



**ILLINOIS STATE
BAR ASSOCIATION**

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August 20, 2020

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Nijman Franzetti, LLP
10 S. LaSalle St., Suite 3600
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Hon. Mary Anne Mason (Ret.)
JAMS
71 S. Wacker Dr., Suite 2400
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Re: Illinois State Bar Association Comments
CBA/CBF Task Force on the Sustainable Practice of Law & Innovation

Dear Co-Chairs Grayson and Mason:

On behalf of the 35,000 member Illinois State Bar Association, I am pleased to provide comments to the recently published CBA/CBF Task Force on the Sustainable Practice of Law & Innovation Report (the "Report") and to thank you for this opportunity.

The ISBA appreciates the well-intended work of the Task Force that produced the Report. For many years, the ISBA has actively monitored, and when considered appropriate taken a leadership role in the national debate within the organized bar on "re-regulating" the legal profession. The ISBA understands that these issues are important but also recognizes that they are complex and not susceptible to easy solutions. The ISBA shares the Task Force's goals of working toward a more sustainable legal profession, a better and more accessible justice system, and improved system of access to legal help for low- and moderate-income consumers and small businesses – the express focus of the Report. However, the ISBA does not support the overwhelming majority of the recommendations set forth in the Report. The ISBA considers the recommendations to be flawed in many respects and, if adopted, will be ultimately harmful to the public and the profession.

I. General Comments

A. Absence of Data Supporting the Recommendations

The Report's premise to solving the identified problem of low- and middle-income consumers and small businesses accessing legal services is based on lowering the cost of those services. It is contended that lower cost can be achieved by many forms whether it is "one-to-many" technology platforms, "licensed paralegals" providing legal advice and services, or simply redefining the practice of law to exclude certain legal services such that they can be offered by nonlawyers. However, the Report provides no data that demonstrates in any way lowering the cost of legal services through these, or any other means, results in an improvement in access to justice by low- and middle-income consumers and small businesses. Conversely, recent studies tend to indicate that positive impacts on improving access to justice by these types of reforms are elusive.

As an example, the State of Washington in June 2020 ended its "Limited License Legal Technology Program" based on overall cost and the small number of participants. That program's impact on access to justice had been earlier identified as providing no improvement in access to justice. Donaldson, *Law by Non-Lawyers: The Limit to Limited License Legal Technicians Increasing Access to Justice*, 42 Seattle University Law Review 1 (2018).

Other US jurisdictions have had similar reforms in place for many years without any demonstrable improvements in low- and moderate-income individual or small business access to justice. Arizona has had "Certified Legal Document Preparers" since 2003, but no data is available that shows it has had any positive impact on access to justice (and given Arizona's current efforts to re-regulate the legal marketplace it would appear that certified legal document preparers have not had a measurable beneficial impact). Also, Washington D.C. has allowed nonlawyer participation in the ownership of law firms for many years, and yet no data is available that demonstrates low or moderate income consumers or small businesses in DC have had greater access to legal services or are using legal services at an increased rate.

Studies that rely on data from the UK where nontraditional forms of legal practice were introduced in 2007 also point toward a lack of any improvement in access to justice or a reduction in self-represented litigants. Robinson, *When Lawyers Don't Get All the Profits*, 29 Geo. J. Legal Ethics 1 (2016). Additionally, the UK Legal Services Board has reported that: "Research evidence suggests more people are handling legal issues alone and fewer are obtaining professional advice; however, the proportion of those who do nothing when faced with a legal issue appears unchanged." *Evaluation: Changes in the legal services market 2006/07 – 2014/15 – Summary*, LSB, July 2016.

Similarly, the ABA's Center for Innovation as recently as February 2020, has commented "there is not yet sufficient evidence to endorse any particular [Legal Services Provider]" and that ""it is also clear that there is not yet enough data to know what 'model' approach

to this subject [regulatory reform] should be or what effect ABS will have on addressing the access to justice crisis.” ABA Center for Innovation, et al., Report to the House of Delegates (February 2020).

