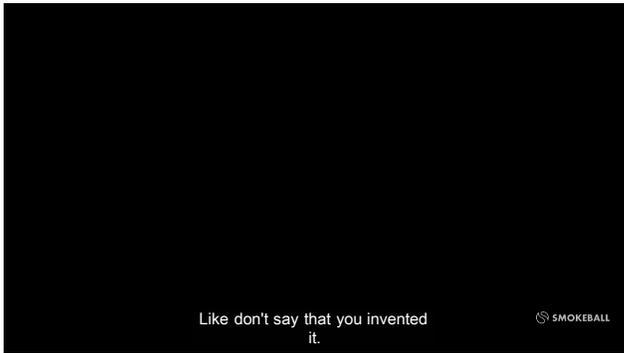


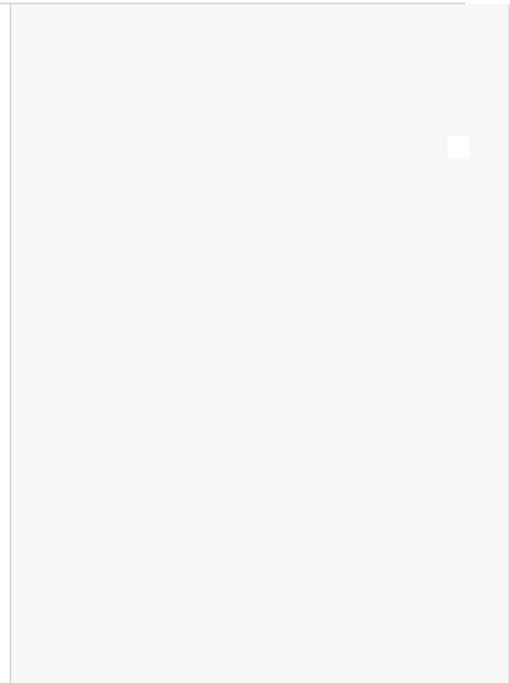
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ABA Votes to Encourage Innovation in Lawyer Regulation, But with Revisions





By [Bob Ambrogi](#) on February 17, 2020

[See update: [Revised ABA Report on Innovation Stripped Out All Mention of Rule 5.4](#)]

At the midyear meeting of the American Bar Association in Austin, Tex., today, the House of Delegates voted to approve a resolution calling on states to consider innovative approaches to the access-to-justice crisis and, in particular, to consider regulatory innovations that could improve the accessibility, affordability and quality of civil legal services.

But some saw the version of Resolution 115 that the HOD approved as watered down — or, as one observer put it, “defanged” — to address concerns that it would be read as endorsing nonlawyer ownership of law firms or the delivery of legal services by providers other than lawyers.

The vote approving Resolution 115 comes as a growing number of states are considering loosening the rules governing the practice of law as a step towards meeting the legal needs of the estimated 80% of low and moderate income individuals who are unable to get legal help.

Proposed jointly by the ABA Center for Innovation, the Standing Committee on the Delivery of Legal Services, the Standing Committee on Ethics and Professional Responsibility, the Standing Committee on Professional Regulation, and the Standing Committee on Public Protection in the Provision of Legal Services, the [original version](#) of Resolution 115 provided:

“RESOLVED, That the American Bar Association encourages U.S. jurisdictions to consider innovative approaches to the access to justice crisis in order to help the more than 80% of people below the poverty line and the majority of middle-income



ROBERT J. AMBROGI

Americans who lack meaningful access to legal services when facing critical civil legal issues, such as child custody, debt collection, eviction, and foreclosure.

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

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

In the [version approved today](#) by the HOD, several changes were made to the original version. Here is an image showing the deletions and additions:

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~~ many of middle-income
- 4 Americans who lack meaningful access to ~~legal services when facing critical civil legal~~
- 5 ~~issues, such as child custody, debt collection, eviction, and foreclosure~~ effective civil legal
- 6 services;
- 7
- 8 FURTHER RESOLVED, That the American Bar Association encourages U.S.
- 9 jurisdictions to consider regulatory innovations that have the potential to improve the
- 10 accessibility, affordability, and quality of civil legal services, while also ensuring necessary
- 11 and appropriate protections that best serve the public including the provision of legal
- 12 counsel as a matter of right and at government expense for children facing essential civil
- 13 legal matters and for low-income individuals in adversarial proceedings where basic
- 14 human needs or a loss of physical liberty are at stake;
- 15
- 16 FURTHER RESOLVED, That the American Bar Association encourages U.S.
- 17 jurisdictions to collect and assess data regarding regulatory innovations both before and
- 18 after ~~the~~ their adoption ~~of any innovations~~ to ensure that changes are effective in
- 19 increasing access to legal services and are in the public interest; and
- 20
- 21 FURTHER RESOLVED, That nothing in this Resolution should be construed as altering
- 22 any of the ABA Model Rules of Professional Conduct, including Rule 5.4, as they relate
- 23 to nonlawyer ownership of law firms, the unauthorized practice of law, or any other
- 24 subject.

Deletions struck through; additions underlined

As you can see, the second paragraph was revised in a manner to suggest that certain legal needs should be met only by the provision of legal counsel.

Even more striking, a final paragraph was added that could be read as effectively erecting a roadblock to many of the innovations currently being considered in states such as Utah, Arizona and California.

But in exchanges on Twitter with some who were present for the HOD vote, they said that my reading is wrong, and that the purpose was simply to clarify that the resolution was not recommending changes to the Model Rules.



Is a Massachusetts lawyer, writer and media consultant. He also writes the blog Media Law and cohosts the legal affairs podcast Lawyer2Lawyer

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“ Not true, Bob. The last resolved clause simply makes the point that the resolution isn't recommending any changes to the Model Rules. The whole point is that we want to see what works at the state level. Then we'll know what should be the "model."

— Andrew Perlman (@Andrew_Perlman) [February 17, 2020](#)

Report Calls for Innovations

The [report in support of the resolution](#), written by [Daniel B. Rodriguez](#), chair of the Center for Innovation and former dean of Northwestern's Pritzker School of Law, said that 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."

As examples of regulatory innovation states might consider, the report identifies:

- Authorizing and regulating new categories of legal services providers.
- Experimenting with variations to Rule 5.4, which prohibits lawyers from partnering and sharing fees with those who are not lawyers.
- New approaches to the unauthorized practice of law.

But, as I noted above, with the changes adopted today, the HOD has made clear that no such innovations will be made in the Model Rules, at least for now.

The report and resolution also call on states to collect and assess data regarding regulatory innovations, "to ensure that changes are data driven and in the interests of the public."

A Step Forward

Had the ABA adopted the resolution as drafted, it would have been a symbolically significant move for an organization that is often viewed as an obstacle to innovation and as a bastion of traditional lawyer regulation.

Even with today's changes, the resolution is significant as an encouragement to states to innovate and as recognition that innovation is needed if we are to address the access-to-justice crisis. Without doubt, it is a step forward.

But with the changes adopted today, the HOD has, in my opinion, muddied the clear language of the original resolution and possibly sent what some will see as a mixed

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message about regulatory innovation.

So now it is up to the states. Some have already taken the lead. Will others now follow suit?



Bob Ambrogi

Bob is a lawyer, veteran legal journalist, and award-winning blogger and podcaster. In 2011, he was named to the inaugural Fastcase 50, honoring "the law's smartest, most courageous innovators, techies, visionaries and leaders." Earlier in his career, he was editor-in-chief of several legal...



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REVISED 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 many middle-income Americans receive inadequate assistance when facing critical civil legal issues, such as child custody and support, 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 ties for 99th out of 126 countries in terms of the accessibility and affordability of civil legal services.⁴

Even where legal aid support is available, lawyers often carry extraordinary caseloads in an effort to help as many individuals in need as possible. Moreover, legal services organizations often lack appropriate assistance from trained professionals, such as paralegals, social workers, and investigators. As a result, in 2017, Legal Services Corporation providers were only able to provide some form of legal assistance to 59% of the eligible problems for which low-income Americans sought help.⁵

For decades, the legal profession and the organized bar have tried to address these problems by calling for increased funding for civil legal aid, more pro bono work, and the recognition of a right to a lawyer for low-income individuals at government expense in certain matters involving essential civil legal needs (referred to, in the past, as civil *Gideon*). These efforts must continue and increase, as the crisis is only becoming more severe,⁶ and the ABA's longstanding policies on the right to counsel should remain unchanged.⁷ But even the most avid proponents of the right to counsel acknowledge that it is a long-term movement that will take decades to accomplish in its entirety. Thus, we need to find ways to supplement and expand existing efforts to address the public's unmet

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>; DEBORAH L. RHODE, ACCESS TO JUSTICE 3, 79 (2004).

