandbox services are causing consumers harm. The Stanford analysis strongly suggests that those metrics will also be used to answer the larger question of whether deregulation will put legal consumers at higher risk or degrade the results they receive from their provider.

But there's a major flaw in the metrics. The Sandbox's primary metric measures one thing only – the rate of called-in consumer complaints. If the number of called-in complaints is not deemed excessive by OLSI, the conclusion reported out is that the provider has done "no harm." But this assumes that data on consumer reported "complaints" then can be causally connected to measure results and ignores the question of whether the legal service resolved the claim for "fair value" or provided correct legal advice. For consumers, that's what matters. Relying on a "complaint rate" to determine harm vs. success is based on the premise that consumers can accurately assess a successful resolution of their claim or service; but can the average consumer accurately assess this?

Legal services are dissimilar to consumer products. Amazon and a local shoe store have different methods of operation, but they sell many of the same products. And the quality of products can be easily assessed by the ordinary consumer. In contrast, determining what is a successful result in many areas of law is not easily assessed by the ordinary consumer, and the consequences of poorly executed legal services are much more severe than the blisters caused by a pair of knock-off sneakers. What is the value of a given legal claim and what affects that value? This is the exact question that a consumer has hired a legal expert to answer, and it depends on many variables. The value of a claim or the quality of legal advice cannot be plugged into a computer algorithm to assess quality, at least in complex matters. I can't

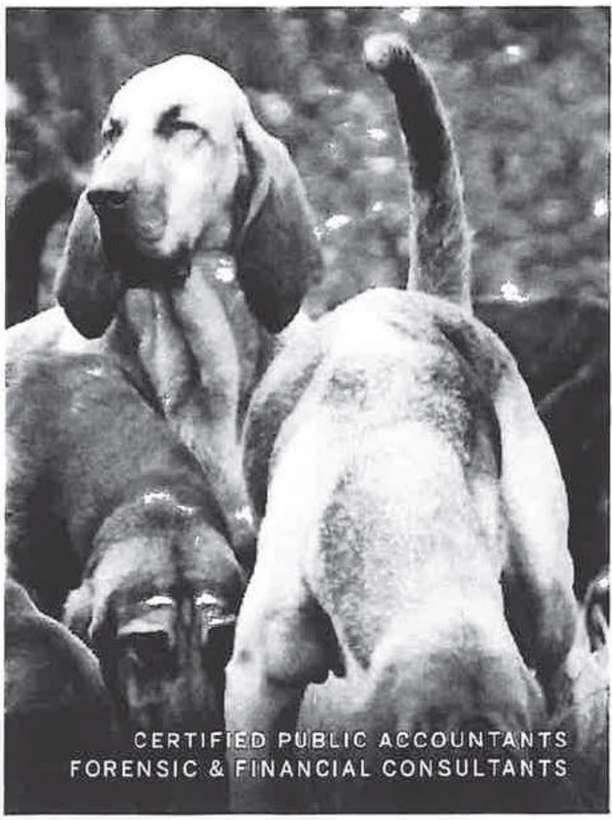
Picking up the scent.

White collar crime is pervasive and persistent— leaving many businesses to struggle with the impact. Our **forensic and investigative accounting** teams help your clients to discover and **mitigate** the source of **fraud and theft**.

Bankruptcy | Restructuring
Forensic Accounting | Due Diligence
Economic Damages | Receiverships
Turnaround | Workout
Business Valuation | IP Valuation

Rocky Mountain RMA ADVISORY

801.428.1600 rockymountainadvisory.com



envision an algorithm capable of factoring in the skills and commitment of the advocate, the presentation and preparation of witnesses, or whether the critical facts have been unearthed or the legal theories applied correctly. And these are only a few of the non-quantitative factors that greatly affect claim values and results. Any trial judge or risk manager will tell you these are all critical to assess who wins, and how much a claim is worth.

Does this mean that all Sandbox projects can't be measured through complaint rate analysis? Probably not. But complaint rates cannot be used to measure whether Sandbox providers are benefitting consumers in making or defending legal claims or providing accurate legal advice, except for legal matters that are quite simple.

It is also fair to question the idea that valid complaints, standing alone, measure anything useful. Whether a complaint is filed or not depends, among other things, on the personality and assertiveness of the client, whether they have objectively reasonable expectations of a fair result, and factors of the client's personality. The correlation of complaints to bad legal representation is weak.

OLSI has reported twelve complaints to date. It seems highly unlikely that out of 27,000 legal services provided, consumers were only unhappy or felt harmed twelve times. OLSI's complaint rate may be impacted because many Sandbox consumers may not understand the benefits of reporting. Or it may mean that the OLSI lacks regulatory personnel equivalent to the Bar to investigate, provide a remedy, or sanction the wrongdoer.

Per OLSI public reports, many Sandbox providers are not even reporting complaint data in a complete and timely fashion. Standing Order 15 contemplates controls beyond complaint-rates such as case audits of the legal services provided by Sandbox entities, and customer surveys. Utah Supreme Court Standing Order No. 15, 15 (Aug. 14, 2020), https://www.utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2020/08/FINAL-Utah-Supreme-Court-Standing-Order-No.-15.pdf. There is no indication that consumers are being proactively surveyed, and of the more than thirty providers, only four have been audited. As of May 2002, OLSI confirmed that there had been thousands of personal injury clients served by Sandbox legal providers, but there have been no audits of those cases.

