Responsive Law
The Consumer's Voice in the Legal System

Testimony on: Responsive Law Comments on Proposed Ethics Advisory Opinion R-25

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Testimony to the

State Bar of Michigan Professional Ethics Committee

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Responsive Law thanks the Committee for the opportunity to present these comments on proposed Ethics Advisory Opinion R-25, concerning "online for-profit matching services." Responsive Law is a national, nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its consumers.

The Justice Gap in the United States Extends from the Poorest Americans Across the Middle Class, with a Fixed Demand for Legal Services and an Inaccessible Supply.

In the World Justice Project 2017-2018 report, the United States currently ranks 94th out of 113 countries (tied with Cameroon, Uganda, and Zambia) in its lack of affordability and accessibility in the civil justice system.[1] Americans cannot afford to pay lawyers for assistance with everyday legal needs even though about fifty to sixty percent of low- and moderate-income American households face an average of two significant legal problems in a year. More Americans do not address their legal problems due to lack of access to justice than their peers in countries such as England and the Netherlands, where there are fewer restriction on how legal services can be offered.[2] Small businesses also struggle with the gap in access to justice, with nearly sixty percent facing legal problems without legal

[1] World Justice Project, *WJP Rule of Law Index 2017-2018* (2018), available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf.
[2] Gillian K. Hadfield & Jamie Heine, *Life in the Law—Thick World: The Legal Resource Landscape for Ordinary Americans in Beyond Elite Law: Access to Civil Justice for Americans of Average Means* (Samuel Estreicher & Joy Radice eds., 2015).

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assistance.[3] Lawyer participation in innovative legal services can be key to bridging the justice gap by expanding accessibility.

One of the barriers to making this happen is overly broad interpretations of the Rules of Professional Conduct. While lawyer-regulators such as the State Bar of Michigan must interpret and enforce the Rules to protect the public, they also must ensure that its positions don't frustrate this purpose by keeping attorneys from offering innovative legal services to the public. The 2016 ABA Commission on the Future of Legal Services expanded on this point, noting that a limited regulatory environment is key for innovation:

> *"The unnecessary regulation of new kinds of LSP [legal service provider] entities could chill additional innovation, because potential entrants into the market may be less inclined to develop a new service if the regulatory regime is unduly restrictive or requires unnecessarily expensive forms of compliance."*[4]

Unfortunately, proposed opinion R-25 does precisely this, creating a more complicated regulatory environment that is likely to chill Michigan attorneys' desire to offer innovative legal services to the public. It does not take into account the vast consumer need, nor does it consider input from consumers on what they are looking for in legal services. And what's more, it does not reflect an open, transparent process of seeking evidence of a need for this type of regulation prior to taking action. For these reasons, and as discussed in more detail below, **we urge the Committee to reconsider, and either withdraw R-25 or revise it to allow attorney participation in such services**.

Ethics Opinions Regarding the Rules of Professional Conduct Must Take Into Account Actual Concern for Consumer and Client Protection.

There is a laudable reason for the Michigan Bar to offer ethics opinions: these resources provide a means for conscientious

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[3] LegalShield, *Decision Analyst Survey: The Legal Needs of Small Business* (2013), available at https://www.legalshield.com/sites/default/files/Legal%20Needs%20of%20American%20Families_0.pdf.

[4] American Bar Association Commission on the Future of Legal Services; Report on the Future of Legal Services in the United States. (2016)

attorneys to ensure they are meeting their obligations to clients, courts, and the public. Ethics opinions are, by design, conservative. They offer safe harbors, often far back from the edges of a rule, in which lawyers can feel comfort in compliance.

While this is a good thing when it comes to matters such as lawyer substance abuse problems and keeping client confidences, this approach to ethics opinions works poorly with those Rules dealing with attorney advertising and business development. Both antitrust law and the First Amendment dictate that rules regulating attorney advertising be far more circumscribed than most other rules. For while the public benefits from "over-compliance" on matters related to their money and confidences, the same cannot be said for attorney advertising and business development. There is an inevitable tension between the cautionary approach of most ethics opinions—which look at the language in the existing rules and apply that language conservatively—and the public interest in access to legal information and legal services.[5]

Antitrust Law Dictates That the Michigan Bar Ensure That the Pro-Consumer Benefits of Regulation Outweigh the Costs.

