

# Increasing Access to Legal Services for the Middle Class

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## INTRODUCTION

Timothy Cook was on the verge of losing his home after his father battled a prolonged illness and fell behind on mortgage payments.<sup>1</sup> Timothy tried to find a lawyer at a local legal aid center, but it was unable to assist him.<sup>2</sup> Next, he went to a self-help center at a local courthouse where he received limited assistance; ironically, the people at the self-help center suggested he try to find a lawyer to help him.<sup>3</sup> With no affordable attorneys in the area, Timothy stated, “Hopefully, maybe, God willing, I’ll find an attorney who will do this pro bono for me.”<sup>4</sup> While he continued trying to locate a lawyer, he ultimately could not find one in time to save his home.<sup>5</sup> His situation could have been entirely different had there been an affordable rate he could pay for at least a consultation. “‘If I could have gotten an attorney, they would have known what to do,’ he said.”<sup>6</sup>

Timothy’s story is all too common. Studies show that forty to sixty percent of middle class legal needs are unable to be met by existing legal services.<sup>7</sup> The economic divide in the United States is such that people of high socioeconomic status can afford to hire private attorneys at their hourly market rates, and people of low socioeconomic status potentially qualify for legal aid programs.<sup>8</sup> However, the options for people in the middle class are murkier because they struggle to fit into

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1. Steve Karnowski, *Poor Economy Hits Court System, Hurts Programs for the Poor*, ASSOCIATED PRESS (Jan. 24, 2009), [https://www.pantagraph.com/news/poor-economy-hits-court-system-hurts-programs-for-the-poor/article\\_2959e777-703c-553d-8888-7d53bb9385f8.html](https://www.pantagraph.com/news/poor-economy-hits-court-system-hurts-programs-for-the-poor/article_2959e777-703c-553d-8888-7d53bb9385f8.html) [<https://perma.cc/3SXW-SAMQ>]; Luz E. Herrera, *Rethinking Private Attorney Involvement Through A “Low Bono” Lens*, 43 LOY. L.A. L. REV. 1, 2 (2009).

2. Karnowski, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Jennifer Bard & Larry Cunningham, *The legal profession is failing low-income and middle-class people. Let’s fix that.*, WASH. POST (June 5, 2017), [https://www.washingtonpost.com/opinions/the-legal-profession-is-failing-low-income-and-middle-class-people-lets-fix-that/2017/06/02/e266200a-246b-11e7-bb9d-8cd6118e1409\\_story.html](https://www.washingtonpost.com/opinions/the-legal-profession-is-failing-low-income-and-middle-class-people-lets-fix-that/2017/06/02/e266200a-246b-11e7-bb9d-8cd6118e1409_story.html) [<https://perma.cc/CWR2-CJ2W>].

8. *See, e.g., Frequently Asked Questions*, ABA, [https://www.americanbar.org/groups/legal\\_services/flh-home/flh-faq/](https://www.americanbar.org/groups/legal_services/flh-home/flh-faq/) [<https://perma.cc/V5JP-MY5T>] (last visited Feb. 23, 2020) (representing that legal aid typically provides free services for those “whose income is less than 125 percent of the federal poverty level”).

either of these categories. They do not qualify for legal aid and also cannot afford to hire private attorneys. The way legal services are distributed today does not provide sufficient opportunities for middle-class individuals to afford quality representation.

Part I of this Note shows how the nature and characteristics of the legal services industry make it difficult for the middle class to access. This section specifically shows how programs for low-income individuals that have strict cutoffs are problematic because they categorically exclude the middle class. Part II explores three competing solutions to increase access to legal services for the middle class: unbundling, legal insurance, and the DC Affordable Law Firm. Finally, Part III finds that for cases that involve litigation, a traditional format of lawyering is most effective. Thus, a model like the DC Affordable Law Firm is the best way to ensure that those in the middle class have an opportunity for a favorable outcome at a relatively low price. However, unbundling is the best option for those looking to resolve a non-litigation case, or for those who have such limited means that full representation—even at a discounted rate—is not an option. The third competing solution, legal insurance, does not conform to the traditional lawyer-client relationship and poses ethical issues as a model.

## I. THE CHARACTERISTICS OF THE LEGAL JUSTICE SYSTEM

Although access to the judiciary has long been regarded as a constitutional right,<sup>9</sup> not everyone has equal access to this right because some can afford to have counsel and others have no other option but to navigate the system themselves. Representing oneself in court is known to be detrimental to case outcomes, so much so that judges must warn defendants of the “dangers and disadvantages” of *pro se* representation in criminal cases.<sup>10</sup> Unfortunately, the cost of legal services has escalated to the point where it is difficult even for those making 200-400 percent above the poverty line to afford representation.<sup>11</sup> This group has not been supported in the same way that legal aid programs have supported the lower-income group.<sup>12</sup> Instead, the increasing cost of legal services has out-paced this additional sector of the population<sup>13</sup>—a sector that as of yet has few options.

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9. *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510–11 (1972); *see also* Boddie v. Connecticut, 401 U.S. 371, 375 (1971); Chambers v. Balt. & Ohio R.R. Co., 207 U.S. 142, 147–48 (1907); NAACP v. Meese, 615 F. Supp. 200, 205–06 (D.D.C. 1985).

10. *Faretta v. California*, 422 U.S. 806, 835 (1975).

11. *Our Story*, DC AFFORDABLE L. FIRM, <http://dcaffordablelaw.org/about-the-firm/our-story/> [https://perma.cc/4LL8-NBWL] (last visited Feb. 23, 2020); *Our Clients and Fees*, DC AFFORDABLE L. FIRM, <http://dcaffordablelaw.org/about-the-firm/our-clients-and-fees> [https://perma.cc/W3TT-YCUU] (last visited Feb. 23, 2020) (For a family of four, 200-400% above the poverty line would be earning \$52,400 to \$104,800 annually.).