Without a careful and robust auditing process, OLSI and the court can't accurately judge whether a client is benefitting from or being harmed by a Sandbox provider. Auditing is only valuable if the auditor is given enough time to accurately determine the quality of services and has the right training. And where will the funds come from to pay for skilled auditors? Effective regulation of any industry or profession requires money. The Sandbox is understaffed and underfunded. OLSI has only three employees. It has only one data analyst and one "Director of Data," who is serving in a part-time or consulting basis. Given such limited resources, can the OLSI effectively design, collect, and analyze the quality of Sandbox services? Inaccurate or incomplete data puts legal consumers at risk that in the attempt to provide more legal services, we've sacrificed quality.

In response, one Sandbox proponent pointed out "we don't audit lawyers for quality now." But don't audits need to be more thorough for non-legal entities, who are not fiduciaries? If the court believes that Bar enforced regulation is not effective, those regulations should be buttressed to be made effective, not abandoned in a "reformed" legal market.

Can't we all play in the sandbox?

*"But when men have **realized** that time has upset many fighting faiths, they may come to **believe** even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas. . . ."* Justice Oliver Wendell Holmes Jr., dissenting in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (emphasis added).

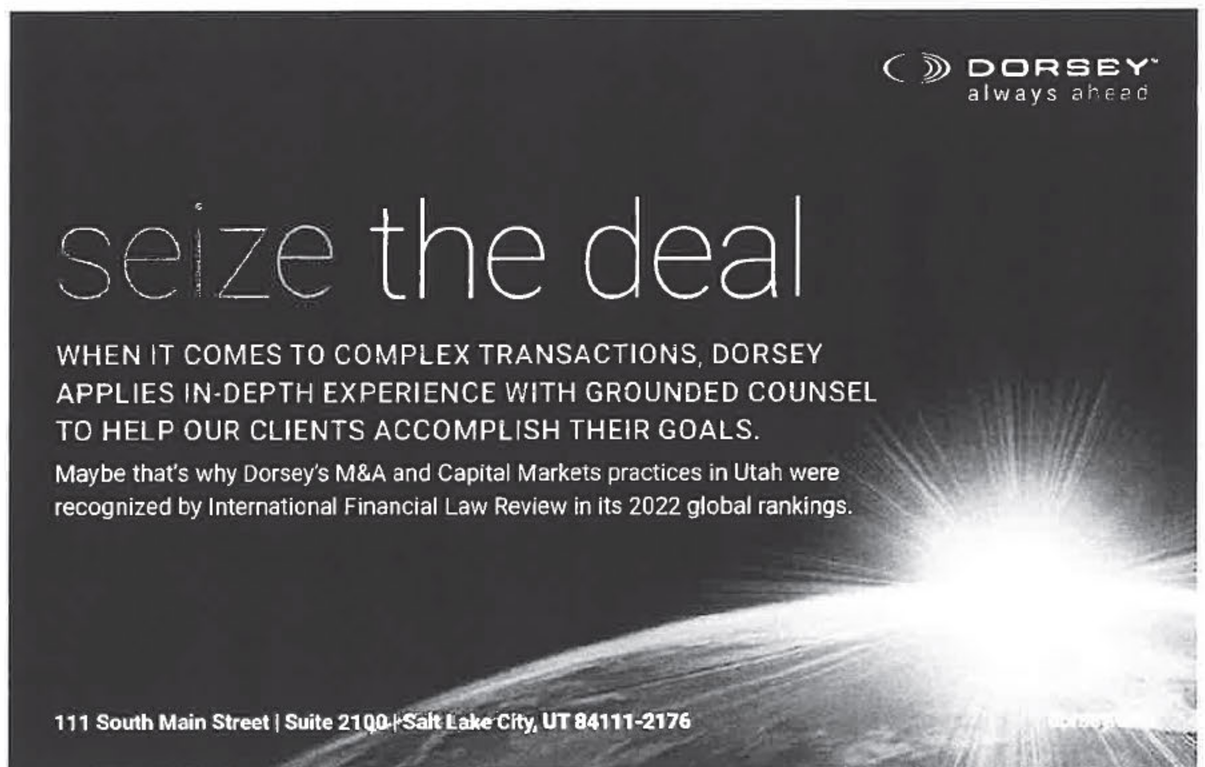
The Sandbox is an ambitious social experiment, which the Bar is now being asked to support and pay for. Social policy made and implemented without the free exchange of ideas risks harm to legal consumers and more unintended consequences. Hearing only the voices of a project's supporters is how autocrats make policy, not democratic leaders.

To this end I suggest first that the court appoint an independent task force or advisory committee to study the Sandbox and report to the court and the public. The committee should include the operators of Sandbox legal businesses, Sandbox regulators, academics for and against deregulation, consumers, and leading members of the Bar. OLSI should be required to openly share information with the committee. The committee can then share its findings and recommendations. This process will provide more information and more balanced information to the court and make it more likely that "confirmation bias" is neutralized when the court makes future decisions about the project. Creation of a diverse and multi-disciplinary advisory committee will also dispel the tension that now exists between OLSI, the court, and the Bar. An advisory committee may bring fresh ideas to improve the Sandbox.

Second, all Sandbox participants should be required to act as fiduciaries and be subject to the Rules of Professional Conduct. To make this meaningful, the court should equip the Sandbox or the Bar with equivalent authority and resources to investigate and discipline violators. It is unjust for the court to require members of the Bar and Sandbox entities to work under differing sets of fiduciary and ethical rules. And consumers with legal problems must trust their legal providers to act in their best interest, whether they possess law degrees or not. Before the court even contemplates that these protections be eliminated for legal consumers, more robust metrics must be developed, a control group established, and the results subject to independent analysis.

