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

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Indiana Supreme Court
200 W. Washington St.
Indianapolis, IN 46204

Via online submission

Re: Comments in support of the Interim Report of the Commission on Indiana's Legal Future

Dear Members of the Court:

I am the Ernest W. McFarland Professor of Law at Stanford Law School and the Co-Director of the Deborah L. Rhode Center on the Legal Profession ("Rhode Center"), one of the largest and most influential academic centers devoted to legal ethics and access to justice in the United States. I write to provide public comment on behalf of the Rhode Center in support of the Interim Report produced by the Commission on Indiana's Legal Future. I write specifically to address the proposal to stand up a regulatory sandbox to authorize new and innovative sources of legal assistance to serve Indiana's people and small businesses.

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

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

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

This access-to-justice crisis is complex and multi-faceted, but scholars agree that the highly restrictive professional monopoly enjoyed by American lawyers over almost all aspects of the legal services market is a significant contributing factor.[3] Indiana's lawyer shortage is an illustration of this national crisis. With only 2.3 lawyers for every 1,000 residents in Indiana, it becomes clear that meeting the legal needs of those residents through lawyers alone is impossible.[4]

Recognizing this reality, in 2020, the Conference of Chief Justices ("CCJ") passed an important Resolution (Resolution 2), which advocated for bold reform.[5] In passing the Resolution, the Chief Justices observed that "access to affordable legal services is critical in a society that has the rule of law as a foundational principle" and that "legal services are growing more expensive, time-consuming, and complex, which makes it difficult for many people to obtain necessary legal advice and assistance in adversarial proceedings involving basic human needs, such as shelter, sustenance, safety, health, and child custody."[6] And the Justices noted that "traditional solutions to reducing the access to justice gap, such as increased funding for civil legal aid, more pro bono work, or court assistance programs . . . are not likely to resolve the gap, which is only increasing in severity."[7] Accordingly, CCJ urged the consideration of "regulatory innovations that have the potential to improve the accessibility, affordability and quality of civil legal services, while ensuring necessary and appropriate protections for the public."[8]

Rhode, 74 STAN. L. REV. ONLINE 1, 8 (2021) (explaining that, each year, "tens of millions of Americans who are currently confronting a legal problem (such as an ex-spouse who is falling behind on child support, an employer who refuses to pay overtime, or an insurer who has denied a legitimate claim), but who are 'lump[] it,' i.e., taking no steps to protect their interests"). As specifically noted in the Interim Report, the rising cost in legal services is creating a "modest means" and "middle class" access to justice problem that is magnified by the limited number of lawyers able to serve these clients. COMM'N ON INDIANA'S LEGAL FUTURE, INTERIM RECOMMENDATIONS 10 (2024).

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

[4] AM. BAR ASS'N, 2023 PROFILE OF THE LEGAL PROFESSION 21 (2023). The state demographic breakdowns are also available online. *Demographics*, ABA PROFILE OF THE LEGAL PROF. 2023, https://www.abalegalprofile.com/demographics.html#bystate last visited Sept. 15, 2024).

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

[6] *Id*.

[7] *Id*.

[8] *Id*.

We at the Rhode Center believe that the regulatory sandbox proposed in the Interim Report offers such an innovation. The regulatory sandbox proposal before you would authorize alternative business and practice models, including *entities*, to provide legal services in Indiana. This is a key difference from the traditional regulation of legal services—and it's a departure that has the potential to pay significant dividends.[9]

My recent paper, *Auto Clubs and the Lost Origins of the Access-to-Justice Crisis*, which I co-authored with my former student, James Stone, and will soon publish as a Feature in the *Yale Law Journal*, offers an illustration of how entities can supply high-quality legal services to ordinary Americans.[10]

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

Like AAA of today, the auto clubs of yore handed out maps, supplied emergency roadside assistance, replaced flat tires, and tested members' brakes and headlights. But the clubs then, unlike the AAA of today, also did something else. Back then, the clubs furnished members a wide variety of free legal services. Clubs tended to employ salaried lawyers—and these lawyers would represent members charged with driving-related crimes and also in civil claims, on both sides of the proverbial "*v*".[11] Club lawyers would offer advice, draft letters, negotiate claims—and also file and defend lawsuits, even through appeal.[12] Furthermore, auto clubs, as entities, did this at scale. In 1931, for example, the Chicago Motor Club handled 8,640 claims for its 65,000 members.[13]

Nor were auto clubs alone. In the course of our research, Mr. Stone and I found evidence that, in the early 1900s, auto clubs were joined by banks, trust companies, unions, trade groups, and even homeowners' organizations.[14] All of these organizations provided free or affordable legal

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[9] *See id*. (explaining that "regulatory innovations," including "the authorization and regulation of new categories of legal service providers, the consideration of alternative business structures, and the reexamination of provisions related to the unauthorized practice of law" are promising—and that experimentation with different approaches to regulatory innovation provides a measured approach to identify and analyze the best solutions to meeting the public's growing legal needs").