12. *See* Herrera, *supra* note 1, at 1 (explaining that the middle class struggles to “navigate the legal system much in the same way as the poor, but they have fewer options”).

13. *Id.*

While the unaffordability of legal services could just be a function of capitalism in the legal services market, there is widespread consensus that the disparity of assistance available to litigants based on how much money they have “threatens the credibility of the justice system, undermines public confidence in the law, and distorts the accuracy of judicial decision-making.”<sup>14</sup> The link between having representation and achieving optimal case outcomes is strong,<sup>15</sup> which highlights the sad truth that success in court depends on how much money you have to spend on a lawyer.

The same issues of the unaffordability of legal services would likely not exist, or at least would not be as prevalent, if the legal system was easily understood and navigable for the average person.<sup>16</sup> Unfortunately, the combination of effective legal communication and the complexity of procedure in cases makes it nearly impossible for a non-legally educated person to be as effective in their own representation as they would be if they had a lawyer.<sup>17</sup>

While there are increasing amounts of initiatives to assist low-income individuals with their legal issues, they are limited by strict income cutoffs, which leave people who make just above the cutoff without alternatives.<sup>18</sup> For example, in 2017, the D.C. City Council committee voted to pass the Expanding Access to Justice Act which offers an attorney to any tenant earning up to 200 percent of the poverty line when fighting a landlord in civil court.<sup>19</sup> The program recognized that, with housing becoming increasingly expensive, tenants will need representation more frequently to fight against eviction.<sup>20</sup> The fact that landlords almost always have an attorney and tenants rarely do creates a scenario “where the tenants will lose every time.”<sup>21</sup>

With astronomically high housing prices in D.C. and other major cities,<sup>22</sup> it is possible that many of the tenants who are evicted would also be unable to afford a lawyer.<sup>23</sup> They might be one hospital visit, divorce, or car accident away from

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14. See Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL’Y 453, 453 (2011).

15. See Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 39 (2010); see also Brenda Star Adams, “Unbundled Legal Services”: A Solution to the Problems Caused by Pro Se Litigation in Massachusetts’s Civil Courts, 40 NEW ENGLAND L. REV. 303, 306 (2005).

16. Adams, *supra* note 15, at 312.

17. See *id.* at 306–07.

18. See Herrera, *supra* note 1, at 2.

19. Martin Austermuhle, *Need A Lawyer To Fight An Eviction? A New D.C. Program Provides One For Free*, WAMU (May 18, 2017), <https://wamu.org/story/17/05/18/need-lawyer-fight- eviction-new-d-c-program-provide-one-free/> [https://perma.cc/784X-ZHWZ].

20. *Id.*

21. *Id.*

22. Pamela M. Blumenthal, John R. McGinty & Rolf Pendall, *Strategies for Increasing Housing Supply in High-Cost Cities: DC Case Study*, URB. INST. (Aug. 2016).

23. Austermuhle, *supra* note 19.

being evicted from their homes, but also make too much money to qualify for an attorney under the Expanding Access to Justice Act.

## II. THREE COMPETING MODELS FOR AFFORDABILITY

“Equal Justice for All” is engraved on the front of the U.S. Supreme Court building, but justice cannot be equal without equal representation or at least equal opportunity for representation. However, as the previous Part explained, justice is hardly distributed equally because the legal services industry has failed at making legal assistance affordable. Instead, those searching for legal assistance must balance the cost of the service with the estimated outcome, and decide whether it is worth paying for representation at all. This balance is highly dependent on the complexity of the case, particularly whether there is litigation involved.<sup>24</sup> This Part analyzes three different ways of achieving legal assistance and compares the prices, extent of representation offered, and case outcomes of each method.

### A. UNBUNDLED LEGAL SERVICES

The first model for increasing access to legal services for the middle class is unbundling. Unbundled legal services have been described as “a la carte coverage,” where individuals can seek legal help on one, or a few, particular parts of their cases instead of full representation.<sup>25</sup> Proponents of the unbundling approach attribute its success to the “flourishing DIY movement” as a result of the vast amount of information available online.<sup>26</sup> It allows people who would likely not approach an attorney at all to receive the amount of legal advice correlated exactly with how much they are willing to pay.

Lawyers offering unbundled services often engage in “ghostwriting,” where an attorney drafts legal documents, such as pleadings, without making it known to the other parties including the judge or opposing counsel.<sup>27</sup> “The lawyer does not sign the document or . . . may not even indicate that he had a role in preparing it.”<sup>28</sup> This has led to some recently resolved debate about whether lawyers can practice unbundling according to the ethical rules to which they are bound.<sup>29</sup>

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24. See Steinberg, *supra* note 14, at 504 (stating that “Litigants with less complicated legal matters . . . might see improvements in outcomes even with only limited attorney involvement.”).

25. See *id.* at 454; see also Dianne Molvig, *Unbundling Legal Services*, [70-SEP] WIS. LAW. 10, 12 (1997).

26. Amy Dunn Johnson, *Unbundled Legal Services: A Revolution Whose Time Has Come*, 49 ARK. LAW. 28, 30 (2014).

27. See Steinberg, *supra* note 14, at 464.

28. *Id.*

29. See generally Tamara M. Kurtzman, *The Implications of Ghostwriting in the State and Federal Courts*, 39-MAR L.A. LAW. 11 (2016) (explaining that federal courts tend to believe that ghostwriting is a misrepresentation to the court, while many state courts are in favor of it).

