



THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

Underexplored Alternatives for the Middle Class

Envisioning Equal Justice

An Initiative of the Canadian Bar Association

February 2013

Standing Committee on Access to Justice

Melina Buckley – Chair

John H. Sims, Q.C. – Vice-Chair

Sheila J. Cameron

Amanda K. Dodge

Sarah J. Lugtig

Patricia M. Hebert

Gillian D. Marriott, Q.C.

Gaylene Schellenberg – Project Director

The Committee acknowledges, with thanks, funding generously provided by The Law for the Future Fund.

Table of Contents

1. Introduction.....	1
A. <i>Envisioning Equal Justice</i> Initiative	1
B. Underexplored Alternatives for the Middle Class	2
2. Situating the Legal Needs of the Middle Class.....	3
3. Promising Innovations to Increase Access to Legal Services.....	7
A. Preventing Legal Problems.....	8
B. Triage and Referral services.....	8
C. Providing Legal Information, Education and Advice.....	9
D. Self Help Initiatives	9
E. Legal advice by non-lawyers	9
F. Summary advice and Duty Counsel.....	10
G. Holistic approaches.....	10
4. Re-engineering dispute resolution processes.....	11
A. Court reform	11
B. Alternatives to Adjudication.....	12
C. Proposals for Family Law Reform.....	13
5. Tackling Affordability of Lawyers' Services.....	13
A. Legal Expense Insurance.....	14
B. Unbundled Legal Services	15
C. Low and Pro Bono.....	16
D. Supply Side Issues.....	17
E. Alternatives to Billable Hours.....	18
F. Changing Models of Practice	19
6. Discussion Questions.....	20

Note: *This consultation document has been produced by the Canadian Bar Association's Standing Committee on Access to Justice for consultation only. It has not been approved by the CBA, and does not represent an official statement of CBA policy. It is intended to foster discussion. That discussion will be considered by the Committee in making its Final Report and recommendations to the CBA at the Canadian Legal Conference in August 2013.*

Underexplored Alternatives for the Middle Class – Discussion Paper

1. Introduction

The Canadian Bar Association's *Envisioning Equal Justice* initiative was announced at the 2012 Canadian Legal Conference in Vancouver. The initiative is a project of the newly formed CBA Access to Justice Committee, chaired by Dr. Melina Buckley.

This Discussion Paper outlines current challenges to providing access to justice for the middle class and identifies the main approaches being used and proposed to address those challenges. Our particular focus is on new ways for lawyers to provide their services, offering opportunities for the profession to consider a broader range of assistance at various price options for the middle class. The Discussion Paper concludes with several questions that we hope will elicit further discussion and debate as to how the CBA can best support the Bar in responding to these new opportunities.

This Discussion Paper was prepared for distribution and consultation beginning at the CBA Mid-Winter Meeting of Council, February 15-17 2013. An Appendix containing more detailed information about the options raised in this Discussion Paper will be available by February 28 2013 on the CBA Committee's website.¹

The CBA Committee invites your responses to any or all of the consultation questions, or the content of this Discussion Paper, and asks that all input be sent to the attention of Gaylene Schellenberg, Project Director, by March 31 2013.

A. *Envisioning Equal Justice* Initiative

The *Envisioning Equal Justice* initiative aims to tackle four barriers that currently impede sustainable and sustained improvement to access to justice. The first barrier is the lack of political profile of the issue. While public access to justice is a pressing and recognized problem for all organizations concerned about justice, no one "owns" this complex problem, and it has little political profile. Broader public engagement on access to justice would ensure the issue resonates with all Canadians. That public engagement will be necessary to create political pressure for change.

The second barrier is the need for improved strategy and coordination. Many organizations are dedicating a tremendous amount of energy and limited resources to new approaches to improve access to justice. How effective these innovations will be in the long term is unclear, and coordination between the various efforts is seriously lacking. The project will seek ways to be more strategic and coordinated in developing and implementing these initiatives.

The third barrier is the absence of mechanisms to measure change. The problem is difficult to communicate about effectively without common terminology or definitions. Progress is also

¹ <http://www.cba.org/CBA/Access/main/default.aspx>

hampered by the absence of a practical definition of success. Access to justice indicators, standards, and improved ability to measure and evaluate the various components of the justice system are critical to increasing performance and learning what actually works. Stronger empirical data, including about system costs, can play an important role in facilitating change.

Finally, there are identifiable gaps in our knowledge as to what can improve access to justice, particularly with respect to both the public and private delivery of legal services and the interface between the two. These gaps also act as barriers to progress.

To address these barriers, the Committee is using three main strategies:

1. **Develop “building blocks” for change** – This involves research and consultation to address current shortfalls in information, and encourage discussion and debate on issues that have not to date been fully explored. The building blocks are:
 1. Access to Justice Metrics: A foundation for the change process
 2. National Standards for Publicly-Funded Legal Services
 3. Future Directions for Legal Aid Delivery
 4. Tension at the Border between Pro Bono and Legal Aid
 5. *Underexplored Alternatives for the Middle Class*
 6. Advocacy Tools to support the change process.
2. **Tell a new story, change the conversation** – Using the outcome of the “building blocks”, the Committee will find a new way of telling the equal justice story, to build public engagement and broaden ownership of the issue. An important aspect of this work will be a national Summit on Access to Justice, scheduled for April 25-27 2013 in Vancouver.
3. **Enhance national strategic coordination** – The Committee will build relationships and coordinate access to justice efforts. It will gather information and highlight innovative initiatives, and provide an annual report and quarterly updates, using the CBA’s website.

B. Underexplored Alternatives for the Middle Class

This Discussion Paper deals with the fifth Building Block above – *Underexplored Alternatives for the Middle Class*. Past CBA access to justice efforts have primarily focused on preserving adequate legal aid so that the most essential legal needs of the most vulnerable populations would be met. Cuts to public funding for legal aid have resulted in continually decreasing financial eligibility levels and increasingly limited services offered by legal aid plans, so even many low income and people living in poverty are now ineligible for the services they need.

At the same time, we know that people of moderate means, generally referred to as the middle class, also suffer from inadequate access to justice. In recent years, substantial efforts have been made to understand and address the barriers experienced by this group. A priority is to develop a more refined understanding of the legal needs of the middle class and how meeting those needs fits

into the overarching access to justice agenda in Canada. The first section of this Discussion Paper sets out the parameters of this issue.

