

Comments on: Proposed Resolution 10A Regarding Online Document Providers

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Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its consumers. We have testified on behalf of consumers of legal services to dozens of state bars, state supreme courts, and state legislatures. We are the only consumer organization to have submitted testimony to the ABA Commission on the Future of Legal Services. In addition, I was named to the 2017 Fastcase 50, honoring the “smartest, most courageous innovators, techies, visionaries, and leaders in the law.”

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While Responsive Law appreciates efforts to protect consumers from unethical legal service providers, we’re skeptical of an attempt by a group of lawyers to regulate their competitors, particularly without evidence of consumer harm, and without input from interested entities both inside and outside the bar. For these reasons, **we ask the House of Delegates to vote against Resolution 10A.**

Consumers Need More Options, Not Fewer, To Address the Growing Access-to-Justice Gap

The United States is facing an access to justice crisis. While many calculations of the extent of this crisis focus on the poorest Americans, the scope of the crisis extends all the way to Americans of modest means and beyond, to encompass most of the middle class.

The justice gap in the United States extends from the poorest Americans across the middle class. In the World Justice Project 2017-2018 report, the United States ranks 94th out of 113 countries (tied with Cameroon, Uganda, and Zambia) in the affordability and

accessibility of its civil justice system.¹ Americans cannot afford to pay lawyers for assistance with everyday legal needs even though the average American household faces a significant legal problem every year.² More Americans do not address their legal problems due to lack of access to justice than their peers in countries such as England and the Netherlands, where there are fewer restrictions on how legal services can be offered.³ Small businesses also struggle with the gap in access to justice, with over half facing legal problems without legal assistance.⁴

Online document preparation provides low- and middle-income Americans legal assistance that they otherwise could not afford. There are many such companies—both for-profit and not-for-profit—that have helped consumers resolve their legal issues. As Andrew Perlman, vice-chair of the ABA Commission on the Future of Legal Services has noted, “more than one million consumers have used LegalZoom in the last ten years alone, and there is no reliable evidence of incompetence.”⁵ Customers of Upsolve, which assists in the preparation of bankruptcy filings, have a 98% discharge rate in their Chapter 7 bankruptcies, compared to the national rate of 96%.⁶

¹ World Justice Project, *WJP Rule of Law Index 2017-2018* (2018), available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf.

² Gillian K. Hadfield & Jamie Heine, *Life in the Law—Thick World: The Legal Resource Landscape for Ordinary Americans in Beyond Elite Law: Access to Civil Justice for Americans of Average Means* (Samuel Estreicher & Joy Radice eds., 2015) (observing that fifty to sixty percent of low- and moderate-income American households face an average of two legal problems annually).

³ *Id.*

⁴ LegalShield, *Decision Analyst Survey: The Legal Needs of Small Business* (2013), available at <https://www.le-galshield.com/news/legal-needs-american-families-0>.

⁵ Andrew Perlman, “Towards the Law of Legal Services,” *37 Cardozo L. Rev.* 49, 107 (2015).

⁶ Judge Henry Callaway & Jonathan Petts, “Too Broke For a Fresh Start,” forthcoming in *American Bankruptcy Institute Journal* (February 2019).

It Is Inappropriate for the ABA to Promulgate Best Practices for Anyone Other Than Lawyers

Even if online document preparers were harming consumers, the ABA is not the appropriate body to address this concern. Imagine that the Alliance of Automobile Manufacturers created best practices for bicycle manufacturers, including a recommendation that all bicycles have sensors to detect cars that may collide with the bike, lasers that emit a virtual bike lane, an automated loudspeaker that warns cars that come too close, and handlebars that vibrate to warn a cyclist approaching an intersection at high speed.⁷ The recommendation would be seen not as a genuine effort to improve transportation safety, but as a ham-handed attempt by automakers to curtail their competition in the transportation industry by using regulation to exponentially raise their competitors' costs. Such a recommendation would likely be ignored by regulators, as well as by the bicycle industry.