## 1. ETHICAL ISSUES

The claim that unbundled services in the form of ghostwriting are unethical stems from the fear that it is misleading to the opposing counsel and the judge.<sup>30</sup> Because *pro se* pleadings are thought to be held to less strict standards than those drafted by attorneys, it would naturally follow that ghostwriting gives the *pro se* plaintiff an unfair advantage.<sup>31</sup> However, the ABA dispelled the ethical concerns of ghostwriting in an opinion stating that lawyers can provide ghostwriting services without disclosing the nature or extent of the service.<sup>32</sup> The opinion denies the idea that judges would be more sympathetic to those *pro se* plaintiffs who benefitted from ghostwriting because if the lawyer has been effective, it will be “evident.”<sup>33</sup> Thus, the ABA assumes that the judge will know a lawyer was involved based on the quality of the legal writing.<sup>34</sup> The ABA suggests that if the writing is up to a certain standard, the judge will no longer view the *pro se* plaintiff as being *pro se*, but will understand that a lawyer is working behind the scenes, and thus will not be more sympathetic toward the *pro se* plaintiff.<sup>35</sup>

A critique of this theory, particularly with unbundled services, is that the *pro se* plaintiff might just be having a lawyer write the brief, but is not being represented beyond that.<sup>36</sup> The plaintiff might actually be unknowledgeable about the court proceedings, but under the ABA’s theory, after reading a brief written by a lawyer, the judge may treat him as if he were being represented in all other aspects of the litigation as well. Regarding *pro se* plaintiffs in the same manner as their represented counterparts could be considered a win for the legal community, as being seen on more equal footing could alleviate some of the disadvantages they face in the courtroom.<sup>37</sup> However, it could also be disadvantageous to *pro se* plaintiffs who the judge assumes are being represented throughout the entire litigation, but in reality, they just had assistance with one aspect.<sup>38</sup> The ABA does not think behind-the-scenes legal assistance is “material to the merits of the litigation” and thus does not need to be disclosed.<sup>39</sup> However, others argue that the judge should be aware of every aspect of the litigation, including who is being

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30. *Id.* at 11.

31. Adams, *supra* note 15, at 307, 310–11 (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (“The United States Supreme Court . . . has said that *pro se* pleadings should be held ‘to less stringent standards than formal pleadings drafted by lawyers[.]’”)).

32. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-446 (2007) [hereinafter ABA Formal Op. 07-446].

33. *Id.*

34. *Id.*

35. *Id.*

36. See Howard Burgoyne Rhodes, *Giving Up the Ghost: Alaska Bar Ethics Opinion 93-1 and Undisclosed Attorney Assistance Revisited*, 30:2 ALASKA L. REV. 231 (2013).

37. See, e.g., Adams, *supra* note 15, at 304.

38. See Rhodes, *supra* note 36.

39. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-446 (2007).

represented and who is not.<sup>40</sup> Regardless, the consensus from the ABA is that ghostwriting is not misleading and does not violate the *Model Rules*.<sup>41</sup> This opens the door for unbundling to be an effective method of providing partial representation to the middle class.

## 2. COSTS

With unbundling, the clients must primarily determine the extent of legal assistance needed. This is a difficult decision to make from a client's perspective, and could result in additional costs. The scenario to avoid is one in which the client believes they can use unbundled services because they are not expecting to go to court, and the issue escalates into litigation. At this point, the client will be stuck either scrambling to find another lawyer to take his case, or worse, as a *pro se* plaintiff.<sup>42</sup> Finding another lawyer might not be a bad option, except that the hourly fees will rack up as the lawyer will need to be brought up to speed with the case. The time and money spent to do so is a cost that can only be avoided by making an informed decision about how much representation will be required, or finding a lawyer that is willing to switch from doing unbundled tasks to full representation.

However, unbundling is potentially the most cost-effective way of paying for legal services if there is no litigation involved and the matters are relatively simple. On a societal level, unbundling provides a method for a limited number of attorneys to reach the maximum amount of people. It stretches attorneys for all they are worth because their services can reach more people when the services they are providing are limited in time and scope. If tasks such as document review or brief advice are sufficient for the case, unbundling is an economical option. However, the low price tag of unbundling may not be worth it in the long run if the case develops into a more complicated one.

Unfortunately, unbundling is actually detrimental to those who are going to court because those going to court with unbundled services achieve the same outcomes as those who are completely unrepresented.<sup>43</sup> Not only are they no better off, but they also lose out on the money they spent on the few hours of legal help. While it may make individuals feel more confident walking into court,<sup>44</sup> they are better off on their own if unbundled services do not substantively change the outcome in most cases.

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40. See Rhodes, *supra* note 36; see also Va. Legal Ethics Op. 1127 (1988) (advising failure to disclose that lawyer provided active or substantial assistance, including the drafting of pleadings, may be a misrepresentation).

41. ABA Formal Op. 07-446, *supra* note 32.

42. See Adams, *supra* note 15, at 307.

43. See Steinberg, *supra* note 14, at 504.

44. Molvig, *supra* note 25, at 12.

## 3. CASE OUTCOMES

Although unbundled services are helpful and effective for drafting documents and general counseling, they are not fit for more complex proceedings. Unbundled services usually do not include representation in court,<sup>45</sup> likely because given the amount of time and effort it takes to be prepared for court, it might as well be full representation. This is problematic because there have been doubts about whether case outcomes are actually improved by the use of unbundled services.<sup>46</sup> While unbundling has become increasingly popular, those who use unbundled services but do not have representation in court fare much worse than those who do.<sup>47</sup> Thus, the effectiveness of unbundling is highly questionable at best.

Unfortunately, the ABA was correct in stating that providing ghostwriting is “not material to the merits of the litigation.”<sup>48</sup> A recent study found that unbundled services are the most helpful to advise recipients procedurally, but that in the end, those who used the services fared no better than their unassisted counterparts in court.<sup>49</sup> In housing cases where unbundled services were used, recipients “lost their homes just as often . . . and made payments to their landlords with the same frequency.”<sup>50</sup> This study also found that “tenants who received full representation achieved outcomes far superior to either the unbundled or unassisted tenant groups.”<sup>51</sup> Another study suggests represented tenants are six times more likely to win in court.<sup>52</sup>

*Pro se* plaintiffs are at a disadvantage even if they do use unbundled services because they are inexperienced and often unprepared in the courtroom.<sup>53</sup> The unpreparedness may not be a result of a lack of effort, but simply because of the “[c]omplicated procedural rules, incomprehensible legal jargon, and a lack of legal knowledge.”<sup>54</sup> Lawyers go through three years of law school and still need additional “on the job” training—sometimes years of it—to feel confident in a courtroom.

