

**IN THE SUPREME COURT
STATE OF FLORIDA**

THE FLORIDA BAR,

CASE NO. SC18-149

Petitioner,

v.

Florida Bar File Nos.
20174035(11B) and
20174045(11B)

TIKD SERVICES LLC,
A Foreign Limited Liability Company,

and

CHRISTOPHER RILEY,
individually and as Founder of
TIKD SERVICES LLC,

Respondents.

_____ /

RESPONDENTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Respondents, TIKD Services LLC (“TIKD”) and Christopher Riley, pursuant to Florida Rules of Appellate Procedure 9.225 and 9.900(j), hereby submit as supplemental authority the following filings, copies of which are attached to this notice:

- (1) Petition to Amend the Rules Regulating the Florida Bar, Case No. SC19-2077 (“New Rule Petition”) (filed Dec. 12, 2019) (**Exhibit 1**);
- (2) Appendix A to the New Rule Petition (filed Dec. 12, 2019) (**Exhibit 2**);
- (3) the Florida Bar’s Motion for Leave to Respond and Response to Comments regarding the New Rule Petition (filed Feb. 10, 2020) (**Exhibit 3**); and

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(4) American Bar Association, Report to the House of Delegates by the Center for Innovation, Standing Committee on the Delivery of Legal Services, Standing Committee on Ethics and Professional Responsibility, Standing Committee on Professional Regulation, Standing Committee on Public Protection in the Provision of Legal Services (Feb. 2020) (**Exhibit 4**).

The supplemental authority is pertinent to the issue in the Florida Bar's Objection discussing whether Respondents' conduct constitutes the unlicensed practice of law, whether Respondents' conduct is authorized, and whether an injunction is necessary to protect the public and discussed on pages 8 through 11 and 27 through 32 of the Objection.

Respectfully submitted,

By: /s/ Christopher M. Kise

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TIKD SERVICES LLC AND
CHRISTOPHER RILEY**

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing was served by electronic mail on February 24, 2020 on all recipients listed below:

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Exhibit 1

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE RULES CASE NO. SC19-
REGULATING THE FLORIDA BAR –
CHAPTER 23 REGISTERED ONLINE
SERVICE PROVIDER PROGRAM

PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR

The Florida Bar (the bar) petitions this Court for an order amending the Rules Regulating the Florida Bar and states:

Jurisdictional Statement

This petition has been authorized by the Board of Governors of The Florida Bar (Board of Governors) under R. Reg. Fla. Bar 1-12.1.

Amendments

The bar proposes a new chapter of the Rules Regulating The Florida Bar to approve a voluntary registration program for online legal service providers. Online legal service providers have been operating for many years. As technology improves and advances, so do the services offered by the online providers. What started out as a disk or CD with fill in the blank legal forms, has now evolved into interactive software assisting consumers. For the most part, the online service providers are not regulated which means the public is not protected. Several jurisdictions have addressed the issue of online legal service providers from the standpoint of the unlicensed practice of law. The approach of chapter 23 is a bit different. For additional information on approaches taken by other jurisdictions, see August 16, 2019 memo to Board of Governors in Appendix D.

In Florida, nonlawyer preparation of legal forms has not constituted the unlicensed practice of law since 1978 when the Supreme Court authorized nonlawyers to sell legal forms and complete them with information provided in writing by the customer. *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla.

1978). Later, the rules were amended to allow a nonlawyer to engage in limited oral communication when assisting a customer in the completion of a Supreme Court Approved form. *The Florida Bar re Amendment to Rules Regulating The Florida Bar (Chapter 10)*, 510 So. 2d 596 (Fla. 1987). As technology changed, this Court's rules and holdings were applied to the different media. Therefore, in Florida it is not the unlicensed practice of law for a website to provide legal forms that are completed with answers to questions generated by the program.

Because it does not constitute the unlicensed practice of law for an online service provider to provide forms completed with interactive software, chapter 23 focuses on how the services can increase access while at the same time protecting the consumer. Chapter 23 creates a new program that allows online service providers to voluntarily register with The Florida Bar. The chapter provides requirements for online service providers to voluntarily register, permissible and prohibited communications, required disclosures to consumers, permitted and prohibited charges, and how registration is granted and revoked. Chapter 23 defines an online service provider as an internet-based business that provides or offers to provide legal services to the public. The legal services are limited to 1) providing legal forms the consumer can complete without the assistance of a lawyer, 2) providing legal forms with the availability of a lawyer to answer the consumer's questions, and 3) referring the customer to a lawyer. Online service providers who register under the rule must certify, among other things, that the online service provider will not interfere with the lawyer's independent professional judgment, which generally is the stated rationale for prohibiting division of fees with nonlawyers. Registered online service providers may advertise that they are registered with The Florida Bar and may use an approved logo.

By offering voluntary registration and its related requirements, The Florida Bar can exercise some oversight of services that are now largely unregulated.

CHAPTER 23 REGISTERED ONLINE SERVICE PROVIDER PROGRAM

SUBCHAPTERS 23-1 THROUGH 23-8

Explanation: Creates a new chapter of the Rules Regulating The Florida Bar that provides requirements for online service providers to voluntarily register with The Florida Bar, permissible and prohibited communications, required disclosures to consumers, charges, and how registration is granted and revoked.

Reasons: Provides voluntary registration and related requirements for online service providers to protect the public in the provision of legal forms and other limited services in an otherwise unregulated service.

Source: Special Committee on Technologies Affecting the Practice of Law

Background Information – Member Commentary / Committee Action:

- Special Committee on Technologies Affecting the Practice of Law approved 7-0 on February 7, 2019.
- Board of Governor's first reading on May 24, 2019.
- The bar's chief financial officer has determined that this new chapter could result in a significant fiscal impact.
- The Budget Committee approved 10-0 on July 18, 2019.
- Rules Committee approved 8-0 on a procedural basis on July 8, 2019.
- Program Evaluation Committee approved 16-0 on a strategic basis on July 18, 2019.

Board Action: Board of Governors approved on voice vote without objection on September 20, 2019.

Official Notice of Amendments

Pursuant to R. Regulating Fla. Bar 1-12.1(g), formal notice of intent to file all the proposals in this petition was published in the November 1, 2019 issue of the bar *News*. A copy of that published notice from the Internet version of that *News* issue is included with this petition, in Appendix C. This notice was published in the online version of the bar *News* on October 17, 2019, and can be found at:

<https://www.floridabar.org/the-florida-bar-news/proposal-to-amend-the-rules-regulating-the-florida-bar/>

No Discrepancy with Thomson Reuters' Florida Rules of Court

During the preparation of this petition, the bar noted no discrepancies between the Rules Regulating the Florida Bar as maintained by the bar and the

Rules Regulating The Florida Bar as published in Thomson Reuters' *Florida Rules of Court*.

