Responsive Law
The Consumer's Voice in the Legal System

Comments on: Lawyer Participation in Attorney Client Matching Services—Proposed Legal Ethics Opinion 1885

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Virginia State Bar Standing Committee on Legal Ethics

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Responsive Law thanks the Committee for the opportunity to present these comments. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its consumers.

Responsive Law has testified on numerous occasions to the American Bar Association and to state regulators about the bar's responsibility to give greater weight to increasing access to justice when interpreting rules of professional conduct, and to consider whether the action in question causes the harm the rules were meant to prevent. Also in the wake of the U.S. Supreme Court decision in *North Carolina Board of Dental Examiners v. Federal Trade Commission*[1], state bars need to exercise caution in enforcing rules that have an anticompetitive impact. For these reasons, **we ask the Committee to reverse its position and allow attorney participation in an attorney client matching service (ACMS) such as the one described in this opinion**.

The Bar Has an Obligation 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.

[1] *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. ___, 135 S. Ct. 1101 (2015).

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The World Justice Project reports that the U.S. is currently tied with Bangladesh and Egypt in terms of the affordability and accessibility of its civil justice system.[2]

At hourly rates that do not dip much below $200 and which routinely exceed $300, few average Americans can afford to pay lawyers for assistance with everyday legal needs: simple estate planning; providing for elder care; arranging child custody and obtaining child support; addressing consumer debt problems and foreclosure; managing disputes over employment conditions or pay; obtaining access to legal entitlements to health care, education and public services.[3] Surveys of legal needs of low- and moderate-income Americans find that roughly 50%-60% of American households faced an average of two significant legal problems in the previous year. Lack of access to legal representation leads Americans to take no action to address their legal problems at rates much higher than in countries, such as England and the Netherlands, with fewer restrictions on how legal services may be offered: roughly 25%-30% compared with 5%-10%.[4]

Small businesses and entrepreneurs also face enormous hurdles in obtaining affordable legal services. They form business entities, file for trademarks and patents, take on debt or equity investment, determine their regulatory obligations, file taxes and manage contracts with customers, suppliers, franchisors and the public. A 2012 survey found that nearly 60% of small businesses had faced serious legal problems in the preceding two years—collections, contract review, supplier disputes, security breaches, products liability, employee theft, tax audits, employee confidentiality issues,

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[2] World Justice Project Rule of Law Index, https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016 (2016).

[3] Deborah L. Rhode, Access to Justice (2005); Gillian K. Hadfield, The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law, 38 Int'l. Rev. L. & Econ. 43 (2014); Gillian K. Hadfield, Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets, Dædalus (2014).

[4] 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, S. Estreicher and J. Radice (eds.) (2015).

threats of customer lawsuits, etc. Close to 60% of small businesses faced these problems without lawyer assistance. For those that did hire lawyers, the average expenditure was $7,600—an enormous cost for a small business.[5]

An ACMS addresses the justice gap in numerous ways. Fixed fee services provide price certainty, which can be even more valuable to consumers than lower costs. In addition, an ACMS provides a measure of convenience that's not available though traditionally marketed lawyers. It can provide its customers with a broad range of choices in regard to both location and subject matter expertise. Finally, an ACMS can allow consumers to easily comparison shop among their many options through an online interface.

The mission of the Virginia State Bar is to (1) regulate the legal profession of Virginia; (2) advance the availability and quality of legal services for Virginians; and (3) improve the legal system in the Commonwealth.[6] The Committee should be certain that when it addresses the first of these goals, it does not abrogate its responsibilities with regard to the other two.

Anticompetitive Actions by the VSB Are Subject to Antitrust Law Under the U.S. Supreme Court's *Dental Examiners* Decision

The U.S. Supreme Court's recent decision in *North Carolina Board of Dental Examiners v. Federal Trade Commission* makes clear that when a controlling number of the decision makers on a state licensing board are active participants in the occupation the board regulates, the board can invoke state-action immunity only if it is subject to active supervision by the state.[7] The current structure of the Committee and the VSB leaves them open to antitrust action, for which *Dental Examiners* makes it clear they would not receive state action immunity.

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[5] LegalShield, *Decision Analyst Survey: The Legal Needs of Small Business* (2013), https://www.legalshield.com/news/legal-needs-american-families-0.

[6] Virginia State Bar, "About the Bar: Overview and Mission", http://www.vsb.org/site/about/

[7] *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. ___, 135 S. Ct. 1101 (2015).

The VSB Council and the Committee consist entirely of lawyers, chosen by lawyers.[8] Therefore, any action the Committee takes with regard to regulation of the legal profession is being made entirely by market participants.