While the ethical concerns about unbundling have been alleviated by the ABA, the concerns about case outcomes have indicated that it is not the best option to increase access to legal services. Similarly, legal insurance is another form of

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45. See Steinberg, *supra* note 14, at 454.

46. See Steinberg, *supra* note 14, at 504.

47. *Id.* at 456.

48. ABA Formal Op. 07-446, *supra* note 32.

49. Steinberg, *supra* note 14, at 457, 472–73.

50. *Id.* at 482.

51. *Id.*

52. *No Time For Justice: A Study Of Chicago's Eviction Court*, LAW. COMM. FOR BETTER HOUS. 3, 18 (2003).

53. Adams, *supra* note 15, at 304.

54. *Id.* at 312.

legal assistance that is primarily helpful in simple cases that do not require extensive attention.

## B. LEGAL INSURANCE

Legal insurance is a method of increasing access to legal services by reducing individual loss from legal fees.<sup>55</sup> The people who use their legal insurance plans frequently for legal questions benefit from the people who purchase the plan but do not need to use it. Most plans offer unlimited consultations, which advances the theory that if people can ask questions to attorneys for free, they will take preventative measures to cure or minimize their legal issues before they become more time consuming and expensive.<sup>56</sup> In this way, prepaid plans give middle-class people an incentive to be proactive and seek legal advice in a more efficient way.<sup>57</sup> This section will focus only on individual plans, and will not address commercial plans which are offered to businesses.

Although legal insurance “operate[s] like any traditional insurance mechanism,”<sup>58</sup> it is important to distinguish legal insurance from medical insurance.<sup>59</sup> Assuming that the narrative surrounding medical insurance is the same as the one that surrounds legal insurance would be a mistake. First, the general population’s interest in legal insurance is significantly lower than it is for medical insurance.<sup>60</sup> This is probably due to the fact that most people do not anticipate having legal issues, but most people can anticipate having serious medical costs at some point.<sup>61</sup> Second, the model of health insurance is based on the assumption that, except for age, “the incidence of sickness is evenly distributed throughout the population.”<sup>62</sup> No similar assumption exists with legal insurance, as legal problems typically plague property owners because of sectors like estate planning.<sup>63</sup> These differences help explain why legal insurance is not widely used.

### 1. COSTS

An individual prepaid legal insurance plan is available for around \$12-\$30 per month and typically covers the individual purchaser, spouse or partner, and dependent children.<sup>64</sup> The insurance company has “in-network” attorneys which

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55. Preble Stolz, *Insurance for Legal Services: A Preliminary Study of Feasibility*, 35 U. CHI. L. REV. 417, 422 (1968).

56. Jeremy Bryant Tomes, *The Emergence of Group and Prepaid Legal Services: Embracing A New Reality*, 16 TENN. J. BUS. L. 25, 36 (2014).

57. *Id.* at 35.

58. *Id.* at 36.

59. Stolz, *supra* note 52, at 423.

60. *Id.* at 424–25.

61. *Id.* at 423.

62. *Id.* at 427.

63. *Id.*

64. See, e.g., *Personal Plan Coverage and Pricing*, LEGALSHIELD, <https://www.legalshield.com/personal-plan/coverage-and-pricing> [<https://perma.cc/NW5C-E6HB>] (last visited Feb. 23, 2020); *Legal Advantage Plus*

they work with, and typically assigns cases to them based on expertise and geographic location.<sup>65</sup> For example, LegalShield's basic plan covers unlimited phone consultations with an attorney, a certain extent of legal document review, and limited phone calls and letters on your behalf.<sup>66</sup> However, some contracts include extreme restrictions on even basic trial assistance.<sup>67</sup> For example, through LegalShield, an attorney is only covered through the insurance plan during trial for eight hours per day, which includes "time both in and out of the courtroom."<sup>68</sup> Also, the prepaid insurance plan does not offer any trial representation for criminal defense, any lawsuit involving drugs or alcohol, or divorce.<sup>69</sup>

If the prepaid plan does not include the services that an individual requires, the local law firms that work with the insurance companies typically offer additional services for a discounted rate (usually twenty-five percent off) for every hour.<sup>70</sup> However, even this discounted rate is expensive; because the plan has extensive exceptions, it seems likely that an average person would need to shell out more money on top of the monthly fee for the plan. For example, market rates typically range from \$200 to \$350 per hour.<sup>71</sup> With the twenty-five percent discount from using legal insurance, the market rate would still be \$150 to approximately \$260 per hour. Additionally, the insurance plans typically only offer this discounted rate for "in-network" attorneys.<sup>72</sup> While there is some cost savings in not having to identify possible attorneys, the discounted rates are high enough that they could still preclude middle-class users.

One of the main issues with legal insurance is having a limited number of providers to choose from in order to receive the twenty-five percent discount on the hourly rate. Although this time savings of not searching for an attorney is valuable, the rates of the in-network attorneys are high enough that it may still not be worth it. Purchasers may be able to use an attorney outside the network, but may

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Prepaid Legal Plan, LEGALZOOM, <https://www.legalzoom.com/attorneys/legal-plans/personal.html> [https://perma.cc/P9ZY-LLEB] (last visited Feb. 23, 2020).

65. *Law Firms*, LEGALSHIELD, <https://www.legalshield.com/law-firms> [https://perma.cc/B3TL-VCU4] (last visited Feb. 23, 2020); *Legal Advantage Plus Prepaid Legal Plan*, LEGALZOOM, <https://www.legalzoom.com/attorneys/legal-plans/personal.html> [https://perma.cc/P9ZY-LLEB] (last visited Feb. 23, 2020).

