Comments on: Issues Paper on the Future of Legal Services

Responsive Law thanks the Commission 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 customers.

The Scope of the Access to Justice Crisis Demands Drastic Changes to the Regulatory Structure of Legal Services

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 Kyrgyzstan, Mongolia and Uganda in terms of the affordability and accessibility of its civil justice system. In New York, over 90% of people involved in housing, family, and consumer problems are forced to appear in court without legal representation. Studies in other states generally find that the proportion of unrepresented individuals exceeds 80%.

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1 Responsive Law, along with others, submitted an amicus curiae brief to the U.S. Supreme Court in FTC v. North Carolina Board of Dental Examiners (No. 13-534, argued October 14, 2014, decision pending). This section is based in substantial part on material from that brief, which has been submitted to the Commission with these comments.


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. 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 who may provide legal advice and assistance: roughly 25%-30% compared with 5%-10%.

Shockingly, the number of Americans obtaining help from a lawyer appears to be falling: a 1995 ABA study found that 29% of the poor and 39% of those of moderate means facing a serious legal problem had help from a lawyer or other legal service provider, but surveys conducted in the past ten years find that those percentages have dropped to about 15%. Conservative estimates based on census data indicate that households facing legal problems in 2012 purchased an average of only one and half hours of lawyer services per problem; this is less than half of the amount purchased in 1990. Moreover, these numbers are only the tip of the iceberg, as they represent erupted legal problems such as a child custody fight, a foreclosure or eviction, or a bankruptcy. Beneath the surface lies great demand for assistance that could avoid or minimize these legal crises before they erupt.

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

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6 Hadfield and Heine, supra.
7 Id.
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.

This crisis in access to justice has many causes, including the complexity of American legal process, cuts to court budgets and limited legal aid funds. But a significant factor is the high cost of legal services, and the excessive degree of regulation of U.S. legal markets is a substantial factor accounting for those high prices.

The depth of this crisis is such that the efforts of those involved in legal aid and pro bono work, while extremely valuable to those they serve, is not nearly sufficient to meet the legal needs of the American public. In fact, it would cost on the order of $50 billion annually just to secure one hour of legal help for all the American households with an unmet dispute-related need (compared to the under-$4 billion currently spent on such services).

To address legal needs of this magnitude, the legal profession needs to make major revisions to the way it provides and regulates legal services.

Fortunately, most of what the legal profession needs to do does not involve drastic new expenditures, nor need it involve significant financial pain to most of the profession. Instead, the profession needs to get out of its own way to allow service providers—both lawyers and non-lawyers—to create new business models that can better serve the modern customer base of consumers of legal services.

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10 Hadfield & Heine, supra.
Consumers Need Access to Legal Service Providers Other Than Lawyers

One of the biggest changes that the legal profession needs to make is to revisit the question of who may provide legal services. Vague, overbroad definitions of the practice of law unnecessarily restrict the options of consumers who need legal help. A common retort from the bar against allowing consumers to seek legal help from non-lawyer professionals is that “You wouldn’t go to anyone other than a doctor if you needed brain surgery.” What this argument fails to acknowledge is that, when dealing with medical issues other than surgery, consumers get help from nurse practitioners, pharmacists, physical therapists, and online resources—with the full support of the medical profession.

Consumers Will Benefit from Expanded Licensing of Non-Lawyer Professionals.

Consumers of legal services deserve at least as great a range of service providers as consumers of medical services. Licensure of intermediate service providers, with credentials less than a law degree and bar passage, is one way to fill the gap in affordable legal services. Washington State will soon license its first limited license legal technicians (LLLTs). These LLLTs will be allowed to provide services such as explaining legal documents to clients, informing clients about legal procedures, and completing pre-approved legal forms for clients.11 LLLTs will be able to address many of the concerns faced by self-represented litigants at a more affordable price than lawyers, who often do not even offer these sorts of limited scope services. Paula Littlewood, Executive Director of the Washington State Bar Association, is a member of the Commission. We hope that the Commission will draw upon her vast experience with the implementation of Washington’s LLLT rules to determine how other states may follow Washington’s lead.

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11 Washington Admission and Practice Rule 28(F).
Unauthorized Practice of Law Restrictions Need to Be Reformed to Serve as Consumer Protections, Not Lawyer Protections.

Aside from intermediate service providers, consumers could receive far more help with their legal matters if regulators took a less expansive view of which services are deemed to be the practice of law, and thus restricted to lawyers. In most states, restrictions on the unauthorized practice of law (UPL) are so broad and vague that they apply to anyone from financial planners to advice columnists to good Samaritans providing a friend with free advice.

UPL laws are ostensibly intended to protect consumers against harm, either from scam artists pretending to be lawyers or from unqualified service providers. The former concern is generally addressed by consumer fraud laws, making UPL laws redundant for that purpose. The latter concern is increasingly mitigated by a free market in which consumers have access to extensive consumer-driven information about service providers. In general, UPL laws are used more often to protect lawyers from competition than they are used to protect consumers from harm.\(^\text{12}\) However, to the extent that UPL restrictions remain necessary, three principles should apply in setting their maximum reach.

First, there should be no cause of action for UPL against those who provide services for free, unless those people falsely claim to be a lawyer. Second, UPL causes of action should require a complaint from a customer and a showing of actual harm to that customer. Third, professionals should not face UPL charges for acting in the normal scope of their profession.

A Safe Harbor Provision for Document Preparation Software Would Expand the Options Available to Consumers.

In addition to these general principles, consumers could benefit from clarification to UPL laws regarding self-help websites. Publication of self-help information and forms is protected by the First Amendment and by some state constitutions as well.\(^\text{13}\) However, despite enjoying

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\(^\text{12}\) Deborah L. Rhode & Lucy Buford Ricca, Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement, 82 Fordham L. Rev. 2587 (2014).