In years past, the State Bar of Michigan may have had the luxury of not needing to concern itself with the Sherman Act antitrust implications of its actions. But those days are no more. Thanks to the 2015 U.S. Supreme Court decision in *North Carolina Dental Board v. FTC,* the Bar can lose its state action antitrust immunity for anti-competitive determinations.[6] What's more, this potential liability carries through not only to the Bar as an entity, but also to each of the individual members of the Board and the Ethics Committee who make these determinations.

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[5] The Supreme Court recently addressed the chilling impact of advisory opinions: *"When the FEC issues advisory opinions that prohibit speech, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." Consequently, "the censor's determination may in practice be final."* [citations omitted]. Citizens United v. Federal Election Commission, 588 U.S. 310 (2010).

[6] North Carolina State Board of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015).

In this case, the Professional Ethics Committee—which is comprised of market participants—has issued an ethics opinion that limits competition. R-25 chills the propensity of other members of the Bar to offer legal services to the public through innovative new online service offerings. And by so doing it also limits the ability of those offering such services to compete in the Michigan legal marketplace against the Bar's own lawyer referral service. It doesn't matter that the Committee's opinions are "advisory" in nature; as the U.S. Supreme Court has held, even ethics opinions from *voluntary* bar associations can suffice to make out antitrust claims.[7] The State Bar of Michigan should also be aware that the Florida State Bar is currently facing a lawsuit for Sherman Act antitrust violations, based largely upon an advisory ethics opinion similar in many respects to R-25.[8]

This is not to say that the Bar is foreclosed from taking actions such as this. But it cannot do so reflexively. It must do so out of a documented need to protect the public. If the Bar wants to avoid liability, it must be able to make an evidence-based showing that the public protection, pro-competitive justifications for its restrictions outweigh the anticompetitive effects.[9] As there does not appear to have been an open and transparent administrative rulemaking process leading up to R-25, and as the opinion itself contains no evidence of the need for such restrictive interpretation of the Rules, we don't see how the Bar can do this.[10]

The Rules of Professional Conduct Relating to Attorney Advertising Must be Interpreted Consistently with the First Amendment.

There are also critically important First Amendment principles that appear to have gone unheeded in the proposed opinion. Michigan's

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[7] See Goldfarb v. Virginia State Bar, 421 U.S. 773, 781-82 (1975).

[8] Tikd Services, LLC v. Florida State Bar, Case 1:17-cv-24103 (SD-Fla, filed Nov. 8, 2017).

[9] California Dental Assn v. FTC, 526 U.S. 756 (1999).

[10] The Bar can also still enjoy its state action antitrust immunity if its action is "actively supervised" by the state. Such supervision would require, at a minimum, that the Michigan Supreme Court review, *de novo,* any opinion issued by the Bar to ensure that the opinion promotes state policy. Such review would also need to include the sort of transparency, openness, and seeking of evidence prior to taking action that is associated with administrative law rulemaking proceedings. North Carolina State Board of Dental Examiners, 135 S. Ct. at 1116.

Rules of Professional Conduct with respect to attorney advertising are fundamentally rules of consumer and client protection. They are intended to lead to outcomes where consumers are not deceived and clients are not harmed. This purpose is both intuitive and required by law. 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.[11]

The Supreme Court focused closely on this important public interest, when first freeing up attorney advertising 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."*[12]

This doesn't mean that attorneys have an unfettered right to advertise in any way they desire. But it does mean that the protection of these important Constitutional interests requires the state to carry the burden of showing any restrictions on lawyer advertising to be both necessary and no more extensive than required to prevent the harm in question.[13]

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[11] *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).

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

[13] 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. There is also a developing form of even-more-rigorous scrutiny for restrictions on non-misleading advertising. This test has been described as occupying a middle ground between "intermediate" and "strict" scrutiny. *See* Sorrell v. IMS Health, 564

For Michigan's attorney advertising rules, the "necessity" is the protection of the public from false and deceptive practices in the selling of legal services. But to meet the *Central Hudson* "intermediate scrutiny" requirements, such regulation must be enacted with this purpose in mind, must be supported by evidence that the harm is real and the application actually works, and must not be any more extensive than necessary to achieve the goal. As discussed below, any interpretation of the Rules by the Bar via an ethics opinion must be undertaken with these Constitutional constraints in mind—and, in several important respects, R-25 fails on this count.

The Proposed Ethics Opinion Goes Far Beyond the First Amendment and Competition Law Boundaries of the Bar's Regulatory Authority in Finding That Online Legal Matching Services Violate the Michigan Rules of Professional Conduct.

The Services Described Are Not the Types of "Lawyer Referral Services" Prohibited Under Michigan's Rules That May Cause Consumer Harm.