The next three sections of the Discussion Paper provide a brief overview of current efforts to find solutions to address barriers to access to justice experienced by the middle class. Those efforts are organized according to three themes:

- promising innovations to increase access to legal services,
- “re-engineering” legal dispute resolution processes, and
- tackling the issue of the affordability of lawyers’ services.

There are many underexplored alternatives with potential to dramatically increase access to justice for the middle class. We have put our emphasis on new approaches for the Bar to consider, offering a broader variety of legal services at a wider range of prices. We would like your input as to what the CBA could do to facilitate the Bar’s efforts to be innovative and creative in delivering affordable legal services, while allowing legal practices to remain economically viable and vibrant.

2. Situating the Legal Needs of the Middle Class

Finding and implementing alternatives to increase access to justice for the middle class requires a better understanding of the unmet legal needs of that group and consideration of those needs within the overarching access to justice agenda. This section of the paper looks at the distinct nature of the legal needs of the middle class, why the legal profession should take a fresh look at how to better meet those needs, and how to distinguish those efforts from others aimed at providing better justice for more vulnerable individuals and groups.

The Chief Justice has characterized access to civil justice in Canada as the “most significant challenge to our justice system”, and noted how poorly Canada is doing in comparison with other wealthy western countries.² The rule of law implies that our laws must be knowable and consistently enforced, and individuals need to be able to avail themselves of law and have the tools to access the system that administers these laws.³ Yet in Canada, even the most serious legal problems of the poorest, most desperate and vulnerable people often fall outside the scope of publicly subsidized services. Those who make slightly more, for example those working in minimum wages jobs and those in the middle class, generally have to find their own way. The most obvious evidence of the problem with middle class access to justice is perhaps the unprecedented numbers of unrepresented litigants in Canada’s courts; some estimates suggest the number is as

² Chief Justice Beverly McLachlin, *Foreward* to Michael Trebilcock, Anthony Duggan and Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at x.

³ Middle Income Access to Civil Justice Steering Committee, *Background Paper* (paper prepared for a Colloquium on Middle Income Access to Civil Justice at the University of Toronto-Faculty of Law, 10-11 February 2011) at 12. *Middle Income Access to Justice, ibid*, and the *Background Paper* have heavily influenced our work.

high as 80% in family courts.⁴ Judges too are put in an untenable position, charged with simultaneously remaining above the fray and impartial and also assisting litigants sufficiently to ensure the proceeding is fair. There are pressures on the formal justice system as a result of unrepresented litigants, given the additional demands on court staff and administration, and court time, for example. However, often the ramifications of access to justice problems are less obvious, as people settle for unfair or unsatisfactory outcomes when they are legally entitled to better, or retreat entirely from seeking justice.⁵

There have been some efforts to define the “middle class”. In 2011, an important Colloquium⁶ hosted by the University of Toronto - Faculty of Law focused on the civil legal needs (mainly in the areas of family, employment and consumer matters) of the middle class, and described the group very broadly, as those ineligible for legal aid yet unable to afford a lawyer.⁷ A 2012 Alberta Law Society study suggested that an income level of \$50,000 or less distinguished low from middle income Albertans in terms of their experience of the legal system.⁸ Whatever the specific criteria, given the very small proportion of the population currently eligible for legal aid, the group that is the focus of this Discussion Paper represents a significant number of people, and will be extremely diverse. Therefore, when we refer generally to the “middle class”, we include those refused legal aid for being just slightly over financial thresholds, through to the “working poor”. These populations would not usually be considered “middle class”, but may be helped by some of the proposed innovations.

There are no hard and fast rules that separate the legal needs of people living in poverty from those with somewhat or significantly higher incomes, but some general differences should be kept in mind when considering innovations. Advancing equal justice is a multi-faceted and complex challenge. It is important to recognize the legal needs of different populations and to be aware of which populations are most likely to benefit from proposed innovations, and which are not.

People living in poverty tend to experience more and different kinds of legal problems with more serious consequences than those with higher incomes.⁹ The poor are not just the middle class without money; they tend to be exposed to the sharp edges of the law in a way the middle class

⁴ Mark Cardwell, “The Scourge of Unrepresented Litigants” in January 2013 *Canadian Lawyer* <http://www.canadianlawyermag.com/4463/the-scourge-of-unrepresented-litigants.html>

⁵ Melina Buckley, *Access to Legal Services in Canada: A Discussion Paper* (paper prepared for the Action Committee on Access to Justice in Civil and Family Matters - Working Group on Legal Services) (funded by Alberta Justice, April 2011) at 6-8.

⁶ The papers presented at the Colloquium are found in *Middle Income Access to Justice*, *supra*, note 2.
⁷ *Ibid.* at 4.

⁸ Alternate Delivery of Legal Services Committee, *Alternate Delivery of Legal Services* (Calgary: Law Society of Alberta, 2012).

⁹ Buckley, *supra*, note 5 at 13.

generally are not.¹⁰ Studies of civil legal needs have found that poverty has a profound impact on legal needs, and that people living in poverty tend to be “enveloped by the law”.¹¹

People living in poverty are also likely to confront legal issues that threaten very basic needs, for example, fighting eviction from public housing that might result in homelessness, trying to resolve bureaucratic problems with government benefits that represent the sole source of household income, and defending themselves against state action, by police, immigration officials or child protection agencies. These problems are often compounding, one worsens another. The legal problems confronted by the middle class, on the other hand, tend to be in the areas that were the focus of the University of Toronto – Faculty of Law Colloquium, that is particularly in family, consumer, and employment law matters.¹² While these matters may also represent serious disruptions and upheaval in people’s lives, they are more likely to be discrete and unusual events that less often implicate basic survival.