\(^\text{13}\) See, e.g., New York County Lawyers’ Ass’n v. Dacey, 21 N.Y.2d 694, 234 N.E.2d 459 (N.Y. 1967), aff’ing on grounds in dissenting opinion, 283 N.Y.S.2d 984 (N.Y.
constitutional protection, online self-help publishers such as LegalZoom face UPL prosecution because they use an automated decision tree to complete forms, rather than handing a printed decision tree to a customer. Such UPL prosecutions have a chilling effect on innovators throughout the online legal industry, leaving consumers with fewer self-help options in a marketplace where hiring a lawyer is increasingly cost-prohibitive.

To remedy this problem, we urge the Commission to study the safe harbor provision in Texas’s UPL statute. This provision defines UPL not to include “design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney.”14 This provision can serve as a model that will allow the growing range of innovative online self-help products to develop without the threat of unwarranted UPL action.

Loosening Restrictions on Multijurisdictional Practice Will Give Consumers Greater Choice in Selecting a Lawyer.

Another set of regulations that chills the development of online legal services is the high barrier to multijurisdictional practice by lawyers. In an era where consumers have access to nearly every other good and service through the Internet, law has lagged behind. Lowering barriers to multijurisdictional practice could be especially valuable to people in less populated states without enough lawyers to serve them, who could then have online or telephone access to lawyers nationwide.

Current restrictions on practice by out-of-state lawyers bear little relation to consumer protection. The only restrictions that should be placed on consumers’ access to lawyers from another state are those that protect clients against lawyer misconduct. Thus, while it is important that an out-of-state lawyer be accountable to some regulatory body, that agency need not be in the state in which the

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14 Texas Government Code 81.101(c).
lawyer is practicing. Additionally, too much importance is placed on out-of-state lawyers taking a bar exam for an additional state in which they are practicing. The practice of law rarely calls upon knowledge memorized for the bar exam; good lawyering entails far more. Consumers may take exam passage into account when selecting a lawyer, but would be far better advised to look at a lawyer's relevant experience. In any event, states should leave consideration of such factors to the discretion of the consumer rather than completely barring access to out-of-state lawyers.

Canada's National Mobility Agreement holds lawyers accountable to their clients while allowing consumers great flexibility in the choice of a lawyer. Its provisions for temporary mobility require lawyers to have a clean disciplinary record. It also requires a lawyer's home jurisdiction to exercise disciplinary authority over the lawyer when practicing out of state. We urge the Commission to study Canada’s example as a potential model for multijurisdictional practice in the United States.

**Restrictions on Outside Investment in Law Practices Inhibit Innovation and Prevent Consumers from Benefiting from Economies of Scale**

One of the essential changes that the profession needs to adopt is to remove the ban on outside investment in law practices. New models for providing legal services have been slow to develop because of the requirement that capital for innovation come only from lawyers. There are numerous lawyers and non-lawyers who have ideas for improving the way legal services are delivered but lack access to sufficient capital to implement them. Without outside investment, Henry Ford would have been limited to producing a few Model Ts and FedEx would be operating a mom-and-pop delivery service out of Memphis.

The ban on outside investment has also prevented consumers from benefiting from the economies of scale that other industries employ. Almost every law firm providing services to middle-income individuals is a small business of no more than a dozen attorneys. A large national firm specializing in these issues could provide standardized training to the attorneys it works with, perform quality control on services offered to clients, and let lawyers focus on
practicing law rather than finding clients. Economies of scale would bring the costs of legal services down, while creating opportunities for attorneys fresh out of law school. Angel investors could actually act on a great proposal for a new legal services model, and bring it into reality. Under current regulations, none of this can happen. Rules intended to protect consumers from unscrupulous lawyers are actually making it harder to connect them with good ones.

The ban on fee sharing was adopted with the noble intent of insulating lawyers from external financial pressures that could cause them to act unethically. However, this logic incorrectly assumes that non-lawyers are more likely to exert such pressure than lawyers themselves. In reality, lawyers already have financial incentives that may conflict with their clients' best interests. For instance, solo practitioners are under pressure to pay their bills, and lawyers at large firms are under pressure to meet their required billable hours, both of which can lead to padding of a client's legal bills. It is either ignorant or arrogant to claim that outside investment in a law practice exposes lawyers to a new type of ethical danger.

We urge the Commission to look to Australia's model for outside investment, which has been operating successfully since 2001. Perhaps the best example of how consumers can benefit from the innovation and economies of scale made available through outside investment is the Australian firm Slater & Gordon, which in 2007 became the world's first publicly traded law firm. Potential clients start off their experience at Slaters by calling the firm, where specially trained call center staff will triage their legal problems and decide which of the lawyers in the firm's 30 practice areas the client should be directed to. This alone is a major improvement over the process for finding legal help in the U.S., where finding the right lawyer involves phone calls or in-person visits to multiple law firms. Because of its size (70,000 to 80,000 inquiries per year), the firm is able to gather sufficient data to set flat fees at an affordable level while still making a profit. Slaters is also able to use non-lawyer expertise to run the back-end of the business more efficiently, freeing lawyers to practice law. And because of the number of
lawyers it employs, the firm is able to offer those lawyers varying career paths that lead to less burnout.\textsuperscript{15}

As we noted in the beginning of these comments, the legal profession as its currently structured does not have enough resources to handle all the legal problems that Americans face. While some of these problems require bespoke solutions, many are suitable for mass-market services. Leveraging the economies of scale that outside investment facilitates is a way of allowing consumers to afford the expertise of a lawyer for the everyday legal matters they face.