In addition, cost alone may not be the determinative factor in consumers employing lawyers or seeking out legal services (both expressed goals of the Report). As such, recommendations that are focused solely on lowering the cost of legal services may likely have no measurable positive effect on increased use of legal services. Reluctance to use legal services is more closely linked to consumer attitudes about the legal system. As noted above, the UK reports an increase in consumers handling legal problems on their own. The reasons vary but include consumer perceptions that the legal matter is straightforward, that lawyers are not required, that there is nothing that can be done to help, or that self-help technology is adequate to resolve the issue. These trends are also seen in the US as demonstrated by the growing number of self-represented litigants. In addition, the 2018 Clio “Legal Trends Report” indicates that 26% of consumers prefer to handle legal matters on their own. An earlier study from the American Bar Foundation also reported that 46% of people faced with a civil justice problem handled it on their own. “*Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*,” Rebecca Sandefur, ABF (August 2014). This growing number of consumers who “do it on their own” will not see any benefit from, nor likely embrace the services of, the Report’s recommendations.

The conspicuous absence of any meaningful data or support for the recommendations strongly suggest such fundamental and sweeping changes to the legal services marketplace are premature and unwarranted.

B. Lack of Meaningful Detail and Overbroad Recommendations

The Report lacks important detail on many of its recommendations. During the discussions by ISBA groups and the Board of Governors, many comments focused on a lack of detail with respect to the specific recommendations. Even with respect to those recommendations that the ISBA could potentially support in concept, the absence of detail and comprehensive discussion presented problems in assessing the merit of the proposals.

C. Public Harm

The impact on the public is critically important in any discussion of legal marketplace reform. In addition to the data referenced above that tends to demonstrate that the public may not seek out new forms of legal services made available by the recommended reforms, serious questions remain about the ability of these new nonlawyer entities to deliver competent and useful legal services to low and moderate consumers and small businesses. The “one-to-many” technology models envisioned by the recommendations will certainly not provide the quality of services associated with individualized lawyer advice. Whether the “just good enough” model of legal services is appropriate is an open question. Just as predatory lenders are not a substitute for funding legal aid for low-

income individuals, legal advice generated by a chatbot created in a joint venture between an attorney and a tech company does not give middle-class families and small businesses access to justice. Finally, it is also important to recognize that the exclusion of lawyers from the delivery of legal services also eliminates all the client protections lawyers are compelled – for good reason - to provide clients as required by the Rules of Professional Conduct.

D. Professional Harm

The recommendations intended to increase competition with lawyers (and presumably lower cost) presents problems for an association that represents lawyers. Particularly solo and small firm lawyers. Nevertheless, we are not myopic on this point. We understand that lawyers have a higher calling and professional obligation to clients and the public rather than to their own pecuniary gain or self-interest. The ISBA understands that in some practice areas and situations, lawyers may not be negatively impacted by nonlawyer competition or technology derived one-to-many legal solutions. In fact, there are many examples of lawyer support for legal services that might be considered to be against their self-interest. However, the breadth and generality of the Report does not allow the ISBA to make the necessary analysis to reach those conclusions about the recommended regulatory reform or identify where such reforms may be appropriate. In the end, the ISBA has a responsibility to defend, the role of a strong, vibrant, and independent legal profession. When the provision of legal services becomes solely a matter of “who can provide legal services at the lowest cost,” the ability of the profession to attract the best and brightest will be adversely affected. That in turn will have long term impacts not only on the profession but potentially on the law’s development, the respect for the law, the preservation of legal rights, the availability of truly independent advice to those in need, and the legal profession as a model of civility and justice.

E. Recommendation Omissions

The focus of the Report recommendations and the responsibility for solving the identified issues associated with low- and moderate-income consumers are almost exclusively addressed to lawyers and the means by which lawyers provide legal services to consumers. However, the Report also raises serious concerns about an “antiquated” court system. Nevertheless, the Report is silent on many reforms other jurisdictions are employing to make their court systems more consumer friendly and navigable. Often these reforms are targeted in specific areas and make use of new and innovative technologies. The ISBA believes these areas should be explored in a much more depth and detail as they may go a long way in furthering the goals of the Report.

II. **Specific CBA/CBF Recommendations**

Notwithstanding the very brief 30-day time period allowed to submit comments on the Report and its recommendations, the ISBA promptly sought input from more than 25 of its substantive member groups in order to get the perspective of its membership and the practicing bar. In view of the significance of the Report recommendations, those groups met on short notice and

devoted the time and energy to provide meaningful comments to ISBA leadership. In turn, the Board of Governor met on two separate occasions and fully considered the group comments. The comments, and Board discussion, reflected a clear and unique unanimity of opinion on many of the Report recommendations. The ISBA is pleased to provide its comments on the specific Report recommendations noted below (using the same numbering system as in the Report).

