Responsive Law
The Consumer's Voice in the Legal System

Comments on: ARDC Study of Client Lawyer Matching Services

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Responsive Law thanks the ARDC for the opportunity to present these comments on the ARDC's Study of client-lawyer matching services, and the ARDC's draft framework for the regulation of such service. Responsive Law is a national, nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its consumers.

We commend the ARDC for its thoughtful and comprehensive approach to these issues. Unlike far too many legal regulators and trade associations, the ARDC has clearly not turned a blind eye to the access to justice problem – and the fact that existing regulation of the legal profession is a major factor contributing thereto.
So we won't spend any time reiterating the problems that exist—the Study does an admirable job of that, and these findings have obviously informed the ARDC's approach. Our comments will focus on several overarching issues, and some specific suggestions regarding the draft framework.

Antitrust and First Amendment Issues

We appreciate the fact that the ARDC has taken seriously the antitrust and First Amendment constraints on its ability to regulate here. With respect to the former, we have little doubt that the ARDC can, with the active supervision of the Illinois Supreme Court, chart a path to regulation that avoids any antitrust law complications. However, the ARDC should be cautious in concluding, as it appears to, that regulation of referral services escapes First Amendment scrutiny as regulation of conduct rather than speech. We believe the sounder and more defensible approach is to enact regulations that can meet the intermediate scrutiny standard applicable to other forms of attorney advertising.

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Attorney Advertising is Important to Consumers

Starting in 1977 and continuing through a string of subsequent decisions, the United States Supreme Court has found that the First Amendment protects the right of the public to be informed by attorneys about legal service offerings.[1] As the Court noted in *Bates v. Arizona:*

> *"[T]he consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision making."*[2]

Attorneys don't have an unfettered right to advertise in any way they desire. But protection of these important Constitutional interests requires the state to show that any restrictions on lawyer advertising are both necessary and no more extensive than required to prevent the harm in question.[3]

Lawyer Referral Services are a Form of Advertising

As the Study notes, there are benefits to the public from lawyer referral services—and there may well be unique benefits provided by for-profit services:

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[1] *See, e.g.,* Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988); Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995).

[2] Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977) (internal citations removed.)

[3] Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York, 447 U.S. 557 (1980). This is what's known as the "intermediate scrutiny" standard for regulation of misleading advertising.

> *The profit motive of for-profit services "benefits consumers by creating an incentive to refer attorneys who can most competently and efficiently handle the case, because dissatisfied customers will not continue to patronize services giving poor referrals." Accordingly, "the interests of for-profit referral services may coincide with those of consumers to a greater degree than is the case with nonprofit bar association referral services."*[4]

The communications that lawyer referral services make to the public, promoting the availability of their attorneys, or legal help generally, are—at a *minimum*—commercial speech.[5] Any regulation of such speech must meet the intermediate scrutiny standard of *Central Hudson.* Yet the ARDC's analysis attempts to parse out the form of payment – i.e., paying for advertising on a per-referral basis – as *conduct* rather than *speech.*

This is mistaken. Appendix 4 of the Study cites two cases[6] for the proposition that payment of referral fees by professionals can be prohibited. Both cases involved attorneys paying "runners" for delivering clients. The findings of these cases are then welded onto the proposition that conduct regulation can impose incidental burdens on speech.

There are obvious differences between the in-person solicitation used by "runners" and the use by a marketing service of a payment mechanism where fees are calculated based on the actual performance of its advertising (rather than a more attenuated metric like impressions). Prohibiting payment for success-based advertising is no mere incidental burden on speech; it is a blanket restriction on an entire form of marketing. And although the decisions in

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[4] ADRC Study, citing letter from Jeffrey I. Zuckerman, Director of Bureau of Competition, to Hon. Nathan S. Heffernan, Chief Justice of the Supreme Court of Wisconsin, Comments to Wisconsin's Consideration of Modifying the ABA Model Rules of Professional Conduct, 7 (Feb. 18, 1987) (on file with the Federal Trade Commission; link).