As attorneys have a constitutional right to advertise—and consumers have a constitutional right to access information about legal services—what purpose is served by an attorney advertising rule prohibiting participation in for-profit lawyer referral services (as MRPC 6.3(b) does)? It must be due to some special risk to consumers from such services. And, to have any chance of meeting the requirements of the First Amendment—and competition law—such a restriction must only be applied narrowly, in instances where evidence shows such a restriction is necessary to protect the public.

The ABA's review of lawyer referral services comes closest to homing in on the narrow consumer protection interest at play when it comes to special regulation in this area:

> *"This debate reveals that the defining characteristic of a lawyer referral service is generally understood, if not explicitly described in court rules, as the use of an intermediary to connect a potential client to a lawyer*

U.S. 552 (2011); [Retail Digital Network v. Appelsmith](), 810 F.3d 638 (9th Cir., 2016).

> *based on an exercise of discretion within stated guidelines."*[14]

In other words, "lawyer referral services" are marketing programs that purport to match a potential client with the right lawyer for their specific legal problem, while actually referring that person to whichever lawyer has bought the right to that "lead" (often through geographic exclusivity).

Many states have concluded, and not without reason, that special regulation is required due to the lack of consumer choice and strong potential for consumer deception inherent in such programs. Michigan has gone further and completely prohibited for-profit referral services. Critically, such a prohibition cannot be applied broadly and still meet the requirements of the First Amendment and competition law. The exclusion of an entire class of speech and speakers must be applied only in such specific circumstances where evidence shows the need, and such exclusion is narrowly applied.[15]

Opinion R-25 makes no such showing or acknowledgement of the constitutional and competition law constraints at play here. In fact, it embraces an incredibly broad theory of the applicability of Rule 6.3(b):

> *"These online matching services promise to match consumers in need of legal services with qualified lawyers. The prospective client's ability to choose a lawyer from the network of participating lawyers rather than the referral service identifying and making the selection does not negate the referral characteristics of the business model."*

This definition gathers in a wide range of for-profit attorney marketing. Yet the only basis for special regulation of lawyer referral services is, as the ABA report alludes, the risk of consumer deception when the referral service chooses the lawyer. And the State Bar must make an even more robust showing here, given that Michigan does not purport to merely add additional restrictions to lawyer referral services: it completely prohibits them.

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[14] ABA Standing Comm. on Lawyer Referral & Information Service (2011) (discussing the regulation of lawyer referral services: a preliminary state-by-state review.
[15] See fn 10, *infra.*

Consumers benefit when they have more information about legal services, and more options for obtaining legal help. In her groundbreaking 2014 report for the American Bar Foundation, Rebecca Sandefur found that consumers are woefully under-informed not only about where to get legal help, but even about whether their problems have a legal component to them. The study showed that only twenty-two percent of Americans facing legal problems sought help outside of their family and friends. In the cases where people did not seek formal assistance, forty-six percent thought there was no need to do so; twenty-four percent thought it would make no difference in the resolution of their matter; and nine percent did not know where to go to find help.[16]

The typical American thus faces three obstacles in getting professional help for her legal problems: recognizing that the problem has a legal component, seeing the value of a lawyer in resolving that problem, and knowing how to find a lawyer who can help her. Advertising and lawyer referral services can help consumers surmount all of these obstacles, as acknowledged by both the current and proposed comments to the Model Rules.[17] Online platforms in particular provide a convenient channel online for consumers to compare a broad range of options among lawyers with regard to location and subject matter expertise. Consumers are best served when they can access a range of services that spans the spectrum of their legal needs to determine which service is best suited for the legal need at hand. We strongly encourage the Committee to revisit its troubling, evidence-free conclusion that vast categories of legal marketing are off-limits to Michigan attorneys.

Analysis of Marketing Fees Should Focus on Consumer Harm, not Mechanics.

R-25 concludes that online intermediary payment mechanisms violate Rule 5.4. Yet this conclusion fails to account for the purpose of the Rule. The prohibition on fee-splitting in Rule 5.4 does not stand to prevent any transaction that “feels” like a fee split; rather, it is in place to protect clients by ensuring that a lawyer’s independent

[16] Rebecca Sandefur, “Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study,” pp. 11-13 (American Bar Foundation, 2014).
[17] ABA MRPC 7.2, Comment 1, retained in proposal as Rule 7.1, Comment 5.

professional judgment is not compromised by a non-lawyer third party having an ongoing interest in the lawyer's fee.

