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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-149

THE FLORIDA BAR,

Petitioner,

vs.

TIKD SERVICES LLC, A Foreign Limited Liability Company,

and

CHRISTOPHER RILEY, individually and as Founder of TIKD SERVICES LLC,

Respondents.
_________________________________/

L.T. Case Nos.: 20174035(11B), and 20174045(11B)

BRIEF OF AMICI CURIAE RESPONSIVE LAW AND CENTER FOR PUBLIC INTEREST LAW

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae submitting this brief ("*Amici*") are: (1) Consumers for a Responsive Legal System ("Responsive Law") and (2) Center for Public Interest Law ("CPIL"). As organizations focused on consumer protection, the *Amici* track anticompetitive and protectionist behavior among licensed professionals across the country, study regulatory trends that affect access to justice, and advocate before all three branches of government to ensure that decision-makers act in the public's interest, and not in the interest of the industries they regulate.

Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to the people. Representatives of Responsive Law have testified before state bar associations, legislatures, and the American Bar Association on regulatory issues affecting consumers of legal services.

CPIL is a nonprofit, nonpartisan, academic center based at the University of San Diego School of Law. It focuses on research, teaching, and advocacy in regulatory and public interest law. As a major part of its academic study and consumer advocacy, CPIL analyzes the intersection of regulatory and antitrust law. Since 1980, all three branches of government have relied on CPIL's expertise in the subject of state regulation of business, professions, and trades—including the legal profession.

SUMMARY OF ARGUMENT

The rapidly evolving and sweeping changes brought about by new and different ways of connecting present many opportunities to deliver services to those who have never had access to them. But these new business models simply do not fit within our existing regulatory framework. As a result, "decision-makers are too often caught in traditional, linear (and non-disruptive) thinking or too absorbed by immediate concerns to think strategically about the forces of disruption and innovation shaping our future."[1]

These proceedings illustrate this problem. In developing its product, TIKD recognized an opportunity to utilize technology to provide access to services in a streamlined and affordable way. This innovative approach helps address the unmet civil legal needs of many average consumers.

Unfortunately, the Florida Bar's insistence that TIKD is engaging in UPL reflects the legal profession's fear that this technological revolution will usurp attorneys' market share and dominance of the legal-services market. But this Court has made it clear that the Bar's "single most important concern" in regulating the legal profession should not be protecting attorneys' business and financial well-being, "protect[ing] *the public* from incompetent, unethical, or

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[1] Bernard Marr, *The 4th Industrial Revolution is Here -- Are you Ready?*, FORBES (Aug. 13, 2018, 12:26 AM), https://www.forbes.com/sites/bernardmarr/2018/08/13/the-4th-industrial-revolution-is-here-are-you-ready/#630c758a628b.

irresponsible representation." *Fla. Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980) (emphasis added). The Bar's objection to the Referee's report cites no evidence of actual consumer harm resulting from TIKD's business model. Indeed, the Referee found "no evidence that the consenting public interests are at risk because of the actions of TIKD." Report of the Referee ("Report") at 12.

As nonprofit organizations dedicated to protecting the public, the *Amici* do not advocate for a marketplace in which technology may be freely utilized to deliver legal services without assurance of minimum competence or accountability. To the contrary: as new delivery methods continue to emerge, a new regulatory framework is essential. This Court should join the emerging trend and acknowledge that new business models can provide greater access to legal services for those who have been previously unable to obtain such services.

The Referee concluded that TIKD is not engaged in UPL. We respectfully urge the Court to adopt that report and overrule the Bar's objection.

ARGUMENT

I. THE HISTORY OF LEGAL INNOVATION

As we explain below, (A) courts and state Bars have interpreted existing regulations to accommodate new technology and new business practices; (B) many individuals who would benefit from legal services do not recognize they need it or

cannot obtain counsel; and (C) state courts and legal scholars nationwide are working to address the justice gap through innovation.

A. Courts and State Bars Have Interpreted Existing Regulations to Accommodate New Technology and New Business Practices

Legal regulators' hesitation to adapt to new business models is nothing new. Historically, legal service regulators have rejected new business models until they become common practice elsewhere. As innovations become commonplace, rules—or their interpretation—often change to accommodate the new reality.

