

Comments on: **Lawyer Participation in Attorney Client Matching Services—Appeal of Joint Opinion: Attorney Committee on Professional Ethics Opinion 732, Committee on Attorney Advertising Opinion 44, and Unauthorized Practice of Law Opinion 54***

Tom Gordon
Executive Director,
Responsive Law

Responsive Law thanks the Supreme Court of New Jersey 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
New Jersey Supreme Court

July 27, 2017

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 Court to reverse the position of the three bodies and allow**

* These comments were submitted as an appellate brief to the New Jersey Supreme Court. They have been edited for format and to remove accompanying legal filings. The content is identical to the substantive section of the brief.

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

attorney participation in attorney client matching services (ACMS) such as Avvo, LegalZoom, and Rocket Lawyer.

The Court 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.

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

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*

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.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.

Chief Justice Rabner created the Supreme Court Advisory Committee on Access and Fairness to guide the judiciary on how to administer justice fairly to all. The committee emphasizes “The Judiciary is guided by its four core values: independence, integrity, fairness and quality service. Access and fairness are the foundation of those values and shape the experience of every litigant. Fairness cannot be attained without access to the courts, the most important component of quality service.”⁶ The Court should be certain that when it reviews the actions of the committees, it does not abrogate its responsibilities with regard to promoting access to the justice

To Civil Justice For Americans Of Average Means, S. Estreicher and J. Radice (eds.) (2015).

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

⁶ *Supreme Court Committee on Access and Fairness*, New Jersey Courts, <https://www.judiciary.state.nj.us/public/access/accessfairness.html#about> (last visited July 21, 2017).

system, fairness in its administration, and the independence and integrity of the judicial branch.

**Allowing Anticompetitive Actions by the Committees Violates
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 Committees leaves them open to antitrust action, as *Dental Examiners* makes it clear they do not receive state action immunity.

The Advisory Committee on Professional Ethics, Committee on Attorney Advertising, and the Committee on the Unauthorized Practice of Law consist of an overwhelming majority of lawyers (versus lay members). Furthermore, those members are selected by lawyers, as it is the Supreme Court of New Jersey that appoints members.⁸ Therefore, any action the Committees take with regard to regulation of the legal profession is being made almost entirely by market participants.

The *Dental Examiners* decision allows active market participants to receive state action immunity if their anticompetitive decisions are actively supervised by the state.⁹ Active supervision requires that the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy and that the state supervisor may not itself be an active market participant.¹⁰ In this instance, the active state supervision requirement mandates that the court engage in *de novo* review of the committees’ opinion so as to

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

⁸ N.J. Court Rules, R. 1:19-1; N.J. Court Rules, R. 1:19A-1; N.J. Court Rules, R. 1:22-1; N.J. Const., Art. VI, Sec. VI, Para. 2.

⁹ *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. ___, 135 S. Ct. 1101 (2015).

¹⁰ *Id* at 1107.

fully exercise its supervision over the decision made by a body of active market participants. Any deference given to the committees would not fulfill the *Dental Examiners* active supervision requirement because it would fail to demonstrate the committees' actions promote state policy and not simply their own anticompetitive interests.¹¹

Furthermore, approval by the Court of anticompetitive ethics opinions by the Committees may be insufficient to protect them from antitrust liability. One of the requirements for active supervision is that "the state supervisor may not itself be an active market participant."¹² New Jersey 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 ten years.¹³ 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."¹⁴ New Jersey Justices may return to private practice after serving on the bench, thus rendering them active market participants while serving on the Court. In fact, of the last ten New Jersey Supreme Court Justices to leave the bench, eight returned to private practice.¹⁵ Therefore, a decision by the Court that upholds anticompetitive restrictions does not insulate the Committees from antitrust liability.

The Court should carefully consider whether any anticompetitive elements of the Joint Opinion are purely in the public interest and that they do not favor existing market participants over new entrants. Additionally, it should apply a *de novo* standard of review to the Committees' opinion, as undue deference to the bar would leave Committee members subject to antitrust law under the *Dental Examiners* decision.¹⁶

¹¹ *Patrick v. Burget*, 486 U.S. 94 (U.S. May 16, 1988)

¹² 135 S. Ct., at 1116–17.

¹³ New Jersey Constitution, Art. VI, Sec. VI.

¹⁴ FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants, p 7 (2015).

¹⁵ See Appendix, pg. 10.

¹⁶ *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. ___, 135 S. Ct. 1101 (2015).

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, RPC 7.2(c) and RPC 7.3(d) provide an exception for the reasonable costs of advertising that is otherwise permissible.¹⁷ 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 potentially viewing 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.

When looking at cost of advertising, the New Jersey Committee on Attorney Advertising has stated it is reasonable that costs may be based on measurable levels of interest evoked (through Internet ‘clicks’ or ‘hits’).¹⁸ 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 Committees give multiple reasons why it believes the marketing fee violates Rule 5.4. One,

¹⁷ N.J. Court Rules, RPC 7.2; N.J. Court Rules, RPC 7.3.

¹⁸ CAA OPINION 43, 205 N.J.L.J. 155 (2011).

addressed above, is that the marketing fee should not be considered the reasonable cost of advertising. Another, 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.¹⁹ 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 Committees should have looked at the purpose of the transaction when applying the ethics rules. If they did so, they would have seen 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 New Jersey or elsewhere—claiming harm of the types that the Proposed Opinion warns against. Without a demonstration of consumer harm, action by the bar, through the Committees, 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.

¹⁹ N.J. Court Rules, RPC 5.4.


Beyond protecting the bar from antitrust liability, the Court has a duty to increase access to justice. Innovative business models such as ACMS have the potential to narrow the enormous access to justice gap that consumers face. The Joint Opinion would chill this innovation and others like it, leaving millions of New Jersey residents with fewer ways to find legal help.

We therefore urge the Court to reverse the decision of the Committees in their Joint Opinion and permit New Jersey lawyers to participate in ACMS.

Table 1: Activity of Recent New Jersey Supreme Court Justices After Leaving the Court

JUSTICE	LEFT OFFICE	ACTIVITY AFTER LEAVING COURT
Helen E. Hoens	October 26, 2013	-Retired ¹
Virginia Long	March 1, 2012	-Counsel in Pinceton office of Fox Rothchild LLP ²
Roberto A. Rivera-Soto	August 21, 2011	-Partner at Ballard Spahr, LLP ³
John E. Wallace Jr.	May 10, 2010	-Of Counsel w/ Brown & Connery, LLP ⁴
James R. Zazzali	January 6, 2007	-Private Practice with Gibbons Law ⁵
Deborah T. Poritz	October 25, 2006	-Of Counsel with DrinkerBiddle ⁶
Peter Verniero	August 2004	-Chair of Corporate Internal Investigations and Appellate Practice Groups w/ Sills Cummins & Gross ⁷
Gary S. Stein	September 1, 2002	-Special Counsel to Pashman Stein. -Adjunct professor at Rutgers Law School ⁸
Daniel J. O'Hern	May 23, 2000	-Special Ethics Counsel to Governor Richard Codey ⁹ -NJ Advisory Committee on Judicial Conduct ⁹ -Editorial Board of NJ Law Journal ⁹ -As Counsel to Becker Meisel, LLC ⁹
Marie L. Garibaldi	February 1, 2000	-Retired ¹⁰

Key

 Shading indicates return to private practice.