As ABA Opinion 465 (echoing ethics opinions from a number of other states[18]) noted in finding that deal-of-the-day websites don't violate Rule 5.4:

> *"The fact that* ***the marketing organizations deduct payment upfront*** *rather than bill the lawyer at a later time for providing the advertising services does not convert the nature of the relationship between the lawyer and the marketing organization from an advertising arrangement into a fee sharing arrangement that violates the Model Rules." [emphasis added]*

Thus, Opinion 465 stands for the conclusion that fee splits are not *inherently* unethical. They only become a problem if the fee is split with a party that may pressure the attorney's decision-making in a given case.

Like the deal-of-the-day websites (or credit card processors, which also technically split fees with their attorney customers, and which state ethics opinions have similarly found do not violate the substance of Rule 5.4[19]), the services reviewed in R-25 do not appear to have any control, interference, or interest in how the lawyer exercises independent professional judgment in service of the client.

The interpretation of Rule 5.4 in R-25 implicates the availability of forms of attorney advertising, and thus must meet the requirements of the commercial speech doctrine. This it cannot do. The interpretation is technical, rigid, and unsupported by argument or evidence that it is necessary to protect the public. If the Bar is going to issue an opinion on this point, we urge it to follow the lead of the ABA, Nebraska, and North Carolina, and opine that Rule 5.4 permits lawyers to engage in such methods of payment as long as there is no interference with the lawyer's independent professional judgement.

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[18] *See, e.g.,* ABA Formal Opinion 465 - Lawyers' Use of Deal-of-the-Day Marketing Programs (2013); Nebraska Ethics Advisory Opinion for Lawyers No. 12-03 (2012); North Carolina Formal Ethics Opinion 10: Lawyer Advertising on Deal of the Day or Group Coupon Website (2011); South Carolina Ethics Opinion 11-05 (2011).

[19] *See, e.g.,* Arizona Ethics Opinion 89-10 (1989); Colorado Formal Opinion 99 - Use of Credit Cards to Pay for Legal Services (1997).

The Variability of Advertising Costs for Services Does Not Disqualify Such Services as Legitimate Marketing Vehicles for Lawyers to Provide Legal Information to Consumers.

R-25 concludes that the online intermediaries at issue violate Rules 5.4 and 7.2 because the marketing fees charged are dependent on the acquisition of business and scale with the size of the matter. In reaching these conclusions, the Opinion contains two curious claims:

> *"A true advertising fee has no connection to the formation of an attorney client relationship or the amount of the attorney's fee paid for the legal services, but is based on the value of the advertisement."*
>
> *"A genuine advertising medium offers no satisfaction guarantee."*

These conclusions are offered with no support or evidence of their validity. And as shown below, they are highly inaccurate and anti-consumer.

Advertising Fees Routinely Vary Based on Type of Matter or Size of Legal Fees.

The costs for modern advertising—and particularly online advertising—can vary depending upon a wide variety of factors. For most legacy forms of advertising—like the Yellow Pages, TV, or radio—the cost of a given marketing "impression" is the same, regardless of the underlying value of the good or service. However, this is not the case online, where so much more data is available, and where targeted advertising allows advertisers to pay only for interested, or even committed, customers.

Some very simple examples: buying an advertisement for the results that appear when internet users search on Google for a "Los Angeles DUI lawyer" is much more expensive than the same search for "Grand Rapids DUI lawyer." The same goes for a search for "brain injury" compared to "slip and fall," or "Michigan LLC formation" vs. "how to form a business." Search engine marketing allows advertisers to "bid" on what they will pay for their ads to appear on search results pages, and predictably, those bids scale up and down based on the value of the services that are associated with those search terms.

Online intermediary sites will use search engine marketing to inform consumers about the legal information they have available, and to connect them with the local lawyers who provide those services. These costs, as described above, can vary widely with the value of the underlying service. But the Committee has offered no evidence whatsoever that this variability is a problem for consumers of legal services. What's more, the variability and targeting involved is actually good for lawyer-advertisers, enabling them to spend their ad dollars more efficiently—which should make legal services more affordable for clients.

Costs of Delivering Marketing Often Correlate with the Size of the Legal Fee Involved.