Third, the court must clarify the scope of the Sandbox and its goals, and provide the Bar and public with more robust information about the operations of OLSI, the type and quality of data the Sandbox is evaluating, and what the perceived benefits are of each approved project. How will each project narrow the "access to justice gap"? It is hard to expect the Bar and its members to pay for or support the Sandbox when this information is not shared.

Fourth, the court should make its intentions known about the extent of its intended regulatory reform and include more voices. Is it moving to largely deregulate legal services? If not, what is the goal? And if the court is contemplating deregulation, large or small, it should encourage an open and vigorous debate about deregulation's risks and benefits and share information about Sandbox successes and its failures. The court should consider the recently published Stanford review and assessment. There is useful information about a number of promising projects, but nothing about lessons to be learned from projects that have not been successful. There was also no mention of the fact that most of the services provided in the sandbox to date have not been in the areas identified by the Work Group in 2019 as legally underserved. The fact that one of the two principal authors was OLSI's first executive director and is on its Executive Committee suggests the serious problem of "confirmation bias." Those who have created the Sandbox are invested in its success, and they created or approved its methodology. Confirmation bias is not always conscious bias, but independent review is essential to address its distortions. There should be no doubt about the genuine commitment to social change and dedicated hard work demonstrated by those who have created and promoted the Sandbox. But they want to emphasize the positives to keep the



work going and to encourage funding. It should be the job of independent assessors and voices to provide another view of what's working, what isn't, and what should be improved, developed, or placed on hold.

Last, I believe the court should confine the Sandbox for the time being to projects that are clearly addressed at improving access to legal services in areas where they are lacking. Projects that are merely testing the broad premise of whether deregulation of legal services will "do no harm" should be put on hold, at least for now. There is insufficient evidence that deregulation will narrow the access to justice gap or that abandoning the consumer protections of current bar regulations and requirements will create a safe legal market for consumers. OLSI has neither the manpower, the financial resources, the sufficient metrics, or the regulatory structure to oversee a widely expanded legal service industry and monitor non fiduciary investors, owners, managers, and their staff. Training processes, licensure, and enforcement are behind the developmental curve. And the metric being used to determine "harm" for many services as complex civil litigation, and business advise, is not likely capable of accurately measuring results.

Conclusion

The access to justice gap is a problem of insufficient resources and information. A Sandbox that focuses on projects that have clear focus on underserved areas may prove to produce modest benefits to consumers who are in need of legal help but cannot obtain it at reasonable cost. But expecting for profit companies or innovative technology to solve the problem is unrealistic, as the experiment in the U.K seems to have demonstrated.

Many consumers have serious legal problems but no money to pay professionals. Simplifying the legal process for consumer claims, expanding small claims processes, and strengthening consumer rights laws would all help those in need of legal help to better access to justice. The Utah Supreme Court, the Bar, and the Utah Legislature should try harder to find common ground. I believe we all want to achieve a common goal – to make legal services more accessible without compromising quality or exposing consumers to harm.

Capitalism and free markets are important tools that can maximize efficiency and innovation in theoretically perfect economic systems. But caveat emptor and broad deregulation carries great risks in markets with asymmetric information access, like legal markets. The Bar and the court should be mindful of those risks.