Bar opinions on accepting payment of legal fees by credit card are a prime example of interpreting existing rules to accommodate new technology. In the 1960s, the ABA interpreted ethics rules to prohibit attorneys from accepting client payments by credit card. The ABA disparaged credit, opining that allowing clients to pay attorneys' fees by credit would lower the legal profession's status and make attorney-client relationships too impersonal and business-focused. ABA Comm. on Prof'l Ethics, Formal Op. 320 (1968). In 1969, the ABA followed with a harsher opinion, calling credit-card use unprofessional. ABA Comm. on Prof'l Ethics, Informal Op. 1120 (1969). The clearest instance of the ABA's ambivalence was its assertion, on one hand, that credit cards unduly placed attorneys on the line for compensation; but its approval, on the other, of attorneys offering their own line of credit. Formal Op. 320. Based on an unfounded negative view of credit cards, the ABA effectively barred their use. In 1971, the

ABA reaffirmed its harsh stance, going so far as to say that it was unethical to accept credit even if firms did not advertise that they accepted them. ABA Comm. on Prof'l Ethics, Informal Op. 1176 (1971).

With credit cards now an instrumental part of everyday consumer transactions, the ethics opinions banning credit card use seem anachronistic. Over and over, the bar asserted, without evidence, that credit cards would compromise the ability to ethically practice law. Formal Op. 320. As credit cards—and knowledge of how they functioned—became more commonplace, the ABA struggled to maintain these arguments. Informal Op. 1176. In 1970, the Federal Reserve reported that 51% of American households had a credit card of some kind.[2] By 1977, the number had risen to 63%. *Id*. Without citing this data, in 1974 the ABA suddenly reversed its opinion on credit cards. ABA Comm. on & Prof'l Responsibility, Formal Op. 338 (1974). Just a year later, Florida followed suit. In the wake of the ABA's new interpretation of a long-held rule, this Court approved a rule that has continued to help consumers and attorneys alike. *In re Amendment of the Code of Prof'l Responsibility*, 316 So. 2d 52, 54 (Fla. 1975).

Today, Florida Bar Ethics opinions show common acceptance of credit cards as a means of paying for legal fees. Fla. Bar Prof'l Ethics Comm., Op. 16-2 (Oct.

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[2] *See* Federal Reserve Bulletin, Federal Reserve, Credit Cards: Use and Consumer Attitudes, 1970-2000, 625 (Sept. 2000), https://www.federalreserve.gov/pubs/bulletin/2000/0900lead.pdf.

21, 2016). The Bar acknowledges that the "risks associated with sharing legal fees with a nonlawyer are not present in this situation." *Id.*

The 1974 ABA opinion and this Court's adoption of it show that regulators are able to react to changing public needs and adjust their interpretations of rules to better serve those needs. Formal Op. 338; *see also* Informal Op. 1176.

B. Many Individuals Who Would Benefit from Legal Services Do Not recognize They Need Legal Help or Cannot Obtain Counsel

People from every demographic have everyday needs that require, or would benefit from, legal services. But a host of barriers prevents consumers from obtaining access to effective legal aid. Beyond the obvious one—a scarcity of affordable legal services—consumers frequently do not even recognize that their problems could benefit from legal assistance.[3]

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[3] *See* A.B.A. COMM'N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES, 14 (2016), https://www.srln.org/system/files/attachments/2016%20ABA%20Future%20of%20Legal%20Services%20-Report-Web.pdf ["ABA REPORT"] (finding that "forty-six percent of people are likely to address their problems themselves, sixteen percent of people do nothing, and sixteen percent get help from family or friends. Only fifteen percent sought formal help, and only sixteen percent even considered consulting a lawyer"); *see also* REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 3, 15 (Aug. 2014), http://www.abajournal.com/files/sandefur_accessing_justice_in_the_contemporary_usa_aug2014.pdf (observing that the main reason people gave for not seeking a lawyer to resolve their issues was that they do not think of their civil justice problems as legal and do not recognize their problems as having legal solutions).

In 2015, an ABA survey, in collaboration with the National Center for State Courts, found that financial cost was the single most common factor cited for not seeking legal services when facing a challenge.[4] In 2016, the ABA also found that more than 80% of litigants in poverty in certain jurisdictions are unrepresented in matters involving basic life needs, such as evictions, mortgage foreclosures, child-custody disputes, child-support proceedings, and debt-collection cases.[5] And the problem is not confined to the indigent. "[T]he majority of moderate-income individuals do not receive the legal help they need. . . . Scholars estimate that '[o]ver four-fifths of the legal needs of the poor and a majority of the needs of middle-income Americans remain unmet.' Moreover, moderate-income individuals often have even fewer options than the poor because they do not meet the qualifications to receive legal aid.'" ABA REPORT at 11-12.

According to a 2018 Legal Trends Report published by Clio, "57% of the general population have dealt with a life issue that could have been handled legally

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[4] ABA REPORT at 15 (finding that "[f]inancial cost included not only direct financial cost but also indirect economic costs, such as time away from work or the difficulty of making special arrangements for childcare").

