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The State Bar of Michigan opposes the adoption of legislation that burdens the public's access to justice, including the adoption of a tax on legal services. The following serves to inform stakeholders debating a tax on services and to describe the facts that lead us to conclude that a tax on legal services would be a burden on access to justice.

What cases are being filed in Circuit Court?

As reported by the Michigan Supreme Court State Court Administrative Office in 2008 (the most current year of statistics available), there were a total of 327,573 case filings in circuit courts in Michigan.

- 64% (210,590) were family division filings¹ (of these, 18% or 38,266 were personal protection orders). Thus, a large majority of all Circuit Court filings involve family troubles, such as child support payments, child custody arrangements, domestic violence, or personal protection orders.
- 20% (65,416) were criminal cases² (for which the Constitution guarantees court-appointed attorneys to indigent defendants)
- 14% (46,216) were civil cases
- 1.5% (5,198) were administrative reviews, circuit court appeals, and extraordinary writ filings.

What about Probate and District Court?

Probate court deals primarily with determining whether vulnerable adults (those alleged to have mental or functional incapacity) need protection and with the administration of the legal methods to help them – guardianships, conservatorships, trusts, institutional commitment, etc.-- as well as with concluding the matters of those who have died (wills and estate administration).

District court hears civil cases involving amounts up to \$25,000, misdemeanor cases, and felony arraignments. Of those cases, 56% are traffic cases, many resolved without attorney involvement.

Does everyone who comes to court have a lawyer?

In small claims court, in which cases involving disputes valued up to \$3,000 are heard, parties are not permitted to use a lawyer. Individuals may represent their own interests in district or civil court. The number of people who are coming into court in non-small claims court cases without an attorney is rising steadily, with serious negative consequences for them and for the efficient and effective administration of justice.

What are some of the major areas of law that are practiced? What kinds of cases?

- Children's Law: advocating for child welfare, child protection
- Business Law: incorporation, compliance with the law
- Consumer Law: protecting individuals from unfair practices
- Criminal Law: assuring the constitutional right to an attorney in all criminal proceedings
- Elder Law and Disability Rights: ensuring proper treatment and adequate guardianship laws
- Environmental Law: balancing the interests of development and protecting the environment
- Family Law: assisting families in the matters of custody, separation and disputes
- Health Care Law: representing both the providers of medical services and the recipients
- Intellectual Property Law: protecting innovation including patents, trademarks, copyrights, licensing
- Probate & Estate Planning: drawing wills and appropriate planning
- Social Security Law: represents individuals who are sick, injured, disabled or no longer able to work
- Tax Law: helping individuals and businesses understand tax law and compliance

¹ Family division filings include domestic relations proceedings, proceedings under the juvenile code, proceedings under the adoption code, personal protection, other family proceedings and ancillary proceedings.

² Criminal case filings include non-capital offenses, capital offenses, and felony juvenile proceedings.

Why do individuals need legal services?

Individuals typically seek legal services when they are at a point of crisis in their lives, facing significant misfortune and financial stress. The most typical services for which people use a lawyer are to:

- Obtain an order for child support payments.
- Receive a personal protection order when victimized by domestic violence or other threats to personal safety.
- Deal with the threat of loss of shelter due to mortgage foreclosure or eviction (Michigan's foreclosure rate has been documented among the top 10 states nationally).
- Assure that their wishes concerning medical treatment in the case of severe illness will be respected.
- Assure that their children and other loved ones will be cared for according to their wishes in the case of their incapacity or death.
- Prepare a will.
- File for bankruptcy.
- Seek counsel in the face of criminal charges.

Why do businesses need legal services?

Businesses seek legal advice as an important part of common, responsible management measures like incorporation. Businesses seek legal counsel to:

- Ensure compliance with the law and for matters of important technical and expert review.
- Protect interests.
- Handle employment matters.
- Seek patents, trademarks, copyrights, franchising rights, etc.
- Comply with tax code.

What legal needs are not being met?

The State Bar and its membership are nationally recognized for their dedication to meeting the legal needs of low-income Michigan citizens. Michigan attorneys have donated millions to pro bono work. Still, legal needs go unmet. The most recent data available is from January 2006 and shows:

- For every four persons served in Michigan in 2005, three are turned away because of insufficient resources.
- Every day in Michigan, 100 people with significant legal needs are denied civil legal services because of the lack of resources.
- The lack of legal services is particularly acute for those with housing problems, where nearly half of those who need help with eviction and foreclosure defenses, or help with obtaining repairs required by law, are denied legal services. In an even more egregious situation, only 25 percent of those with income problems are able to receive legal help, meaning that poor people are denied food stamps, health care, cash disability and other income benefits without sufficient legal recourse.
- These figures do not even count poor persons who did not seek legal help either because they did not recognize their situation as one open to a legal solution, or were not aware that affordable legal help was available. (Documenting the Justice Gap In Michigan, Prepared by the State Bar of Michigan in Collaboration with Michigan's Legal Services Corporation Funded Providers, Spring 2006)

Given the rise in unemployment in Michigan, the State Bar believes that more recent data would reflect that need for civil legal services has increased.

Who are the lawyers in Michigan?

The State Bar of Michigan has a membership of approximately 40,000. Approximately 32,200 are Michigan residents. 16,491 Michigan lawyers, 51.25% of the membership, are engaged in the private practice of law and of those, 6,501 or 39.4% are in solo practice. The median gross income of a sole practitioner is \$62,500. In-house counsel accounts for about 9.2% of attorneys in private practice.

How are legal services billed?

- Transactional costs
- Hourly with a retainer agreement
- Hourly without a retainer agreement
- Contract
- Contingency arrangement
- Not applicable because in-house legal counsel is available.

What current taxes apply to legal services?

Some legal transactions, such as property transfers and estate administration, are already taxed. Some lawyers also pay tax under the Michigan Business Tax.

Do other states tax legal services?³

There are only three states that tax legal services:

- Hawaii: Legal services are taxed at a rate of 4%. Physician services are subject to the same rate.
- New Mexico: Legal services are taxed at 5%. The tax rate also applies to gross receipts for physician services with deductions available.⁴
- South Dakota: Legal services are taxed at 4%. Anecdotal commentaries from attorneys in South Dakota indicate that this tax is not enforced because it is so difficult to calculate and collect.

There are three other states that tax legal services indirectly:

- Delaware: Tax rate applies to gross receipts in excess of \$50,000 per month. No state sales tax, gross receipts tax varies by category of business activity. This rate also applies to physician services.
- Tennessee: Attorneys pay a \$400 Professional Privilege Tax, in addition to other licensing fees.
- Washington: Attorneys are subject to a 1.5% Business and Occupations tax on gross receipts.

Discussion questions

- Are there any legal services that could be considered discretionary?
- Would a tax on privately retained counsel in criminal proceedings (for those persons determined not to be indigent) be in violation of the constitution?
- Would an audit of a tax on legal services result in the violation of attorney-client privilege?
- How would contingency fee arrangements be taxed? What if a case is lost and no payment is made on the legal services provided? What if a case is won and the settlement is meant to make the victim whole?

³ Source: Federation of Tax Administrations (FTA), 2007 Survey of Service Taxation

⁴ Tax rate applies to gross receipts. May be deductible if the payment is made by a health care insurer for commercial contract services. Additional deductions are available for receipts from Medicare and payments from Indian Health Services (IHS) for beneficiaries covered by the IHS. (FTA, 2007).