AFFORDING JUSTICE

BY IRWIN R. KRAMER, ESQ.

Q. EVERY WEEK, CONSUMERS AND BUSINESS OWNERS CALL ME WITH CASES THAT AREN'T LARGE ENOUGH TO JUSTIFY MY FEES. I HATE TURNING THEM AWAY. BUT WHAT'S THE ALTERNATIVE?

A. NATURALLY, YOU CAN CUT YOUR FEE OR HANDLE THESE CASES PRO BONO. BUT IF YOU DO THAT EVERY WEEK, YOU'LL FIND YOURSELF OVERWORKED, UNDERPAID, AND BURNED OUT.

If the value of the case is low enough, litigants may present "small claims" to courts that relax the rules of evidence and regularly hear cases without counsel. Where larger claims arise, low-income consumers might qualify for low- or no-cost representation through a dwindling number of legal aid bureaus and law clinics. But neither small claims court nor legal aid present viable options to those with claims or with incomes above their minimal thresholds.

Your question reveals a significant shortcoming in a legal system which has grown beyond the reach of many who seek access to justice. Once a problem which fell below the poverty line, the skyrocketing cost of legal services has squeezed out the middle class as well. As attorneys' fees rival the value of their cases, many segments of society have been forced to fend for themselves, or simply give up.

IN AN ERA WHERE FEW CAN AFFORD OUR FEES, ARE WE REALLY PROTECTING THOSE WHO CANNOT? CAN WE SERVE THE PUBLIC BETTER BY TRAINING OTHERS TO HANDLE MATTERS THAT WE WOULDN'T TAKE?

Though Maryland lets lawyers provide "unbundled" services by handling discrete tasks or phases of a case,[1] those who can only afford limited service may only receive limited relief. When demand letters or piecemeal efforts fall short, those who can't afford greater service have nowhere else to turn.

The contractor whose $18,000 bill prompted threats of a counterclaim can't risk a similar sum on a lawyer who must litigate his construction dispute to an uncertain result. The real estate broker, with reams of records entitling her to thousands in unpaid commissions, can't afford to spend thousands more on lawyers who must read them before evaluating the case. Nor can the homeowner afford to fight a large insurer who cited intricate policy exclusions to deny claims arising from a flooded basement. In each of these cases, the high cost of justice may be hard to justify for those of moderate means.

This isn't a problem you can solve on your own. Filling the gap in access to justice will require us to change our minds and our system.

As lawyers, we have long held a monopoly on legal services. Fighting those who may tread on our turf, we criminalize their activity as the "unauthorized practice of law," claiming that we alone are qualified to protect the public. But, in an era where few can afford our fees, are we really protecting those who cannot? Can we serve the public better by training others to handle matters that we wouldn't take?

The Institute for the Advancement of the American Legal System, the Association for Professional Responsibility Lawyers and task forces throughout the country believe we can. Recognizing the need to serve a larger segment of society, they comprise a growing movement to advocate reforms which increase the delivery of legal services and reduce the cost of legal relief.

Rather than limit legal services to lawyers themselves, several proposals would expand the arsenal of justice by:

LICENSING NON-LAWYERS TO DELIVER MORE AFFORDABLE ASSISTANCE

This may seem like a radical concept. But other professionals may say the same about our monopoly on legal services. We may pretend that legal problems are too complex or

1 See Md. Rule 19-301.2(c).

monumental to delegate, but the medical profession has long recognized the life-threatening consequences of this myopic view. If doctors treated the public as we do, many patients would die while waiting for the medical attention of a licensed physician.

Fortunately for patients, physicians do not have the market cornered on healthcare. Life-saving intervention often lies in the capable hands of trained paramedics and other first responders who may reach distressed patients within minutes. Even without an emergency, the need to expand public access to medical care has prompted the profession to license hundreds of thousands of physician assistants and nurse practitioners to provide treatment which was once dispensed by physicians alone.

Recognizing a similar need to expand public access to legal services, states like Washington, Utah, California, Arizona, Minnesota, and Oregon have borrowed this concept to consider programs which would relax lawyers' long standing monopoly. Though these proposals require a specific regimen of education, examinations, and regulations to protect the public, such reforms have faced stiff opposition from the legal community—opposition which only a few states have overcome.

Just last year, Arizona, Utah and Oregon relaxed restrictions on the unauthorized practice of law to allow licensed advocates to assist families facing eviction. Oregon's program would let these paraprofessionals represent clients in certain family law cases as well. This follows the lead of Minnesota, which is now completing a three-year pilot program allowing paralegals to represent clients in certain landlord-tenant and family law cases.[2]

STIFLING INNOVATIVE WAYS TO SERVE CLIENTS, MARYLAND PROHIBITS PARTNERSHIPS BETWEEN LAWYERS AND NON-LAWYERS.

PROMOTING INTERDISCIPLINARY APPROACHES TO CLIENT PROBLEMS

As lawyers, we know that many "legal problems" may be solved most effectively with the assistance of professionals in other disciplines. But most states restrict the extent to which we may collaborate with other professionals. Stifling innovative ways to serve clients, Maryland prohibits partnerships between lawyers and non-lawyers. Claiming to promote the "Professional Independence of an Attorney," our ethics rules forbid lawyers from sharing fees with non-lawyers or from forming ventures in which non-lawyers have any form of ownership interest.