Other Pending Amendments

There are 3 pending petitions to amend Rules Regulating The Florida Bar pending before this Court:

In re: Amendments to Rule Regulating The Florida Bar - 1-3.2, Case No. SC19-1335;

In re: Amendments to Rule Regulating The Florida Bar - Rule 3-6.1, Case Number SC19-1688; and

In re: Amendments to Rule Regulating The Florida Bar 21-4.1, Case No. SC19-1861.

The proposed amendments within this filing are unrelated to the petitions above and may be considered independent of them.

Contents of Appendices

The complete text of all proposals is included in Appendix A to this petition, in legislative format (i.e., deleted language struck through, shown first, followed by new language underlined).

A separate two-column presentation follows in Appendix B, which includes extracted text of affected rules with proposed amendments in legislative format and an abbreviated recitation of the reasons for the changes.

The notice of intent to file this petition is provided in Appendix C.

A memo outlining regulatory activity regarding online service providers in other jurisdictions is in Appendix D.

Comments in Response to Amendments

No comments were received by the bar in response to these amendments.

Oral Argument Requested

The bar seeks oral argument regarding these amendments.

Effective Date Request

As to all amendments sought in this filing, the bar requests that any changes be made effective no sooner than 60 days from the date of this Court's order so that the bar can educate its members regarding any amendments.

The bar requests that this Court enter an order amending the Rules Regulating the Florida Bar as requested in this petition.

Respectfully submitted,

/s/ Joshua E. Doyle

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CERTIFICATE OF TYPE SIZE AND STYLE

I certify that this petition is typed in 14 point Times New Roman Regular type.

/s/ Joshua E. Doyle

Joshua E. Doyle
Executive Director
Florida Bar Number 25902

CERTIFICATE OF READ-AGAINST

I certify that the Rules Regulating the Florida Bar set forth within this petition have been read against the most recent copy of *Thomson Reuter's Florida Rules of Court*.

/s/ Joshua E. Doyle

Joshua E. Doyle
Executive Director
Florida Bar Number 25902

Exhibit 2

APPENDIX A

PROPOSED AMENDMENT IN LEGISLATIVE FORMAT

December 12, 2019

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RULES REGULATING THE FLORIDA BAR
CHAPTER 23 REGISTERED ONLINE SERVICE PROVIDER
PROGRAM
23-1 PURPOSE

Every resident of Florida should have access to the legal system. A person's access to the legal system is enhanced by the assistance of a qualified lawyer. Floridians often encounter difficulty identifying and locating lawyers who are willing and qualified to consult with them about their legal needs. Qualifying providers meet certain of these needs under rule 4-7.22 and chapter 8 of these rules governing nonprofit lawyer referral services. Notwithstanding those services, a significant gap remains in the access to the justice system for the residents of Florida.

The purpose of this chapter is to allow the voluntary registration of online service providers to provide greater access to legal services and the legal system and greater protection of the public.

This chapter sets forth the registration requirements for an online service provider to qualify for the safe harbor under this chapter. Registration is voluntary. Nothing contained in this chapter may be used in an unlicensed practice of law proceeding under these rules or may be construed to permit any activity that is otherwise prohibited as the unlicensed practice of law, as that is determined by the Florida Supreme Court.

Comment

The chapter is intended to provide greater access to legal services, the legal system, and members of The Florida Bar while at the same time providing public protection which is lacking. These goals are achieved by creating voluntary registration for online companies that are providing or offering to provide legal services to the citizens of Florida. The chapter is not intended to establish regulation of the online service providers that are not registered under this chapter. Online service providers that voluntarily register under this chapter agree to be regulated by The Florida Bar and the Supreme Court of Florida. Online services providers that voluntarily register under this chapter also receive benefits that are not available to online service providers that do not register. This chapter

recognizes that some online service providers that do not voluntarily register will be subject to other rules contained in the Rules Regulating The Florida Bar. Nothing in this chapter is intended to replace or supersede those rules. This chapter does not permit activities that would otherwise constitute the unlicensed practice of law or provides as a defense in an unlicensed practice of law matter.

23-2 DEFINITIONS

RULE 23-2.1 GENERALLY

For purposes of this chapter, the following terms have the following meaning:

(a) Online Service Provider. An online service provider is an internet-based business that provides or offers to provide legal services to members of the public. Legal services for the purposes of this chapter include only the following: 1) providing legal forms the consumer can complete without a lawyer’s assistance, 2) providing legal forms with the availability of a lawyer to respond to questions from the consumer including assisting the consumer in completing and filing the legal form, and 3) referring the consumer to, or matching a consumer with, a lawyer. Nothing in this rule allows or authorizes an online service provider to engage in the unlicensed practice of law.

(b) Registered Online Service Provider. A registered online service provider is an online services provider that has registered with The Florida Bar under this chapter.

(c) Legal Form. A legal form is:

(1) a current form approved by the Supreme Court of Florida as defined elsewhere in these rules; or

(2) a form consistent with current Florida Law that has been reviewed and approved by a member of The Florida Bar eligible to practice law in Florida.

(d) Board. The board is the Board of Governors of The Florida Bar.

(e) The Bar. The bar is The Florida Bar.

(f) Lawyer. A lawyer is a member of The Florida Bar eligible to practice law in Florida.

(g) Consumer. A consumer is a person or legal entity which uses, or seeks to use, the services of a registered online service provider.

23-3 APPLICATION OF QUALIFYING PROVIDER RULE **RULE 23-3.1 GENERALLY**

An online service provider that meets the definition of a qualifying provider under rule 4-7.22 must comply with that rule, except that a registered online service provider may advertise, charge, and collect fees as provided elsewhere in this rule and is not required to file advertisements with The Florida Bar for review.

Comment

In some instances, a registered online service provider will also be considered a qualifying provider as defined elsewhere in these rules. This would occur, for example, where the registered online service provider matches a consumer with a lawyer to assist with a legal issue. If a registered online service provider is also a qualifying provider, the registered online service provider must also comply with the requirements of the qualifying provider rule including complying with lawyer advertising rules, referring consumers only to persons lawfully permitted to practice law in Florida, receiving no payment that is an improper division of legal fees, placing no requirement or pressure on participating lawyers for cross referrals, annual reporting to The Florida Bar of the names and bar numbers of participating lawyers, providing documentation of compliance with these rules to participating lawyers, responding to any official bar inquiry within 15 days, using its actual or registered fictitious name in all communications with the public, not leading the public to believe the provider is a law firm or directly provides legal services to the public, and disclosing to prospective clients at the time of referral the lawyer's bona fide office location by city, town, or county. However, unlike a qualifying provider who is not registered pursuant to this chapter, a registered online service provider may advertise using the designation "Registered With The Florida Bar," may include an approved logo on all advertisements and communications, and may collect the lawyer's fee directly from the consumer and take a portion of the fee for the referral or match.

