

LegalCare: It is Time to Lower Legal Costs and Ensure Affordable, Accessible Legal Coverage for All

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According to the American Bar Association, thousands of innocent working Americans are wrongfully convicted of crimes every year, in part due to negligent or poorly trained lawyers, careless judges, and prosecutorial misconduct.¹ Samuel R. Gross, Professor of Law at University of Michigan, estimates that between 3.3 percent and 7 percent of convictions are erroneous, meaning that between 60,000 and 140,000 innocent Americans are incarcerated.²

With attorney-legislators scrutinizing and planning the reform of medicine and the health insurance industry, it is only fitting that physicians apply the most current progressive healthcare reform principles to the legal profession. Attorney-legislators and other politicians and appointees are strongly encouraged to use the present healthcare reform momentum to simultaneously reform the legal profession. Doing so would greatly add to their credibility among constituents and other stakeholders, since they know essentially nothing about medicine and everything about law. Legal reform: it is time.

Illustrative Anecdotes

- Cameron Willingham was convicted of murdering his children by arson in 1992. Due in part to poverty, inadequate representation by legal counsel, and an inefficient, haphazard, paper-dependent legalcare system based on medieval principles and practices, he was executed in 2004.³ The Texas Forensic Science Commission has been examining the flawed investigation that contributed to the execution of this man, thought by many arson experts to be innocent.
- Jimmy Bromgard's public defender failed to investigate the facts of his client's case, filed no motions on behalf of his client, failed to give an opening statement, failed to prepare for closing arguments, provided no expert witnesses for his client, and failed to file an appeal. As a result of our two-tiered legalcare system, Bromgard languished for 15 years in prison for a rape he did not commit.⁴
- Eddie Lloyd was wrongfully convicted of rape and murder in 1985. Contributing factors to this tragic injustice included representation by a court-appointed attorney, poor hand-off between defense attorneys prior to trial, and the fact that another state-appointed attorney failed to meet with Lloyd or file a claim of ineffective assistance of counsel. Lloyd was exonerated after spending 17 years in prison, and died two years later.⁵

Scope and Severity of the Problem

Legalcare costs in the U.S. are skyrocketing, with tort costs alone draining Americans of \$865 billion dollars annually, a sum

greater than the entire combined gross domestic products of New Zealand, Hong Kong, Ireland, Vietnam, Qatar, Ecuador, and Luxembourg.⁶ Billions more are wasted by fearful business owners complying with dubious regulations drafted by lawyers. Are we getting our money's worth? Is the United States any more safe, just, or lawful than Japan or Great Britain, where the legal-cost burden is half of what we pay? According to *The Times* of London, our legal system is worse than that of either Russia or China.⁷

The prohibitive costs of lawsuits and liability insurance are smothering small business owners and working Americans, who bear almost 70 percent of business tort liability costs.⁸

Class-action lawsuits result in multi-million dollar payouts to lawyers while consumers end up with nothing of value. David de Alba, a California Superior Court Judge, awarded attorneys who filed a class-action lawsuit against Ford Motor Company \$25 million. What did the plaintiffs receive? *Coupons* they could apply toward the purchase of a new vehicle.

Expenses related to defensive medicine practices add \$124 billion annually to healthcare costs, more than enough to give a \$10,000 health insurance premium to each chronically uninsured American.^{6,9}

The burden of lawsuits in America is an unseen "tax" of \$9,827 on each working family of four.⁶ Unless you're Warren Buffett or Bill Gates, your family or small business is just one serious legal bill away from bankruptcy, and all bankruptcies in America involve at least one expensive legal bill.

A large percentage of all legal spending goes to administrative and overhead costs, needlessly increased by reliance on antiquated paper-based records and information systems typified by the 8 ½ x 14-inch yellow legal pad.