Were these rules designed to protect our "professional independence," or to protect our "professional turf"? This was the precise question posed to me by an English solicitor who noted that the United Kingdom repealed such restrictions more than a decade ago.[3] The move was designed to increase competition in the legal industry, while expanding the delivery of critical services. Letting non-lawyers invest in law firms to form "alternative business structures," the UK has embraced interdisciplinary approaches and technological innovations that reduce the cost and improve the quality of client service

Much closer to home, the District of Columbia has permitted such partnerships for more than 30 years. Rather than lament a lack of professional independence, lawyers there are reviewing proposals to promote alternative business structures by relaxing remaining restrictions even more. Welcoming such investment, Arizona has already repealed prohibitions on non-lawyer ownership and fee-sharing. Even the conservative state of Utah created a "regulatory sandbox" that allows non-traditional providers, including non-lawyers, to offer certain legal services under regulatory oversight.

None of these states have reported harm to consumers or a decline in the "professional independence" of their lawyers. Beyond the antiquated prohibition on non-lawyer investment, all the same ethical rules apply to these attorneys and, by extension, to the businesses formed.

2 Ironically, the state which inspired such reforms recently abandoned a program to deliver services through Limited License Legal Technicians. Adopted by Washington State in 2012, the program to assist litigants in family law cases failed to gain traction. Because few "LLLTs" were ultimately licensed, the state's supreme court cited fiscal constraints in voting to sunset the program. Perhaps the most significant setback for such reforms involved California's plan to expand the delivery of legal services using paraprofessionals. Poised to implement its program in a variety of legal areas, legislative opposition killed the proposal in 2022. See AB 2958 (California law restraining the bar from implementing a paraprofessional program and other innovations).

3 See Legal Services Act 2007.

REPEALING ECONOMIC RESTRICTIONS DISGUISED AS "ETHICAL" RULES

Despite rules designed to protect a lawyer's turf, lawyers in states that have maintained this monopoly seem to be losing ground. With the exponential growth of providers like LegalZoom, Rocket Lawyer and other "disruptors," lawyers unable to invest at the start-up stage have forgone exponential profits and the ability to shape the future of legal innovation.

In an industry that fails to serve those who need it the most, perhaps we should rethink these antiquated restrictions and disrupt it even more. But we are lawyers, not disruptors. Fond of our legal fictions, our learned profession pretends that we may expand access to justice by encouraging our noble colleagues to increase their commitment to *pro bono* service.

However laudable that may be, the gap is too large to be filled by volunteers lacking any economic incentive to do so.

Nor will we solve a problem of this magnitude by ignoring the economic forces creating it. Expanding access to legal services requires that we expand economic incentives to deliver them. We cannot expand this market by closing it off to competition and maintaining a monopoly that fails to achieve its mission.[4]

OPENING ACCESS THROUGH TECHNOLOGY

In a profession that clings to precedent, lawyers react slowly to societal changes and resist new approaches and innovations. Though new technology has greatly expanded our access to information, this learned profession has yet to embrace it. Hiding fundamental rights behind a verbal firewall of legalese, we guard our knowledge like trade secrets with arcane language that renders the law inaccessible to those who must live by it.

But the law does not belong to lawyers. Resting in the public domain, the law should not be monopolized by professionals that few can afford to retain. Nor should we resist changes designed to expand its reach.

Whether we welcome these changes or not, technological innovations and market forces will disrupt the *status quo*. Expanding the use of technology to enhance the efficiency and speed of our lethargic legal system, artificial intelligence is poised to disrupt it even further. Rather than resist these innovations and cling to the past, we must embrace them as opportunities to help those we are sworn to serve.

IMPLEMENTING SOLUTIONS

Ignoring the urgency of this crisis, our learned profession prefers to take its time to study the problem. In Maryland alone, commissions have been formed, disbanded and reconstituted for decades. While we study the problem, our fellow citizens continue to suffer without the services they need or the justice they deserve.

Actions speak louder than words. We must focus on solutions. If lawyers in other states can test and implement novel approaches, Maryland lawyers should not be content to sit on the sidelines as spectators. Nor should we tolerate a lethargic approach to an urgent problem. If we really care about the plight of Maryland citizens, Maryland must take the lead in closing the monumental gap in access to justice.

CONCLUSION

Though some of these changes may improve our bottom line and quality of life, lawyers have long resisted attempts to "disrupt" the legal industry. Quickly dismissing proposed reforms, many have argued that letting non-lawyers provide any form of legal service would harm consumers. Others have candidly confessed their fears that relaxing restrictions on the "unauthorized practice of law" would break their monopoly as legal service providers and reduce the value of their licenses.

But regulations on the practice of law are supposed to protect the public – not to preserve the cartel of those who serve it. For far too long, our resistance to change has perpetuated a system which fails to protect a growing segment of society – people who call for help that we cannot provide in a cost-effective manner. If we really want to protect the public, we must provide feasible alternatives which make the law accessible to those who must live by it. As our fellow Marylanders continue to suffer without any assistance at all, we must answer their call for changes in a failed system.

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4 In Attorney Grievance Comm'n v. Jackson, 477 Md. 174, 269 A.3d 252 (2022), the Supreme Court of Maryland expressed a willingness to revisit restrictions on the "unauthorized practice of law." Questioning a rule imposing geographic constraints on out-of-state lawyers, the Court observed that "changes to the modern practice of law ... have caused us to reflect on its continued wisdom." Id. at 209-10, 269 A.3d at 273. The Court later amended the rule to remove such antiquated restrictions. See Md. Rule 19-305.5(d)(3). Given the impact of other changes in the legal industry, the Court may wish to reflect on the continued wisdom of economic restrictions as well.