



**Department of Justice Roundtable on Anticompetitive Regulation**  
**May 31, 2018**  
**Written Statement of the Association of Corporate Counsel**

The Association of Corporate Counsel (ACC) is pleased to participate in this roundtable series on regulation and antitrust law. ACC is a global bar association for in-house counsel with more than 40,000 members who work for more than 10,000 organizations in 85 countries. Our members work for businesses of all sizes, across all industries. As in-house counsel, our members are often charged with maintaining corporate compliance with antitrust rules, and providing proactive advice on business transactions and acquisitions in order to avoid antitrust violations.

Many of our members' companies are affected by anticompetitive regulations in the United States – both positively and negatively. We will be sharing some of these experiences at the May 31<sup>st</sup> roundtable, but with our written submission we wish to focus on the effects of anticompetitive regulations in the legal industry.

ACC has a vested interest in the regulation of the legal profession. In-house counsel are in the unique position of being both providers of legal services and clients of legal services providers. They are affected by legal industry regulations both as regulated professionals and as consumers of legal services. As access to affordable legal services has declined, the call for regulatory reform within the legal industry has grown. Limits on who can provide legal services and how entities that provide legal services can be funded have limited competition in the legal industry and contributed to the high cost of legal services and lower rates of innovation in the legal industry. While commentators rightly focus on how these restrictions affect the individual consumer of legal services, the same restrictions affect the \$100 billion corporate legal services market in which our members provide and buy legal services.

Our members' experience as corporate legal providers and consumers has led us to the conclusion that there are two primary regulations within the legal industry that stifle competition and increase the costs of providing legal services. These two regulations are the prohibition on the unauthorized practice of law (UPL) and the prohibition on non-lawyer participation and investment in law firms. Although both of these prohibitions are meant to protect the public from harm, their continued application has not adjusted to the realities of the modern world or the critical need for affordable legal services for individual consumers. A restriction on competition should be justified by a valid need such as protecting the public interest and also be narrowly tailored to minimize its impact. It is questionable how much these restrictions protect the public interest, and as our comments below illustrate, neither is narrowly tailored.

**Unauthorized practice of law rules are applied too broadly without clear evidence of harm to consumers**

Clearly, some UPL prohibitions must exist to prevent fraudsters from holding themselves out as fully licensed lawyers when they are not, and to ensure that individual consumers are protected when they are purchasing legal services. However, UPL prohibitions go far beyond what is necessary to protect the public interest. UPL restrictions have the potential to capture a wide range of activities, conducted both by lawyers and non-lawyers. These rules encourage protectionism that excludes non-lawyers from the market for legal services and deters competition among lawyers from different states. For example, it can be the unauthorized practice of law for a lawyer licensed and located in Maryland to draft last wills and testaments for residents of Virginia. This restriction of the free flow of legal services across state lines raises the costs of legal services, restricts clients' choice of lawyers, and makes it more difficult to establish innovative approaches to legal services, such as virtual law firms.<sup>1</sup> In justifying these restrictions on who can provide legal services and where, state bars and supreme courts often rely on vague claims of harm that will befall the public if such restrictions are lifted. However, most complaints alleging unauthorized practice of law are made by lawyers or the bar association itself, not by consumers, suggesting that the primary motivation for these rules may not be consumer protection.

In the context of a sophisticated organizational client like the ones for which ACC members work, the UPL prohibitions do not serve a public interest. It does not much matter to these businesses if a lawyer who is licensed in Tennessee provides advice about complying with employment laws in Texas, because businesses that employ in-house counsel usually have multi-state or multi-national operations and expect their lawyers to competently advise them on the laws in multiple jurisdictions. Likewise, if a sophisticated business consumer wants to utilize the services of non-lawyers to perform what could be considered legal work under state law, there is no harm to the public interest if the business made a judgment and assumed the potential risk of receiving inferior legal services. There is no reason that states could not carve out "sophisticated consumer" exceptions to the UPL rules, so that lawyers and non-lawyers could provide legal services to sophisticated business consumers without fear of a UPL violation. States could start by carving out these sophisticated business consumers<sup>2</sup> and then evaluate what other aspects of UPL restrictions might be eliminated or modified to allow greater access to legal services for individual consumers.

---

<sup>1</sup> Most states allow virtual law firms (law firms without a physical office space), but because of unauthorized practice of law restrictions, such firms can only offer services to clients who are residents of the state(s) in which the firm's lawyers are authorized to practice or who have matters in the state(s) in which the firm's lawyers are authorized to practice.