66. *Personal Plan Coverage and Pricing*, LEGALSHIELD, <https://www.legalshield.com/personal-plan/coverage-and-pricing> [https://perma.cc/NW5C-E6HB] (last visited Feb. 23, 2020); *Legal Advantage Plus Prepaid Legal Plan*, LEGALZOOM, <https://www.legalzoom.com/attorneys/legal-plans/personal.html> [https://perma.cc/P9ZY-LLEB] (last visited Feb. 23, 2020).

67. *See, e.g., Contract*, LEGALSHIELD, <http://contracts.legalshield.com/contracts/LSDC300.118.pdf> [https://perma.cc/27LF-XF44] (last visited Feb. 23, 2020).

68. *Id.* at 6.

69. *Id.*

70. *Id.*; *Legal Advantage Plus Prepaid Legal Plan*, LEGALZOOM, <https://www.legalzoom.com/attorneys/legal-plans/personal.html> [https://perma.cc/P9ZY-LLEB] (last visited Feb. 23, 2020).

71. *See* Herrera, *supra* note 1, at 2.

72. *Law Firms*, LEGALSHIELD, <https://www.legalshield.com/law-firms> [https://perma.cc/B3TL-VCU4] (last visited Feb. 23, 2020); *Legal Advantage Plus Prepaid Legal Plan*, LEGALZOOM, <https://www.legalzoom.com/attorneys/legal-plans/personal.html> [https://perma.cc/P9ZY-LLEB] (last visited Feb. 23, 2020).

have to pay up front and be reimbursed by the insurance company.<sup>73</sup> Additionally, the insurance provider is unlikely to cover the cost of services that is higher than that of in-network attorneys, leaving the client responsible for the difference.<sup>74</sup>

Not being able to choose an attorney is a cost of the legal insurance plan system, and should give those seeking legal advice pause before purchasing a pre-paid plan. Certainly, there are people who would appreciate not having to do the research to find an attorney. However, like any profession, there are certain attorneys that are more competent, understanding, and efficient than others. Individuals seeking legal assistance should be able to choose which attorney to trust with their most pressing issues. For attorneys to be able to represent clients most effectively, the clients must feel comfortable sharing confidential information with them. They should feel that the attorney truly cares about their cases and outcomes, and should be able to look around or seek recommendations from friends or family without losing the benefits of their legal insurance plans. Not everyone will want to do the research and make a choice, but those who do should not lose the benefit of the money they have already spent. The attorney-client relationship is of utmost significance, yet with a legal insurance plan, the relationship is left to someone else to decide.

Additionally, legal insurance plans run into the same issues as unbundling in terms of the amount of support given by the attorneys. As stated earlier, most of the plans do not offer trial assistance. One insurance company, Legal Zoom, only allows a thirty-minute consultation for each issue.<sup>75</sup> These force clients to either use the recommended law firm for additional assistance or find another on their own. The consultations with the legal insurance company can help clients obtain “general information regarding court filings,” but will not actually assist in the process.<sup>76</sup> For those with complex issues, and especially those requiring representation in court, the limited assistance of legal insurance is not a viable option to be successful in the proceeding.

## 2. LEGAL ETHICS ISSUES

There are two main legal ethics issues that members of the middle class in need of assistance should be aware of before purchasing a legal insurance plan. First, the structure of monitoring the provided services has the potential to conflict with Model Rule 1.6 regarding confidentiality because the attorneys must

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73. Amy Fontinelle, *How Personal Legal Insurance Works*, INVESTOPEDIA (Apr. 6, 2015), <https://www.investopedia.com/articles/personal-finance/040615/how-personal-legal-insurance-works.asp> [https://perma.cc/AKL9-A39N].

74. *Id.*

75. *Legal Advantage Plus Prepaid Legal Plan*, LEGALZOOM, <https://www.legalzoom.com/attorneys/legal-plans/personal.html> [https://perma.cc/P9ZY-LLEB] (last visited Feb. 23, 2020).

76. *Id.*

disclose the extent of services that are provided.<sup>77</sup> Second, a client and a lawyer are required to have an independent relationship according to Model Rule 1.8(f), where no aspect of the lawyer's judgment or services is restricted by a third party.<sup>78</sup> This is nearly impossible to achieve when legal insurance plans restrict the amount of time and what kinds of services a lawyer is allowed to provide. This poses potential issues with either the confidentiality requirement or the professional independence requirement.

This situation is complicated by the fact that lawyers, in general, are not professionally restricted to only give advice on legal matters.<sup>79</sup> Clients often look to lawyers for all kinds of non-legal advice that they could get from another professional but choose not to.<sup>80</sup> There is a fear that clients will use their legal insurance as a method of getting advice on a plethora of other issues.<sup>81</sup> Overuse is a risk<sup>82</sup> and legal insurance companies should have some kind of monitoring system to ensure the claims for benefits are honestly pertaining to valid legal issues.<sup>83</sup> Otherwise, insurance holders faced with urgent legal questions may face long wait times or other delays because others are seeking never-ending, non-legal advice. Any kind of monitoring is problematic because in some circumstances, even "reporting a client's name and informing the legal service provider that the lawyer has been retained may be considered a disclosure of confidential information."<sup>84</sup> This leaves few options for legal insurance companies to monitor not only the kinds of issues that are being brought, but also the quality of advice given by the participating attorneys.

For example, LegalZoom's insurance plan clearly implicates the confidentiality issue with monitoring the legal services used. LegalZoom offers a prepaid plan that includes an unlimited number of thirty-minute phone consultations with a lawyer.<sup>85</sup> The kicker is that each consultation must be about a "unique issue," defined as "a question that has not been answered by a plan attorney in a previous discussion."<sup>86</sup> The policy would be meaningless without a mechanism to enforce it, but any enforcement of this policy would go completely against the confidentiality standards put in place for the legal profession.<sup>87</sup> Not only would the lawyer have to disclose that the client sought services, but also for which issues the client was seeking help during any given consultation.

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77. See Tomes, *supra* note 54, at 50–51.

78. *Id.* at 51.