In addition to having a greater financial “safety net”, those in the middle class may have greater resources, for example in terms of education, literacy and health, to address legal problems that arise. With the right information, this population may be better able to prevent an ordinary life problem from becoming a “legal problem”, or be able to access an appropriate level of help, geared to the degree and nature of their legal problem. They may be able to consider options in terms of service delivery and service deliverers, and choose what they can best afford, sufficient to address their situation. They may be able to use information and tools to avoid the justice system entirely when that is the best solution. Innovations should not be limited, therefore, to those pertaining to the formal justice system. Nor should they be limited to options that require lawyers’ involvement, and in fact, many options rely on other sources of legal information, assistance and representation. That said, where a lawyer’s skills and training are required, individuals who retain counsel achieve better and fairer outcomes than those who are unrepresented.¹³ Sometimes lawyers are essential for a just result.

Too many people either do not know where to go for help, fear the cost of hiring a lawyer, are unaware of options that might better suit their budgets, or opt to use any available resources to deal with their problems unassisted, sometimes to their detriment.¹⁴ The University of Toronto – Faculty of Law *Background Paper* noted that most litigants (60-70%) are unrepresented because of

¹⁰ Stephen Wexler, “Practicing Law for Poor People” (1970) 79 *Yale Law Journal* 1049.

¹¹ Buckley, *supra*, note 5 at 13, citing R. Roy McMurtry, Chair, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: The Ontario Civil Legal Needs Project Steering Committee, 2010) at 41.

¹² *Supra*, note 2 at 3.

¹³ *Background Paper, supra*, note 3 at 21.

¹⁴ Karen Cohl and George Thomson, *Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services* (Toronto: Law Foundation of Ontario, 2008) at 45.

limits on legal aid, some could pay for some amount of legal help, and only about 10% actually choose to represent themselves.¹⁵

Lawyers' fees are often identified as the main problem for middle income household access to justice. This is particularly true when thinking of a traditional lawyer-client relationship – where a client hires a lawyer to manage all aspects of a legal problem, from start to finish. According to the University of Toronto-Faculty of Law *Background Paper*, “[f]or the most part, the increasing number of unrepresented litigants is a result of rising costs of legal services.”¹⁶ Still, surveys of people who have recently retained a lawyer have found that they did not view the cost of legal services as a major concern.¹⁷ A 2010 Alberta Law Society study found that 91% of people who had recently retained a lawyer were satisfied with the “good cost value” of the experience.¹⁸ The Ontario Civil Needs¹⁹ study noted a widespread public perception that legal fees are prohibitively expensive, but also that 30% of the study’s target population with a civil legal problem found free service, and another 20 % had paid less than \$1000 for help.²⁰ The study concluded that a significant proportion of middle-income Ontarians can afford to pay for some legal services.²¹ Innovations in legal service delivery could better serve this market, through unbundling, legal expense insurance, or other forms of subsidized or lower cost legal services, and would represent an important step forward.²² Further, the issue of lawyers’ fees and the discrepancies in the survey results mentioned highlight the need for more exploration of this issue.

The University of Toronto – Faculty of Law Colloquium also highlighted policy reasons to do better to improve access to justice for the middle class. Professor Michael Trebilcock noted the problem of asking the middle class to support legal aid through their tax dollars, when they themselves see legal services as financially out of reach. In “Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance”, Professors Trebilcock and Sujit Choudhry, and James Wilson “propose an optional public insurance scheme operated through the province’s legal aid plan.”²³ The Colloquium called for a range of innovative and unconventional public/private partnerships to explore new avenues for access to justice.²⁴

¹⁵ *Supra*, note 3 at 17. This paper reserves “self-represented” when speaking of that 10%, and uses “unrepresented” when speaking of those who represent themselves out of desperation, not by choice.

¹⁶ *Ibid.* at 9.

¹⁷ Rebecca Sandfeur, “Money Isn’t Everything: Understanding Moderate Income Households’ Use of Lawyers’ Services” in *Middle Income Access to Justice*, *supra*, note 2 at 232.

¹⁸ Presentation by Susan Billington, Policy and Program Counsel, Law Society of Alberta, to International Legal Ethics Conference, July 2012.

¹⁹ *Supra*, note 11 at 57.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Supra*, note 2 at 385.

²⁴ *Ibid.* at 122.

For many working to improve access to justice, the goal is to find solutions that will best alleviate the unmet legal needs of the *most* people possible. A significant proportion of available resources are now being devoted to those solutions: websites, hotlines, legal education and information materials, self-help tools, and other forms of assistance that are widely available and not geared to financial criteria.²⁵ While certainly a laudable objective, the CBA has consistently emphasized that efforts to address the legal needs of this significant majority must not obscure or detract from the need and public responsibility to find comprehensive solutions that will also properly address the legal needs of the most vulnerable and marginalized populations. Other parts of the *Envisioning Equal Justice* initiative address this important concern in some depth.

System-wide changes will be necessary to improve access to justice for the middle class. In her study of legal aid in Canada,²⁶ Melina Buckley commented on several recent trends that are equally applicable when considering ways to expand access to justice for the middle class. Significant effort is now going into expanding the range of legal services, and to developing ways to be more nimble in terms of service delivery, to make the most of limited resources and help more people in a way that is proportionate and appropriate to their individual situations. Access to justice requires a range of service options suitable to individual circumstances.²⁷ Solutions that can make access to justice real for this broad and diverse group, without depleting attention or public resources away from aiding the most disadvantaged, are desperately needed. Change will be needed within the practice of law and how lawyers serve individual clients, in the ways that lawyers interact with other justice system players and in how the profession as a whole advocates for systems reform. The remainder of this paper will offer an overview and some suggestions in relation to those changes.

3. Promising Innovations to Increase Access to Legal Services

This section reviews current innovations to improve access to justice, in the context of the workings of the justice system as a whole. Many legal organizations, legal education and information providers, law societies, bar associations, judges' organizations and academics are considering new ways to effectively and expeditiously connect middle class clients with the legal services they need. Much work has been done,²⁸ and this brief summary does not begin to do it justice, but it is intended to give a sense of the promising options that exist in order to facilitate further discussion. In spite of the volume of work already done, there are areas that deserve further consideration and support.

²⁵ See the Action Committee on Access to Justice in Civil and Family Matters - Working Group on Legal Services Report (May 2012) for a discussion of some of these options.

²⁶ Melina Buckley, *Moving Forward on Legal Aid* (Ottawa: Canadian Bar Association, 2010) at 115-117.

²⁷ Buckley, *supra*, note 5 at 18.