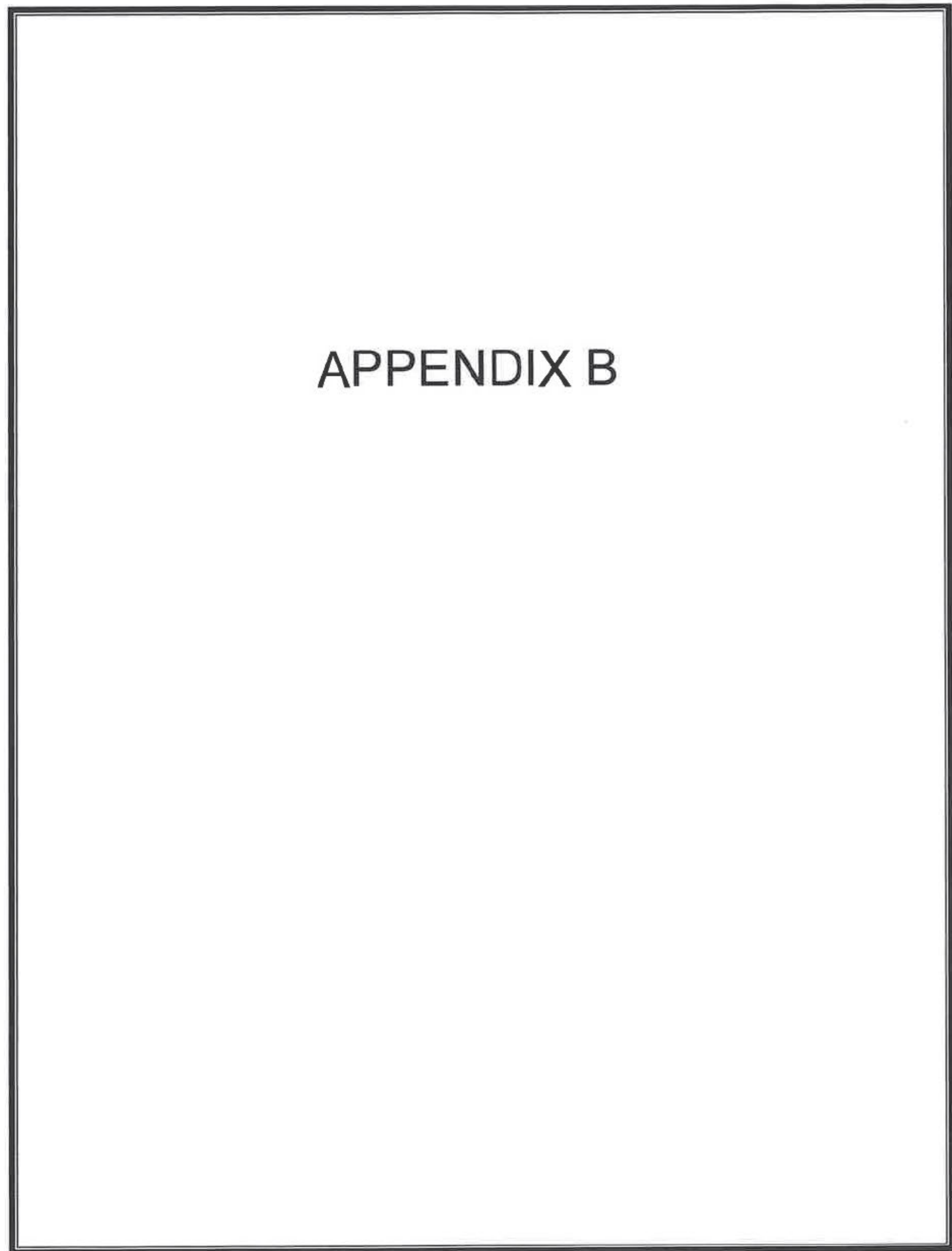
A Note on Transparency

In Order 15, the Court underscored the importance of transparency in creating effective regulatory reform for legal services. Transparency requires robust, inclusive communication and dissemination of complete information. OLSI and the court need much improvement in this domain.

I've reviewed publicly available communications from OLSI and the court. This documentation is so general in nature that an outside observed cannot possibly determine how OLSI is doing its work or how robustly. Nor can one tell what access to justice benefits each project is promising. No details are available describing what data is being reported by OLSI or what access to justice benefits projects are delivering. OLSI has not posted, nor shared the audits of any Sandbox entities. Nothing is available to inform us of what the court considers or discusses when evaluating applicants recommended by OLSI. Thus, we are left only clues about where regulatory reform was being practiced in its execution or how the project is evolving. Since OLSI's inception, the Bar and other organizations have submitted similar questions and concerns about the Sandbox, which largely remain unanswered.

In discussions with me, several leaders of the Sandbox entities have stated that the Bar acts as a "guild" to restrict fair competition for legal services. This furthers the impression that OLSI, the court, and the Sandbox proponents assume Bar and lawyer input is not valuable because lawyers in the Bar will reflexively oppose all efforts at reform out of perceived self-interest. In a democracy, inclusiveness and transparency are important to establish good social policy, then test and refine it as it is implemented it. The Sandbox is a major social policy experiment, and its proponents have ambition to change the model of how legal service are practiced in Utah and throughout America. Policy making requires vigorous, and open debate. The court's values this principle so highly that it publishes its opinions, including dissents. Buy-in from all stakeholders is required for social change and is best accomplished when all stakeholders have a voice. What could we accomplish if OLSI saw the bar as partners in innovation, rather than a hinderance to it.

In assessing the project, policy makers must account for the tendency of a program's advocates to interpret and report information consistent with their existing beliefs and goals while discounting what is contrary to them. Without more inclusion and transparency, and more voices, our court will not have the best tools at its disposal to "narrow the access to justice gap."



APPENDIX B

STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0115

California Legislature

December 7, 2021

Ruben Duran
Chair, Board of Trustees, State Bar of California
180 Howard St.
San Francisco, CA 94105
(by electronic mail)

Re: Legislative Concerns Regarding the Closing the Justice Gap Working Group

Dear Chair Duran:

We are writing to express concern with the California State Bar's Closing the Justice Gap Working Group (CTJG). As Chairs of the Assembly and Senate Judiciary Committees, we have repeatedly urged the State Bar to focus on its core mission of protecting the public by correcting the delays and defects in the attorney discipline system. That focus remains urgent and must be prioritized.

Unfortunately, it appears that the State Bar has chosen to divert its attention from its core mission of protecting the public and addressing the critical issues affecting the discipline system. Instead, the State Bar has used a substantial amount of its resources for the CTJG, as well as the Paraprofessional Program Working Group, apparently utilizing hundreds of hours of staff time and an unknown amount of other State Bar resources. This is very disconcerting given the recent State Auditor's report noting that the State Bar's backlog of discipline cases grew by 87 percent since December 2015 and that recent changes to the system have significantly reduced its efficiency.

The CTJG has been exploring a proposed regulatory sandbox and proposals that would recommend allowing a participant in the sandbox who is not a licensed attorney to be exempt from existing statutory laws regarding the practice of law and rules of professional conduct. Our Committees have prioritized protecting consumers from unscrupulous actors, including those seeking to do business in the legal field. Corporate ownership of law firms and splitting legal fees with non-lawyers has been banned by common law and statute due to grave concerns that it could undermine consumer protection by creating conflicts of interests that are difficult to overcome and fundamentally infringe on the basic and paramount obligations of attorneys to their clients.