Recommendation #1: “Recognize a New Intermediary Entity Model to Help Connect Lawyers to Legal Consumers.” The ISBA supports the concept of regulating “matching services.” However, the ISBA does not support the CBA/CBF recommendation. In contrast, the ISBA in concept is supportive of the more comprehensive regulatory proposal of the ARDC with respect to Intermediary Connecting Services and continues to work with the ARDC on an acceptable regulatory program.

Recommendation #2A: “Modernize the Rules So that Lawyers Can More Actively Participate in the Development and Delivery of Technology-Based Products and Services.” This recommendation envisions nonlawyer ownership of legal practices and the delivery of legal services to the public by nonlawyers. For the reasons stated above in Section I, the ISBA does not support this recommendation.

Recommendation #2B: “Explicitly Authorize the Delivery of Technology-Based Legal Products and Services by Individuals or Entities and Appoint a Board to Develop an Appropriate Regulatory Mechanism Responsible for Registering and Vetting Approved Legal Technology Providers.” For the reasons stated above in section I, the ISBA does not support this recommendation.

Recommendation #3A: “Streamline Rules to Expand the Use of Limited Scope Court Appearances.” The ISBA supports this concept. As you may know, on February 4, 2020 the ISBA submitted a similar proposal to the Court to amend S. Ct. Rule 13 to make withdrawal from a limited scope representation automatic upon completion of the representation. The proposal is still pending with the Court. The ISBA would be happy to work with the CBA/CBF to accomplish this recommendation.

Recommendation #3B: “Enhance Educational Programming for Law Students, Attorneys, Judges, and Court Staff.” The ISBA supports this concept.

Recommendation #3C: “Expand and Improve Data Collection on Limited Scope Representation.” The ISBA supports this concept. The collection of detailed data on this, and other types of court appearances and representations, such as self-represented litigants, would be very helpful in analyzing the need for potentially more precise regulatory reforms.

Recommendation #3D: “Consider Expansion of Limited Scope Representation in Federal Court.” The ISBA supports this concept but notes it typically does not routinely pursue rule changes in the federal courts.

Recommendation #4: “Develop New/Amended Rules on Alternative Fees and Fee Petitions.” The ISBA takes no position on this recommendation at this time. While the use of alternative fee arrangements has demonstrated benefits for both lawyers and consumers, and should be given

effect by the courts, particular fee arrangements should not be expressly preferred over others in the IRPC Comments. In addition, the impact of this recommendation on existing attorney fee law is unknown.

Recommendation #5: “Recognize a New Licensed Paralegal Model So that Lawyers Can Offer More Efficient and Affordable Services in High Volume Areas of Need.” The ISBA does not support this recommendation. The ISBA recognizes the Report’s acknowledgment that “there is scant data to support the proposition that the creation of new independent categories of providers in some jurisdictions have had a meaningful impact on access to justice.” However, the recommendation itself, focused on supervised providers within a law practice, provides insufficient detail for it to be fully assessed. Based on the information provided, important details about a number of features of the recommendation are absent including supervisory requirements, applicable areas of practice, the scope of available services, the impact on lowering cost of legal services, and the likely negative impact on new lawyers. We believe there is serious doubt as to the practicality and efficacy of the proposal as drafted.

Recommendation #6: “Streamline and Modernize the Rules Around Lawyer Advertising.” The ISBA does not support this recommendation. The ISBA finds the Report’s commentary that the IRPC advertising rules are “confusing, unnecessary, duplicative, overly prescriptive,” and have a “chilling effect” on lawyers making their services known entirely conclusory and without support. In addition, to the extent there is any impediment in the ability of consumers to find lawyers because of a defect in the current advertising rules it is likely de minimis. According to the 2019 Clio Trends Report, 59% of consumers find lawyers through referrals from family or friends, 35% use a lawyers website or an online search engine, and only approximately 6% rely on advertisements.

Recommendation #7: “Recognize a New Community Justice Navigator Model to Build Off the Success of Illinois JusticeCorps in the Courts.” The ISBA does not support this recommendation. Like the proposal with respect to licensed paralegals, too many questions about a number of aspects of the recommendation remain including training requirements, the nature of sponsoring organizations, liability, and avoiding the unauthorized practice of law. Several ISBA groups specifically wanted a description of the perceived successes of the JusticeCorps, and noted that if it was successful, a new “navigator” program could possibly be incorporated into the existing program.