Labeling ethics opinions as "advisory" does not insulate the VSB and the Committee from antitrust action, as the VSB should be well aware from previous experience. In *Goldfarb v. Virginia State Bar*, the U.S. Supreme Court held that labeling fee schedules as "advisory" was not relevant when the prospect of disciplinary action would dissuade lawyers from offering lower prices.[9] Similarly, even though this Ethics Opinion would not be binding on any court, it would have a chilling effect on lawyer conduct.

Additionally, review of ethics opinions by the Virginia Supreme Court is insufficient to meet the active state supervision requirement of *Dental Examiners*. One of the requirements for active supervision is that "the state supervisor may not itself be an active market participant."[10] Virginia Supreme Court Justices are active market participants under the definition established in *Dental Examiners*. Justices are required to have been members of the state bar for at least five years.[11] Additionally, FTC guidance on active supervision states, "A person who temporarily suspends her active participation in an occupation for the purpose of serving on a state board that regulates her former (and intended future) occupation will be considered to be an active market participant."[12] Virginia Supreme Court Justices face the prospect of not winning re-election and are subject to a mandatory retirement age. As result, they may return to private practice after serving on the bench, thus rendering them active market participants while serving on the Court. Therefore, Virginia Supreme Court review of ethics opinions does not insulate the Committee or the VSB from antitrust liability.

Because the Committee is subject to antitrust liability for any anticompetitive elements of its decisions, it should carefully consider

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[8] Bylaws of the Virginia State Bar: Part I, Articles I-III; Part II, Articles I-II.
[9] 421 US 773, 781 (1975).
[10] 135 S. Ct., at 1116–17.
[11] Constitution of Virginia, Art. VI, Sec. 7.
[12] FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants, p 7 (2015).

whether those decisions are purely in the public interest and that they do not favor existing market participants over new entrants.

The Proposed Opinion's Position on Control of Client Funds Will Harm Consumers by Prioritizing Form over Function

Ethics rules governing commingling of funds were adopted with a noble purpose: the protection of clients' money until earned by a lawyer. However, the bar now attributes too much power to a rule that is more bookkeeping formality than security system. As a result, it subordinates true client protection to strict adherence to the rules.

A lawyer who is intent on stealing client funds will not be deterred by the fact that such funds reside in a trust account rather than in an operating account. The trust account is not a subterranean vault guarded by a goblin at Gringotts Wizarding Bank; it's a paper (or electronic) construct to which the lawyer has complete access. In contrast, if client funds reside with an ACMS under the model being evaluated, the lawyer has no access to them until the completion of services.

It's fair to ask who poses the greater risk to the security of client funds: a lawyer or an ACMS. An individual lawyer may not manage funds competently, or may be desperate for cash due to personal problems such as substance abuse, or a gambling addiction. In contrast, an ACMS does not suffer from these human frailties.

Furthermore, if a customer feels that their money has been taken unfairly, the existence of a trust account will provide little additional recourse over that available from an ACMS. The primary additional protection available to a client would be the right to file a complaint with the Clients' Protection Fund. However, doing so requires (1) that the client learn that the CPF exists, (2) that the client complete a six-page petition for restitution, and (3) that the lawyer in question has been suspended or disbarred from the practice of law.[13] (The last

[13] The lawyer in question could also have retired, died, been found incompetent, or have unknown whereabouts. VSB Clients' Protection Fund Rules, Paragraph 4(B).

hurdle may be the most difficult, as only 40 Virginia lawyers were suspended or disbarred for any reason in 2015.[14])

In contrast, a customer who believes that an ACMS has stolen their money can call or email the ACMS customer service department. It's likely that an ACMS would refund the customer's money rather than face the bad publicity and legal liability that would come with not delivering services that it had arranged. And, since the ACMS in this model holds the money until the client confirms completion of the work, they would not lose any profits, since the refund would come from money that would have gone to the lawyer had the client not asked for a refund.

Because the purpose of Rule 1.15 is to keep client funds safe, the rule should not be interpreted in such as way as to make those funds less safe, especially if doing so diminishes access to justice.

The Proposed Opinion's Position on Reasonableness of Fees Is Contrary to the U.S. Supreme Court's *Dental Examiners* Decision

One of the Committee's objections to the ACMS model under consideration is that participating lawyers may not be charging reasonable fees as required by Virginia Rule of Professional Conduct 1.5(a). The requirement that fees be "reasonable" is a vestige of the now-unconstitutional fee schedules once set by bar associations. The reasonableness standard can raise fees as easily as it can lower them. It also inhibits innovation in the delivery of legal services that can benefit consumers.