In addition, the legal profession has been struggling with underemployment among its newest members. Mass-market consumer law firms—which are only possible through outside investment—could provide the training ground for many of these newly-minted lawyers. Many recent law school graduates would welcome the ability to work at a Slaters-style call center with a steady paycheck, internal training on lawyering skills, and opportunities for internal advancement. Mass-market consumer law can be the solution to the paradox of the modern legal market, where there are too many out-of-work lawyers, yet too many consumers unable to afford a lawyer.

\textbf{A Clients' Bill of Rights Would Inform and Protect Consumers}

While the previous recommendations to the panel involve regulators of the legal profession reducing some of the burden they impose, we’d also like to address an area where an additional regulation could benefit consumers. We urge the Commission to consider requiring lawyers to follow a Clients’ Bill of Rights. Clients are often poorly informed about the rights they enjoy when then retain a lawyer. Responsive Law has created a list of ten essential rights every consumer should have and be aware of from the moment she decides to hire a lawyer through the conclusion of that lawyer’s representation.

Many of these rights are already guaranteed by law. Others are ones that a client, like any other customer in a free market, can insist upon as a condition of hiring a particular lawyer. Responsive Law believes

\textsuperscript{15} For a more detailed description of this business model, see Mitch Kowalski, “\textit{How to Make a Law Firm Float},” CBA National Magazine (January-February 2014).
that both clients and lawyers are best served when clients are aware of these rights. Therefore, states should require that lawyers present a written copy of the Client Bill of Rights to a client before beginning a representation. New York State has a similar requirement that lawyers post a copy of that state’s Client Bill of Rights in their offices. We have submitted a copy of our policy paper on this topic along with our comments as a resource for the Commission.

**Conclusion**

The legal profession is at a crossroads. Consumers are finding it increasingly difficult to find affordable legal help and lawyers are paralyzed by regulations that prevent them from either providing that help themselves or allowing others to do so. The profession has two choices. It can double down on its current course of resisting innovation and find itself increasingly irrelevant, as consumers are forced to solve their legal problems either on their own or with help that exists in a gray market. Alternatively, the profession can get out of its own way and share in the benefits of a largely untapped legal market, while simultaneously making great strides in closing the access to justice gap. We believe the decision is clear, and hope that the existence of this Commission is evidence that the profession is moving in the right direction.

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16 22 NYCRR §1210.1
In The
Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, 

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF LEGALZOOM.COM, INC., RESPONSIVE LAW, FILERIGHT LLC, JUSTANSWER LLC, JUSTIA COMPANY, SHAKE, INC., AND LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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August 6, 2014
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INTEREST OF AMICI CURIAE¹

Alternative Service Provider Amici

LegalZoom.com, Inc. provides affordable online legal solutions for individuals and small businesses. LegalZoom has helped over two million Americans create their own legal documents addressing a variety of routine legal matters. LegalZoom has been subject to anticompetitive actions taken by self- and financially-interested regulatory agencies controlled by private market participants that have threatened to restrict the market choices available to consumers.

Consumers for a Responsive Legal System (Responsive Law) is a non-profit organization that seeks to make the legal system more affordable, accessible and accountable by educating consumers, improving access to online legal resources, championing innovative lawyers and promoting alternative legal services.

FileRight, LLC operates a website located at www.fileright.com where it provides an online platform for consumers to create their own immigration documents.

¹ The accompanying brief was not written in whole or in part by counsel for any party, and no persons other than amici have made any monetary contribution to the preparation or submission of this brief. The parties have blanket consents on file for the filing of amicus briefs. The law professors’ institutional affiliations are provided for identification purposes only, and imply no endorsement of the views expressed herein by any of the institutions or organizations listed.
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**Shake, Inc.** operates a website at www.shakelaw.com where it provides a technology platform making the law accessible, understandable and affordable for consumers and small businesses.

**Law Professor Amici**

**Richard L. Abel** is Connell Distinguished Professor of Law Emeritus and Distinguished Research Professor at UCLA School of Law. His recent publications include *LAWYERS ON TRIAL: UNDERSTANDING ETHICAL MISCONDUCT* (Oxford University Press 2010) and *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (Oxford University Press 2008).

**Benjamin H. Barton** is Helen and Charles Lockett Distinguished Professor of Law at the University of Tennessee College of Law. He has authored numerous books and articles on the regulation of lawyers including *THE LAWYER-JUDGE BIAS IN THE AMERICAN COURTS* (Cambridge University Press 2011).
Elizabeth Chambliss is Professor of Law and Director of the Nelson Mullins Riley & Scarborough Center on Professionalism at the University of South Carolina School of Law. Her recent publications include “Law School Training for Licensed Legal Technicians? Implications for the Consumer Market” (South Carolina Law Review 2014) and “It’s Not About Us: Beyond the Job Market Critique of U.S. Law Schools” (Georgetown Journal of Legal Ethics 2013).

Jon M. Garon is Dean and Professor of Law, Nova Southeastern University, Shepard Broad Law Center. His recent publications include “Legal Education in Disruption: The Headwinds and Tailwinds of Technology” (Connecticut Law Review 2013).

Richard S. Granat is Affiliate Professor of Law and Co-Director, Center for Law Practice Technology, Florida Coastal School of Law, and Co-Chair of the eLawyering Task Force of the Law Practice Management Section of the American Bar Association. He is also Founder/CEO of DirectLaw, Inc., a virtual law firm platform provider to solos and small law firms.