²⁸ An appendix to this Discussion Paper will be available by February 28 2013 on the CBA's website, including an inventory of many of these current initiatives.

The current trend is distinctly away from considering legal assistance as an all or nothing proposition, where a client either retains a lawyer to handle the whole file from start to finish, or has no help at all. Instead, the focus is on finding an appropriate response in the circumstances, based on continuum of possibilities. This exploration also extends to consideration of the most appropriate point to provide services. Several initiatives are aimed at how best to prevent ordinary problems from turning into legal problems at all. At the opposite end of the spectrum are ways to ensure that once solutions to legal problems are achieved, they last (often called “legal resiliency”).

Although many of the options mentioned do not directly pertain to the practice of law, it is important for the Bar to be aware of them to inform its own efforts to better meet the needs of the middle class. Knowing of these various efforts also facilitates lawyers’ ability to work with other partners seeking equal justice, and within the profession in the context of advocacy for system reform.

A. Preventing Legal Problems

Resources or activities that improve the public’s ability to understand, anticipate and resolve everyday problems can mean they are able to deal effectively with those problems before they escalate or fester into legal problems (this is sometimes called “legal capacity”). Legal education and information can help to develop these capabilities, and several provinces encourage an early start by including law courses within high school curricula.

A preventative approach can also be taken through law reform, regulatory measures or consumer protection schemes. “Systemic advocacy to reform laws, regulations and institutions is often the only effective way to eliminate recurring problems because they address the root causes that give rise to repeated and often routine legal issues.”²⁹ Regulatory frameworks put the onus for ensuring compliance on the regulator, rather than expecting individuals to make and pursue individual complaints.

B. Triage and Referral services

Given the volume of creative approaches to providing legal information and services in recent years, an important challenge now is to connect people with the appropriate type of help as expeditiously as possible. “[P]art of today’s access to legal services agenda involves making sure that the various components match up – that is the dispute resolution process and legal services provided are consistent with the nature and intensity of the legal dispute.”³⁰

Some “one stop shops” for legal services include a triage and referral component, such as through the Justice Access centres in British Columbia, the community justice centres in Quebec or Law Help Ontario.

²⁹ *Supra*, note 5 at 19.

³⁰ *Ibid.* at 9.

C. Providing Legal Information, Education and Advice

People may not assert or defend their legal rights and protections out of ignorance that those rights exist, or the processes they might use to exert them.³¹ Related to ideas for better equipping the public to determine an appropriate and proportionate response to prevent common problems from becoming legal problems are efforts aimed at providing public legal information and advice to assist people in dealing appropriately with legal issues once they crystalize.

Many services are now provided through telephone hotlines, websites, kiosks in public places, and related venues. Research has shown that this type of vehicle for sharing information is most effective when accompanied by follow up and support for users, who may need human contact to help figure out how to apply the information offered to their own lives and the problem at hand, and appropriate referrals.³²

Information about local lawyers and paralegals and what they charge for different services is also often not readily available to the public. Improving access to this information would enable people who can afford to pay for some legal services make informed choices.

D. Self Help Initiatives

Related to public legal education materials are the various tools now available to facilitate self-representation within the formal justice system, commonly provided within or near to courthouses.

Technology is being used in several ways to increase access to justice, and there is the potential to do more. For example, web-based guided interviews have also been used to elicit the necessary information, and “translate” it into legal language in order to complete court documents. Again, in person or live support has been shown to significantly increase the value of technological resources for many people.

In spite of the clear potential of technology to bring people together with legal service providers and information, it is a tool, not a panacea.³³ It cannot replace direct communication between a person who needs help and a service provider. Further, as the potential of technology is increasingly explored, problems are arising in terms of coordination and consistency between providers.³⁴

E. Legal advice by non-lawyers

Professor Russel Engler makes a three pronged proposal for improvements to access to justice for the middle class:

³¹ Report by the Access to Justice Taskforce, Attorney General’s Department (Sydney: AG, 2009).

³² Buckley, *supra*, note 5 at 24.

³³ *Ibid.* at 27.

³⁴ *Ibid.* at 30.

- that the roles of court staff and judges be reimagined to encompass something more like a customer service mentality toward assisting unrepresented litigants;
- that it be recognized that not all legal situations require full representation, and
- that a continuum of options, from legal information through to legal advice and representation, be considered.³⁵

Within this continuum are several options for including non-lawyers/non paralegals, and paralegals, to provide legal assistance, and advice and representation in circumscribed situations.

While paralegals and non-lawyers/non-paralegals are an important part of improving access to justice, the potential of this resource has not been fully explored in all parts of Canada. Concerns may be raised about the consistency or quality of advice offered, but UK studies suggest that specialization, not qualifications, are the best predictor.³⁶ Consideration of appropriate safeguards in Canada to better take better advantage of the potential of third parties to offer preliminary advice may be worth exploring as a means to increase access to justice for the middle class.

F. Summary advice and Duty Counsel

The University of Toronto – Faculty of Law *Background Paper* defines summary advice, duty counsel and referrals as services offered by paralegals and lawyers that are short of full representation.³⁷ Duty counsel is defined as lawyers providing publicly funded limited assistance to unrepresented litigants in family and criminal courts. Duty counsel can be available for anyone who needs assistance, based on financial criteria or for a certain type of case. Some current Canadian initiatives include the Duty Counsel Project (British Columbia and Ontario), Enhanced Duty Counsel Project (British Columbia), Legal Aid Enhanced Duty Counsel (Nova Scotia), Legal Help Centre (Manitoba), Summary Advice Counsel (Nova Scotia), Aboriginal Legal Services of Toronto and Calgary Legal Guidance Clinic.

G. Holistic approaches

It is critical to have an effective triage system, capable of assessing people seeking help and referring those people to the right resource tailored to their needs in a timely fashion. The University of Toronto-Faculty of Law *Background Paper* suggests enhanced collaboration between legal and non-legal service providers to address more problems and avoid those that often result from working in silos. As socio-economic problems generally occur in clusters, and are not neatly

³⁵ Russel Engler, “Opportunities and Challenges: Non-Lawyer Forms of Assistance in Providing Access to Justice for Middle Income Earners”, in *Middle Income Access to Justice*, *supra*, note 2 at 145.