[5] ABA REPORT at 12. *See also* LEGAL SERVICES CORPORATION, THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (June 2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf (finding that in 2017, "86% of the civil legal problems reported by low-income Americans received inadequate or no legal help").

but wasn't."[6] Moreover, 35% of those surveyed did not believe that the end benefits of hiring a lawyer justified the cost, while 28% identified as a barrier not knowing the final cost of legal services.[7]

These individuals' decisions to forego legal services have a major impact on the justice system. As the ABA observed, "large numbers of unrepresented litigants clog the courts, consume the time of court personnel, increase the legal fees of opposing parties due to disruptions and delays, increase the number of cases that advance to litigation, and result in cases decided on technical errors rather than the merits." ABA REPORT at 15. Despite efforts from state bar associations, state supreme courts, pro bono legal organizations, and prepaid legal plans, the legal justice gap persists. ABA REPORT at 11.

This is where legal innovation can help. According to a 2019 study, in US jurisdictions over 320 digital legal tools exist for non-lawyer users.[8] Surveys show that clients' perceptions of legal technologies are growing more favorable toward developments like "virtual lawyers, working with lawyers remotely, and using

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[6] Clio, LEGAL TRENDS REPORT 2018 20 (2018), https://www.clio.com/wp-content/uploads/2018/10/Legal-Trends-Report-2018.pdf.

[7] Clio, *supra* note 6, at 22-23 (observing the most commonly handled issues without the law included traffic violations, family issues, and estate planning).

[8] REBECCA L. SANDEFUR, LEGAL TECH FOR NON-LAWYERS: REPORT OF THE SURVEY OF US LEGAL TECHNOLOGIES 3 (2019), http://www.americanbarfoundation.org/uploads/ cms/documents/report_us_digital_legal_tech_for_nonlawyers.pdf ["SANDEFUR, LEGAL TECH FOR NON-LAWYERS"].

tools such as artificial intelligence and chatbots to handle their legal issues."[9] With consumers' growing demand for digital legal help and limited financial resources, legal technologies are increasing. They can reach consumers who otherwise would not have legal counsel and could fill the current gaps in justice.

C. State Courts and Legal Scholars Are Working to Address the Justice Gap Through Innovation

Recognizing the large numbers of individuals who lack access to the legal system, as well as the potential market for legal-tech solutions, state courts across the country, including this one, are studying this issue. For example, in 2016 this Court established the Florida Commission on Access to Justice "to study the unmet civil legal needs of disadvantaged, low-income, and moderate income Floridians and to address those needs with programs, services, and *innovative technological solutions* that will create meaningful access to civil justice." *In Re: Florida Commission on Access to Civil Justice,* Administrative Order No. AOSC18-27 (2018) (emphasis added).

Several other state supreme courts are adapting decades-old rules to modern consumer needs and business practices. The California Access Through Technology in Legal Services Task Force, appointed by the State Bar of California, has proposed a series of reforms to the state's ethics rules, including the

[9] Clio, *supra* note 6, at 43.

elimination of the prohibition on fee-sharing with non-lawyers.[10] And the Supreme Court of Utah is in the process of proposing a series of changes to its rules of professional conduct that would loosen restrictions on fee-sharing and non-lawyer participation in providing services, and that will use risk-based models that evaluate regulations based on the potential harm and benefit to consumers.[11]

II. THIS COURT'S INTERPRETATION OF UPL RESTRICTIONS SHOULD PRIORITIZE THE PUBLIC INTEREST

Below we show that (A) the Florida Bar's approach to UPL is stifling innovation in the delivery of legal services; and (B) the Referee's conclusion aligns with Florida policy prioritizing access to justice.

A. The Florida Bar's Approach to UPL is Stifling Innovation in the Delivery of Legal Services

The Bar's objection overlooks the purpose of prohibiting the unlicensed practice of law in the first place—"to protect the consuming public from being advised and represented in legal matters by unqualified persons *who may put the*

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[10] http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2019-Public-Comment/Options-for-Regulatory-Reforms-to-Promote-Access-to-Justice.

[11] *See* Supreme Court of Utah, *A Move Toward Equal Access to Justice* (March 4, 2019), https://www.utahbar.org/wp-content/uploads/2019/03/A-Move-Toward-Equal-Access-3.pdf.; *see also* The State Bar of California, *California Task Force on Access Through Innovation of Legal Services (ATILS) Notice and Agenda* (June 28, 2019), http://board.calbar.ca.gov/Agenda.aspx?id=15281&tid=0&show=100022353#10030123.

consuming public's interests at risk." *Fla. Bar v. Neiman,* 816 So. 2d 587, 596 (Fla. 2002) (emphasis added). As this Court has emphasized, this is "[t]he single most important concern in the Court's defining and regulating the practice of law." *Moses,* 380 So. 2d at 417.

