

Comments on: Proposed Amendments to Florida Bar Rule 4-7.22 - Lawyer Referral Services

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Comments to the
Florida Supreme Court

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Responsive Law thanks the Court for the opportunity to present its testimony on the proposed amendments to Rule 4-7.22 of the Rules Regulating the Florida Bar. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible and accountable to the people.

We oppose the components of the proposed amendments broadening the definition and scope of lawyer referral services (LRS) to “qualifying providers,” which unnecessarily burden the services covered without creating any appreciable benefit to consumers. The proposed rules would impose considerable and unnecessary burdens on LRSs and participating lawyers. In doing so, the proposed rules would affirmatively harm legal consumers by discouraging referral services and effective lawyer advertising, thereby depriving ordinary consumers of essential information concerning legal representation.

Since the Florida Supreme Court adopted rules permitting for-profit LRSs in 1986, the rules regulating such services have remained largely unchanged. Although the Florida Bar Board Review Committee on Professional Ethics and Board Technology Committee set forth concerns regarding these services in 2013 and petitioned to amend 4-7.22 in 2014, this Court rejected the proposed amendments and required the bar to propose new amendments mandating even stricter restrictions on the management and ownership of such services.

The newly proposed amendments currently under consideration by this Court would re-categorize LRSs as part of a larger bundle of referral services defined as “qualifying providers.” This expanded definition targets not only traditional LRSs but also lawyer directories, online matching systems, grouped or pooled advertising systems, and tips or lead systems. Such an expanded definition will fail to address the purported consumer harms contemplated by the

Bar, and it will also significantly adversely affect the ability of such agencies to fulfill their mandate to facilitate the provision of high-quality legal services to consumers.

Floridians are unaware of how to find help for legal problems, and they are often unaware that such problems are even legal in nature.

Despite a continually growing need for legal services, particularly among first time consumers, such services remain out of reach for most low and middle income individuals, organizations, and families.¹ The source of this problem is twofold.

First, due to a lack of sophistication regarding the legal system many individuals in need of legal services fail to even recognize that their problems contain a legal issue. As noted by the American Bar Association Commission on the Future of Legal Services, past promotional efforts by state bars have proven insufficient to raise public awareness of the need for legal checkups.² Similarly, the lack of sufficient promotional resources leaves the public unaware of bar-sponsored LRSs.

Second, even when a given consumer does recognize that her need is legal in nature, she may be at a loss in determining what sort of aid is needed and how it can be located. A 2013 study found that two-thirds of random adults in a mid-sized American city experienced at least one significant civil justice legal issue within an 18-month period, but only one-fifth of those experiencing such a situation sought any formal help.³ A significant factor in the justice gap stems from the difficulty inherent in identifying particular consumers'

¹ Justice Steven Gonzalez, "Unmet Needs, the Future of Legal Practice, and Legal Services from Nonlawyers," July 20, 2016, http://www.americanbar.org/publications/tyl/topics/law-practice-2050/unmet_needs_future_legal_practice_and_legal_services_nonlawyers.html, (retrieved September 14, 2016).

² ABA Commission on the Future of Legal Services, "Report on the Future of Legal Services in the United States," 2016, <http://abafuturesreport.com/#1> (Retrieved September 13, 2016).

³ Sandefur, Rebecca L., "Accessing Justice in the Contemporary USA: Finding from the Community Needs and Services Study," submitted to the American Bar Foundation August 8, 2014. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478040 (retrieved September 14, 2016).

needs and connecting them to appropriate legal aid providers. Under the regulatory regimes currently active in many states, the system through which consumers access legal services is “confusing, opaque, and inefficient for many people.”⁴ When faced with a civil justice issue, up to half of those who do not choose to seek outside help fail to do so because they believe that such help would be ineffective, too difficult to locate, or too costly.⁵

Lawyer referral services provide important benefits to the public by raising public awareness of lawyer services and making those services more accessible.

LRSs have an important role to play in making members of the public aware of the legal components of their problems and in serving as a valuable aggregator of legal information and resources.

Under current regulatory regimes, a latent demand for legal services goes largely unmet due to myriad barriers preventing consumers from connecting with service providers and accessing the preliminary information needed to make informed decisions about the nature of their legal needs and the best avenue by which to meet them. Demand in this “latent legal market” vastly outstrips the resources available to serve it, having a disproportionate adverse effect on low and middle income individuals, organizations, and associations. Among those low- and middle-income Americans with justiciable civil legal issues, nearly a quarter report taking no action at all.⁶

⁴ Carter, Stephen, “The Legal Services Corporation Launches Pilot Program to Increase Access to Justice,” quoting Legal Services Corporation President James J. Sandman, April 19, 2016, <http://www.lsc.gov/media-center/press-releases/2016/legal-services-corporation-launches-pilot-program-increase-access-0>, (retrieved September 14, 2016).

⁵ Sandefur, Rebecca L., “Accessing Justice in the Contemporary USA: Finding from the Community Needs and Services Study,” submitted to the American Bar Foundation August 8, 2014. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478040 (retrieved September 14, 2016).