[5] Some communications of lawyer referral services may be non-commercial speech, the regulation of which would need to survive strict scrutiny.

[6] People v. Guiamelon, 140 Cal. Rptr. 3d 584 (Cal. App. 2012); Commonwealth v. Stern, nos. 94-07-1872, 94-07-1851, 94-07-1850, 1995 Pa. Dist. & Cnty. Dec. LEXIS 180 (Pa. C.P. Feb. 15, 1995).

Guiamelon and *Stern* are brief, they inherently rely on the in-person conduct of the referrals—as if they did not, any form of speech dependent on payment could be restricted, free of constitutional concerns, simply by prohibiting the conduct of *paying* for such speech. This is clearly not the law.

What's more, the law of commercial speech is evolving. The Supreme Court has made clear in recent years the tight connection between money and speech.[7] Some courts are considering a form of even-more-rigorous scrutiny for restrictions on non-misleading advertising.[8] And as Justice Breyer noted, in a 2017 concurrence:

> *"I agree with the Court that New York's statute regulates speech. But that is because virtually all government regulation affects speech. Human relations take place through speech. And human relations include community activities of all kinds—commercial and otherwise.*
>
> *When the government seeks to regulate those activities, it is often wiser not to try to distinguish between "speech" and "conduct." See R. Post, Democracy, Expertise, and Academic Freedom 3-4 (2012). Instead, we can, and normally do, simply ask whether, or how, a challenged statute, rule, or regulation affects an interest that the First Amendment protects."*[9]

Indeed. And as the ARDC can meet its public-protective objectives while keeping its regulations in this area limited to those that *can* meet the intermediate scrutiny standard, it would be wise to do so.

Specific Issues Regarding the Draft Framework

Although we have a number of suggestions for further study or improvement of the draft framework, we appreciate the amount of

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[7] Citizens United v. Federal Election Commission, 130 S.Ct. 876, 898 (2010).
[8] This test has been described as occupying a middle ground between "intermediate" and "strict" scrutiny. See Sorrell v. IMS Health, 131 S.Ct. 2653, 2664 (2011); Retail Digital Network v. Appelsmith, 810 F.3d 638, 648 (9th Cir., 2016).
[9] Expressions Hair Design v. Schneiderman, 137 S.Ct. 1144 (2017).

thought and insight that has already gone into this work. We believe the Study and draft framework represents an important step forward toward improving innovation and access to justice.

Providing a Safe Harbor via Registration is a Better Approach than Limiting the Field via Regulation

The Study concludes that "directly regulating matching services" would open access and protect the public more than a safe harbor would. However, we do not see meaningful evidence for this proposition. While regulating such entities would provide the ARDC with some greater measure of oversight and control than "safe harbor" registration would, the ARDC should carefully consider how much additional consumer protection this provides—and at what cost. For there is not only the cost of administering and enforcing a regulatory regime (a cost sure to be considerably greater than a safe harbor registration program), but even more importantly the tax on innovation such a regulatory requirement would impose.

If the long history of attorney marketing regulation has taught us anything, it is that attorneys, voluntary bar associations, and even some attorney regulators have a strong tendency to "over-comply" with such regulations. In the context of vague and overly broad regulations—the current state today—this leads to attorneys holding back from providing the public with information about legal services. Increasingly—as has been seen in the wave of cautionary, overreaching ethics opinions dealing with Avvo Legal Services—it also acts as a significant drag on innovation in the delivery of legal services.

A system limiting attorneys to only those programs registered with the ARDC runs this same risk. The lines between different forms of marketing and business development are increasingly blurry, and attorneys will surely pull back from certain forms of marketing (particularly those that are national in scale) because such programs have not registered with under a mandatory program. We believe that a safe harbor registration system would strike the right balance. Such a system would provide virtually all of the benefits of a regulatory regime while still preserving space for innovation. We encourage the ARDC to study in more depth the pros and cons here.