³⁶ Richard Moorhead, Alan Paterson and Avrom Sherr, “Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales”, (2003) 37 *Law & Society Review* 765 at 773, cited in *Background Paper*, *supra*, note 3 at 43.

³⁷ *Supra*, note 2 at 45.

packaged, requiring people to follow up on several different suggestions for assistance can lead to what is called “referral fatigue”.³⁸

Multi-disciplinary service centres can address many of these challenges. Clients can be triaged and referred within the organization, ensuring that the referral is successful. By its multi-disciplinary nature, the problem of working in silos can be avoided. Professor Michael Trebilcock has suggested expanding the mandate of the Ontario community clinics to take on an increasingly holistic approach, conducting a global needs assessment for clients, and using an organized referral system for clients with multiple needs.³⁹ Others have suggested that expanding Unified Family Courts would accomplish many of these same goals.⁴⁰

4. “Re-engineering” dispute resolution processes

This section considers recent efforts to “re-engineer” dispute resolution processes, with the goal of making those processes more accessible to the public. The need for legal advice, assistance and representation depends to some extent on the structure of the legal dispute resolution process and the assistance that is provided directly from a court, tribunal or other institution, so changes to simplify that structure or develop new ways to assist the public can minimize the need for professional help. Dispute resolution services for parties without representation, at no or low cost, can also reduce the need for legal assistance. Similarly, reform of the substantive law can increase access to justice by providing increased clarity. This section briefly surveys some of the main trends, their impact on the delivery and practice of law and some underexplored alternatives.

A. Court reform

Current proposals for court reform generally involve consideration of proportionality, diversion and streaming, simplification, case management, better use of technology, or some combination of these strategies.⁴¹ Raising the financial limits for small claims courts, where lawyers will often not be involved, can bring more matters within the jurisdiction of those courts. Fast tracks, simplified procedures, and expedited trials are ways of dealing with cases outside the financial limits for small claims courts, but where the issues at stake are at the lower end of civil cases.⁴² Simplified rules of court make the process easier to access for the public, especially for unrepresented litigants.

³⁸ *Background Paper, supra*, note 3 at 52.

³⁹ Michael Trebilcock, *Report of the Legal Aid Review 2008* (report submitted to Ontario Attorney General Chris Bentley) at 108.

⁴⁰ For example, “Family Law and Access to Justice: A Time for Change”, Remarks by Chief Justice Warren K. Winkler at the 5th Annual Family Law Summit (Toronto: The Law Society of Upper Canada, June 2011).

⁴¹ For example, see the Action Committee on Access to Justice in Civil and Family Law Services - Working Group on Court Processes Simplification Report (May 2012).

⁴² *Ibid.*

Case management and technology are also being used to lower litigation costs and reduce delays, and set timelines and goals for the progress of a case. Case management guidelines can also mean earlier judicial involvement and consideration of options like dispute resolution, as well as prompt rulings on motions. Technology has already had a significant impact on filing documents, communications and document exchange with opposing parties in the litigation process, and more.

Specialized courts are also being considered. For example, Unified Family Courts have the potential to address demanding family law cases in an integrated way, providing several resources for separating couples under one roof and specialized professionals and judges to assist (see, too the discussion above about “Holistic approaches”).

B. Alternatives to Adjudication

In the earlier discussion of ways to prevent legal disputes, consideration was given to ways to use primarily publicly funded mechanisms to make broad changes that would enhance access to justice for many members of the middle class. “When legislation establishes certain regulatory regimes, for example with respect to employment conditions or consumer rights, it might be suggested that primary responsibility for ensuring compliance should lie with government bodies. In these circumstances, requiring breaches of such legislation to be addressed by individuals pursuing legal claims may be considered a form of “downloading” or privatization with respect to compliance or enforcement functions.”⁴³ Specialized tribunals can also provide speedier and more specialized services, with various degrees of formality, often emphasizing alternative dispute resolution techniques.

Ombudspersons and compensation funds have similar potential. Injured workers can look to a “Fair Practices Commissioner” in British Columbia, Manitoba and Ontario for resolution of complaints. Compensation funds can be relatively easily accessed, without significant costs to receive compensation. Ontario and Quebec have funds for trip failure, so people can avoid litigation to sue their travel agents.⁴⁴

Law reform measures, such as Canada’s Child Support Guidelines, are intended to provide the public with an objective and easy to apply way to ascertain the amount of child support required by law, potentially avoiding the need for legal assistance or representation.

Technological developments have also provided new opportunities. For example, online forums are serving as an alternative source for dispute resolution.⁴⁵

⁴³ *Background Paper, supra*, note 3 at 80.

⁴⁴ *Ibid.* at 83.

⁴⁵ See, for example, www.cybersettle.com, or www.clicknsettle.com. Other online sources at Consumer’s Guide to Legal Help - www.findlegalhelp.org.

C. Proposals for Family Law Reform

Family law issues are the primary reason why most people enter the civil justice system.⁴⁶ Much of the attention around the issue of unrepresented litigants has been focused on family law. Professor Nick Bala noted that the “vast majority of those without lawyers in the family justice process are unable to afford the cost of legal services, and are ineligible for legal aid.”⁴⁷ The Ontario Civil Legal Needs study found that the experience of unrepresented litigants in family court is often unsatisfactory, and that 44% had not resolved their problems three years later. The study suggested a broader range of services in all sectors.⁴⁸

Some consideration has been given to making dispute resolution the priority on entering the family court system (except for cases where it is inappropriate, such as those involving domestic violence), using some combination of mediation services, assessments, parent education, parent coordinators, mediation-arbitration or collaborative law. Limited scope retainers, or unbundling, can also be effectively used in family law cases.

Professor Bala suggests that family law reform should involve more information, including information sessions connected to the courts, expanded and improved triage systems to facilitate early identification of the issues involved. Mediation and streamlined court processes to identify complex and high conflict cases, as well as expanded use of Unified Family Courts, are other recommendations.⁴⁹

5. Tackling Affordability of Lawyers’ Services

This final section of the paper considers ways for the legal profession to make changes to the way legal services are offered to the public, in order to offer clients a wider variety of legal service options at a broader range of price points. This would provide the benefit of some professional help to more members of the public in dealing with their legal issues.