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 LEGAL SERVS. CORP., JUSTICE GAP REPORT: MEASURING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS at 42 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.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, e.g., AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 06A112A https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.

civil legal needs.⁸

In recent years, U.S. jurisdictions have tested and implemented a number of innovative ideas to address the pervasive problems that exist. Examples include the use of online dispute resolution,⁹ the development of new tools and forms of assistance for pro se litigants,¹⁰ the expansion of virtual court services,¹¹ the implementation of streamlined litigation processes,¹² and the use of technology to facilitate pro bono work.¹³

In addition, U.S. jurisdictions, through their supreme courts and bars, are considering regulatory innovations. For example, regulators and bar associations in several states, including Arizona, California, Connecticut, the District of Columbia, New Mexico, Oregon, Utah, and Washington, are considering or have adopted substantial regulatory innovations.¹⁴ 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 and clients.

The regulatory innovations that are emerging around the United States are designed to spur new models for competent and cost-effective legal services delivery, but

⁸ The word “public” is intended to refer to both clients and members of the public who do not currently receive assistance from a lawyer.

⁹ Richard Susskind, *ONLINE COURTS AND THE FUTURE OF JUSTICE* (2019); Joint Technology Committee, *Case Studies in ODR for Courts: A view from the front lines*, (Nov. 2017), <https://www.ncsc.org/~media/files/pdf/about%20us/committees/jtc/jtc%20resource%20bulletins/2017-12-18%20odr%20case%20studies%20final.ashx>; Erika Rickard & Amber Ivy, *Can Technology Help Modernize the Nation’s Civil Courts*, <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/03/04/can-technology-help-modernize-the-nations-civil-courts> (Mar. 4, 2019) (last visited Feb. 10, 2020).

¹⁰ See, e.g., AM. BAR ASS’N COMM’N ON THE FUTURE OF LEGAL SERVS., *REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 19* (2016); National Association of Counties Blog, Tyler Technologies, *Increased Access to Justice for All*, <https://www.naco.org/blog/increased-access-justice-all> (Apr. 8, 2019).

¹¹ AM. BAR ASS’N COMM’N ON THE FUTURE OF LEGAL SERVS., *REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 19* (2016).

¹² *Id.* at 46.

¹³ See, e.g., ABA Free Legal Answers, <https://abafreelegalanswers.org/>; Pro Bono Net, <https://www.probono.net/our-work/>

¹⁴ See, e.g., ABA Center for Innovation, *Legal Innovation Regulatory Survey*, <https://legalinnovationregulatorysurvey.info/>; ARIZ. TASK FORCE ON THE DELIVERY OF LEGAL SERVICES, *REPORT AND RECOMMENDATIONS* (2019), <https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf?ver=2019-10-07-084849-750>; 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).

it is not yet clear which, if any, specific regulatory changes will best accomplish these goals consistent with public protection. More data is needed. For this reason, the Resolution does not recommend amendments to existing ABA models rules, such as the Model Rules of Professional Conduct or other policies. The ABA should nevertheless play a leadership role by encouraging states to consider jurisdictionally tailored regulatory innovations that are consistent with public and client protection, collect and analyze relevant data both before and after the implementation of any innovations, and use the data to shape future reform efforts. Such state-based reviews should engage broad and diverse stakeholders, including client communities.

II. Data Should be Collected and Analyzed

The third Resolved clause 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 clients and the public. The collection of 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, best provide continuing and necessary protections for those in need of legal services, and best serve the interest of clients and the public.

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.¹⁵ 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.”¹⁶

III. 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.”¹⁷ The Resolution calls for precisely this kind of courageous experimentation.

Respectfully submitted,

Don Bivens
Chair, Center for Innovation
February 2020

¹⁵ Institute for the Advancement of the American Legal System, *Unlocking Legal Regulation*, <https://iaals.du.edu/projects/unlocking-legal-regulation>

¹⁶ *Id.*

¹⁷ *New States Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).