Gillian Hadfield is Richard L. and Antoinette Schamoi Kirtland Professor of Law and Professor of Economics at the University of Southern California Gould School of Law. Her recent and forthcoming publications include “Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans” (with Jamie Heine) (forthcoming 2015); “Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets” (Dædalus 2014); and “The
Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law” (International Review of Law and Economics 2014). She is on LegalZoom’s Legal Advisory Council and the Advisory Board for JustAnswer.com. She has no financial interest in either company.

**William D. Henderson** is Professor of Law and Van Nolan Faculty Fellow at the Indiana University Maurer School of Law. His recent publications include “A Blueprint for Change” (Pepperdine Law Review 2013).

**Renee Newman Knake** is Professor of Law at Michigan State University College of Law and Co-Director of the Kelley Institute of Ethics and the Legal Profession. She is co-author of PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH, 2ND ED. (West Publishing 2013) with Pearce, Capra, Green and Terry, and numerous articles on lawyer regulation, including “Legal Information, the Consumer Law Market and the First Amendment” (Fordham Law Review 2014) and “Democratizing the Delivery of Legal Services” (Ohio State Law Journal 2012).

**Deborah J. Merritt** is John Deaver Drinko/Baker & Hostetler Chair in Law at the Moritz College of Law, Ohio State University. She has authored numerous books and articles, including “Unleashing Market Forces in Legal Education and the Legal Profession” (Georgetown Journal of Legal Ethics 2013).
Russell G. Pearce holds the Edward & Marilyn Bellet Chair in Legal Ethics, Morality & Religion at Fordham University School of Law, and is co-Director of the Louis Stein Center for Law and Ethics and Faculty Moderator of the Institute for Religion, Law, and Lawyer’s Work. He is co-author of Professional Responsibility: A Contemporary Approach, 2nd Ed. (West Publishing 2013) with Capra, Green, Knake and Terry, and “The Virtue of Low Barriers to Becoming a Lawyer: Promoting Liberal and Democratic Values” (International Journal of the Legal Profession 2012) with Nasseri.

Deborah L. Rhode is Ernest W. McFarland Professor of Law and Director of the Center on the Legal Profession at Stanford Law School. She is the past president of the International Association of Legal Ethics and the most frequently-cited scholar on issues of professional responsibility.

Tanina Rostain is Professor of Law at the Georgetown Law Center and Co-Director of the Center for the Study of the Legal Profession. Her recent scholarship includes the book Confidence Games: Lawyers, Accountants, and the Tax Shelter Industry (MIT Press 2014) with Regan.

William H. Simon is Arthur Levitt Professor of Law at Columbia University. His areas of expertise are Professional Responsibility and Social Policy.
SUMMARY OF ARGUMENT

These amici curiae comprise alternative legal information and service providers and a group of prominent law professors who research, analyze and teach about access to justice and the market for legal services. These amici strongly believe that the Fourth Circuit’s ruling below was correct, and that Petitioner and its allied amici’s effort to undermine this Court’s precedents that subject state agencies to antitrust scrutiny when they are controlled by private market participants is misguided.

There is an ongoing and worsening access-to-justice crisis in the United States. Increasing numbers of low- and middle-income Americans simply cannot afford to hire lawyers to address legal issues they routinely face. This access crisis is caused, in large part, by over-regulation of the legal market and unnecessarily high and complex barriers to entry. Bar associations, similar to the dental board Petitioner here, are often run by active participants in the very market they are empowered to regulate and control, without meaningful state policy direction or active oversight. As a result, individuals, families, entrepreneurs and small businesses lack access to legal information, resources and assistance.

The research of amici law professors and the real-world experience of amici market participants provide useful insight to this Court’s evaluation of why antitrust oversight remains necessary to deter
the use of state authority to regulate and control markets in self-interested ways.

The first section of this brief outlines the contours of how restricted access to legal services is harming American citizens and businesses. The second section provides illuminating anecdotes of how some state bar associations and their committees have used state-granted enforcement authority to restrict perceived competition with their members, in ways that defy judicial review and are inconsistent with basic due process checks and balances. The final section explains that continued antitrust oversight of financially self-interested parties’ enforcement of their members’ legal monopoly does not threaten their ability to assure ethical and competent behavior by their members.
ARGUMENT

I. PETITIONER'S EFFORT TO UNDO THIS COURT'S PRECEDENTS HOLDING THAT STATE AGENCIES CONTROLLED BY FINANCIALLY SELF-INTERESTED PARTIES ARE PRIVATE ACTORS SUBJECT TO ANTITRUST OVERSIGHT THREATENS ACCESS TO AFFORDABLE LEGAL SERVICES.

A. Anticompetitive use of state bar regulatory authority is causing substantial harm to consumers and plays a major role in the American crisis of access to justice.

The World Justice Project reports that the U.S. is currently tied with Kyrgyzstan, Mongolia and Uganda in terms of the affordability and accessibility of its civil justice system. As leaders in the American judiciary have recognized (and no reasonable observer disputes), the U.S. faces a crisis in access to justice. For instance, in New York, over 90% of people involved in housing, family, and consumer problems are


forced to appear in court without legal representation. Studies in other states generally find that the proportion of unrepresented individuals exceeds 80%.

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, such as simple estate planning, obtaining elder care, arranging child custody, obtaining child support, addressing consumer debt and foreclosure, managing disputes over employment conditions or pay, and obtaining entitlements to health care, education and public services.

Surveys of legal needs of low- and moderate-income Americans find that roughly 50%-60% of 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.