The bar's attempts to beat its competitors through regulation rather than in the marketplace are nothing new. Over a half-century ago, lawyers from New York attempted to use their unauthorized practice of law restrictions to prevent Norman Dacey from selling the self-help book *How To Avoid Probate*, resulting in a three year legal battle that ultimately vindicated the rights of millions of Americans who chose to use this book rather than hire a lawyer.⁸ Now, lawyers from New York are using a more subtle approach of "best practices" to limit competition from online self-help material.

To the detriment of consumers, this resolution—unlike the hypothetical best practices for bike manufacturers above—is unlikely to be ignored by regulators, since state bars and supreme courts frequently follow the ABA's lead and may adopt these best practices as part of their regulations governing the provision of legal services. It is questionable whether state bars and supreme courts have any authority to regulate entities that are not engaging in the

⁷ Angela Herring, "Smart Bike Pedals Toward Accident Prevention," *News@Northeastern* (January 7, 2014)(retrieved from <https://news.northeastern.edu/2014/01/07/smart-bike> on 1/17/2019) has information about these and other actual bicycle safety technologies.

⁸ *Dacey v. New York County Lawyers' Association*, 423 F.2d 188 (2d Cir. 1970).

practice of law, but consumers shouldn't have to wait years for a court battle to play out before getting access to affordable legal help.

The Resolution Uses Consumer Protection as a Fig Leaf for Its Anticompetitive Intent

There are, to be sure, some members of the bar who truly believe that measures such as this resolution are in the best interests of consumers. Our training as lawyers has instilled in us a duty to preserve and expand access to justice. However, this value often comes with a fallacious corollary that only lawyers can provide access to justice. Lawyers who have fallen prey to this fallacy, however well intentioned, need to be aware that adherence to this belief denies consumers access to justice by limiting the ways in which they can affordably solve their legal problems.

The bulk of the evidence, however, points to a less noble motive for this resolution: protection and expansion of the lawyer monopoly. This resolution came about only after a failed attempt by its proponents to sneak it through the House of Delegates as an emergency measure at the ABA Annual Meeting in August 2018. We are aware of no consultation with consumer groups—or even anyone outside the bar—in crafting this measure. Furthermore, there has been no evidence put forward of specific harm to consumers from using online document preparation software.

The bar has a sordid history of using “consumer protection” as a fig leaf for protecting its cartel. This history goes back to *Dacey* and beyond, and has included numerous UPL actions against entities ranging from LegalZoom to individuals providing scrivener services. A recent survey of state bar unauthorized practice committees and enforcement agencies found that most complaints about alleged UPL are made by lawyers or the bar association itself, not by consumers.⁹ Nearly 70% of UPL enforcement authorities surveyed could not

⁹ Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 Fordham L. Rev., 2587-2610 (2013-14).

recall a single instance of serious injury to the public from alleged unauthorized practice in the previous year.¹⁰

Such anticompetitive actions by the bar used to go unpunished. However, the U.S. Supreme Court held in *North Carolina State Board of Dental Examiners v. FTC* that state regulatory agencies, if controlled by members of the professions they oversee and operating without any active supervision by the state, are subject to antitrust laws.¹¹ State bars that adopt a market restriction based on these “best practices” would not be immune from antitrust liability.

Furthermore, the ABA, as a private trade organization, does not fall under the state action immunity doctrine. While attempts to lobby policymakers to adopt the best practices in the resolution would be protected under the *Noerr-Pennington* doctrine, any attempts to use the resolution to restrain trade through private action could subject the ABA and the members of the House of Delegates to antitrust liability.

Of course, self-interest should not be the basis for voting against this measure, any more than it should be the basis for voting for it. Rather, members of the House of Delegates should recognize that our duty as lawyers to preserve access to justice does not give us the exclusive jurisdiction over the entire legal system. The modern legal economy is comprised of many types of entities besides law firms—including consumers. The ABA is the trade association for lawyers, and it should leave other service providers alone rather than manufacturing an excuse to serve as their regulators.

¹⁰ *Id.* at 2595.

¹¹ 574 U.S. ___, 135 S. Ct. 1101; 191 L. Ed. 2d 35 (2015).