Not all registered online service providers will also be considered a qualifying provider. For example, a registered online service provider would not be a qualifying provider and would not have to meet the requirements of rule 4-7.22 if

the registered online service provider only provides forms that can be completed without the assistance of a lawyer, instructions and general information about the legal process and legal issues. This type of registered online service provider would be able to use the designation “Registered With The Florida Bar” and include an approved logo on all advertisements and communications.

23-4 REQUIREMENTS

RULE 23-4.1 APPLICATION

(a) Application. To register under this chapter, an online service provider must complete and send to the bar at its headquarters address in Tallahassee an application promulgated by the bar that is signed by an individual having the authority to bind the online service provider and includes the following:

(1) the name and the URL address of the online service provider;

(2) a description of the services offered by the online service provider;

(3) the name, address, telephone number, and e-mail address to which a consumer can direct any complaints or concerns about the services received from the online service provider;

(4) a certification that the online service provider will not interfere with the lawyer’s independent professional judgment in representing clients or direct the lawyer’s activities in representing clients;

(5) a certification that the online service provider will submit to jurisdiction in a Florida forum for resolution of disputes with Florida consumers;

(6) a certification that the online service provider will provide The Florida Bar with copies of all consumer complaints about the suitability of the form used or the quality of the services provided and will notify The Florida Bar how all these consumer complaints were resolved without disclosing any information confidential under law;

(7) a certification that the online service provider understands that registration and revocation of registration under this rule is solely at the discretion of The Florida Bar;

(8) a sworn statement by an individual having the authority to bind the online service provider that the online service provider has read and will abide by the provisions of this rule; and

(9) a registration fee set by the bar's executive director.

(b) Review by The Florida Bar. The bar will review every application received for compliance with this chapter. If the online service provider meets all of the requirements of this chapter, the online service provider will be added to the roll of Florida Bar registered online service providers and a certificate of registration will be issued. If the bar determines that the application is incomplete or that the online service provider does not meet all of the requirements of this chapter, the bar will notify the online service provider.

RULE 23-4.2 ANNUAL RENEWAL

A registered online service provider must re-register annually with the bar to retain its registered status. The annual registration process will follow the time requirements for annual membership fees payments by Florida bar members. The annual registration process will require that registered online service providers pay a fee set by the executive director and provide a certification by an individual having the authority to bind the online service provider that it remains in compliance with the requirements of this rule.

RULE 23-4.3 DUTY TO UPDATE

A registered online service provider must inform the bar promptly of any circumstance that would render the entity ineligible for registration and any changes in the information required by this rule.

23-5 ADVERTISING AND COMMUNICATIONS

RULE 23-5.1 GENERALLY

(a) Designation. A registered online service provider may use the designation "Registered With The Florida Bar."

(b) Prohibited Communications. A registered online service provider may not state or imply that its services, including forms that are provided, are a substitute for the advice of a lawyer. A registered online service provider may not

state or imply that the bar has approved an advertisement, the registered online service provider, any participating lawyer, or the services offered by the registered online service provider or any participating lawyer.

RULE 23-6 REQUIRED DISCLOSURES
RULE 23-6.1 GENERALLY

(a) Source of Form. If the registered online service provider is using a form approved by the Supreme Court of Florida, the form must be designated as a Supreme Court Approved form. If the registered online service provider is using a form that has been reviewed and approved by a member of the bar, the form must state that it has been reviewed by a member of The Florida Bar.

(b) Lawyer-Client and Work Product Privilege. The registered online service provider must inform consumers that communications with the registered online service provider may not be protected by the lawyer-client privilege or work product privilege before allowing the consumers to provide the registered online service provider with information about their matters. The registered online service provider must require the consumer to acknowledge this disclaimer before the consumer may proceed with the service.

(c) Dispute Resolution. The registered online service provider must inform consumers of the process for submitting complaints and of the process for resolving disputes, including a statement that the registered online service provider will submit to jurisdiction in a Florida forum for resolution of disputes with Florida consumers. The registered online service provider must require the consumer to acknowledge this disclaimer before the consumer may proceed with the service.

(d) Use of Consumer Information. The registered online service provider must inform the consumer of all the ways, if any, the registered online service provider intends to use and share the consumer's personal and legal information. The consumer must be informed before initiating the relationship and be provided with an affirmative opt-in so that the consumer has expressly acknowledged understanding that the information will be used and shared.

Comment

Registered online service providers operating in Florida must comply with state and federal requirements regarding privacy and security of consumer information, which may include personal, legal, medical, and financial information. These requirements are in addition to any requirements imposed by this chapter.

23-7 CHARGES RULE 23-7.1 GENERALLY

(a) Permissible Charges. When the services of a registered online service provider include the participation of a lawyer, the registered online service provider may impose a charge on the participating lawyer. The charge must be reasonable and based on the registered online service provider's costs for marketing and administration and may allow a reasonable profit. In all events, any charge imposed on the participating lawyer must be imposed regardless of whether the lawyer is hired by the consumer. Except as provided elsewhere in this rule, the registered online service provider's charge may vary, and the registered online service provider may set the fee the lawyer charges.

(b) Impermissible Charges. A charge imposed under this rule may not be based on the perceived or actual value of the consumer's legal matter or on the outcome of the services provided.

(c) Collection of Payments to Lawyers. When the services of a registered online service provider include the participation of a lawyer, the registered online service provider may collect the participating lawyer's fee directly from the consumer, retain its charge imposed on the participating lawyer from the fee collected from the consumer, and remit the remainder to the participating lawyer.

Comment

A registered online service provider may charge a lawyer who participates in its service. Charging a lawyer is not prohibited unless the charge constitutes fee sharing. The prohibition against fee sharing is based on preserving the lawyer's independent professional judgment and discouraging improper solicitation of clients by a third party who expects to collect a portion of the lawyer's fee for doing so. A charge based on the registered online service provider's advertising

and administrative costs plus a reasonable profit would not constitute fee sharing and is allowed as long as the lawyer is charged regardless of whether the consumer ultimately chooses representation by that lawyer. This charge may vary based on the method of advertising and the type of matter. For example, a registered online service provider may have a standard charge for a dissolution matter that varies from the standard charge for an immigration matter. Because the charge is the same regardless of the actual or perceived value of the consumer's legal matter or whether the lawyer accepts the case or the client accepts the lawyer, the charge is not improper fee splitting. Conversely, a registered online service provider's charge based on the perceived or actual value of the consumer's legal matter would constitute improper fee splitting and is prohibited.