Corporations are driven by profits and demands for returns to shareholders, and do not have the same ethical duties and are not subject to the same regulatory oversight as attorneys. The regulatory sandbox could become an open invitation for profit-driven corporations, hedge funds,

or others to offer legal services or directly practice law without appropriate legal training, regulatory oversight, protections inherent in the attorney-client relationship, or adequate discipline to the detriment of Californians in need of legal assistance. Any proposal that would materially change current consumer protections for clients receiving legal services and fundamentally alter the sacrosanct principles of the attorney-client relationship would be heavily scrutinized by our Committees.

We reiterate our call for the State Bar to redouble its efforts to focus on the core mission of policing attorney misconduct and supporting proven programs offering access to justice and legal services such as legal aid, court-sponsored self-help, and pro-bono assistance, as well as innovative approaches to increasing the number of attorneys who are licensed in California. These are tangible and existing problems that need your immediate and sustained attention, especially as our courts struggle to get through the COVID-19-induced backlog of cases.

Sincerely,

Assemblymember Mark Stone
CHAIR, Assembly Committee on Judiciary

Senator Tom Umberg
CHAIR, Senate Committee on Judiciary

Cc:
Leah Wilson, Executive Director, State Bar of California
Justice Alison M. Tucher, CTJG Chair
Merri Baldwin, CTJG Co-Chair
Rebecca Sandefur, CTJG Co-Chair

From:	[redacted]
To:	Entity Regulation Pilot
Subject:	[External]WSBA Pilot Test of Entity Regulation
Date:	Thursday, September 12, 2024 22:00:37

You don't often get email from [redacted] Learn why this is important

Executive Summary of Comment (Generated by Microsoft CoPilot)

Dave Daggett, a seasoned technology transactions attorney, discusses – solely in his personal capacity – the need for the legal profession to embrace technological advancements and alternative service models to improve client outcomes and maintain relevance.

- **Technological Evolution and Legal Practice**: Dave Daggett has extensive experience in technology transactions and emphasizes the importance of adapting to technological changes in the legal field.
- **Benefits of Embracing Change**: Embracing technological advancements can improve access to legal services, reduce costs, and enhance service delivery, aligning with the values reflected in the RPCs.
- **Duty to Safeguard the Profession**: The legal profession has a duty to protect clients and maintain integrity, but rules should not serve merely to protect traditional business models without client benefits.
- **Informed Consent**: Clients should be allowed to make informed decisions about their legal representation, even if those choices are unconventional or suboptimal from a lawyer's perspective.
- **Alternative Solutions**: Lawyers should consider alternative solutions that meet client needs efficiently, even if these solutions differ from traditional legal services.
- **Regulated Legal Services**: While the legal profession provides significant social utility, protectionism should be limited to ensure greater access to justice and legal services.
- **Future of Big Law**: Daggett foresees a reduction in the size of big law firms due to technological advancements, urging firms to evolve to stay profitable and relevant.

Full Comment

To Whom It May Concern: My name is Dave Daggett, and I've practiced in Washington State for 26 years, most of that in AmLaw firms as a technology transactions attorney. I have represented some of the world's largest technology companies, in some of their most significant transactions. Before law school and starting in the third grade, I was a software developer. I've watched technology evolve considerably over my life and throughout my practice. Perhaps not surprisingly, I have some strong feelings about these issues. I offer these comments purely in my personal capacity and not on behalf of my law firm or any of its clients.

First, and although we as attorneys may often resist change, anything that has the potential to (a) improve access to quality legal services (or an appropriate substitute), (b) make fees more reasonable, and (c) make service delivery more timely, is inherently good for clients and the profession. Indeed, the RPCs reflect these values. *See, e.g.*, Section [6] to the Preamble and Washington Comment [25] to the Preamble, RPC 1.3, and RPC 1.5. In addition, our duty of competence arguably requires us to embrace advances in technology. *See* Comment [8] to RPC 1.1.

Second, the profession has a clear duty – both to the Bar and to the public – to safeguard the profession for the benefit of the public. In that regard, rules and laws have evolved that proscribe the unauthorized practice of law and prohibit fee sharing with non-lawyers. These rules and laws are good for the profession and for clients when they prevent clients from being deceived or victimized and preserve the integrity and viability of the profession (assuming that a vibrant and well-educated Bar is an unambiguous good for a free society). On the other hand, these rules and laws are at their least compelling when they serve merely to protect the franchise and business models but provide no clear benefit to clients.

Third, our professional rules are animated with the concept of informed consent. Indeed, the word "consent" appears in the most recent Washington RPCs 168 times. At a high level, these all stand for the proposition that the scope and nature of the representation is up to the client, and the client is permitted to make decisions we may think imprudent (although we are still responsible for the work product, if we remain involved). Even where the client's choice is grossly inconsistent with our other duties (e.g., our duty of honesty to the tribunal), the ultimate remedy is not to prevent the client's free choice but rather to withdraw from representation. The client's choice is always paramount, even if we are not permitted to join the client on that chosen path.

Fourth, although clichés are seldom useful, there may be some simple wisdom and applicability in the following: (a) many roads lead to Rome, (b) don't throw the baby out with the bathwater, and (c) don't let perfect be the enemy of good.