The Framework Should Not Limit the Availability of Limited-Scope Legal Services

The proposed change to Rule 6.3(d)(1)(ii) prohibits services that would "limit the objectives of the representation" or "limit the means to be used to accomplish these objectives." We don't believe the ARDC intends this language to foreclose the availability of limited-scope services, but many will interpret this language as doing so. We suggest clarifying the language or adding a specific caveat that the Rule does not prohibit the referral of limited-scope services.

Referral Services Subject to the Framework Should Be More Sharply Distinguished From Other Forms of Advertising

Rule 723 defines a "lawyer-client matching service" as:

> *"any person, group of persons, association, organization, or entity that receives any consideration for the referral or matching of prospective clients to lawyers, including matching services that connect prospective clients to lawyers and pooled advertising programs offering to refer, match or otherwise connect prospective legal clients with lawyers."*

In our experience with bar associations and lawyers, this definition will be interpreted too broadly. Is Google Adwords a "matching service?" Is Avvo's legal directory, or listings on Martindale-Hubble?

Whether as a mandatory regulation or a safe harbor registration, the ARDC should limit this definition to that which specifically concerns it. This may be some combination of referral services that don't offer consumers a choice of lawyer and those that involve splitting fees, or condition the marketing payment on successfully connecting lawyer and client. But as written, this language will surely chill attorney participation in many forms of marketing.

The Registration Requirements Should Be Carefully Considered to Maximize Participation and Innovation

It is important, when devising registration requirements, that the ARDC consider not only its needs but also those of future registrants.

It should also strive to make compliance easy. We have identified several areas within the draft registration requirements that could be improved:

723.II.(a) Commencement of Operation: We cannot imagine a reason for a 15-day delay, and this requirement obviously doesn't provide for legacy services, or those services launching new offerings that may fall under the rule. Taking a safe harbor approach would eliminate a need for this provision.

723.II.(a)(1)(i) Documents Required: Requiring state-issued documents is onerous and unnecessary. Many national publication and online services will not have such documents, as Illinois state registration is not required to sell advertising in Illinois.

723.II.(a)(1)(iv) Rate Schedules: Services are increasingly likely to have dynamic rates, as well as price testing, promotions, etc. While we understand the ARDC's concern here, its registration should provide for flexibility. This could be accomplished by having services generally describe the parameters of their pricing structure and perhaps a "snapshot" of current or exemplar pricing.

723.II.(a)(1)(vi) Responsible Attorney: We assume that the requirement that a responsible attorney sign the registration is the "hook" by which the ARDC can enforce these regulations. However, this will greatly limit the willingness and ability of providers to participate, as it does not make allowance for services provided by non-lawyers. It will also potentially complicate the participation of corporate entities, whose lawyers may be justifiably concerned that they will be subject to discipline personally should there be an issue with the service. Again, a "safe harbor" approach would eliminate the need for this provision and remove a major friction point to participation and innovation in service delivery.

Registration Fees Should Be Eliminated (or Nominal).

Managing and enforcing a regulatory system is expensive. And while a "safe harbor" program—which doesn't carry the costs associated with enforcement—would be considerably less expensive, it would not come without some cost. If the ARDC is planning on having this

program be self-supporting (i.e., that registration and renewal fees will cover all costs of administration and enforcement), it may be sorely disappointed – or achieving this end may necessitate charging fees that unduly burden innovation and protected expression.

It is beyond the scope of these comments to propose how best to address this, other than to suggest that ARDC build a plan for funding from sources other than registration fees, or have registration fees only cover the nominal costs of processing registration paperwork.

Conclusion

We appreciate the deep and diligent work the ARDC has done on this issue, and the "minimum standards" for referral services (as listed in Rule 723.III) comprise a fine and thoughtful list. However, we strongly believe that the interests of the public—which include protection from unscrupulous practices, but also unfettered access to information about legal services and wider availability of services themselves—are best met by creating a "safe harbor" program rather than a rigid system of regulation. An ARDC "stamp of approval" that a service meets these requirements would enhance consumer trust, drive service provider transparency, and still provide room for innovation by not forcing the question, in every instance, of whether a new service falls within the ambit of the rule.