79. Stolz, *supra* note 52, at 429.

80. *Id.*

81. *Id.* at 429–30.

82. See Tomes, *supra* note 53, at 49.

83. Stolz, *supra* note 52, at 430.

84. See Tomes, *supra* note 53, at 50.

85. *Legal Advantage Plus Prepaid Legal Plan*, LEGALZOOM, <https://www.legalzoom.com/attorneys/legal-plans/personal.html> [https://perma.cc/P9ZY-LLEB] (last visited Feb. 23, 2020).

86. *Id.*

87. Tomes, *supra* note 53, at 50–51.

Describing trust as “the hallmark of the client-lawyer relationship,” Model Rule 1.6 states that “[a] lawyer shall not reveal information relating to the representation.”<sup>88</sup> This is necessary to the success of the survival of the legal system as we know it. For attorneys to do their jobs adequately, the client needs to communicate “fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.”<sup>89</sup> For the insurance company to monitor on which issues advice is given, there would need to be informed consent from the client. It is not conducive to the way legal services operate to require every person seeking legal insurance to consent to their identities and topics of their legal issues being shared with the insurance company.

Even if there is informed consent, the insurance companies construct the pre-paid plans to offer a limited amount of services, which interferes with the independent professional relationship that must exist between a lawyer and a client.<sup>90</sup> In a Formal Opinion, the ABA Commission on Ethics and Professional Responsibility expressed concerns regarding the relationship between prepaid legal service plans and Rule 1.8(f), which requires lawyers to have independent professional judgment.<sup>91</sup> The Opinion emphasized that once a company refers a client to a lawyer, an entirely independent lawyer-client relationship should exist.<sup>92</sup> It cautioned against plans that “set limits on the amount of time a lawyer may spend with each client’s case,” or require that a lawyer stop representing a client “beyond the scope of the agreement in the plan.”<sup>93</sup> Both of these concerns are implicated in the average legal service plan.

Certain legal insurance plans dictate the amount of time that each consultation lasts.<sup>94</sup> For example, any consultation with a LegalZoom attorney can last only thirty minutes, and each thirty-minute consultation must be about a different issue.<sup>95</sup> It is possible that, after hearing about an issue, an attorney decides that it is in the client’s best interest to have an hour consultation instead because of its complexity. It seems that the lawyer would then be unable to exercise this independent judgment, as strictly confined to offering what the plan provides. The decision of the length and depth of the representation should be decided by the lawyer and client only.<sup>96</sup> The time limit also begs the question of whether the legal insurance model is actually offering what would be considered legal services. It is difficult to imagine a legal issue that can be adequately addressed in

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88. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2018) [hereinafter MODEL RULES].

89. MODEL RULES R. 1.6 cmt. 2.

90. Tomes, *supra* note 54, at 51.

91. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-355 (1987) [hereinafter ABA Formal Op. 87-355].

92. *Id.*

93. *Id.*

94. *Legal Advantage Plus Prepaid Legal Plan*, LEGALZOOM, <https://www.legalzoom.com/attorneys/legal-plans/personal.html> [https://perma.cc/P9ZY-LLEB] (last visited Feb. 23, 2020).

95. *Id.*

96. See ABA Formal Op. 87-355, *supra* note 88.

thirty minutes because very few legal questions are cut and dry. The time limit pushes legal services closer to cursory canned question and answer sessions. Additionally, certain aspects of this model do not seem like legal representation at all because so much of them are controlled by a third party rather than the lawyer.

Second, the scope of the services that each plan provides differs; some strictly do not include more sophisticated methods of representation such as trial assistance,<sup>97</sup> while others include limited civil trial assistance.<sup>98</sup> The lawyer and client could work out an agreement beyond the legal insurance plan, otherwise the client lands in a situation where a lawyer who is familiar with the case cannot represent them in court. Without this representation, the client will likely fare the same as if they had never purchased legal insurance in the first place, only they will be out of the money spent on the legal insurance.

### C. DC AFFORDABLE LAW FIRM

“The DC Affordable Law Firm is a non-profit organization whose mission is to provide high quality, affordable legal services to DC Residents with unmet legal needs who do not qualify for free legal aid and are unable to pay prevailing legal rates.”<sup>99</sup> The firm provides services for people who earn 200-400 percent above the poverty line, and focuses mainly on immigration and family law along with some estate planning and probate matters.<sup>100</sup>

The DC Affordable Law Firm resulted from a partnership between the Georgetown University Law Center, Arent Fox, and DLA Piper.<sup>101</sup> The lawyers who work at the DC Affordable Law Firm are recent law school graduates and are trained for three months by a combination of Georgetown University Law Center faculty, legal aid organizations in the District, current lawyers at the DC Affordable Law Firm, Arent Fox and DLA Piper lawyers, and private bar practitioners.<sup>102</sup> After completing the fifteen-month fellowship program, participants receive an L.L.M. free of cost. The L.L.M., in addition to the mentorship and training opportunities afforded to the new lawyers, make the DC Affordable Law Firm a uniquely attractive post-graduation job opportunity.

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97. *Legal Advantage Plus Prepaid Legal Plan*, LEGALZOOM, <https://www.legalzoom.com/attorneys/legal-plans/personal.html> [https://perma.cc/P9ZY-LLEB] (last visited Feb. 23, 2020).

98. *Personal Plan Highlights*, LEGALSHIELD, <https://www.legalshield.com/personal-plan/coverage-and-pricing> [https://perma.cc/NW5C-E6HB] (last visited Feb. 23, 2020).

99. *Our Story*, DC AFFORDABLE LAW FIRM, <http://dcaffordablelaw.org/about-the-firm/our-story/> [https://perma.cc/4LL8-NBWL] (last visited Feb. 23, 2020).

100. *Our Clients and Fees*, DC AFFORDABLE LAW FIRM, <http://dcaffordablelaw.org/about-the-firm/our-clients-and-fees> [https://perma.cc/W3TT-YCUU] (last visited Feb. 23, 2020).