Applying the above to the question before the Bar leads me to the following conclusions:

- Many roads lead to Rome.
  - We're in the business of solving problems where client needs intersect with our legal system. We're lawyers, and we're trained to respect precedent and identify and avoid risk. These traits tend to drive us to apply the same or a similar solution to a given problem that we've applied to all similar problems. The RPCs require more of us, however. If the client can achieve an acceptable solution, from the client's perspective, faster and at a lower cost than via a traditional legal service, that's a good outcome for the client. This is true even if the alternative solution is perceived by a lawyer to be suboptimal when compared to that traditional solution, so long as the client understands the difference and consents to the alternative.
  - At least for lawyers in private practice, we're also in a for-profit business. We must be profitable to survive. Although this is critical to maintaining the profession, the remedy – *at least where certain alternative solutions may be seen as preferable by a fully informed client* – is not protectionism to safeguard the franchise but rather for private practice lawyers to evolve our business model. We cannot solve our problems at the expense of the client, at least where

an alternative, more acceptable solution – ***from the client's perspective*** – would be available to the client but for that protectionism. To be clear, we may not be able to participate at all, if we fundamentally disagree with the client's choice. The challenge to the private practice lawyer – if we cannot convince certain clients to do things in our preferred mode – is to evolve the business model – to differentiate our product from alternatives, to establish our different value proposition, to drive down our production cost (in part through embracing new technologies), and to evolve our service delivery – to remain economically viable. It is also important to recognize that alternative, lower cost solutions and service delivery models, although they may theoretically displace some traditional legal services and traditional service providers, may not have a material effect on workflow, at least not from traditional clients. In other words, I am almost certainly not the alternative of someone thinking about buying "services" via LegalZoom.

  - The frequency of the concept of "consent" in the RPCs compels the conclusion that – at some level of disclosure to a reasonably sentient "client" – a disclosure becomes sufficiently clear, compelling, and conspicuous that a client accepting an alternative service subject to that disclosure has provided informed consent. The specific form and content of any such disclosure is beyond the scope of this comment, but it is reasonable to conclude that for any alternative service that potentially displaces a service that could otherwise be provided by a licensed practitioner, the disclosure should at least clarify that: (a) the alternative is not "legal services," (b) the alternative service provider is not a lawyer, (c) there is no attorney/client privilege with regard to the service, and (d) if the alternative service implicates any risk or value that materially exceeds the cost of the service – and that will almost always be true – the "client" would be a fool not to at leave have the output from the alternative service reviewed by (or by someone supervised by) a practicing lawyer.

- Don't throw the baby out with the bathwater.
  - The legal profession, in the form of traditional practitioners, has substantial social utility. It's a business, but it's regulated, in large part to protect both the profession and the public. Clearly, the profession should always be evolving and limit protectionism where doing so creates greater access to justice and access to legal services, particularly for "clients" who would not otherwise be consumers of traditional legal services (e.g., due to cost). Protecting the legal franchise becomes much more compelling, however, where: (a) implementing alternative service models merely shifts the service provider from licensed lawyers to unlicensed individuals (e.g., accountants or consultants) without any appreciable cost savings or other efficiencies to "clients," (b) the alternative service primarily displaces traditional services with no clearly articulable benefit to "clients", (c) an alternative service delivery model does not increase access to justice or access to legal services, or (d) there could be material harm to the "client" (e.g., a loss of privilege) beyond just the arguably lower quality service. In such a case,

the new service delivery method does not solve a problem – it just introduces new, unregulated competition with no appreciable benefit to anyone in the ecosystem, other than to the new service provider.

- In this regard, I have little sympathy for fee-sharing models that do not have a direct and material benefit to clients. Sharing in a way that permits offloading certain tasks that do not require legal skill or knowledge to non-traditional providers may be useful. Sharing in the pursuit of alternative marketing strategies or to "drive demand" for legal services is not particularly compelling. Clients are rarely well served by an attitude of "how can I put you into this legal work product today?"

- Don't let perfect be the enemy of good.
  - The Internet exists. It is not going away. There is already copious "bad" information related to every conceivable legal issue or problem available online. Somewhere between the nadir of this bad legal information and the zenith of legal services provided by an AmLaw 50 lawyer is "the art of the possible": a virtually unlimited number of possible services that – whether based on alternative legal service providers, artificial intelligence or other technologies, or any combination of these – would be better for, and more useful to, the service recipient than Google search self-help. If a service recipient is sufficiently well informed to understand what she's buying and what she's not, preventing her from buying it because it's perceived to be deficient when compared to a traditional legal service is simply paternalistic and protectionist. Moreover, it's inconsistent with the public policy that permeates the RPCs in favor of informed consent.
  - The universe of consumers of alternative legal services and alternative legal service providers likely has only a *de minimis* intersection with the universe of consumers of traditional legal services, at least today. Today, someone predisposed to spend $200 to buy a potentially imperfect contract draft online is likely not going to spend $15,000 to have me draft something bespoke merely because the $200 option is unavailable. If the Bar enthusiastically embraces a pilot of alternative services and alternative service providers, these alternatives will like improve in quality and capability over time, and – over time – that intersection may grow. That this may eventually take some business away from traditional practitioners is not, however, a reason to eschew the pilot. If there's a benefit to a possible change that resonates with the policies underlying the RPCs (e.g., it may increase throughput or decrease cost), and it's not merely change for change's sake, the profession has an ethical obligation to at least evaluate it.