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4 Jefferson, Liberty and Justice for Some.


that impose fewer restrictions on who may provide legal advice and assistance: roughly 25%-30% compared with 5%-10%. Shockingly, the number of Americans obtaining help from a lawyer appears to be falling: a 1995 ABA study found that 29% of the poor and 39% of those of moderate means facing a serious legal problem had help from a lawyer or other legal service provider, but surveys conducted in the past ten years found that those percentages have dropped to about 15%. Conservative estimates based on census data indicate that households facing legal problems in 2012 purchased an average of only one and half hours of lawyer services per problem; this is less than half of the amount purchased in 1990. These numbers are only the tip of the iceberg, as they represent erupted legal problems such as a child custody fight, foreclosure, eviction or bankruptcy. Beneath the surface lies a great need for legal help that might prevent or minimize these crises before they erupt.

Small businesses and entrepreneurs – the biggest drivers of new employment – also face enormous hurdles in obtaining affordable legal services. They

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8 Id.
9 Id.
10 Id.
form business entities, file for trademarks and patents, take on debt or equity investments, 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.

This crisis in access to justice has many causes, including the complexity of American legal process, cuts to court budgets and limited legal aid funds. But a significant factor is the high price of legal services, and the excessive degree of regulation of U.S. legal markets contributes substantially to those high prices.

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12 Id.

13 Id.

Although some access-reducing restrictions result from rules adopted by state legislatures and supreme courts, others result from the actions of state bar associations. Like Petitioner North Carolina State Board of Dental Examiners, many state bar associations (including amici bar associations appearing here) are controlled by active practitioners who may have a direct financial self-interest in maintaining restrictions on who can practice law and how they can do so, and in defining the scope of that monopoly broadly. Like Petitioner, state bar associations routinely operate without active state supervision and may seek to limit competition from alternative legal services providers. A recent survey of state bar unauthorized practice committees and enforcement agencies found that most complaints about alleged unauthorized practice of law (UPL) are made by lawyers or the bar association itself, not by consumers. Nearly 70% of those surveyed could not recall a single instance of serious injury to the public from alleged unauthorized practice in the previous year. The vast majority of complaints never result in court proceedings where enforcement actions can be supervised by state court judges – rather, they are resolved unofficially through bar and committee investigations.

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Monopoly: Failing to Protect Consumers, 82 Fordham L. Rev. 2683 (2014).

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

16 Id.
pressure and consent agreements.17 Ironically, the access-to-justice crisis often leaves those accused of unauthorized practice without legal representation themselves.

Modern technology has spawned a proliferation of innovative alternative legal service providers – software and Internet-based legal document completion and filing services; unbundled legal information and communication platforms; client and lawyer matching services, among a variety of other new business models. Alternative providers of such services, including amici here, have a critical role to play in reducing the cost of legal information and services and improving access to justice. Alternative providers may provide low-cost access to legal forms, legal information and support for people navigating legal processes. They may provide easier and cheaper ways to find attorneys willing to represent them. But these innovators – like innovations introduced into the legal market in the past18 – are perceived as a threat

17 Id.
18 See, e.g., Bates v. Arizona State Bar, 433 U.S. 350 (1977) (First Amendment prevents state bars from punishing lawyers for publishing truthful advertisements); New York County Lawyers' Ass'n v. Dacey, 287 N.Y.S.2d 422 (N.Y. 1967), aff'ing on dissenting op. below, 283 N.Y.S.2d 984 (N.Y. App. 1967) (layman's publication of How to Avoid Probate! book with legal forms and instructions protected by First Amendment from local bar association's effort to ban its publication); In re Nolo Press/Folk Law, Inc., 991 S.W.2d 768, 773-75 (Tex. 1999) (mandamus action arising from state UPL committee's effort to ban legal self-help publications and software).
by some practicing lawyers and bar associations. This Court should not accept Petitioner and its supporting amici’s request to tear down the existing bulwark against the potential anticompetitive abuse of state power by financially self-interested regulators.

B. This Court correctly treats financially self-interested market participants as private parties, even when a state gives them regulatory power and calls them a state agency.

This Court’s precedents hold that financially self-interested market participants – such as the board of dental examiners here and many state bar associations – are private entities subject to Sherman Act scrutiny when they regulate competition in their own markets. Designating a dental board or bar association controlled by market participants a “state agency” “does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.” Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975). In Goldfarb, this Court treated the Virginia State Bar as a private actor when the Bar took a variety of actions to enforce a minimum fee schedule for legal services that had been set by a county bar association. Enforcing those minimum fees was “essentially a private anticompetitive activity” and was not beyond the reach of the Sherman Act. 421 U.S. at 792.

This Court has recognized that the threat of unregulated anticompetitive conduct increases when a
decision-making body “is composed, at least in part, of persons with economic incentives to restrain trade” and “the restraint is imposed by persons unaccountable to the public.” Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501-02 (1988) (citing Goldfarb and Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-08 (1962)). “We may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf.” Allied Tube & Conduit Corp., 486 U.S. at 501 (quoting Hallie v. Eau Claire, 471 U.S. 34, 45 (1985)).

C. The Board of Dental Examiner’s unsupervised, anticompetitive regulation of its self-defined market monopoly closely resembles the unsupervised, anticompetitive actions of some state bar associations.

Typically, professional self-regulatory bodies like the dental board here and state bar associations are elected by and accountable to their members, rather than to the public. This Court’s concern in *Allied Tube* that private actors given regulatory authority tend to act “on their own behalf” is borne out by the facts in this case, by scholarly research, and by the actual experience of legal market innovators.