How the lawyer is paid is a factor that must be considered in determining whether the payment constitutes improper fee splitting. Collecting the payment and remitting it to the lawyer mitigates in favor of a conclusion that the charge is impermissible. Therefore, an online service provider who is not registered with the bar may not collect the payments due to the lawyer. On the other hand, a registered online service provider may collect the payments due to the lawyer and remit that payment to the lawyer. When registering, the online service provider agrees to be bound by this chapter, which contains safeguards to prevent the registered online service provider from affecting the lawyer's independent professional judgment and engaging in improper solicitation. Collecting the payment and remitting it to the lawyer is not improper with these safeguards in place.

23-8 REVOCATION OF REGISTRATION

RULE 23-8.1 GRANTING AND REVOKING REGISTRATION

Granting registration of an online service provider under this chapter is solely at the discretion of The Florida Bar and may be revoked.

Comment

The Florida Bar may revoke registration including, but not limited to, for failure to comply with these rules. For example, The Florida Bar may revoke registration for nonpayment of registration and renewal fees, failing to timely update information required by these rules, and failing to provide the required sworn statement of compliance signed by an individual with authority to bind the

online service provider. The Florida Bar may revoke registration based on consumer complaints about the registered online service provider, although The Florida Bar will not directly handle or resolve any consumer complaints about the registered online service provider.

Exhibit 3

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO RULES
REGULATING THE FLORIDA BAR -
CHAPTER 23 REGISTERED ONLINE
SERVICE PROVIDER PROGRAM

CASE NO. SC19-2077

**THE FLORIDA BAR'S MOTION FOR LEAVE TO RESPOND AND
RESPONSE TO COMMENTS**

The Florida Bar (the bar) respectfully requests leave to respond to comments and, if granted, responds as follows. The bar states:

The bar filed a petition to amend the Rules Regulating The Florida Bar by adopting Chapter 23 Registered Online Service Provider Program on December 12, 2019.

Florida Bar members filed 49 comments in response to the petition, 35 of which do nothing more than express support for the comment filed by another bar member (Maguire) and 1 of which was stricken by this Court for failure to file electronically.¹ The bar will not respond to in turn to each individual comment, but instead will respond to the main points raised in various comments. The 13 main points raised in the comments together with the bar's response are as follows:

1. Online service provider advertisements will not be subject to the lawyer advertising rules, resulting in deceptive advertising.

The rule would not result in unfair or deceptive advertising. There are federal and state laws prohibiting businesses from engaging in unfair and deceptive trade practices that are applicable to all businesses. The proposed rule does not

¹ There was a concerted effort to urge Florida Bar members to file comments by a lawyer employed by The Ticket Clinic, including providing a form to agree with bar member Maguire's comments and instructions on how to file through the e-filing portal (see attached emails from Hollander to unknown bar members in Appendix A). Of the 49 comments filed, 10 were filed by lawyers owning, employed by, or representing law firms who primarily handle traffic ticket defense (Gold, Beller, Hollander, Mumford, Hauser, Maguire, Kowitt, Unger, Goldin and Hochman). Sixteen comments were filed by lawyers who are employed in 4 law firms: 6 comments were filed by lawyers owning or employed by The Ticket Clinic and a lawyer representing The Ticket Clinic in other litigation (Gold, Beller, Hollander, Mumford, Hauser, and Maguire). Six comments were filed by lawyers who own or are employed by CPLS, P.A. (Persad, Figueroa, Frank, Mihok, Zobel, and Ducker). Two comments were filed by the owners of Unger and Kowitt (Kowitt and Unger). Two comments were filed by the owners of Hochman & Goldin (Goldin and Hochman).

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change federal and state law, which would apply to online service providers offering services in Florida. Additionally, online service providers would be subject to the lawyer advertising rules if the online service providers refer consumers to, match consumers with, or provide leads or tips to Florida Bar members.² Rule Reg. Fla. Bar. 4-7.22(d)(1) provides that a lawyer may not accept referrals if the online service provider advertises or solicits in any way that would violate Rules Regulating The Florida Bar on lawyer advertising.³ Therefore, lawyers would not be able to accept referrals unless the online service provider complies with substantive lawyer advertising rules. Currently, the bar has no authority to regulate the advertising of any person or entity other than lawyers and, indirectly, entities that meet the definition of qualifying provider under Rule Reg. Fla. Bar 4-7.22(b).

2. Online service providers will be able to directly solicit when no lawyer is involved.

This is true, but is already true under current law, and is true only if the online service providers do not refer consumers to lawyers. If an online service provider refers consumers to a lawyer, the online service provider cannot solicit prospective clients in person, by telephone, or by live electronic means such as Skype under Rules Reg. Fla. Bar 4-7.22(d)(1), 4-7.18(a), and 4-8.4(a). Additionally, online service providers may neither solicit nor advertise to provide services that constitute the unlicensed practice of law under Rule Reg. Fla. Bar 10-2.1(c).⁴

² Rule Reg. Fla. Bar. 4-7.22b) provides that any person or entity that receives a benefit from directly or indirectly referring prospective clients to lawyers is a qualifying provider, which includes matching services, lawyer referral services, group or pooled advertising programs, directories, and tips and leads generators. For brevity, all these activities will be referred to as referring consumers to lawyers in the remainder of this response.

³ Rule Reg. Fla. Bar. 4-7.22(d)(1) prohibits a lawyer from accepting referrals from a qualifying provider if it advertises or solicits in violation of the Rules Regulating The Florida Bar.

⁴ Rule Reg. Fla. Bar 10-2.1(c) provides that “it constitutes the unlicensed practice of law for a lawyer admitted in a jurisdiction other than Florida to advertise to provide legal services in Florida which the lawyer is not authorized to provide.”

3. Online service provider advertisements will not be subject to mandatory bar review, even when a lawyer is involved.

Although the proposal would not require bar review of advertisements, advertisements of online service providers would still be subject to state and federal law involving deceptive trade practices, regardless of any lawyer involvement. Advertisements of online service providers who refer consumers to lawyers must comply with substantive lawyer advertising rules, and the lawyers who accept referrals would be subject to discipline for the online service provider's failure to comply with substantive lawyer advertising rules under Rules Reg. Fla. Bar 4-7.22(d)(1) and (e)(2) and 4-8.4(a). Additionally, the bar would review advertisements if filed voluntarily under Rule Reg. Fla. Bar 4-7.19(d).