In closing, and as someone whose spent most of his professional life in "big law," I wanted to make a comment that's somewhat against interest. I sat down for lunch eight or nine years ago with a very senior client lawyer at a very large technology company. Before going in-house, he had been managing partner at a large Seattle firm. We hadn't been sitting for more than 10 seconds when he blurted out "I don't see how 'big law' doesn't get a lot smaller in the future. What do you think." It

was a lengthy discussion, but I think he was right. This should not be seen as some sign of a dystopian future or the death of big law. We do, however – at least from the personal perspective of this attorney – need to change. As a tech attorney with lengthy experience in service, and with lots of real-world tech expertise, I can say with absolute confidence that AI is not going to take everyone's job. But, it will take jobs over time, primarily at the lower end, and that will require firms that want to stay vibrant and profitable to evolve. That doesn't mean the world is going to end for big firm lawyers, and it could mean – if we smartly embrace change – that we can make even more money than we did before. We must, however, evolve. Period. "*We must do [pick your favorite legal task] this way because that's how we did it when I was coming up as an associate*" is a recipe for economic disaster. The Bar directly embracing change will indirectly push firms to evolve, and this is good for all of us. Thank you for engaging in this effort.

Dave Daggett

From:	Alex Thomason
To:	Entity Regulation Pilot
Subject:	[External]Comments on Entity Regulation
Date:	Friday, September 13, 2024 10:47:37

You don't often get email from alex@valorlawgroup.com. Learn why this is important

To Whom It May Concern:

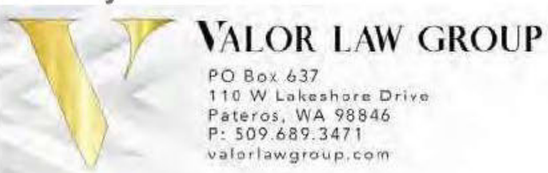
My firm is located in Okanogan County, Washington, a two-judge county. A large portion of my practice serves undocumented individuals, minorities, and people without significant financial resources. For example, the two nearest schools are 87% minority enrollment and 89% are economically disadvantaged (Brewster) 61% minority enrollment and 72% are economically disadvantaged (Pateros). Family law is challenging in this area because very few have the ability to pay for more than a single motion hearing.

With the advances in technology, I believe it would greatly serve these populations if a technology company were permitted to assist with AI generated content to facilitate *pro se* family law motions and petitions. A low cost, technology rich machine learning program would incorporate current, accepted legal standards and law, and allow disadvantaged individuals to fairly represent their own interests in efficiently presenting their case. A program that could assist in drafting a residential schedule, declarations, and a legal memorandum would level the playing field for those who cannot afford a lawyer.

Permitting the use of entity representation will not compete with current attorneys—these programs would be used by those who are outside of the system and go without counsel. Those with money would continue to hire lawyers as they have always done.

I strongly support to adoption of a Legal Regulatory Lab.

ALEX THOMASON
Attorney at Law



CONFIDENTIALITY: If you have received this email in error please reply to me and delete your copy immediately as this email may contain attorney-client privileged and/or confidential information which should not be reproduced or distributed in any way.

From:	Hanley, Elizabeth
To:	Entity Regulation Pilot; Sara Crumb; Daniel Goodman; Leah Snyder; Kelli Carson;
Subject:	[External]WSAJ Letter re Pilot Test Entity Regulation
Date:	Friday, September 13, 2024 16:33:49
Attachments:	WSAJ Letter to WSBA re Pilot Test Entity Regulation 2024.9.13.pdf

You don't often get email from hanley@sgb-law.com. Learn why this is important

Good afternoon,

I am writing in my capacity as President of the Washington State Association of Justice to provide information to the WSBA on WSAJ's concerns relating to the Pilot Test Entity Regulation. WSAJ expects to provide WSBA with more detailed information about the concerns outlined in this letter during the upcoming comment period.

Sincerely,

Elizabeth A. Hanley
Attorney
Schroeter Goldmark & Bender
401 Union Street, Suite 3400
Seattle, WA 98101
206-622-8000
206-682-2305 (fax)
email | web | en español

CONFIDENTIALITY NOTICE: This e-mail may contain confidential and privileged information. If you have received this e-mail by mistake, please delete it without distributing it to anyone else, and notify me immediately via e-mail or telephone at 206-622-8000. Thank you.

September 13, 2024

Washington State Bar Association
1325 Fourth Ave., Suite 600
Seattle, WA 98101-2539
entityregulationpilot@wsba.org

Re: Pilot Test Entity Regulation

To the Washington State Bar Association:

The Washington State Association for Justice ("WSAJ") has over 2,100 attorney members who represent thousands of individuals in civil matters across the state. WSAJ respectfully submits the following overview of its concerns regarding the Washington State Bar Association's ("WSBA") proposed Pilot Test Entity Regulation ("the program"):

1. Access to Justice: WSAJ supports efforts to expand access to justice across Washington state. However, the Pilot Test Entity Regulation is unlikely to result in greater access to justice for Washingtonians. WSAJ evaluated outcomes from jurisdictions which have already implemented the type of sandbox programs contemplated here. Those jurisdictions have not seen significant enough increases in access to justice or affordable legal services which outweigh the risks to consumers of legal services with sandbox programs.
2. Limited Oversight: The program would substantially change the existing framework for oversight of client services. Despite this, the existing POLB Blueprint allows for an insufficient number of oversight hours.
3. Data Collection: One of the criteria for determining the effectiveness of the Pilot would be the successful outcome of legal work across many different practice areas. The data provided by the regulated entities under this Pilot will be insufficient to determine the extent of consumer harm or provide a logical framework for evaluating the success or failure of the program.
4. Advertising and Referral Fees: Unmerited referral or other fees may be tacked on or become the cost of doing business for the entities created under the contemplated program. The current proposal lacks explicit enough rules to exclude advertising agencies and referral fee generation companies from taking advantage of the proposed program to the detriment of consumers of legal services.
5. Contractual Agreements/Terms of Service: Many of the responsibilities to clients and limits on attorney action are waivable rights or privileges of clients. It has been well-established that corporations operating in the consumer space often include onerous, extreme, and one-sided contractual terms or waiver of rights in these terms. WSAJ opposes any efforts to inject these into legal services.