The legal profession is frequently criticized as pricing itself out of reach of all but wealthy clients, including those in the middle class. “While making too much money to qualify for legal aid, middle-income earners, as Chief Justice McLachlin observed, cannot hope to pay legal fees..., leaving them little option but to represent themselves in court or go away empty-handed.”⁵⁰ On the other hand, a recent Ipsos Reid study commissioned by the Law Society of Alberta showed a general satisfaction among clients who do seek assistance from lawyers, and that 37% of legal files in the sample were

⁴⁶ Ontario Civil Legal Needs Study, *supra*, note 11 at 58.

⁴⁷ Nick Bala, “Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts”, in *Middle Income Access to Justice*, *supra*, note 2 at 291.

⁴⁸ Ontario Civil Legal Needs Study, *supra*, note 11 at 59.

⁴⁹ *Supra*, note 47 at 296.

⁵⁰ Engler, *supra*, note 34 at 148.

resolved for under \$1000.⁵¹ This discrepancy highlights the need for further research into the affordability issue. Professors Lorne Sossin and Samreen Beg note that there are forces beyond lawyers' fees that impact the cost of legal services, and fees are just one of several factors influencing the high cost of litigation.⁵² Access to justice does not necessarily require access to a lawyer, but there is no doubt that lawyers often play an indispensable role in arriving at a just result. Outcomes for unrepresented litigants are not as favourable as for those parties with counsel.⁵³ With initiative and innovation, the legal profession could offer more legal services in different ways than in the past, and at various rates.

Beyond only cost considerations, the public's demands of lawyers are changing toward wanting more involvement in their own files, more certainty in terms of costs, and greater efficiencies, and generally expecting lawyers to do more with less. Legal commentators and theorists caution the profession to reconsider how lawyers practice law to stay relevant.⁵⁴ Technology is also having an impact - some information and referral services in the US have created websites allowing clients to describe their problem and be referred to counsel on line, though they may never meet their lawyers. Other services match lawyers with clients by again allowing clients to describe their legal matter on line, and then receive bids from lawyers prepared to help.⁵⁵

LegalZoom, for example, advertises itself as the alternative to the traditional law firm. It claims to be the leading provider of online legal document services and legal plans to families and small businesses, combining technology and access to experienced attorneys. As of 2011, the company reported helping over a million small businesses and families with their legal needs.⁵⁶

A. Legal Expense Insurance

Legal expense insurance, or prepaid legal expense plans, generally operate much like other forms of insurance. Customers pay premiums based on insurers' assessment of risk, and are subsequently provided with legal services when they need them. Lawyers are sometimes retained as in-house counsel by a provider, or insurers may contract with particular law firms to provide services to their customers, sometimes based on a bulk fee arrangement. Others offer customers broader choice of counsel.

⁵¹ See, Billington, *supra*, note 18.

⁵² Beg and Sossin, "Should Legal Services be Unbundled" in *Middle Income Access to Justice*, *supra*, note 2 at 197.

⁵³ *Ibid.* See also, Billington, *supra*, note 18.

⁵⁴ For example, see Richard Susskind, *The End of Lawyers?* (Oxford: Oxford University Press, 2008).

⁵⁵ For example, see, <http://www.theglobeandmail.com/report-on-business/small-business/starting-out/lawyers-new-business-bid-a-bidding-service-for-lawyers/article4201359/>

⁵⁶ <http://www.legalzoom.com/business-management/success-stories/legalzoom-celebrates-10-years>

Legal expense insurance has been widely used in Europe for many years, and in some countries, most households are covered.⁵⁷ Prepaid legal expense plans are also popular in the United States. In Canada, the idea has only taken hold in Quebec, and even there, only recently. The exception is that some unions and other employers have offered legal expense insurance to workers for several years. It is important to note that most offerings, in Canada and elsewhere, do not include family law services.

Last August, the CBA passed a resolution supporting the expansion of legal expense insurance for Canadians.⁵⁸ It also committed the CBA to assist in educating the public about the potential of legal expense insurance to increase access to justice for the middle class, provided insurers consider including family law services, which represent the greatest area of unmet need in Canada.⁵⁹

For lawyers, working for an insurer may mean lower hourly rates, in exchange for a larger and predictable client base. For the public who are able to afford a policy, either stand-alone or in conjunction with home insurance (as is common in Europe), legal expense insurance has potential to significantly address the legal needs of the middle class.

B. Unbundled Legal Services

While not a new idea, unbundled legal services or limited scope retainers have received significant attention in recent years, especially in the context of considering ways to increase access to justice for the middle class. “Unbundling offers a half way house between full representation and no representation”.⁶⁰ Lawyers can tap a market that might currently perceive their services as unaffordable, while clients can have lower and more predictable legal fees, and for those who want it, greater control over their own file. For example, a client may ask a lawyer to draft the pleadings for a case, but then decide to be unrepresented when the case is heard. Where the traditional model of full solicitor-client representation is either not possible or not wanted, making at least some professional legal help available to people at a cost they can afford is highly desirable.

A US report from 2000 said that the primary criticisms of unbundling fall into three broad classifications – concern that courts and judges might be misled, clients might be misled, and clients might make mistakes.⁶¹ In Canada, the law societies in British Columbia, Ontario, Quebec, Alberta and Nova Scotia have all studied limited scope retainers and issued reports or adopted rule changes

⁵⁷ For example, in the UK, 59% of households have some coverage under home insurance policies. See, UK Law Society, *Access to justice review: Final Report* (November 2010) at 25, cited in *Background Paper, supra*, note 3 at 58.

⁵⁸ CBA Resolution 2012-07-A.

⁵⁹ Ontario Civil Legal Needs, *supra*, note 11 at 58.

⁶⁰ Beg and Sossin, *supra*, note 52 at 197.