4. The proposal would allow fee splitting.

The proposal does not allow fee splitting. The online service provider may only collect the lawyer's fee directly from the consumer and must transmit the entire legal fee to the lawyer to whom a legal matter is referred. Although the bar agrees, as noted in the proposal, that a nonlawyer's collection of the lawyer's fee is a factor that could lead to the conclusion that a lawyer is engaged in improper fee splitting with the entity as prohibited by Rule Reg. Fla. Bar 4-5.4(a), that is a factor that is not necessarily dispositive of whether the lawyer is engaged in improper fee splitting. The bar believes that this incentive to voluntary registration is a transactional function that should be permitted in exchange for limited regulation of these entities that are currently unregulated.

5. The proposal would allow online service providers to set lawyer fees.

Nothing in the proposal states that an online service provider may set lawyer fees.

6. The proposal will promote the unlicensed practice of law.

The proposal will not promote the unlicensed practice of law. The proposal clearly states that it does not change the current status of the law on unlicensed practice. The proposal does not allow online service providers to engage in any activities not permitted under current law. The proposal does impose additional restrictions that do not currently exist on those online service providers that seek the "Registered With The Florida Bar" designation: they will be required to

submit to a Florida forum to resolve consumer disputes, they will be required to provide copies of consumer complaints to The Florida Bar, and they will be required to notify consumers before they agree to use the online service providers that the attorney-client and work product privileges may not apply to information given to the online service provider, any ways in which the online service provider intends to use consumer's personal and legal information, and how the consumer may submit complaints and have the complaints resolved by the online service provider. In the most recent Florida Bar survey (2019), 56% of bar members responding to the survey indicate that online or alternative legal service providers should be regulated.⁵ Additionally, lawyers who assist in the unlicensed practice of law are subject to discipline under Rule Reg. Fla. Bar 4-5.5(a).

7. The proposal will not increase access to legal services.

The bar's proposal in part is an attempt to increase access to legal services, but it is speculative to state definitely that it will or will not increase access. Opponents of this proposal have no more ability to predict the future than the bar. The bar also believes this is a modest but valuable attempt to regulate these entities for both the protection of Florida's citizens and the benefit of Florida lawyers. The proposal establishes safeguards for consumers that do not currently exist with online service providers, particularly those that have no connection to lawyers, as discussed more fully in the petition and summarized in numbered paragraph 6 above.

8. The cost of legal services may or will increase.

Online service providers will still have to compete in the marketplace. If a consumer's main concern is price, the consumer will have options to choose the least expensive service. If an online service provider refers consumers to a lawyer, the comment to Rule Reg. Fla. Bar 4-7.22 indicates that the lawyer may not pass on the cost of doing business with the online service provider under Rules Reg. Fla. Bar 4-1.7(a)(2) and 4-1.5(a).

9. There are no limitations on or screening of who may be an online service provider.

There currently are no limitations on or screening of or who may be an online services provider. The bar's proposal allows the bar to grant or revoke

⁵ <https://www-media.floridabar.org/uploads/2020/01/2019-Membership-Survey-Report-Final.pdf>

registration of any online service provider at the bar's sole discretion. The bar may decline to grant or revoke the registration of any online service provider for any reason, and the bar would decline or revoke registration of any service the bar has cause to believe either may harm or has harmed consumers.

10. The bar will not resolve any consumer complaints by online service providers.

This is correct, but the bar may revoke the registration of an online service provider based on consumer complaints, which creates an incentive for online service providers to correct problems with their services.

11. The bar should wait until the new special committee finishes its study.

An earlier special committee, the Special Committee on Technologies Affecting the Practice of Law, studied this issue for months before submitting its proposal to the Board of Governors. There is no reason for the new special committee to duplicate the work of the Special Committee on Technologies Affecting the Practice of Law. Additionally, this proposal offers more protections to consumers than currently exists, as discussed more fully in the petition and numbered paragraph 6 above.

12. The proposal allows online service providers to have the imprimatur of the bar and this Court (one comment referred to "court certification").

The proposal is not a form of certification, and the word "certification" may not be used by registered online service providers under the proposal. Online service providers will not be permitted to make any mention of this Court in their advertising. The only phrase that may be used is "Registered with The Florida Bar." In exchange for that designation, online service providers who are currently subject to little, if any, regulation must provide specified consumer protections, as discussed more fully in the petition and summarized in numbered paragraph 6 above.

13. The proposal violates antitrust laws.

This proposal does not violate antitrust laws. The bar is an arm of this Court for any regulatory function, and this Court's exercise of its regulatory power through the bar cannot constitute an antitrust violation. Moreover, the proposal's *voluntary* registration poses no anticompetitive threat.

The bar requests that this Court grant leave to respond and accept the above comments.

Respectfully submitted,

/s/ Joshua E. Doyle

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CERTIFICATE OF TYPE SIZE AND STYLE

I certify that this petition is typed in 14 point Times New Roman Regular type.

/s/ Joshua E. Doyle

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this motion has been sent by e-mail to the following individuals on this 10th day of February, 2020:

Joel L. Mumford; Adam D. Harmelin; Alan Frederick Wagner; Bill Wagner; Timothy P. Chinaris; James McGuire; Karl M. Schmitz; Samuel M. Yaffa; Mary Jo Rivero; Robin L. Hoyle; David Luther Woodward; Eric S. Kolar; Dana Laganella Gerling; David R. Paz; Lawrence J. Navarro; Teeluck Persad; Evelyn J. Pabon Figueroa; Mark S. Gold; Rodney D. Gerling; Russell J. Frank; Melissa C. Mihok; John Olea; Russell Earl Warren; Nina T. Marano; Hallie L. Zobel; Harry G. Reid; William Falik; Eric M. Beller; Ted L. Hollander; George W. Chesrow; Jose Mauricio Bello; Curtis LeBlanc; Loretta A. Kenna; Louis C. Arslania; Sunny Goldin; Christy L. Glass; Sergiu Gherman; Barry D. Kowitt; Kevin M. Unger; Brian E. Pabian; Matthew Rosenfeld; Christopher J. Cona; Aubrey Harry Ducker; Scott G. Hochman; Cory G. Hauser; Cheryl-Dene Spring; William T. Cotterall; Erwin Rosenberg; and Gerald Salerno.

/s/ Joshua E. Doyle

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Exhibit 4

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AMERICAN BAR ASSOCIATION

CENTER FOR INNOVATION

STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

STANDING COMMITTEE ON PROFESSIONAL REGULATION

STANDING COMMITTEE ON PUBLIC PROTECTION IN THE PROVISION OF LEGAL SERVICES

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association encourages U.S. jurisdictions to
2 consider innovative approaches to the access to justice crisis in order to help the more
3 than 80% of people below the poverty line and the majority of middle-income Americans
4 who lack meaningful access to legal services when facing critical civil legal issues, such
5 as child custody, debt collection, eviction, and foreclosure.