The marketing fee charged by online intermediary sites will differ depending on a variety of factors, including the type of service purchased and the overall cost of the service. Despite the Committee's conclusion that this is somehow illegitimate and not a "true advertising fee" (a conclusion for which no evidence or even *theory* of consumer harm has been offered), there are numerous factors why marketing fees might vary in this way:

- Online legal intermediaries buy ads elsewhere online; the cost of those ads – as discussed above – varies widely depending on the value of the underlying service.
- Legal intermediaries pay the credit card processing fees for their consumer-focused services. These fees are a <u>direct</u> percentage of the legal fee spent by the client.
- By handling the transaction (which is simpler for the client and the lawyer alike), the intermediary site takes all of the payment processing risk, which also scales directly with the cost of the service purchased:
  - Unfulfilled services (voided transaction risk).
  - Client dissatisfaction, despite the attorney completing the work (refund risk).
  - Client demanding charges be reversed via their credit card provider (chargeback risk).
- Intermediaries also provide customer service to potential clients and purchasers. Purchasers of more expensive services will typically have more questions and concerns.

We go into this level of detail to disabuse the Committee of the notion that there is some single "right" way to do advertising, or that

advertising is unmoored from the value of the underlying transaction. It's not, particularly when it comes to digital marketing and intermediaries who help drive demand and make the provision of legal services smoother for consumers. What's more, the Committee has not identified any evidence of consumer harm stemming from variable marketing fees.

Attorneys Can Navigate Trust Accounting Rules, and the Bar Should Encourage – Rather than Discourage – Services That Allow Clients to Pay in Ways That Comply with Trust Accounting Rules.

Opinion R-25 states that online legal services "subvert compliance" with trust accounting rules. This overly cautionary approach risks stifling innovation and choking off greater consumer access to legal services. For while online services have the *potential* to "subvert compliance" with the trust accounting rules, the same could be said of any financial business relationship—bank account formation, for example—entered into by an attorney. What's important are the details: does the use of a specific online intermediary *actually* run afoul of the trust accounting rules?

For example, a service that billed a client's credit card after the legal service was provided (as we understand Avvo Legal Services does, for its brief consultation and document review products) would not be a problem from a trust accounting perspective, since the fee would be fully-earned prior to being charged. Likewise, the objections raised in R-25 about refunds and intermediary access to attorney trust fund accounts would be moot if the intermediary service does not have access to the attorney-participant's trust account.

Overall, if the opinion is going to focus on this area, it should remind attorneys of their non-delegable obligations when it comes to trust accounting compliance, but note that there may well be ways that online intermediaries handle client funds in ways that comply with the Rules. Bar members can then be motivated to seek out such providers, and encourage new entrants to build services in ways that meet the consumer-protective requirements of the trust accounting rules.

No Facts Indicate That the Online Intermediaries Described Are Engaged in the Unlicensed Practice of Law.

The Proposed Ethics Opinion breezily concludes that the intermediaries described are engaged in the unlicensed practice of law due to their "naming conventions," "marketing schemes," and use of money-back guarantees. However, the Committee raises no facts to indicate either intermediary described is holding itself out as a law firm or otherwise deceiving consumers into believing that legal services are being provided by non-lawyers (or that a satisfaction guarantee is somehow a basis for a UPL finding, rather than a tried-and-true method to build buyer trust). Indeed, in Responsive Law's review of Avvo Legal Services and UpCounsel it appears plain that consumers are more than adequately informed that services are being provided by licensed lawyers.

Consumers are best served when they have the widest possible range of legitimate choices. This end is not met by overly broad readings of the monopoly lawyers enjoy in the provision of legal services. This is also one of the areas where competition law concerns are at their keenest. We strongly encourage the Committee to reassess the basis for its conclusion that these intermediaries are engaging in the unlicensed practice of law.

No Facts Indicate That the Online Intermediaries Described Are in Violation of Rules 5.5(a) or 5.3.

Finally, the Committee concludes—in a single sentence—that intermediaries may implicate MRPC 5.3 by performing "back offices" services, including handling confidential client communication. This is potentially a concern with ANY third-party service used a lawyer or law firm; indeed, it's a concern with any employee hired by a lawyer or law firm. However, it does not serve the public to warn lawyers off from participating in potentially useful services by flagging phantom fears. Instead of raising this as somehow a special issue for marketing intermediaries, the Committee should, at most, remind lawyers of their diligence obligations when using such third-party services.

Conclusion

The State Bar of Michigan Professional Ethics Committee must be very careful—in discharging its Constitutional duty, avoiding anti-

competitive behavior, and best serving the public—when interpreting the Rules relating to ways that attorneys choose to generate business. There is no evidence that R-25 is necessary, desired, or advisable. In light of not only the law, but also the needs of the public in having access to competent, high-quality, and affordable legal assistance, we encourage the Ethics Committee to reconsider the conclusions it has tentatively reached here.