101. *Our Story*, DC AFFORDABLE LAW FIRM, <http://dcaffordablelaw.org/about-the-firm/our-story/> [https://perma.cc/4LL8-NBWL] (last visited Feb. 23, 2020).

102. Interview with Peter Edelman, Professor of Law, Georgetown University Law Center, in Wash., D.C. (Oct. 1, 2019) (on file with author).

The DC Affordable Law Firm also works closely with various public interest organizations in the District of Columbia. These organizations refer many clients to the DC Affordable Law Firm because they are above the income range and are thus disqualified from receiving services.<sup>103</sup> In the first five years of its existence, DC Affordable Law Firm has shown that it is possible to run a law firm that provides effective services to the middle-income class, and thanks to the support of grants, foundations, partnerships, and private benefactors, is on trajectory to be sustainable on a long-term basis.<sup>104</sup>

### 1. COSTS

The firm charges \$100 for an initial consultation with an attorney.<sup>105</sup> After receiving preliminary advice, the client and the lawyer decide whether they will continue with the case “either on a limited or full representation basis.”<sup>106</sup> The consultation is a key aspect of the DC Affordable Law Firm format because the lawyers can help the clients decide whether unbundling would be a wise decision for the desired results of their cases. If the lawyer and client determine that unbundled services would not be sufficient, they work together to figure out a payment plan that will work.<sup>107</sup> Although it typically costs \$75 for each additional hour after the consultation,<sup>108</sup> the DC Affordable Law Firm charges a monthly fee based on each client’s situation and is open to charging a fixed fee in certain situations.<sup>109</sup> Because the financial payment plan is determined on a case-by-case basis, the firm considers what the prospective client can pay and tries to make their services available at a relatively low cost.<sup>110</sup>

### 2. CASE OUTCOMES

It is difficult to determine what deems a case successful in areas of law such as family law.<sup>111</sup> However, as previously discussed, full representation has been proven to lead to more successful case outcomes in litigation than unbundling.<sup>112</sup> Because unbundling is appropriate in some scenarios but not others,<sup>113</sup> the client

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103. Interview with Sheldon Krantz, current Chair of the Board of Directors, former Executive Director, DC Affordable Law Firm, in Wash., D.C. (Dec. 1, 2019) (on file with author).

104. *Id.*

105. *Our Clients and Fees*, DC AFFORDABLE LAW FIRM, <http://dcaffordablelaw.org/about-the-firm/our-clients-and-fees> [https://perma.cc/W3TT-YCUU] (last visited Feb. 23, 2020).

106. *Id.*

107. Interview with Peter Edelman, *supra* note 99.

108. *Our Clients and Fees*, DC AFFORDABLE LAW FIRM, <http://dcaffordablelaw.org/about-the-firm/our-clients-and-fees> [https://perma.cc/W3TT-YCUU] (last visited Feb. 23, 2020).

109. Interview with Sheldon Krantz, *supra* note 100.

110. *Id.*

111. *Id.*

112. *See infra* Part II.

113. *Id.*

is best served by having a conversation with a lawyer before making this decision.

Another relevant factor of success is whether the initial and later costs of the representation are affordable, even if the case should go to court unexpectedly. The \$100 consultation fee is a large up-front cost, and it is paid before the firm decides whether it will take the client's case.<sup>114</sup> However, the \$75 hourly fee is a very modest price considering other fees in the area range from \$200-350 per hour.<sup>115</sup> Thus, the DC Affordable Law Firm makes the most sense economically for those seeking full representation and not for those seeking answers to minor questions.

The largest benefit of the DC Affordable Law Firm is that it offers full representation for a reasonable price. The flexible payment plan, tailored to each individual's financial situation, makes receiving services possible for many who would otherwise be forced to represent themselves *pro se* due to the lack of affordable representation. Because *pro se* individuals have substantially less favorable case outcomes than those who are represented,<sup>116</sup> the DC Affordable Law Firm offers a much-needed solution for full representation that gives clients increased chances at success. Because it functions more or less like a typical law firm, it does not run into the same legal ethics issues of confidentiality or professional independence like a legal insurance model.

### III. RECOMMENDATION TO EXPAND THE DC AFFORDABLE LAW FIRM

Because the DC Affordable Law Firm provides full representation if needed, has a low hourly rate compared to other firms in the area, and a flexible payment plan, it should be implemented in more jurisdictions. Although the \$100 consultation fee is a hurdle, it has the potential to help clients save money in the long run. The DC Affordable Law Firm paired with unbundling in proper situations would also create a cost-effective option for receiving legal services.

The advantage of receiving unbundled legal services from a system like the DC Affordable Law Firm over other unbundling is most starkly seen during complex proceedings. Unbundled services from lawyers who will not offer representation in court can help procedurally, but are substantively ineffective if there will be litigation involved.<sup>117</sup> However, when initially facing a legal issue, it is difficult to know whether and to what extent legal representation will be needed.<sup>118</sup> If it turns out that the client only seeks the answer to a brief question,

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114. *Our Clients and Fees*, DC AFFORDABLE LAW FIRM, <http://dcaffordablelaw.org/about-the-firm/our-clients-and-fees> [https://perma.cc/W3TT-YCUU] (last visited Feb. 23, 2020).

115. See Herrera, *supra* note 1, at 2.

116. See *infra* Part II.

117. See Steinberg, *supra* note 14, at 457.

118. See generally Rebecca L. Sandfeur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*, U. ILL. URBANA-CHAMPAIGN, 1, 13 (Aug. 8, 2014) (finding that the main reason people with legal issues do not contact a lawyer is because they do not recognize the need for advice).

or she is trying to decide whether to bring a legal action, then unbundling could be sufficient. However, it is possible that once an attorney is involved, the individual realizes that the legal issue will consume more time and money than originally thought. Instead of blindly agreeing to receive unbundled services,<sup>119</sup> and later having to switch attorneys if the case ends up going to court, an initial consultation with the DC Affordable Law Firm could save time and money in the long run. It helps assess what kind of legal representation will be needed, and determines whether it would be possible to be successful with unbundled services or opt for more complete representation.