6
7 FURTHER RESOLVED, That the American Bar Association encourages U.S.
8 jurisdictions to consider regulatory innovations that have the potential to improve the
9 accessibility, affordability, and quality of civil legal services, while also ensuring necessary
10 and appropriate protections that best serve the public.

11
12 FURTHER RESOLVED, That the American Bar Association encourages U.S.
13 jurisdictions to collect and assess data regarding regulatory innovations both before and
14 after the adoption of any innovations to ensure that changes are effective in increasing
15 access to legal services and are in the public interest.

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REPORT

I. Introduction

Access to affordable civil legal services is increasingly out of reach across the United States. More than 80% of people below the poverty line and a majority of middle-income Americans receive inadequate assistance when facing critical civil legal issues, such as child custody, debt collection, eviction, and foreclosure.¹ Approximately 76% of civil matters in one major study of ten major urban areas had at least one self-represented party.² Moreover, in rural areas, there are often few, if any, lawyers to address the public's legal needs.³ As a result of these and related problems, the United States ranks 103rd out of 126 countries in terms of the accessibility and affordability of civil legal services.⁴

Traditional solutions to fixing this “access to justice” crisis are not enough. For decades, the legal profession and the organized bar have called for increased funding for civil legal aid, more pro bono work, and the recognition of civil *Gideon* rights that would afford people a right to a lawyer in matters involving essential civil legal needs (06A112A).⁵ These efforts are important and have met with some modest success, but they have not come close to fixing the problems that exist. In fact, the problems are becoming more severe.⁶

The legal profession cannot solve these problems alone. The public needs innovative models for delivering competent legal services, and such models require the knowledge and expertise of other kinds of professionals, such as technologists and experts in the design of efficient and user-friendly services.⁷ The existing regulatory structure for the legal profession, however, increasingly acts as a barrier to the involvement of other professionals, both within and outside of law firms. Regulators and bar associations in several states, including Arizona, California, New Mexico, Oregon, Utah, and Washington, have recognized this problem and are working to address it by proposing or adopting substantial regulatory innovations.⁸ More U.S. jurisdictions are

¹ LEGAL SERVS. CORP., JUSTICE GAP REPORT: MEASURING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>.

² NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

³ Jack Karp, *No Country For Old Lawyers: Rural U.S. Faces A Legal Desert*, LAW360 (Jan. 27, 2019), <https://www.law360.com/articles/1121543/no-country-for-old-lawyers-rural-u-s-faces-a-legal-desert>.

⁴ WORLD JUSTICE PROJECT, RULE OF LAW INDEX: CURRENT AND HISTORICAL DATA (2019), <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019/current-historical-data> (rankings are available in the downloadable spreadsheet).

⁵ AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 06A112A https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lis_sclaid_06A112A.authcheckdam.pdf.

⁶ See, e.g., Anna E. Carpenter, et al., *Studying the “New” Civil Judges*, 2018 Wisc. L. Rev. 249, 284 (2018) (noting that “[w]here nearly every party was once represented by counsel, today, the vast majority of litigants are pro se”).

⁷ See generally STANFORD LEGAL DESIGN LAB, <http://www.legaltechdesign.com/> (last visited Nov. 4, 2019).

⁸ See, e.g., ARIZ. TASK FORCE ON THE DELIVERY OF LEGAL SERVS., REPORT AND RECOMMENDATIONS (2019), <https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf?ver=>

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considering doing the same. In most cases, these jurisdictions are not considering deregulation, but rather re-regulation. That is, they are working to find ways to revise, rather than eliminate, regulatory structures so that any new services are appropriately regulated in the interests of the public.

The regulatory innovations that are emerging around the United States are designed to spur new models for competent and cost-effective legal services delivery that improve the quality of justice, but it is not yet clear which, if any, specific regulatory changes will best accomplish these goals consistent with consumer protection. More data is needed. For this reason, the Resolution does not recommend amendments to existing ABA model rules, such as the Model Rules of Professional Conduct. The ABA should nevertheless play a leadership role by adopting policies that encourage more state-based regulatory innovations, collecting and analyzing the data from those innovations, and using the resulting data to shape future reform efforts, including appropriate changes to or adoption of new ABA model rules and policies.

II. The Need for Regulatory Innovation

The Resolution calls for U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver competent and cost-effective legal services and have the potential to improve the accessibility, affordability, and quality of those services while retaining necessary and appropriate client and public protections.⁹ This Resolution is consistent with one of the recommendations of the ABA Commission on the Future of Legal Services (Commission), which recommended that “[c]ourts ... consider regulatory innovations in the area of legal services delivery.”¹⁰

[2019-10-07-084849-750](https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf); THE UTAH WORKGROUP ON REGULATORY REFORM, NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION (2019), <https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>; Press Release, N.M. Admin. Office of the Courts, Supreme Court Work Group to Consider Non-attorney Option for Providing Civil Legal Servs. (May 21, 2019), https://www.nmcourts.gov/uploads/FileLinks/a6efaf23676f4c45a95fdb3d71caea83/News_Release_Working_Group_to_Consider_Licensed_Legal_Technicians.pdf; *Task Force on Access Through Innovation of Legal Services*, CAL. BAR ASS’N, <http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Task-Force-on-Access-Through-Innovation-of-Legal-Services> (last visited Nov. 4, 2019); *Special Committee on Technologies Affecting the Practice of Law*, FLA. BAR, <https://www.floridabar.org/about/cmtes/cmte-me104/> (last visited Nov. 4, 2019).

⁹ See, e.g., AM. BAR ASS’N MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES (2016) (identifying public protections that should be considered when exploring regulatory changes, such as the independence of professional judgment, the protection of privileged and confidential information, and the accessibility of civil remedies for negligence and breach of other duties owed). Innovations must include necessary and appropriate protections for the public. Depending on the type of innovation and services provided, the traditional legal requirements of informed consent, client confidentiality, avoidance of certain conflicts and disclosure of other conflicts and fiduciary obligations may be appropriate but not necessary, while in other situations certain core requirements of professional ethics will be both necessary and appropriate.

¹⁰ AM. BAR ASS’N COMM’N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 6 (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf

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As noted above, the evidence is clear that existing solutions to the access to justice crisis are insufficient and that we need new ideas, such as regulatory reforms to unlock new delivery models. Although the need for change is compelling, the evidence does not yet support any particular regulatory innovation.

