

Comments on: **Participation in Online Platform for Finding and Employing a Lawyer— Proposed 2017 Formal Ethics Opinion 6**

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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.

Submitted to the
North Carolina State Bar Ethics Committee

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. For this reason, **we urge the Committee and the Bar Council to approve this proposed ethics opinion regarding the use of online platforms for finding and employing lawyers.**

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The Bar Must 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 World Justice Project ranks the U.S. tied with Bangladesh and Egypt in affordability and accessibility of its civil justice system.¹

At hourly rates that do not dip much below \$200 and which routinely exceed \$300, few average Americans can afford to pay

¹ World Justice Project Rule of Law Index, <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016> (2016).

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.² 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%.³

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, 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.⁴

² 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).

³ 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).

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

Online platforms of the type at issue address 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, such platforms provide a measure of convenience that's not available through traditionally marketed lawyers. They can provide their customers with a broad range of choices in regard to both location and subject matter expertise. Finally, these platforms can allow consumers to easily comparison shop among their many options through an online interface.

The Proposed Opinion Adheres to Principles That Protect Consumers Without Being Limited to Any Particular Technology or Business Model

We commend the Committee for prioritizing consumer interests in drafting the proposed opinion. The result is a reasonable set of guidelines that maintain the consumer protection principles behind the Rules of Professional Conduct and will maintain their relevance as technology, legal business models, and consumer expectations evolve, rather than making bright-line rules based on current models that may not be a good fit for unforeseen future circumstances.

Unauthorized Practice of Law

As noted by the Committee, a disclaimer that the online platform is providing advertising for lawyers and is not itself a law firm is sufficient notice to protect consumers from any misconceptions about the nature of the service they are purchasing. Many consumers have used similar platforms to find other services, such as doctors and babysitters, and their main concerns are whether they can find a reliable service provider through the platform, not the corporate structure of the platform's owners.

Lawyer Referral Service

The proposed opinion says that online platforms are not considered lawyer referral services as long as the platform "does not exercise discretion to match prospective clients with participating lawyers." The Committee may wish to clarify whether allowing consumers to

search and filter within the complete list of lawyers provided would be allowable, as such functionality can provide great benefit to consumers and should be permissible.

Independent Professional Judgment and Non-Interference in the Professional Relationship

This portion of the proposed opinion requires the online platform to stay out of the lawyer's professional relationship with clients once the consumer selects a lawyer. This is in best interest not only of consumers, but is also in the best interest of lawyers and online platforms. It allows consumers to be confident that their lawyers will place their interests first, and that the lawyer cannot be restricted by a limitation by the platform on scope of representation, nor will their confidentiality be violated. On the flip side, lawyers can feel confident that their professional judgment will not be second-guessed by the platform. Finally, a platform that abides by this hands-off policy benefits from having a reputation for allowing lawyers to exercise their professional judgment free from interference and bias.

Determination of the Amount of the Legal Fee and Resolution of Fee Disputes:

This provision places the burden on lawyers to determine whether particular fees set by an online platform are "clearly excessive" and mandates that they decline to participate in the platform if they are. Rather than making a top-down determination about the appropriateness of fees, the Committee has wisely left this determination to individual lawyers, who have localized knowledge about appropriateness of fees in their locality and practice areas.

For fee disputes, a full refund of fees by the platform is deemed sufficient to resolve any fee disputes, which places the consumer's well-being above the minutiae of rules governing the flow of money in legal practice. We would also recommend that online platforms make information about state fee dispute resolution programs available to their customers.

Collection and Disbursement of the Legal Fee:

As noted by the proposed opinion, ethics rules do not prohibit using an intermediary to collect a legal fee. In fact, this is standard business practice when lawyers accept credit cards or use collection agencies. The lawyer's duty is to make sure that online platform is reliable and trustworthy. If it is not, says the opinion, then the lawyer may not participate.

This is a far better application of fee-sharing restrictions to fee collection than a blanket rule that certain types of fee collection methods are permissible or impermissible. Protection of client funds comes from the business practices of the lawyer and the particular service providers they employ, not from the classification of types of accounts.

Sharing a Legal Fee With a Non-Lawyer

The proposed opinion states that as long as there is no interference in the professional relationship, a percentage of the legal fee can be a reasonable cost of advertising. The Committee has acknowledged here that, as with credit cards, it can be reasonable for lawyers to pay for services on a percentage basis rather than with a flat fee. By making interference with the professional relationship the touchstone of its analysis, the proposed opinion declines to elevate fee-sharing itself from a proxy for consumer harm to *per se* harmful.

Conclusion

By engaging in analysis of the actual impact on consumers of online platforms, the Committee has drafted an ethics opinion that protects consumers while fostering an environment in which access to the legal system will improve for North Carolinians. Furthermore, it provides an example for other state ethics committees to follow. It is a welcome contrast to the handful of states that have blindly followed anachronistic interpretations of ethics rules without regard to the consumer protection purpose of those rules. For these reasons, **we urge the Committee to approve the proposed opinion.**