The Bar's own website acknowledges this primary purpose in describing its UPL program: "[t]he [UPL] program was established by the Supreme Court of Florida to protect the public against harm caused by unlicensed individuals practicing law."[12] But the Bar presents no evidence—or even argument—that consumers are likely to be harmed by TIKD's business model. Indeed, the record appears to lack any examples of consumers who complained of, or were harmed by, TIKD and its services.

To the contrary, it appears that the only parties objecting to this business model are certain Florida attorneys for whom TIKD represents competition.[13] But this Court has never stated that the UPL rules exist to prevent competition; nor is it the test by which this Court should measure whether non-lawyer conduct constitutes UPL. As this Court has warned, "[t]he reason for prohibiting the

[12] *See* The Florida Bar, *Unlicensed Practice of Law*, https://www.floridabar.org/public/upl/ (last visited July 7, 2019).

[13] Ticket Clinic's amicus brief is illustrative. *See* Amicus Brief of Gold & Associates, P.A. d/b/a The Ticket Clinic, et al. in Support of the Florida Bar, at 11-12 ("[A]llowing TIKD to operate as it does also injures Florida lawyers . . . These revisions [of advertisements] can impose costs and delays that are not borne by TIKD, placing Florida lawyers at an unfair competitive disadvantage").

practice of law by those who have not been examined and found qualified to practice is frequently misunderstood. It is not done to aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop. It is done to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe." *State ex rel. Fla. Bar v. Sperry*, 140 So. 2d 587, 595 (Fla. 1962), *vacated sub nom. Sperry v. State of Fla. ex rel. Fla. Bar*, 373 U.S. 379 (1963).

The Bar's objection adopts highly technical interpretations of this Court's jurisprudence—most of which far predate the internet. In fact, the Bar dedicates over 15 pages of its brief to comparing TIKD's present-day mobile app platform and business model to cases involving business models at least 15-50 years' old, decided when the types of services TIKD offers were not even possible. Objection at 8-23.

Other than speculating that TIKD's owners may be involved in a lawyer-client relationship, the Bar does not even attempt to explain (or cite any evidence) why TIKD's customers are at any risk of harm from this business arrangement. It is undisputed that licensed attorneys represent TIKD's customers in court and provide all legal advice regarding the traffic citations at issue. Report at 12;

Objection at 13, 17. The fact that TIKD receives compensation for its services, and communicates with customers through its digital platform, does not convert its business into UPL. Again, the test is not the method of payment, as the Bar suggests, but rather the potential for consumer harm.

Finally, although not at issue here, the anticompetitive implications of the Bar's arguments cannot be ignored. While the antitrust dispute between these parties was settled, *see TIKD Servs. LLC v. Fla. Bar*, No. 17-24103-CIV, 2019 WL 1112375 (S.D. Fla. Jan. 30, 2019), sustaining the Bar's Objections risks endorsing anticompetitive behavior. *See Fla. Bar v. Brumbaugh,* 355 So. 2d 1186, 1189 (Fla. 1978) (noting that "the natural tendency of all professions [is] . . . to act in their own self interest"); *see also N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101, 1111 (2015) (highlighting the increased need for supervision "when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern").

B. The Referee's Conclusion Aligns with Florida Policy Prioritizing Access to Justice

As the Referee noted (Report at 11), the purpose of prohibiting UPL is "to protect the consuming public from being advised and represented in legal matters by unqualified persons who may put the consuming public's interests at risk."

Neiman, 816 So. 2d at 597. This is "the single most important concern in the Court's defining and regulating the practice of law." *Moses*, 380 So. 2d at 417. And the Referee found "no evidence that the consenting public interests are at risk because of the actions of TIKD, rather the contrary. TIKD furthers the consuming public's interest by providing a speedy, efficient and relatively painless way to deal with traffic tickets." Report at 12.

The popularity and success of using credit cards to pay for legal services shows that the legal profession is capable of working with new technology and adopting it to meet a lawyer's needs within the rules of professional conduct. Just as state Bars across the country found ways to interpret their rules to permit clients to pay their attorneys' fees with credit cards and ensure appropriate trust account treatment, they must now adapt to ensure that lawyers are capable of utilizing new technology for ethical legal services. New legal services, like TIKD, only stand to help consumers receive the legal aid they need.

Just as with credit cards, the rules can be adapted to increase access to legal services without sacrificing ethics.

CONCLUSION

For the reasons stated, *Amici* respectfully urge this Court to adopt the Referee's Report.

Dated: July 29, 2019

Respectfully submitted,

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I CERTIFY that a copy of this brief has been filed through Florida's e-Filing Portal and a copy was served by electronic transmission on July 29, 2019 on:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Rule 9.210(a)(2) and is written in Times New Roman 14-point font.

By: /s/ *Raoul G. Cantero*
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