Recommendation #8: “Create a Hub Where the Public Can Find Court Approved Sources for Information and Assistance.” The ISBA does not support this recommendation. The recommendation provides insufficient detail to be fully assessed. Of particular concern are proposal features that would “vet” and “approve” information included on such an information Hub. In addition, there appears to be no recognition of the vast amount of legal information already online and available in the legal marketplace.

Recommendation #9: “Adopt a Clearer Practice of Law Definition with a Recognized Safe Harbor.” The ISBA does not support this recommendation. Determining what constitutes the practice of law is a matter of public protection and ensuring the integrity of the legal system. *E.g. Downtown Disposal Services v. Chicago*, 2012 IL 112040. The Illinois Supreme Court has also repeatedly held

that there is no mechanistic formula to define what is and what is not the practice of law. *Id.* The flexibility of this “case by case” approach is sound and necessary in order to address changes in the law and individual factual situations. Development of a static definition of the practice of law would likely only be a vehicle for nonlawyer special interests to obtain authorization to provide their particular version of legal services without regulation. The well-established purposes behind the law surrounding the unauthorized practice of law would be undermined. In addition, crafting a static definition of the practice of law that is meaningful is likely a very complicated task, and as the Report itself discusses, efforts by other organizations to do so (the ABA) have failed in the past.

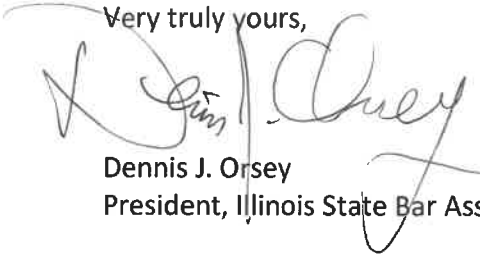
Recommendation #10A: “Undertake a Broader Plain Language Review of the Rules to Modernize Them With the Lightest Hand of Regulation Needed to Achieve the Court’s Regulatory Objectives.” The ISBA does not support this recommendation. The recommendation provides insufficient detail for it to be fully assessed, especially the meaning of phrase “the lightest hand of regulation needed.” In addition, there is value to the legal profession in ensuring consistency with the ABA Model Rules of Professional Conduct wherever possible and that deviations from the ABA Model Rules, as perhaps contemplated in the recommendation, should be undertaken only with the substantial and well-reasoned justification.

Recommendation #10B: “LTF and ARDC Should Work Together to Amend Rule 1.15 to Accommodate the Court’s Plain Language Initiatives.” The ISBA takes no position on this recommendation. However, some ISBA groups provided commentary that the current IRPC 1.15 is not a model of clarity.

Recommendation #11: “Convene a New Committee to Explore the Potential Benefits and Harm Associated with Eliminating the 5.4 Prohibition on Ownership of Law Firms by People Who are Not Lawyers.” The ISBA does not support this recommendation. As you may know, the ISBA strongly believes that IRPC 5.4 represents and protects certain core values of the profession, among others preserving the independence of a lawyer’s judgment on behalf of clients. This has been a longstanding position of the ISBA clearly supported by the vast majority of members of the profession across the country as evidenced by the significant resistance the ABA’s Center for Innovation experienced at the ABA’s 2020 Midyear meeting in Austin when the subject of revisions to Rule 5.4 was considered. Of course, the ISBA is not blind to the ongoing debate surrounding Rule 5.4 and the calls for change, often made or supported by those who would stand to gain by the elimination of Rule 5.4. Nevertheless, in the absence of any process by which the outcome is not prejudiced or pre-ordained, any formalized discussions on this subject remain problematic.

The ISBA again thanks the CBA/CBF for the opportunity to provide comments on the Report. There is no question that the Report recommendations envision sweeping and fundamental change to the legal marketplace in Illinois, which may significantly affect the ISBA membership but also the administration of justice in Illinois. The ISBA looks forward to continued opportunities to comment on and discuss them as may be appropriate.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Dennis J. Orsey". The signature is written in dark ink and is positioned above the printed name and title.

Dennis J. Orsey
President, Illinois State Bar Association

cc: Rob Glaves (CBF)
Jessica Bednarz (CBF)
Hon. Robert Anderson (Ret.)
James M. Lestikow