



A Failed Market?

By [Lucian Pera](#) on Wed, 11/01/2017 - 12:00am

There's a large and growing gap between the existing legal needs of ordinary Americans — not just the poor — and the ability of the legal profession to meet those needs.

As a profession that sees self-regulation as a core value, what responsibility do we have to address this fundamental problem? More importantly, what can be done?

I put those pressing questions to an audience at the amazing Tennessee Alliance for Legal Services' 40th Annual Equal Justice University, the annual gathering of Tennessee's access-to-justice community.

For decades, Tennessee has been a national leader — the national leader, in some ways — in encouraging the delivery of pro bono legal services. Tennessee is also a powerful national innovator — [ABAFreeLegalAnswers.com](#) was born here, midwifed by former TBA President (and now ABA Pro Bono Committee Chair) Buck Lewis. It's now available in more than 40 states.

Indeed, with a few tweaks, this Tennessee innovation was recently modified to allow non-Texas lawyers to answer, online and pro bono, the vital, Hurricane Harvey-related questions of storm victims. (Visit [Texas.FreeLegalAnswers.com](#) right now to volunteer. Texans still need our help.)

So I put the questions I started this column with to the EJU crowd, plus a few more.

The access-to-justice community, including our TBA Access to Justice Committee, ably chaired by John Farringer, primarily and rightly focuses on the access-to-justice gap faced by those with incomes up to 125 percent of the poverty line. But the access-to-justice gap does not stop there. I want you to think about the gap differently.

Consider instead the series of closely related markets lawyers serve — or could serve, including everyone from the biggest corporations on Earth to the one-location dry cleaner in your neighborhood, from the rich people in Germantown to the Memphis mom working for minimum wage who can't spare a dime to pay for legal help to deal with eviction.

Different legal services providers often serve these markets today, but licensed lawyers are the common thread. A single, self-regulated profession serves all these related markets, and significant parts of these markets are just not working. Lots of those who want and need legal services can't afford them; lots of lawyers who are willing to practice and serve these legal needs can't make it work financially.

That's a fundamental problem.

On the one hand, there's no indication that the overall legal needs of Americans are shrinking; there is evidence they're growing.

On the other hand, more lawyers are minted every year by law schools (while fewer now than in past boom years).

So far, so good, right? Not really.

There is solid evidence that unmet legal needs are growing.

In his remarkable and thought-provoking new book, *Rebooting Justice: More Technology, Fewer Lawyers and the Future of Law*, University of Tennessee Law Professor Ben Barton points to a 1994 ABA study that examined the legal needs of both low-income (up to 125 percent of the poverty line) and moderate income (between the 20th and 80th income percentiles) Americans. At least half these household had at least one legal need every year, but three-quarters (low-income households) or two-thirds (moderate income) of these problems were never brought to the civil justice system. (That's significantly worse than in other wealthy countries and in developing countries.)

Professor Barton also cites evidence, based on the total legal services spending by individuals and average solo and small-firm hourly rates, suggesting that, between 1990 and 2012, the hours of legal services bought by individuals declined 30 percent. Over the same period, the lawyer time Americans were able to use to address a legal problem declined from four hours to one hour.

In courtrooms, there's also evidence of an increase in unrepresented litigants. Professor Barton reports that the rate of self-representation has been growing and reaching more complex legal disputes over at least the last 20 years, accelerating since 2008. In many courts, a majority of cases now include at least one pro se party. Recent reports I have personally heard — literally from extreme ends of the state in Sullivan and Shelby Counties — confirm that this problem is real.

But the incomes of a significant portion of our profession — solo practitioners, many of whom represent individual consumers — are shrinking. Professor Barton points to IRS data showing that solo practitioners' average income was essentially stagnant in constant dollars from 1967 to 1988. From 1988 to 2010, they saw a 37 percent decline.

Data from an Alabama bar survey showed similar declines for attorney income from 1985 to 2009. Indeed, 23 percent of Alabama lawyers were making less than \$25,000 in 2009, and 37 percent were making less than \$50,000. As Barton puts it, "[R]oughly one quarter of the lawyers surveyed in Alabama in 2010 are earning less practicing law than they could as managers at McDonald's, yet access to justice remains an acute problem in Alabama, as it is everywhere else."

To me, these facts paint a vivid portrait of a failing market. Put more bluntly, the delivery of legal services to pretty much everybody but very well-heeled individuals and businesses is failing.

It's certainly not the fault of our profession's access-to-justice community, in Tennessee or nationwide. They make daily, heroic efforts to fill the gap, aiming their efforts at those most in need.

My thought for this month is about our collective responsibility.

If we are a self-regulated profession, as we all like to say, and if we choose to remain one, don't we have a responsibility as lawyers and judges to see what we can do to "fix" this market failure?

I am not naïve. I don't believe that a regulator can always "fix" a market that's not working to deliver services to all those who want or need them. Still, could we help? Don't we have a responsibility to see what can be done, by changing — adding, removing, amending — the regulatory framework, or in some other way, to make the market work more effectively for consumers?

I think we do.

What should be our goal? Simply stated: Legal services markets that deliver legal services to more of those underserved today — services that are better, faster and cheaper — and do so in a way that fundamentally protects clients and the public.

What then is to be done?

I'll turn to that next month in this space. (Spoiler alert: Expect more questions than answers, but the discussion has to start somewhere and it needs to include all of us.)



LUCIAN T. PERA is a partner in the Memphis office of Adams and Reese LLP. A Memphis native, he is a graduate of Princeton University and Vanderbilt University School of Law. He is a former TBA YLD president and a past ABA treasurer. Jane, his wife, tells us he's always suggesting stuff for her to read, too. You can reach him at Lucian.Pera@arlaw.com.