The DC Affordable Law Firm is also a better option than legal insurance because the client has the freedom to compare rates between firms and choose an attorney. The process of receiving legal help through the DC Affordable Law Firm begins with an hour-long consultation.<sup>120</sup> During this process, the client is able to meet with an attorney from the firm, and make an informed choice whether to continue being represented by the DC Affordable Law Firm.<sup>121</sup> A legal insurance plan provides phone consultations with a lawyer, and the case gets referred to a local firm of the insurance company's choosing if the client needs more representation.<sup>122</sup> The client has already paid the monthly fee(s) and would get a discount on the chosen law firm's rate.<sup>123</sup> However, should the client prefer a different attorney to handle her case, she does not truly have a meaningful choice without deciding to forfeit the monthly fee(s) she already paid in addition to the discount she would receive.

Additionally, unlike through a legal insurance plan, the attorneys at the DC Affordable Law Firm can provide full representation and are not limited to giving general advice.<sup>124</sup> Regardless of whether the attorney at the DC Affordable Law Firm thinks that unbundling is sufficient or that more complete representation is needed, because the lawyer has an independent relationship with the client, together they can decide the extent of representation that is appropriate without being influenced by a third party. Because of the traditional lawyer-client relationship, the DC Affordable Law Firm does not prompt any of these same legal ethics concerns of confidentiality or lawyers and clients maintaining an independent relationship.

The required aspects of the lawyer-client relationship inhibit the viability and success of non-traditional legal services models like unbundling and legal insurance. The *Model Rules of Professional Conduct* have codified the state of the traditional attorney-client relationship as it had evolved over centuries of the

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119. Molvig, *supra* note 25, at 13.

120. Interview with Peter Edelman, *supra* note 99.

121. *Id.*

122. *Law Firms*, LEGALSHIELD, <https://www.legalshield.com/law-firms> [https://perma.cc/B3TL-VCU4] (last visited Feb. 23, 2020).

123. *Id.*

124. Interview with Peter Edelman, *supra* note 99.

profession.<sup>125</sup> They have shaped the public perception of what to expect when seeking legal services, and have given lawyers clear guidelines for how to administer them.<sup>126</sup> However, the *Model Rules* are unable to account for innovative, non-traditional service models, and do not allow them to survive without qualms.<sup>127</sup> Moreover, the lawyer is the one who has to bear the risk that participating in these legal services is potentially unethical or otherwise disallowed by the *Model Rules*.

Modifying the *Model Rules* would eliminate the ethical issues that currently prevent more innovative ways of administering legal services from being successful.<sup>128</sup> On the other hand, it is possible that modifying the *Model Rules*—particularly Rule 1.6 regarding confidentiality and Rule 1.9 regarding professional independence—could create negative consequences outside of the context of non-traditional legal service models. However, until the *Model Rules* are modified to allow more innovative ways of lawyering to proceed, the system will continue to prefer those with traditional legal assistance. Alternatively, non-traditional service models could be adjusted or innovated to fit within the *Model Rules*.

## CONCLUSION

Although other initiatives have tried to increase access to legal services for those in the middle class, they are not as effective as the DC Affordable Law Firm. Unbundling, although ideal for simple legal issues, is unfit for complex proceedings because case outcomes do not improve with the use of unbundled services when there is litigation involved.<sup>129</sup> Legal insurance has potential to be a successful model with more public buy-in and clarification of how the system works within the boundaries set by the *Model Rules*.<sup>130</sup> Unless the plan requirements or the *Model Rules* are updated, legal insurance does not provide the best option for addressing the affordability of legal services.<sup>131</sup> This is because the lawyer-client relationship is incredibly influenced by the insurance company when it was intended to be a private relationship.<sup>132</sup> Additionally, the restrictions on the use of the plans and the high expense of in-network attorneys makes it a pricier option than the DC Affordable Law Firm.

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125. See, e.g., John M. Burman, *Ethically Speaking: Duties to Prospective Clients*, [33-AUG] WYO. LAW. 34, 34–35 (2010).

126. See generally Ben W. Heineman, Jr., William F. Lee & David B. Wilkins, *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century*, HARV. L. SCH. CTR. LEGAL PROF. (2014) (exploring how ethical responsibilities shape the public perception of the legal profession).

127. See generally Tomes, *supra* note 54 (explaining that the *Model Rules* give a framework for the administration of legal services and that changing individual rules will not alter the system as a whole).

128. See *id.* at 64.

129. See *infra* Part II.

130. See *id.*

131. *Id.*

132. See ABA Formal Op. 87-355, *supra* note 88.

The DC Affordable Law Firm should be implemented in more jurisdictions to have the largest effect possible on providing legal services to the middle class. It is currently the only model of its kind.<sup>133</sup> The model is easily replicable in other cities because it was born out of a collaboration between two big law firms and a law school. These actors are frequently located close to one another in other cities, and would be easier to replicate because it has already proven to be successful in D.C. The DC Affordable Law Firm is interested in helping replicate their model,<sup>134</sup> and would assist other firms and law schools trying to do similar work. An affordable law firm program could be successful in New York City, with the myriad of law firms and law schools that exist there. Additionally, many of the residents in New York City likely face similar challenges as those of D.C.: high rent and little spare money for legal expenses.

Affordability should not be a hurdle to accessing quality legal services. There must be continual innovation in the legal services sector to provide for those in the middle class who are categorically excluded from models like legal aid. Modernizing the *Model Rules* to account for advances in the way legal services are administered is a necessary but long-term goal. In the meantime, expanding the DC Affordable Law Firm model to another jurisdiction would be a substantial step toward giving middle-class individuals the opportunity to be represented.

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133. Interview with Peter Edelman, *supra* note 99.

134. *Id.*