Nearly all of the eight criteria for determining reasonableness in Rule 1.5(a) are based on factors intrinsic to the lawyer. Only Rule 1.5(a)(4)—"the amount involved and the results obtained"—takes into account the value of the services to the client. Yet, a price that a client finds reasonable may depend on many factors other than the lawyer's input.

Consumers are willing to pay more for services that are more convenient. They are also willing to pay more when they value the

[14] American Bar Association Survey on Lawyer Discipline Systems, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2015_sold_results.authcheckdam.pdf (2016)

reliability of a branded network. The ACMS at issue here provides both of these qualities. However, the Proposed Opinion would prevent it from charging a premium for these benefits. If the Committee requires lawyers to set their prices based on the business model used by the majority of lawyers, it would be chilling competition from lawyers who want to provide services in new and innovative ways. Not only does this harm consumers by limiting their marketplace options, it is anticompetitive behavior that favors insiders over outsiders, in violation of *Dental Examiners*.

A Lawyer's Payment of a Marketing Fee to the ACMS Falls Under the Advertising Exception to the Prohibition on Giving Anything of Value to One Who Recommends the Lawyer's Services

Although a lawyer may not generally pay anyone to recommend the lawyer's services, Rule 7.3(b)(1) provides an exception for the reasonable costs of advertising that is otherwise permissible. For at least the last decade, large parts of the economy have been operating on the Internet (even if lawyers have been slower to do so). As the ability to track potential customers grows, advertisers have been able to move from paying for poorer proxies for business generated (e.g., size of an ad, size of the audience to see the ad) to paying for better proxies for business generated (e.g., number of people to express interest in an ad by clicking on it) to paying precisely for the business generated by the ad.

The Proposed Opinion itself notes that reasonable costs may be based on "quality of presentation, market exposure, demography, and measurable levels of interest evoked (through Internet 'clicks' or 'hits')." This allows lawyers to pay for advertising based on a closer proxy for the value they derive. Why, though, would the ethics rules allow lawyers to use clicks, but not business generated, to measure "levels of interest evoked" when the latter is a more accurate measure than the former? It is commonplace and reasonable for Internet advertising platforms to charge based on the volume of business generated. Putting aside (until the next paragraph) concerns about sharing fees with non-lawyers, there is nothing about this model of payment that falls outside of the advertising exception to Rule 7.3(b).

Lawyers Participating in the ACMS Would Not Be Engaged in Unethical Fee Splitting with Non-Lawyers

The marketing fee charged by the ACMS is not a violation of the Rule 5.4 prohibition on fee splitting. The Committee gives two reasons why it believes the marketing fee violates Rule 5.4. The first, addressed above, is that the marketing fee should not be considered the reasonable cost of advertising. The second, addressed below, is that basing the size of the marketing fee on the dollar value of attorney fees generated is inherently an unethical fee split.

Rule 5.4(a)(4) allows lawyers to accept credit cards, even though a credit card company takes a percentage of the fees charged by the lawyer. It doesn't cost the credit company more to process a charge of $100 than it does to process a charge of $10,000. However, the credit card company is allowed to charge more money for the higher transaction because it exposes itself to a greater loss if the customer doesn't pay.

Similarly, although it doesn't cost the ACMS more to market and process a $2995 service than a $149 service, it's a reasonable business practice to charge $400 for the former and $40 for the latter. The ACMS is not only providing marketing services; it's providing payment collection services as well. The ACMS faces a much greater potential loss if it can't collect a $2995 fee than if it can't collect a $149 fee. These costs are undoubtedly reflected in the ACMS's own credit card processing fees.

Perhaps if the ACMS called its fee a "marketing and payment processing fee," it would better illuminate the actual nature of this transaction. However, regardless of the transaction's name, the Committee should look at the purpose of the transaction when applying the ethics rules. If it does so, it would see that the transaction is a permissible fee for service, and not an unethical fee split.

Conclusion

Responsive Law is unaware of any consumer complaints against an ACMS—in Virginia or elsewhere—claiming harm of the types that the Proposed Opinion warns against. Without a demonstration of consumer harm, action by the Committee and the VSB that restricts

new entrants and new means of delivery to the legal services industry looks less like the bar acting as a force for consumer protection and more like the bar acting as a cartel.

Beyond the impact of *Dental Examiners* on the bar's antitrust liability, the bar has a duty to increase access to justice. Innovative business models such as the ACMS have the potential to narrow the enormous access to justice gap that consumers face. The Proposed Opinion would chill this innovation and others like it, leaving millions of Virginians with fewer ways to find legal help.

We therefore urge the Committee to reverse its position and to redraft the Proposed Opinion, giving greater weight to its duty to provide consumers access to legal help and recognizing that an anachronistic interpretation of ethics rules does not truly protect consumers.