<sup>2</sup> ACC would define a sophisticated business consumer as an entity that employs an in-house lawyer. This presence of the in-house lawyer can ensure that the entity understands the nature of the legal services it is purchasing and can evaluate any risks inherent in utilizing a lawyer licensed in any particular jurisdiction or a non-lawyer to provide the services at issue.

**Restrictions on non-lawyer participation and investment in law firms prevent U.S. firms from competing on equal terms in the market for corporate legal services**

All U.S. states limit the ability of lawyers to partner with non-lawyers in offering legal services or financing the activities of a law firm.<sup>3</sup> These restrictions on non-lawyer participation and investment in law firms have the anticompetitive effect of putting law firms at a disadvantage against other types of professional service providers and non-U.S. law firms<sup>4</sup> because they limit U.S. firms' ability to make large investments that support innovation and service delivery within the firm. The debt financing that most law firms currently rely on has conditions and constraints that are not present in equity investments. The limited availability of long-term investment options for U.S. law firms is seen as a primary reason that law firms have been slow to invest in technology to enable more efficient delivery of legal services.

The arguments against loosening the restrictions on non-lawyer participation and investment center around maintaining lawyers' independence and minimizing potential conflicts of interest between the lawyers' or outside investors' economic interests and the client's best interest. But similar to the UPL prohibitions, the restrictions on non-lawyer investment make little sense in the context of a sophisticated business consumer of legal services. A sophisticated consumer of legal services is equipped to make a determination whether the potential for conflicts of interest is an acceptable one. Indeed, corporate legal departments are already doing so when they choose alternative legal service providers over law firms. Alternative legal service providers provide e-discovery, contract management, due diligence and other legal services to corporate legal department and the law firms that serve them. These providers generally leverage technology to lower costs, as well as using a mix of lawyer and non-lawyers to provide the services. These alternative providers generally are corporations with private, non-lawyer investors. They are able to provide these services without operating as a law firm because the services are supervised by corporate in-house lawyers or outside counsel, thus allaying fears that the service providers are actually practicing law under state laws. Bespoke legal services will likely always be dominated by law firms, but law firms are increasingly losing out on more "commoditized" legal services to these alternative providers that offer better value.

Sophisticated business consumers would benefit if law firms were allowed the same private investment options as the alternative legal service providers, because it would increase competition in the corporate legal services market. Even more so than sophisticated business consumers, individual consumers of legal services stand to benefit greatly from rules that allow for outside investment in law firms. There is a vast underserved market for individual consumer legal services that would benefit from the cost-savings of economies of scale. But the current limits on non-lawyer investment in law firms prevent the investment that would be needed to transform a law firm providing direct-to-consumer legal services to a large-scale operation, similar to the way H&R

---

<sup>3</sup> Washington state and the District of Columbia both allow a limited ability to partner with non-lawyers.

<sup>4</sup> Several countries allow various forms of non-lawyer participation and investment in law firms.

Block has applied economies of scale to tax preparation. While there are greater public interest concerns in the individual consumer legal market than in the corporate legal market, experiences in the United Kingdom, Australia, and other countries have demonstrated ways to implement regulations that provide at least as much protection against potential conflicts of interest as exist under our current legal regulatory system.

**Increasing competition and competitiveness in the legal industry will be good for all consumers of legal services**

As noted earlier, ACC looks at the state of regulation in the legal industry with the perspective of both a member of the profession and a consumer of legal services. As consumers with a wide range of service provider options (to include alternative legal services providers, accounting and consulting firms), we highly value the legal services offered by law firms, but we are concerned that regulations in the traditional sectors of the legal industry have not kept pace with the demands of modern businesses. As members of the profession, we want to see the legal industry remain strong and a force for what is ethical and compliant in the business world. The regulations that we have identified above are ripe for reform, especially as applied to the sophisticated business consumers in the corporate legal services market. Reform will help lower costs and support innovation in the legal industry.

Taking a broader view, starting the process of reform with services provided in the corporate legal market can give the industry an opportunity to experiment with new rules for the profession in a way that presents virtually no downside for individual consumers. For example, state bars can design a regime that provides for lawyer mobility by eliminating UPL violations for licensed attorneys, and start by applying this regime for sophisticated business consumers within the corporate legal services market before later applying it to the individual legal services market. Getting regulators comfortable with new rules and modes of regulation in the corporate legal services market can open the door to further reforms that more directly benefit the market for individual legal services.

In closing, we applaud the Department of Justice for its active practice of commenting on the anticompetitive implications of regulations within the legal industry. ACC would be happy to offer further in-house perspectives on this topic. We hope someday soon, the regulators of the legal industry will begin to consider how to welcome competition within the industry to better serve all consumers of legal services.