While half of all Americans will require legalcare services in any given year, almost 280 million Americans lack legal insurance. For those few Americans who do have legal insurance coverage, most plans only cover a limited number of attorney visits and fail to provide coverage for preexisting situations such as divorce proceedings, custody cases, bankruptcy, or cases involving alcohol or drugs, thus exposing hardworking families to unlimited financial liabilities.¹⁰ Even those Americans with coverage are struggling to cope with soaring legal expenses. As a nation we can no longer afford to accept the status quo. The cost of inaction is simply too much to bear.

Lack of affordable legalcare is compounded by serious flaws in our legalcare delivery system. Limited access to legalcare by the uninsured poor and racial minorities results in unacceptable sentencing and incarceration disparities. It is critical that we close these gaps in legalcare for all Americans, but particularly for blacks and Latinos, where the incidence of conviction and incarceration is disproportionately high. More than 60 percent of inmates are racial minorities, and one in eight black males in their 20s is in jail on any given day.¹¹

Racial minorities, the poor, non-citizens, and men receive longer prison sentences than whites, the wealthy, citizens, and women, respectively.¹² Recent studies by the American Bar Association estimate that half of all poor Americans suffer from at least one serious legal problem each year, but 75 percent of them have no access to legalcare services. While the average profit per partner of the most successful law firms soared to \$755,000 annually over the past 10 years, these same attorneys only provided eight minutes per day of pro-bono legalcare services to the needy and helpless who suffer from serious legal conditions.¹³ Clearly, perverse profit motives have hindered the ability of many attorneys to reach their potential in providing low-cost or free legalcare services to the poor. Imagine an America in which disenfranchised socioeconomic groups and disparity ethnic groups had access to the same quality legalcare afforded to the wealthiest Americans!

Too many Americans go without high-value preventive legalcare services such as professional income tax preparation and reviews; estate, will, and trust planning; legal risk reviews; pre-crime legal mitigation assessments; and other critical legal services available only to the wealthiest Americans. Routine use of preventive legal services could help Americans avoid future liabilities, but owing to prohibitive costs, many working American families forgo such counsel only to suffer the far greater consequences of future legal or regulatory noncompliance. Our legal *care* system has become a criminal and civil *punishment* system, and the time for reform is well overdue.

Lower Costs to Make Our Legalcare System Work for People and Businesses—Not Just for Lawyers.

Inefficient and poor-quality legalcare costs the nation hundreds of billions of dollars every year. Billions more are wasted on administration and overhead, and this problem will only worsen as legal spending increases over the next decade. We must redesign our legalcare system to reduce inefficiency and waste, and improve legalcare quality, driving down costs for families and businesses. We can do this by: (1) adopting state-of-the-art legal information technology systems; (2) ensuring that clients receive, and attorneys deliver, the best possible counsel, including preventive legal services and chronic-offender management services; and (3) liberating attorneys from perverse profit incentives by implementing a national single-payer legalcare system.¹⁴

Legal costs and quality can vary tremendously among firms and attorneys; however clients have limited access to this information. We must require firms and attorneys to collect and publicly report measures of legal costs and quality, including data on hourly fees, legal errors, miscarriages of justice, attorney-to-client staffing ratios, overruled motions, reversed verdicts, and conviction rates.¹⁴

We must align incentives with excellence. Sadly, many attorneys collect fees based on the *volume* of services provided rather than on the *quality* of those services.¹⁵ For example, a working parent might take her obese child to an attorney to sue a school for damages arising from chronic illnesses caused by the federally funded school lunch program. The attorney might think to himself,

“I could make a lot more money by taking this case and billing these people \$400 per hour, rather than telling them that the case is futile.”

Enter LegalCare, a national single payer legal system that would set reimbursement rates for attorneys and link quality legal counsel with incentives. LegalCare would cover all Americans and drive down legal costs across the board. LegalCare would be administered by a Department of Legal Services (DLS). Reimbursement rates would be modeled on the highly successful Medicare program, and would range from \$12.56 to \$170.65 per attorney-client session, based on coded documentation of the complexity and quality of legalcare services provided.