The dental board here mailed cease-and-desist letters to perceived competitors for teeth-whitening business and to their landlords without a clear articulation in state legislation that teeth-whitening was “dentistry” under state law, and without state supervision of its enforcement actions. The board’s threatening letters exceeded its power under state law, and the letters’ *in terrorem* effect reduced competition and increased prices. The board’s control by active, practicing dentists gave no assurance that its cease-and-desist letter campaign promoted state policy rather than the private interest of dentists. *See Patrick*, 486 U.S. at 101 (no assurance that private parties’ unsupervised anticompetitive conduct promotes government policy, rather than private interest).
The dental board’s letter campaign closely resembled – indeed, was modeled after – the North Carolina State Bar’s enforcement practices in the legal services market. Like the dental board, that state bar conducts investigations and issues cease-and-desist letters to non-lawyers, accusing them of the unauthorized practice of law or UPL. Not coincidentally, that state bar and several others are amici supporting Petitioner, asking this Court to abandon the requirement of active state supervision over their power to enforce the legal monopoly granted to their members.

State bar UPL enforcement – especially when challenging perceived competition from non-lawyers – often suffers from the same inadequacies as the dental board’s actions here. There is often no clearly articulated state policy on what constitutes “the practice of law.” What constitutes UPL is notoriously poorly defined, often treated on a case-by-case basis, leaving state bars with broad discretion to choose targets for enforcement. State bars face little supervision by the state or scrutiny by the public. Their UPL investigations often take place behind closed doors and outside the reach of public information statutes.

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20 Id.
21 For example, until corrected by judicial rule-making, the Texas Unauthorized Practice of Law Committee claimed that not (Continued on following page)
this opacity, some state bars hold short of taking formal enforcement actions that would subject their UPL enforcement to independent judicial review. Rather, they rely on closed-door investigations, cease-and-desist letter demands, and opinions released by small committees of members, typically volunteers. Even without judicial enforcement, such “official” actions effectively suppress competition for legal services.

Some state bars’ UPL committees – usually composed of volunteer attorneys in private practice – issue *sua sponte* opinions determining that certain actions or even specifically-named companies are violating state law. Likewise, state bar ethics committees composed of volunteers in private practice issue ethics opinions that conclude, without judicial oversight, that attorneys who choose to participate in innovative legal service models risk professional discipline. Unsupervised and issued by financially self-interested practitioners, these opinions restricting law practice have the same effect as concerted refusals to deal. See *Goldfarb*, 421 U.S. at 781-82.

Recent examples of how some state bars have used this unsupervised power to suppress perceived

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only were its investigations private, but also that its *rules* and its *membership* were secret from the public and from the parties it investigated. See *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 773-75 (Tex. 1999).
competition may shed light on this Court’s consideration of whether to retrench on *Midcal’s “clear articulation”* and “active supervision” requirements, as Petitioner and the state bar *amicis* request.

### 1. Anticompetitive state bar UPL opinions.

Responding to “many informal inquiries” by its members, the Connecticut Bar Association’s UPL committee in early 2008 *sua sponte* published an “informal opinion.”\(^{22}\) The opinion specifically named *amicus* LegalZoom and another alternative legal provider and accused both of violating Connecticut law. The committee based its opinion solely on what it saw on the Internet – it gave the companies no notice it was considering the issue; it gave them no opportunity to be heard; it sought no public input; and it conducted no hearing. The bar took no enforcement action – that would have brought independent judicial review. Nonetheless, this state “agency” opinion remains online, derogating and discouraging perceived competition from non-lawyers.\(^{23}\)

In 2008, *amicus* North Carolina State Bar published a “cease-and-desist” letter addressed to LegalZoom, claiming that its services were “illegal in North

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\(^{23}\) *Id.*
Carolina and must end immediately.”\textsuperscript{24} The letter directly contradicted a letter the bar had sent to LegalZoom in 2003, telling LegalZoom it was \textit{not} engaged in the unauthorized practice of law.\textsuperscript{25} The bar’s unexplained about-face shows that its market regulation is not following a clearly-articulated state policy nor is it actively supervised by the state. Like the Connecticut bar, the North Carolina bar took no direct enforcement action for five years, avoiding judicial review of its action.

Unsupervised, financially self-interested market regulation emboldens other financially self-interested regulators. In 2010, the Pennsylvania Bar Association’s UPL committee, relying on the Connecticut and North Carolina bars’ actions, issued its own “formal opinion,” concluding that only attorneys could provide online legal document services “beyond the supply of pre-printed forms selected by the consumer.”\textsuperscript{26} Like the Connecticut bar, the Pennsylvania bar gave no notice to affected parties; it provided no opportunity to be heard; sought no public input; and conducted no hearing.


\textsuperscript{25} Id. at 6-7.

2. Anticompetitive state bar ethics opinions.

While operating as a limitation on their own members’ actions, professional responsibility standards also may effectively discourage innovation and competition in the legal services markets, reinforcing bar members’ monopoly while disserving consumers. *Goldfarb*, 421 U.S. at 781-82. The attorney price-fixing in *Goldfarb* is just one example; bar associations have a history of informal, unsupervised market regulation.

For example, in 2005, with no public input or hearing, the Texas State Bar Professional Ethics Committee (comprised entirely of licensed attorneys) issued an opinion holding that attorneys could not participate in an innovative online system that matched attorneys with prospective clients. This system not only helped licensed attorneys find prospective clients, but by simplifying the process for consumers, increased access to lawyers while allowing competition to lower prices. Texas attorneys risked sanctions if they participated, effectively preventing such systems from operating in Texas. The next year, after an effected entity objected and another opinion was sought, the committee substantially

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reversed its position, but again with no public input or hearing or state supervision.²⁸

More recently, again with no public input, the South Carolina Bar issued an advisory opinion holding that its members could not participate on *amicus* JustAnswer's question-and-answer internet site.²⁹ This site provides consumers with prompt, low-cost access to legal information that would not be readily available otherwise. The bar gave JustAnswer no notice or opportunity to be heard. It sought no public input and it conducted no hearing. Because South Carolina lawyers risk disciplinary proceedings by participating, the “informal” opinion effectively stifled innovation and competition with no state supervision or judicial review.