⁶¹ If a judge is misled into believing that a litigant is fully self-represented, for example, he or she might extend greater leniency to the litigant than if the judge knew that that person’s pleadings and argument had actually been “ghost-written” by a lawyer. See, Proceedings from the First National Conference on Unbundling, October 12-14, 2000, Baltimore, Maryland.
<http://www.unbundledlaw.org>

to deal with these issues in differing degrees. The CBA also issued a report on unbundling in 2000.⁶² The major concern identified in the CBA report was that lawyers could be acting for clients based on inadequate information, which might lead to worse results for the client and complaints or negligence claims against the lawyer.⁶³

The Law Society of Upper Canada summarized the concerns expressed by Canadian law societies and regulators as:⁶⁴

- lack of clarity about the agreement between the lawyer and client
- ensuring that the quality of unbundled legal service meets a high standard
- the possibility that lawyers will be acting for clients based on inadequate information
- whether the lawyer's assistance must be disclosed
- the risk that either the client, the court or opposing counsel could be misled
- uncertainty surrounding the ethical rules that apply.⁶⁵

Beg and Sossin conclude that “while only one piece of a massive puzzle, unbundling...represents a significant and positive step toward a more accessible civil justice system”.⁶⁶ They acknowledge that unbundling is not without risks both to litigants and to lawyers, but that the potential benefits outweigh the possible downsides.⁶⁷ They urge changes both in the regulatory culture and the business model of the legal profession to achieve this potential.⁶⁸

C. Low and Pro Bono

Lawyers have traditionally provided free or low cost services, on occasion. This was more often to community members, family and friends, rather than to strangers demonstrating unmet legal needs. In the 1950's and 60's, law societies in Canada began organizing referral services of pro bono lawyers, as an early form of “legal aid”. This proved to be too informal and ad hoc an approach to address the growing public demand for such services. Gradually, publicly funded legal aid plans developed to provide a more fair and consistent response to the public's legal needs,

⁶² *The Future of the Legal Profession* (Ottawa: CBA, 2000).

⁶³ *Ibid.*

⁶⁴ *Background Report – “Unbundling” of Legal Services and Limited Legal Representation* (Toronto: LSUC, September 2011).

⁶⁵ Some additional questions include: Can opposing counsel deal directly with the self-represented litigant who receives unbundled legal services? If so, under what circumstances? Will the court allow counsel to withdraw after completing the agreed-upon services? See, *ibid.* See also, Beg and Sossin, *supra*, note 52 at 217-218.

⁶⁶ Beg and Sossin, *ibid.* at 221.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* at 193.

based on established financial eligibility criteria.⁶⁹ Since the mid-1990s, however, legal aid plans in Canada and elsewhere have experienced serious cutbacks and new approaches by a variety of different legal system participants have been considered to fill the gaps left by those cuts.

The rise of organized pro bono services is an example of this recent trend. Pro Bono organizations now exist in 5 provinces, and provide an infrastructure and administrative support to facilitate pro bono opportunities for lawyers. They also publicize the availability of pro bono services to members of the public, and establish financial criteria around who should be eligible for the pro bono services. In addition, they may request public funds to support their organizations, which raises issues about the relationship between legal aid and pro bono services (discussed in depth in another report of the *Envisioning Equal Justice* project - *Tension at the Border: Pro Bono and Legal Aid*).

In addition to providing free legal services, various programs currently facilitate lawyers providing lower fees to those who can afford to pay some amount short of usual hourly rates, often called “low bono”. For example, JusticeNet provides a roster of lawyers willing to work on a sliding fee scale where family incomes are less than \$59,000, taking into account dependents.⁷⁰ The Law Society of Manitoba’s Family Law Access Centre also provides a matching service, where lawyers prepared to act for legal aid rates are paired with clients who can afford to pay only those rates. The Law Society stands behind the process by paying the lawyer and collecting from the client, eliminating any problems of collection for the lawyer.⁷¹

D. Supply Side Issues

In recent years, there has been a steady decline in small and sole practitioners, the kind of lawyers most often retained by individuals with legal problems.⁷² 80% of rural and remote lawyers are in small firm and sole practitioners, and there are economic challenges to those practices. Lawyers practicing in rural and remote communities also face challenges because of large service areas, isolated clients, lack of public awareness of their services and difficulty in recruiting staff.⁷³

The profession has helped with incentives to bring lawyers to underserved communities.⁷⁴ Some options are free legal education or loan forgiveness based on time spent following law school in remote or rural communities. Law students can be brought to non urban communities for articling opportunities, and perhaps will decide to stay on and continue practice in that setting.

⁶⁹ *Supra*, note 26 at 111.

⁷⁰ <http://www.justicenet.ca/who-we-are/>

⁷¹ See, Federation of Law Societies, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada* (Ottawa: FLSC, 2012).

⁷² See, *supra*, note 3 at 64.

⁷³ *Ibid.* at 65 or Billington, *supra*, note 18.

⁷⁴ See, for example, a joint initiative of the Law Society of Manitoba, CBA Manitoba Branch and University of Manitoba Law School, *supra*, note 70.

Urban lawyers can also consider technological innovations allowing them to provide services to rural and remote clients, though those innovations are not without limitations.⁷⁵

E. Alternatives to Billable Hours

The managing partner of a major Toronto firm has said:

We've been predicting since the early '90s the absolutely imminent demise of the billable hour and a move to alternate billing, but in any objective sense it hasn't happened.⁷⁶

Perhaps the most fundamental problem with billing by the hour is that time spent by the lawyer does not always equate to value delivered to the client.⁷⁷ For clients who want results, paying by the hour can feel like handing their lawyer a blank cheque. It is difficult to budget for many legal matters, and hard to shop around for a lawyer offering the best product and a reasonable rate.

Alternatives to the billable hour⁷⁸ include the flat fee, or fixed fee. Under this system, the lawyer is paid a flat fee for performing a specified service (see also the section above on "unbundling").

Another alternative to hourly billing is the contingency fee. Under this arrangement, the client only pays the firm for a good result. The lawyer bears the entire financial risk; no success means no fee whatsoever, creating a strong incentive for lawyers to achieve a good result for the client. Given the risk, lawyers expect a substantial proportion of any recovery from the client, and 30 % is not uncommon. A related kind of arrangement is called the success fee. Under such an arrangement, the client agrees to pay the lawyer more than regular fees if they win in court, but less if they lose. Again, this involves risk for firms, but less than in a pure contingency arrangement.