III. Categories of Regulatory Innovation

In general, states are currently considering three broad areas of regulatory reform as part of their efforts to improve the affordability, accessibility, and quality of civil legal services and civil justice.

A. Authorizing and Regulating New Categories of Legal Services Providers

Just as healthcare providers other than doctors can provide services to patients and reduce healthcare costs, some states have concluded that legal service providers other than lawyers can do the same. Two major ABA reports recently made a similar observation, recommending that U.S. jurisdictions consider authorizing and appropriately regulating new categories of legal services providers.

In 2014, the ABA Task Force on the Future of Legal Education concluded that a broader array of professionals should be permitted to deliver legal services:

Broader Delivery of Legal and Related Services: The delivery of legal and related services today is primarily by J.D.-trained lawyers. However, the services of these highly trained professionals may not be cost-effective for many actual or potential clients, and some communities and constituencies lack realistic access to essential legal services. To expand access to justice, state supreme courts, state bar associations, admitting authorities, and other regulators should devise and consider for adoption new or improved frameworks for licensing or otherwise authorizing providers of legal and related services. This should include authorizing bar admission for people whose preparation may be other than the traditional four-years of college plus three-years of classroom-based law school education, and licensing persons other than holders of a J.D. to deliver limited legal services. The current misdistribution of legal services and common lack of access to legal advice of any kind requires innovative and aggressive remediation.¹¹

More recently, in its final report, the ABA Commission on the Future of Legal Services concluded that it “supports efforts by state supreme courts to examine, and if they deem appropriate and beneficial to providing greater access to competent legal services, adopt rules and procedures for judicially-authorized-and-regulated legal services providers

(Recommendation 2).

¹¹ ABA TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS 3 (2014), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.pdf [hereinafter LEGAL EDUCATION REPORT].

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(LSPs).¹² The Commission offered several examples of these efforts:

Examples of such LSPs include federally authorized legal services providers [such as those who have long represented individuals before the Social Security Administration] and other authorized providers at the state level, such as courthouse navigators and housing and consumer court advocates in New York; courthouse facilitators in California and Washington State; limited practice officers in Washington State; limited license legal technicians in Washington State; courthouse advocates in New Hampshire; and document preparers in Arizona, California, and Nevada. In some jurisdictions, where courts have authorized these types of LSPs, these individuals are required to work under the supervision of a lawyer; in other instances, courts, in the exercise of their discretion, have authorized these LSPs to work independently. In each instance, the LSPs were created and authorized to facilitate greater access to legal services and the justice system, with steps implemented to protect the public through training, exams, certification, or similar mechanisms.¹³

There is not yet sufficient evidence to endorse any particular LSP model, so the Commission merely called for U.S. jurisdictions to consider authorizing new categories of legal services providers:

The Commission does not endorse the authorization of LSPs in any particular situation or any particular category of these LSPs. Jurisdictions examining the creation of a new LSP program might consider ways to harmonize their approaches with other jurisdictions that already have adopted similar types of LSPs to assure greater uniformity among jurisdictions as to how they approach LSPs. Jurisdictions also should look to others to learn from their experiences, particularly in light of the lack of robust data readily available in some states on the effectiveness of judicially-authorized-and-regulated LSPs in closing the access to legal services or justice gap. The Commission urges that the ABA Model Regulatory Objectives guide any judicial examination of this subject.

The Resolution takes a similar approach and does not endorse any particular model.

B. Experimenting with Variations to Rule 5.4

Rule 5.4 of the Model Rules of Professional Conduct generally prohibits lawyers from partnering and sharing fees with anyone who is not a lawyer. Some have argued that this prohibition impedes the development of innovative legal service delivery models,¹⁴ especially those that require the active involvement of other kinds of

¹² AM. BAR ASS'N COMM'N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 6 (2016), *supra* at 40-41.

¹³ *Id.* Since the Commission's report was written, Utah has created Licensed Paralegal Practitioners starting in 2019 and New Mexico is considering the creation of Limited Licensed Legal Technicians that are similar to those in Washington state.

¹⁴ WILLIAM HENDERSON, STATE BAR OF CAL., LEGAL SERVICES LANDSCAPE REPORT (2018),

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professionals, such as technologists, or that need substantial outside capital to succeed.

Such arrangements – often called alternative business structures (ABS) – are increasingly common around the world, and jurisdictions adopting ABS believe that they can help to improve access to justice.¹⁵ For this reason, several U.S. states recently adopted or are proposing significant liberalization of their versions of Model Rule 5.4.¹⁶

The ABA Commission on the Future of Legal Services called for this kind of review. In its final report, the Commission recommended “continued exploration” of reforms in this area so that “evidence and data regarding the risks and benefits associated with” ABS can be developed and assessed.

This issue also has attracted the attention of United States Supreme Court Justice Neil Gorsuch, who has advocated for change:

All else being equal, market participants with greater access to capital can increase output and lower price. So, for example, optometry, dental, and tax preparation services are no doubt cheaper and more ubiquitous today thanks to the infusion of capital from investors outside those professions. Indeed, consumers can often now find all these services (and more) in their local “superstores.” Yet Rule 5.4 of the ABA’s Model Rules of Professional Conduct — adopted by most states — prohibits nonlawyers from obtaining “any interest” in a law firm. So while consumers may obtain basic medical and accounting services cheaply and conveniently in and thanks to (say) Walmart, they can’t secure similar assistance with a will or a landlord-tenant problem. With a restricted capital base (limited to equity and debt of individual partners), the output of legal services is restricted and the price raised above competitive levels....

Notably, the United Kingdom has permitted multidisciplinary firms and nonlawyer investment since 2007. In the first two years of the program, 386 so-called “alternative business structures” (ABSs) were established. Six years into the experiment, the Solicitors Regulatory Authority analyzed ABSs and found that while these entities accounted for only 3 percent of all law firms, they had captured 20 percent of consumer and mental health work and nearly 33 percent of the personal injury market — suggesting that ABSs were indeed serving the needs of the poor and middle class, not just or even primarily the wealthy. Notably, too, almost one-third of ABSs were new participants in the legal services market, thus increasing supply and presumably decreasing price. ABSs also reached customers online at far greater rates than traditional firms — over 90 percent of ABSs were found to possess an online presence versus roughly 50 percent of traditional firms, again suggesting an increased focus on reaching individual

<http://board.calbar.ca.gov/docs/agendaltem/Public/agendaitem1000022382.pdf>.

¹⁵ *Id.*

¹⁶ See ABA CTR. FOR INNOVATION, LEGAL INNOVATION REGULATORY SURVEY, <http://legalinnovationregulatorysurvey.info/> (last visited Nov. 4, 2019).