III. SUBJECTING STATE BAR ASSOCIATIONS TO ANTITRUST OVERSIGHT WHEN THEY POLICE THE BOUNDARIES OF THEIR MONOPOLY ON LEGAL SERVICES DOES NOT UNDERMINE THEIR ABILITY TO PROMOTE ETHICAL AND COMPETENT BEHAVIOR BY THEIR MEMBERS.

The state bar association amici supporting Petitioner vastly overstate the impact of the Fourth Circuit’s decision below. It will not lead to new layers of bureaucracy – under Goldfarb, state bars are already subject to antitrust scrutiny when they use their informal powers to benefit their members, rather than to promote a clearly articulated state policy.

The promulgation of admission and disciplinary rules is typically done with adequate process and review. Bar members and applicants have substantial incentive to monitor the scope and application of those rules. Admission decisions and disciplinary proceedings are ultimately supervised by state courts. The state bar amici provide no examples – either case law or anecdotal – that Goldfarb has restricted their ability to ensure ethical and competent behavior by their members.

The state bar amici supporting Petitioner incorrectly conflate actions promoting ethical and competent behavior by bar members with enforcement by bar members of their own monopoly over the practice of law. Self-regulation and monopoly-enforcement implicate very different state interests. It is not essential that private, financially self-interested market
participants conduct both functions. Bar associations may effectively regulate their members’ admission and professional conduct without also holding the power to enforce their members’ monopoly against non-members. Unauthorized practice restrictions may be enforced by numerous state officials who, unlike state bar associations, do not have a direct financial interest in suppressing perceived competition. Judges, state and federal prosecutors, administrative agencies and attorneys general all typically have the power to take action against the unauthorized practice of law.

The Fourth Circuit’s decision follows this Court’s existing precedent that treats private parties as such when acting in their own interests, including restricting competition within their regulated market. Petitioner and its allied state bar amici seek a dangerous change in the law that would remove meaningful review of financially self-interested private parties empowered by state law to enforce their own monopolies. Nothing in the Sherman Act or this Court’s precedent supports, let alone requires, this disquieting result.

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**CONCLUSION**

No doubt many, if not most, private attorneys given the power by states to enforce the professional bar’s monopoly over the practice of law are honorable individuals. However, logic, academic research and the real-life experience of consumers and innovative
service providers show that actual, active state oversight of financially-interested market participants remains a fundamental check on the potential for abuse. This Court should decline the request of Petitioner and its allied amici to undermine this existing and necessary bulwark against the unfettered ability to use state power to advance private interests at the expense of the free market.

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Policy Paper

The Clients’ Bill of Rights

Clients are often ill-informed about the rights they enjoy when then retain a lawyer. Responsive Law has created a list of ten essential rights every consumer should have and be aware of from the moment she decides to hire a lawyer through the conclusion of that lawyer’s representation.

Many of these rights are already guaranteed by law. Others are ones that a client, like any other customer in a free market, can insist upon as a condition of hiring a particular lawyer. Responsive Law believes that both clients and lawyers are best served when clients are aware of these rights. Therefore, states should require that lawyers present a written copy of the Client Bill of Rights to a client before beginning a representation.

The following is a list of the rights outlined in the Client Bill of Rights and a description of each one. There are also references to the New York Client Bill of Rights (22NYCRR§1210.1) (hereinafter, “NYCBR”), which lawyers in New York are required to post in their offices.

Rights Existing Under Current Law

These rights are guaranteed in any state whose lawyer ethics rules follow the American Bar Association Model Rules of Professional Conduct.

1) You have the right to have your calls, letters, questions and concerns addressed promptly.

One of the most common complaints clients have about their lawyers is that they are left in the dark; unaware of how their matter is proceeding. A lawyer should make sure her client is regularly updated on the status of her case and promptly address any concerns or questions about the case the client may have.

Comments to
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Responsive Law
1380 Monroe St NW, #210
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tom@responsivelaw.org
(202) 649-0399
This right is contained in ABA Model Rule 1.3, which requires a lawyer to “act with reasonable diligence and promptness in representing a client” and Model Rule 1.4, which requires a lawyer “to keep the client reasonably informed about the status of the matter” and to “promptly comply with reasonable requests for information.” The comments to Model Rule 1.3 point out that “perhaps no professional shortcoming is more widely resented than procrastination.” This is true for most professionals, and even more important when legal rights are at stake. Item 5 of the NYCBR has a nearly identical provision, stating, “You are entitled to have your questions and concerns addressed in a prompt manner and to have your telephone calls returned promptly.”

2) **You have the right to be present at all meetings and court appearances related to your matter, unless a court orders otherwise.**

Being present during meetings and court appearances is essential, not only so that the client can witness firsthand how their matter is being handled, but also so the client can understand and appreciate the details of their matter and make informed decisions on how to proceed.

Clients have the fundamental right to be present during all court proceedings as guaranteed under the Due Process Clause of the Fifth Amendment of the U.S. Constitution. ABA Model Rules 1.2 and 1.4 further require a lawyer to consult with her client and keep her fully informed about the matter.

3) **You have the right to have your goals respected by your lawyer, including whether to settle.**

Just as a doctor should not make the final decision as to whether a patient should have surgery, a lawyer should not make final decisions about what actions a client should take. A lawyer’s job is to help her client make the best possible decision; it is never to make that decision for them.