Tackling the Disparities in Legalcare

Although all Americans are affected by this crisis in our legalcare delivery system, an overwhelming body of evidence indicates that certain populations are significantly more likely to receive lower quality legalcare than others.

Do not all Americans deserve access to the best available legalcare? Could a poor working minority group member accused of drug possession simply walk into the office of a politically connected trial lawyer, and receive the legalcare he needed and deserved at an affordable price? Of course not! Lawyers demand cash retainers, ranging in the thousands to tens of thousands of dollars for criminal defense. He would likely end up with a poorly trained, non-connected public defender, and spend years languishing in prison. According to a damning 2002 report, many public defenders are “unqualified, irresponsible, or overburdened and do little if any meaningful work for [their] clients.”¹⁶ It is our nation’s moral duty to ensure that attorneys and law firms provide affordable counsel to all Americans, especially our most vulnerable and disenfranchised; and to end the practice of “cherry-picking” easy clients or lucrative cases.

We must challenge the legal system to eliminate inequities in legal outcomes by requiring law firms, attorneys, and judges to collect, analyze, and report legal outcome inequalities for disparity populations, and we must hold them accountable for any differences found. We must also diversify the legal workforce to ensure culturally effective legal counsel.¹⁴

Attorneys must be required to keep electronic legal records (ELR) for their clients, the benefits of which are substantial: improved administrative efficiencies, improved quality of legalcare, elimination of legal errors, reduction of redundancies and paperwork, and lower legalcare costs, among others. The ELR should be modeled after the functional and efficient Department of Defense electronic medical record, AHLTA, which is arguably the “Porsche” of electronic medical records.¹⁷ The National Coordinator of Legal Information Technology would ensure that attorneys who fail to be meaningful users of the approved ELR (Attorney Hypermetric Longitudinal Technology Application) by 2015 face reduced payments and other financial penalties from the DLS. In a general sense, meaningful users of the ELR are defined as attorneys who demonstrate to the government that they are using

electronic documentation, that their technology is connected in a manner that provides for electronic exchange of legal data to improve quality of legal services, and those attorneys who submit information to the government on legal outcome measures.¹⁸

The National Institute of Comparative Legal Effectiveness would monitor attorney-client decisions via the ELR to make sure that lawyers do what the DLS deems appropriate, fair, and cost-effective. The goal is to reduce costs and guide attorneys' decisions, with the aim of standardizing and improving legal outcomes for all Americans.

Lawyers, judges, and other legalcare providers will have to adjust to a values-oriented system. In too many cases legal professionals are providing legalcare that doesn't reflect the latest laws, societal norms, or sentencing guidelines. That will have to change. They will have to learn to operate less like solo professionals and more like team members, working with attorneys in other practices, state bar associations, and the DLS to optimize legalcare. In return, they will enjoy the benefits of working in a simpler, seamless system that emphasizes and rewards excellent performance and fair legal outcomes.¹⁹

Affordable, Accessible Coverage for All

We must guarantee affordable and accessible legal counsel for all Americans. Currently, with nearly 280 million Americans lacking legal insurance, rising costs are a burden on working families and small businesses. It is simply too expensive for individuals and families to buy the legalcare they need and deserve on the open market, and is impossible for many with ongoing or pre-existing legal problems.

We must require law firms and attorneys to accept clients with pre-existing legal problems (to include recalcitrant criminal behavior, drug and alcohol addictions, and civil problems such as complicated divorce and custody battles), at fair reimbursement rates set by the DLS. We can no longer allow attorneys and firms to accept easy or lucrative cases while dismissing those who cannot pay, or who suffer from challenging legal conditions.

LegalCare would be budget-neutral if it were funded with a small addition to the existing Federal Insurance Contributions Act tax (FICA), and a federal tax of 75 percent on all tort awards and on all court filing fees. LegalCare will enable all deserving Americans to get the comprehensive and quality legal benefits they need and deserve at a fair and stable price. It will eliminate the two-tiered legalcare system currently in place, keeping courthouse doors open for all, regardless of economic status or race.

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