WSAJ looks forward to the opportunity to submit a formal comment during the rule period.

Sincerely,

Elizabeth A. Hanley, WSAJ President

From: Dave Church
To: Entity Regulation Pilot
Subject: [External]this is a bad idea
Date: Monday, September 16, 2024 15:40:21
Attachments: Outlook-u1fy331e.png

You don't often get email from dave@churchandpage.com. Learn why this is important

To Whom It May Concern:

I just received my copy of the Bar News today. In the editor's note and on the opposite page, I found a little blurb about this topic. I got on the bar's website and was shocked to find a notice stating that you wanted to hear from the bar association members during the Sept 6-7 Board of Governors meeting or that we could submit comments by September 13, 2024. Essentially, you have eliminated all opportunity for meaningful comment by getting this information out after your own deadlines. I hope that since my comments are apparently only one day late, you will still consider them.

I believe that the bar association is heading in the wrong direction as it relates to the regulation of the practice of law in the State of Washington. In the not too distant past, the rules for reciprocity and admission of out of state attorneys were relaxed. While this may have been a noble idea in theory, in practice it has been quite detrimental to those needing quality legal services in our state. The result has been that out of state attorneys have flooded into Washington through disingenuous means. I would have no problem with an attorney moving here, opening a legitimate office, and competing. But this is not what they do. Instead, they advertise as if they are here. They mislead potential clients into believing that they have a local attorney, but they never even set foot in Washington. When push comes to shove and the out of state marketing firm isn't able to resolve their client's case, they have no choice but to bow out. These types of firms have no intention to ever file a lawsuit in Washington State. They are simply looking for the low hanging fruit that will pay them a quick and easy fee. This leaves the client in a worse position than they were at the beginning. Local attorneys then have to try to clean up the messes these marketing mills pretending to be law firms have created. I have seen this scenario play out over and over again. The result is a huge black eye for the legal profession in Washington.

Allowing entities to practice law is an even worse idea. At least if an out of state attorney runs screws up bad enough, presumably the WSBA will take actions to suspend their license. This isn't really feasible with an entity. Sure, you could revoke the entity's ability to practice, but the individuals who make the money at that entity will simply create another entity and start right off where their previous, failed entity left off. The cycle will just repeat, and the quality of legal representation will continue to decline. When you invite charlatins in, you shouldn't be surprised when they misbehave.

The quest to be so advanced thinking fails to consider the real-world consequences of such actions. The bar association should be focusing on the current members of the bar and those we serve on a daily basis. We need rules and proposals that protect the current bar membership and the citizens of Washington. We don't need rules and proposals that sacrifice quality legal representation for Washingtonians in favor of faceless corporations. The citizens of Washington and the current bar membership deserve better!

Your materials state that you are considering this pilot because "Online companies and innovative business models are already delivering legal services to the public and their prevalence and sophistication will only expand in coming years." If this is the case, then you have admitted that the unlicensed practice of law is occurring. Your choice to describe this as an innovative business model is troubling. It doesn't take much innovation or sophistication to break the rules. That should not be something that the leadership of our bar association condones. Rather than focusing any resources on helping these cheaters succeed, you should be focusing your efforts on forcing them to stop cheating! I can't understand why the bar association would ever consider adopting a policy of if you can't beat them join them. Yet, that appears to be exactly what you are doing. Please don't go down this road.

Thanks,
Dave Church
Attorney at Law

Kennewick Office: 30 S. Louisiana St., Suite 225, Kennewick, WA 99336
Wenatchee Office: 200 Palouse St., Suite 103, Wenatchee, WA 98801
***Yakima Office:** 414 N 2nd Street, Yakima, WA 98901
****Please send all physical mail to Yakima Office***

Office: (509) 638-1414
Fax: (509) 361-6201

Please note that this email and any attachments are intended only for the above named addressee(s) and may contain privileged and/or confidential information. If you are not the intended recipient, you are hereby notified that any use of, disclosure, copying, distribution, or reliance on the contents of this email is strictly prohibited and may result in legal action against you. If you received this message in error, please reply to the sender advising of the error and immediately delete the message and any attachments. Thank you.

From:	Inez "Ine" Petersen
To:	Public Service; Entity Regulation Pilot
Subject:	[External]Comments on making pro bono mandatory and entity registration
Date:	Wednesday, September 18, 2024 11:13:56

Some people who received this message don't often get email from [redacted] Learn why this is important

I see this as another empire building move to expand the scope and staff of the WSBA. It is enough that we voluntarily give the WSBA the pro bono information. I see making it mandatory as a stepping stone to making us volunteer pro bono to solve the public defender shortage.

Regarding expanding WSBA membership ito businesses, this is another empire building move with the added benefit of increasing income to be spent on the WSBA's ever expanding budget.

I can't help looking at these ideas with a jaundiced eye.

Inez Petersen
WSBA #46213