ABA Model Rule 1.2 encompasses this right, requiring a lawyer to “abide by a client’s decisions concerning the objectives of representation” and to “consult with the client as to the means by which they are to be pursued.” The same rule explicitly states that “a lawyer shall abide by a client’s decision whether to settle a matter.” The NYCBR also notifies clients of this right in Item 7, which says, “You are entitled to have your legitimate objectives respected by
your attorney, including whether or not to settle your matter (court approval of a settlement is required in some matters)."

4) **You have the right to confidentiality from your prospective lawyer, the lawyer you hire, and people who work for your lawyer, both during and after the engagement.**

It goes right to the heart of the attorney/client relationship that the client be able to convey to her lawyer all relevant information with the implicit understanding that it will be kept in the strictest confidence. If that trust does not exist, a client may well be reluctant to divulge critical information to her lawyer limiting the effectiveness of the representation.

ABA Model Rule 1.6 requires that “a lawyer shall not reveal information relating to the representation of a client.” Comments to this rule establish further that “a lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.” This required confidentiality is enforced not only during the course of the matter, but long after the matter is concluded; even after the attorney/client relationship has ended. Item 8 of the NYCBR provides that “You have the right to privacy in your dealings with your lawyer and to have your secrets and confidences preserved to the extent permitted by law.”

5) **You have the right to have access to sufficient information to allow you to participate meaningfully in your matter, including access to all materials provided to your lawyer or prepared by your lawyer, during and after the representation.**

Everything that happens in a client’s case could potentially affect the outcome. Therefore, lawyers should provide clients with all memos and court filings in their cases.

As discussed above, ABA Model Rule 1.4 requires that a lawyer keep her client informed with all information relevant to the matter. The Rule also requires a lawyer to “promptly comply with all reasonable requests for information.” Similarly, the NYCBR, in Item 6, provides that “You are entitled to be kept informed as to the status of your matter and to request and receive copies of papers. You are entitled to sufficient information to allow you to participate meaningfully in the development of your matter.”
6) You have the right to fire your lawyer for any reason at any time even if he or she was hired on a contingency fee basis, and to hire a new one or go it alone.

In every professional relationship, no matter the service provided, the client has the right to fire the professional and seek assistance elsewhere. The Client Bill of Rights is intended to help lawyers and clients avoid the kind of problems that might otherwise result in the client ending the representation, but when things don’t go the way the client had hoped and the relationship between the client and her lawyer is beyond repair, the client should feel free to fire her lawyer.

ABA Model Rule 1.16 gives the client the power to discharge her lawyer at any time, with or without cause. The Rule further requires that, after being discharged, the lawyer must take reasonable steps “to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.” Also, it is important to note, as discussed above, that Model Rule 1.6 requires the lawyer to maintain confidentiality regarding the matter even after she is fired and to take “all reasonable steps to mitigate the consequences to the client.” This provision is similar to Item 2 of the NYCBR, which states, “If you are not satisfied with how your matter is being handled, you have the right to withdraw from the attorney-client relationship at any time (court approval may be required in some matters and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge).”

The following rights are not guaranteed, but you might want to ask your lawyer to agree to them

Unlike the rights described above, the following are not explicitly required by the ABA Model Rules. However, there are portions of the Model Rules that address issues similar to the rights listed.

7) You have the right to receive a written engagement agreement outlining the scope and objectives of the representation, the likelihood of success, and the risks involved.

It is customary in most professions, especially those that carry a heavy cost burden, that a client be provided up front with a written
estimate detailing the nature of the services to be performed and explaining all potential risks. Clients should be aware that they can ask for a written description of the work to be performed, as well as the risks involved, just as they could do for a financial planner or a home contractor.

8) You have the right to have a written fee agreement describing how fees and expenses will be computed, as well as the terms of payment.

Any smart lawyer would advise her client to get any business agreement in writing. No smart consumer would buy a car or conduct major home improvements without a written statement containing a precise description of how much she would pay and what services will be provided. In this respect, a contract for legal services is like any other: it should be easily understood by the client and it absolutely should be in writing.

ABA Model Rule 1.5 governs fees, and while it does not generally require fee arrangements to be provided upfront or in writing, the Rule does clearly state a preference for written agreements. If the fees in the case are to be paid to the lawyer on a contingency basis, however, ABA Model Rule 1.5(c) does require that the lawyer provide the client with a written agreement explaining the exact nature of the fee arrangement and that this agreement be signed by the client.

The NYCBR has a similar provision in Item 4, which provides a right “to have your lawyer explain at the outset how the fee will be computed and the manner and frequency of billing.” The same item also states, “You are entitled to request and receive a written itemized bill from your attorney at reasonable intervals.”

9) You have the right to receive itemized bills on a regular basis describing the specific tasks performed, the name and title of the person who performed them, and, if you are being billed by the hour, the hourly rate and time spent by each person on each task.

It is rare these days for almost any service provider not to send customers a regular itemized bill. Without such information, it is impossible not only for a client to know what services are being performed, who performed them, and at what cost, but also for that client to challenge her bill if she feels she’s been incorrectly charged for services.
10) You have the right to be informed of the education, training, and relevant experience that each lawyer working on your case has.

Choosing a lawyer can be a daunting proposition for most people. That is why it is essential that lawyers be as forthcoming as possible about who they are, where they went to school, and their experience with the kind of cases for which the client is considering using them.

**Conclusion**

These ten basic rights are intended to help restore much needed balance to the relationship clients have with their lawyers. It is the job of lawyers to help guide their clients through the legal system and to be a trusted advisor in what can often be a hostile and unfriendly environment. These rights help make that role clear to legal consumers, so that they may pursue legal matters with confidence.