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consumers. Given the success of this program, it's no surprise that some U.S. jurisdictions have appointed committees to study reforms along just these lines.¹⁷

On several occasions, the ABA has considered and rejected amendments to Model Rule 5.4 that would have permitted some form of ABS. The primary argument against such changes was that they would jeopardize a lawyer's professional independence. In contrast, advocates of change respond that lawyers already exercise professional independence in conceptually similar situations.¹⁸

Advocates for change also point to the lack of evidence of public harm in the increasing number of countries that now permit lawyers to practice in some form of ABS.¹⁹ The ABA Commission on the Future of Legal Services made a similar observation in its final report:

The Commission's views [calling for continued exploration of reforms in this area] were informed by the emerging empirical studies of ABS. Those studies reveal no evidence that the introduction of ABS has resulted in a deterioration of lawyers' ethics or professional independence or caused harm to clients and consumers. In its 2014 Consumer Impact Report, the UK Legal Consumer Panel concluded that "the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialised." Australia also has not experienced an increase in complaints against lawyers based upon their involvement in an ABS.²⁰

Despite these arguments, it is also clear that there is not yet enough data to know whether any changes to Model Rule 5.4 are necessary and, if so, what they should be. For this reason, the resolution does not propose any changes to Model Rule 5.4.

C. New Approaches to the Unauthorized Practice of Law

The resolution also encourages U.S. jurisdictions to reexamine their approaches

¹⁷ NEIL M. GORSUCH, A REPUBLIC IF YOU CAN KEEP IT 258-60 (2019).

¹⁸ Justice Gorsuch explains:

For example, we permit third parties (e.g., insurance companies) to pay for an insured's legal services but restrict their ability to interfere with the attorney-client relationship. We allow in-house counsel to work for corporations where they must answer to executives but require them sometimes to make noisy withdrawals. And we increasingly permit law firms to manage client and personal financial conflicts by screening affected lawyers rather than by banning the firm from representing a client. Of course, in each of these cases lawyers stand to benefit from rules that permit an engagement that might otherwise be forbidden while here, by contrast, they may stand to lose financially. But surely it shouldn't be the case that we will forgo or lift outright bans in favor of more carefully tailored rules only when it's in our financial interest.

Id. at 260.

¹⁹ ABA COMM'N ON THE FUTURE OF LEGAL SERVS., ISSUES PAPER REGARDING ALTERNATIVE BUSINESS STRUCTURES 11 (2016),

https://www.americanbar.org/content/dam/aba/images/office_president/alternative_business_issues_paper.pdf; LEGAL SERVS. BD., TECHNOLOGY AND INNOVATION IN LEGAL SERVICES 2018,

<https://www.legalservicesboard.org.uk/research/technology-and-innovation-in-legal-services-2018> (last visited Nov. 4, 2019).

²⁰ See LEGAL EDUCATION REPORT, *supra* note 11, at 42.

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to the unauthorized practice of law (UPL). U.S. jurisdictions often define UPL broadly or in such an ambiguous way that prospective innovators do not want to risk developing new services and face allegations that they are engaging in UPL.

Other approaches are worth considering. For example, in the United Kingdom, rather than trying to define the practice of law, the Legal Services Act of 2007 provides that anyone can perform law-related activities unless those activities are specifically “reserved” for authorized professionals. That is, the burden is on the profession to identify the specific areas of legal services that only authorized professionals should be permitted to perform. There is no evidence of harm in the U.K. from such an approach relative to the much more restrictive approach in the U.S., where the definition of UPL tends to be so vague that it covers a range of services that could be safely performed by professionals other than lawyers.²¹

Recognizing the problems with existing approaches to UPL, several U.S. jurisdictions have begun to experiment in this area. For example, Utah has developed a so-called “regulatory sandbox” that will allow new kinds of legal services providers to operate on a pilot basis without concerns that they will be accused of UPL.²² Other jurisdictions are seeking to expressly recognize that online legal document providers are not engaged in the unauthorized practice of law in exchange for modest regulation or registration requirements.²³

These developments are still in their infancy in the U.S., so as with other regulatory reforms, it is not possible to identify a model approach. (Indeed, such efforts in the UPL particular context may raise antitrust concerns.)²⁴ The point of the resolution is to encourage U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver effective legal services and have the potential to improve the accessibility, affordability, and quality of those services while preserving core protections.²⁵

IV. Data Should be Collected and Analyzed

The final part of the resolution calls for the collection and assessment of data regarding regulatory innovations, both before and after the adoption of any innovations, to ensure that changes are data driven and in the interests of the public. The collection of

²¹ Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S. C. L. REV. 429, 431-33 (2016).

²² Press Release, *Utah Courts, Utah Supreme Court Adopts Groundbreaking Changes to Legal Serv. Regulation* (August 29, 2019), <https://www.utcourts.gov/utc/news/2019/08/29/utah-supreme-court-adopts-groundbreaking-changes-to-legal-service-regulation/>.

²³ Jim Ash, *Board Recommends Voluntary Registration Program for Online Legal Service Providers*, FLA. BAR NEWS (Sept. 25, 2019), <https://www.floridabar.org/the-florida-bar-news/board-recommends-voluntary-registration-program-for-online-legal-service-providers/>.

²⁴ ABA CTR. FOR PROF'L RESPONSIBILITY, *FTC Letter Opinions on the Unlicensed Practice of Law* (June 23, 2016), https://www.americanbar.org/groups/professional_responsibility/resources/client_protection/ftc/.

²⁵ See *supra* note 9.

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such data is critical if the legal profession is going to make reasoned and informed judgments about how to regulate the delivery of legal services in the future and how to address the public's growing unmet legal needs. We need to experiment with different approaches, analyze which methods are most effective, and determine which kinds of regulatory innovations best provide the widest access to legal services, provide continuing and necessary protections for those in need of legal services, and best serve the public interest.

One example of such an effort is the recently launched *Unlocking Legal Regulation* project of the Institute for the Advancement of the American Legal System.²⁶ Among other initiatives, the project will “assess and support pilot projects for risk-based regulation in Utah and other states, including identifying metrics and conducting empirical research to evaluate outcomes.”²⁷

V. Conclusion

Justice Louis Brandeis once wrote that “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²⁸ The resolution calls for precisely this kind of courageous experimentation.

Respectfully submitted,

Daniel B. Rodriguez
Chair, Center for Innovation
February 2020

²⁶ Institute for the Advancement of the American Legal System, *Unlocking Legal Regulation*, <https://iaals.du.edu/projects/unlocking-legal-regulation>

²⁷ *Id.*

²⁸ *New States Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).