Another option is to combine an hourly rate and contingency fee. The lawyer accepts a relatively low hourly rate but gets a bonus for a good outcome. This reduces the risk for the lawyer and still offers a lower-cost option for the client. Sometimes, the parties might agree to cap the total compensation paid under such an arrangement. Another common hybrid agreement combines an hourly rate and fixed fee. The lawyer does the initial, more open-ended work on a file on an hourly rate, but agrees on a fixed fee to complete the transaction or matter when the parameters are more clearly known.

Sometimes the lawyer and client establish a budget, and the client agrees to pay an hourly rate up to, but not exceeding, the budget ceiling. If the lawyer bills less than the budgeted amount, the client agrees to pay a bonus of, say, 40% of the savings under the budget.

⁷⁵ Buckley, *supra*, note 5 at 28.

⁷⁶ Ann Macauley, *The Billable Hour – Here to Stay?*; <http://www.cba.org/cba/practicelink/mf/alternatives.aspx>

⁷⁷ Canadian Bar Association, *The Future of the Legal Profession: The Challenge of Change* (Ottawa: CBA, 2000) at chapter 5, *Alternative Billing*.

⁷⁸ See generally, David Goehl, "Common Alternative Billing Methods and When to Use Them", *Sugarcrest Report*, April 2002; see also, Macauley, *supra*, note 76.

There are other variations on the straight hourly rate. Clients may negotiate a blended hourly rate with their lawyers. This rate may be the average of two or more lawyers who will be doing the work, or some other rate set between the highest paid and more junior counsel on the file. It is also not uncommon for lawyers to agree to volume discount, accepting a lower fee in return for getting return business from a client.

F. Changing Models of Practice

In 2002, the American Bar Association Working Group on Delivery of Legal Services produced a summary of emerging models of practice at that time. Some of the examples in their report called “Innovations in the Delivery of Legal Services: Alternative and Emerging Models for the Practicing Lawyer”,⁷⁹ have already taken hold to some degree, such as collaborative law and unbundled legal services. Others may have potential for suggesting new ways of providing services to the middle class.

Holistic lawyering and Preventative law

Like holistic medicine, the holistic lawyer looks at the whole client, rather than just the client’s legal issue. Similarly, preventative lawyers function more as problem solvers looking at the client as a whole, rather than as having a discrete legal problem. These lawyers look at what is sometimes called “legal capacity”, or “legal health”, to assist clients in finding long term solutions to their issues.

Micro-Niche Practices

Lawyers certified as specialists in a particular area of law might develop a micro-niche practice limited to only that type of law or to a certain clientele.

Subsidiary Marketing

This idea expands on the idea of working more holistically, and seeing the client as a whole person. Agencies provide services for people going through a particular type of life transition, such as divorce or bankruptcy, and lawyer referrals are only one of several service offerings (others may include mediators, financial planners, accountants, and psychologists).

Online case matching

Potential clients can describe their legal issues, and wait for lawyers to contact them. The client can review the lawyer’s credentials, and then decide to hire the lawyer. Caution must be exercised to ensure that the matching service conforms with rules of professional conduct.

Outreach

Lawyers have already opened practices in storefronts and shopping malls, bringing their services to places frequented by the public, rather than asking the public to come to them. This idea has been expanded in various ways. For example, the Superior Court of California in Ventura County bought a

⁷⁹ American Bar Association (Chicago: ABA, 2000).

mobile home, staffed it with volunteer lawyers and court personnel, and equipped it with computers, books, and various legal information materials, to then allow it to bring services to clients throughout the county.

6. Discussion Questions

We have divided the discussion of proposed reforms to improve access to justice for the middle class into three areas:

- Innovating the provision of legal assistance and finding better ways of matching assistance to people and their problems
- changing the processes/justice institutions themselves to make them more accessible, and so reducing the need for legal representation and assistance; and
- finding new ways for lawyers to provide greater variety and cost in the services they offer, to make more services accessible to more people.

These relationships are dynamic, so change in one can lead to change in the other two areas. We would like your feedback on any of the issues that were raised in the Discussion Paper, and/or the questions below. In particular:

What do you consider the most promising avenues to make lawyers' services more available and affordable to increase access to justice? Why?

1. Spreading the cost of lawyers' services through legal expense insurance:
 - What terms and conditions would you like to see in legal expense insurance policies for Canadians?
 - Do you have issues or concerns if legal expense insurance takes hold in Canada outside of Quebec, as it has done in Europe and Quebec. If so, what could be done to address those issues or concerns?
2. "Unbundling" or limiting the scope of lawyers' services to offer clients reduced cost options and added predictability in pricing:
 - To what extent do you provide unbundled legal services?
 - What are the advantages to your clients? To you?
 - Are there remaining issues or concerns associated with unbundled legal services that concern you, and if so, how could those issues or concerns be resolved?
3. Increasing the availability of low bono/pro bono lawyers:
 - Do you provide free, or pro bono services to the public? Comments?
 - Do you provide reduced rate, or low bono services to the public? Comments?

- Do you have specific suggestions to encourage more lawyers to provide pro bono or low bono services?
4. Addressing the supply of lawyers acting for individuals, or practicing in remote and rural locations:
 - What proportion of your practice involves acting for individuals in areas of law that relate to their personal lives?
 - Do you provide legal services to clients in remote or rural locations?
 - What would you suggest to increase the supply of lawyers acting mainly for individuals or practicing in remote and rural parts of Canada?
 - Are you aware of successful initiatives to improve service to those populations?
 5. Changing the ways lawyers' fees are charged:
 - What percentage of your firm's business comes from alternative fees?
 - What factors do you consider when weighing whether to bill by the hour or use some other way to charge for your services?
 - What are clients' reactions to alternative fees?
 - What impediments do you perceive to moving away from hourly billing, and how would you overcome those impediments?
 6. Changes in law firm and practice structures:
 - Which alternative law firm structures do you find worth exploring further – what would be potential advantages?
 - Which alternative law firm structures do you find less promising, and why?

How can the CBA best support the Bar in responding to new opportunities to increase access to justice for the middle class?

The CBA Committee invites your responses to any or all of the consultation questions, or the content of this Discussion Paper, and asks that all input be sent to the attention of Gaylene Schellenberg, Project Director, by March 31 2013 (gaylenes@cba.org; 1 800 267 8860 ext.139).