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

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

[12] *Id*.

[13] *Id*. at 28-30. These were small claims. As the Chicago Motor Club stressed in its defense of its practice against attacks from the Bar, 99.2% of claims involved damages of less than $200 ($4,500 in inflation-adjusted dollars). *Id*. at 40.

[14] *Id*. at 34.

services to individuals—an arrangement that's generally impermissible today per Indiana Rule of Professional Conduct 5.4(d).[15]

Just as importantly, our romp through the historical record did not uncover evidence of consumer harm.[16] Auto clubs were popular—and, *by all accounts*, they served their members with loyalty and fidelity. Indeed, in the course of our research, we uncovered one study from the era that endeavored to assess client satisfaction. It found that respondents reported greater satisfaction with the advice and assistance they received from nonlawyers and from entities (including the AAA) than from lawyers.[17]

So, what happened? As our paper details, America's auto clubs were shut down owing to the coordinated effort of the organized bar. In the early 1930s, in city after city and in state after state, bar associations sued auto clubs, insisting that the corporate practice of law constituted the unauthorized practice of law and was a no-no (even though fully licensed lawyers were the ones providing legal services).[18]

In advancing this new—and counterintuitive—interpretation of unauthorized practice of law rules, the bar offered a series of arguments. First, the bar rolled through an odd syllogism: that corporations are not natural persons entitled to practice law and so they cannot practice law through natural persons.[19] Second, bar associations surmised that lawyers working for corporate owners would not be capable of independent judgment.[20] And third, the bar argued that the arrangement imperiled clients and consumers (though here, it never brought the receipts).

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

> For starters, the only-humans-can-practice-law-corporations-are-not-humans-ergo-corporations-cannot-practice-law syllogism is almost laughable. As one commentator noted, it was akin to saying that a trucking company cannot run the business of trucking because the company cannot obtain a license to drive.
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> Second, the bar tended to lean hard on a particular proxy for lawyerly independence (direct payment from the client to the lawyer), without ever establishing the proxy's essential fit. The bar never convincingly explained why, exactly, client payment to the lawyer preserves professional independence

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

[16] Engstrom & Stone, *supra* note 10, at 47.

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

[18] Engstrom & Stone, *supra* note 10, at 39.

[19] *Id*. at 44.

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

> (particularly since a key component of lawyer independence is independence from the client). Nor did the bar grapple with the fact that, if direct payment was the *sine qua non* for lawyerly independence, in battling corporate practices, its campaign was deeply underinclusive. Even by the 1930s, for instance, plenty of lawyers worked in law firms and "owe[d] their bread and butter to the office"—and so, by rights, these lawyers, too, should have fallen outside the sanctioned (paid by the client) scheme.
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> Third (and similarly), in arguing that the corporate practice of law *necessarily* harms consumers, the bar never distinguished myriad similar arrangements which were wholly permitted. In particular, lawyers have long been authorized to represent their corporate employer (as, apparently, lawyers' loyalty is only compromised when they are serving the corporation's members or customers, not the corporation itself). Insurance companies have long been permitted to employ lawyers to represent policyholders. Lawyers who served the indigent could be employed by intermediaries. The government could employ lawyers to represent individuals. Since the early days of the Republic, nonlawyers have long been permitted to represent themselves. Lawyers could employ nonlawyers (just not the opposite). And, lawyers could be compensated by nonclients, assuming the lawyer complied with certain requirements. It is not clear—and the bar never persuasively explained—why we worry about lawyer independence in one context and not others. . . .
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> Finally—and tellingly—in the course of its campaign, the bar neither surfaced concrete proof of *any* auto club inflicted harm, nor grappled with the *genuine* harm that would predictably ensue by the withdrawal of the auto club's legal services.

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

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

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

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

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

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

I commend the Indiana Supreme Court's action in creating the Commission on Indiana's Legal Future and for prioritizing in the Commission's work consideration of how rethinking the regulation of legal services might enable new models of service to be developed and deployed to increase access. The Interim Report before you includes many ideas which, if supported, could significantly improve the viability of Indiana's legal market and improve consumer access to legal services.

Thank you for your attention and consideration.

Sincerely,

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