⁶ Sandefur, Rebecca L. 2007. “The Importance of Doing Nothing: Everyday Problems and Responses to Inaction.” Pp. 112-132 in *Transforming Lives: Law and Social Process*, edited by Pascoe Pleasence, Alexy Buck and Nigil Balmer. London: TSO: Rebecca L. Sandefur 2010: “The Impact of Counsel: An Analysis of Empirical Evidence.” *Seattle Journal of Social Justice* 9 (1): 51-95.

Compared with the Florida Bar, the private sector can dedicate substantial resources to raising public awareness through marketing LRSs, if it sees the potential to profit from doing so. For example, in Fiscal Year 2015-2016 the total approved operating budget of the Florida Bar was just over \$70 million.⁷ In contrast, Avvo.com will spend \$20 million this year on a single television ad campaign promoting its online lawyer directory.⁸ If LRSs and similar qualifying providers are permitted to provide legal assistance and guidance without the fear of running afoul of regulations designed for a bygone era of individualized long-term (and expensive) lawyer representation, then they will be able to increase public awareness about the need for lawyers through their marketing efforts, and they will do so at a level far beyond even the most optimistic capacities of state bars.

LRSs are also able to guide consumers toward lawyers who are well-suited to provide a specific legal service. Such recommendations can be invaluable to ordinary consumers, who generally have little or no experience with the legal system and face considerable difficulty in determining which lawyer will best serve their given legal needs. LRSs also provide other beneficial services to legal consumers, including uniform descriptions of lawyers' qualifications and experience and cost comparisons between lawyers offering similar services. The proliferation of competitive for-profit referral services also promotes the development of new and innovative forms of legal marketing. This allows legal advertisers to take advantage of emerging technologies to effectively communicate with consumers, and it allows consumers to quickly and efficiently access essential information concerning legal representation.

Proponents of increased LRS regulation may argue that the proliferation of for-profit LRSs reduces legal consumers' freedom in

⁷ "Board Approves Bar Budget," April 15, 2016, <http://www.floridabar.org/divcom/jn/jnnews01.nsf/8c9f13012b96736985256aa900624829/b7b274a7edb0b32b85257f8b005e41ef!OpenDocument> (Retrieved September 14, 2016).

⁸ "Legal startup Avvo hopes to get tongues wagging with humorous new ad campaign," January 13, 2016, <http://www.geekwire.com/2016/avvo-will-get-tongues-wagging-with-humorous-new-ad-campaign/> (retrieved April 13, 2016); "Have you seen our new TV ad campaign," January 28, 2016, <http://lawyernomics.avvo.com/avvo-news/have-you-seen-our-new-tv-ad-campaign.html> (retrieved April 13, 2016).⁹ Rule 4-7.22(b)(2) (emphasis added).

selecting a lawyer because it limits their options to participating lawyers. This argument, however, fails to recognize that most consumers currently have no effective mechanism by which to find or select an appropriate lawyer. Contacting a lawyer based on the particularized direction of a LRS is surely preferable to simply calling the first law-firm 1-800 number a consumer happens to see on television. Especially in the modern internet-based marketplace, LRSs further the goal of improving access to justice for even the most unsophisticated of consumers. Furthermore, allowing LRSs to operate without unnecessary regulatory hindrances will promote the development of new LRSs and encourage greater lawyer participation, both of which will serve to further increase the average consumer's ability to practically obtain the specific legal assistance that serves her specific legal need.

The redefinition of lawyer referral services to include a wide range of qualifying providers is overly broad and imposes unjustifiable burdens on both agencies and consumers.

The proposed expansion of the types of agencies covered by Rule 4-7.22 is overly broad and encompasses a significant number of purely advertising programs. Under the amended rule, a qualifying provider includes “*any group or pooled advertising program . . . wherein the legal services advertisements utilize a common telephone number or website and potential clients are then referred only to [participating] lawyers or law firms.*”⁹ The proposed amended rule is further designed to incorporate “Directories,” defined as “publishing in any media a listing of lawyers *together in one place*,” even where that listing does not direct consumers to a particular lawyer or firm.¹⁰ Accordingly, a group advertising program that provides any form of direction to consumers—even direction based solely on location or practice area—is designated a qualifying provider. Where a consumer using a pooled advertising or legal directory faces no compulsion to select a particular provider of legal services, the feared corruption of the legal services market simply will not manifest.

Additionally, the amended rules would drastically limit the types of public communication in which qualifying providers may engage—

¹⁰ Rule 4-7.22(b)(3) (emphasis added).

limiting them to only those communications that are permissible when undertaken by lawyers acting independently.¹¹ Such an obligation could prove disastrous to directory and advertising services, which depend on precisely the type of prohibited communication that this rule addresses. Although restricting the advertising of individual lawyers protects the integrity of the profession, restricting the advertising of an organization *that exists purely to advertise legal services* deprives consumers of a key means of understanding their legal issues and selecting appropriate providers.

This scheme is particularly problematic in the age of internet advertising. The broad definition of a qualifying provider sweeps up common online marketing methods, such as those provided by Lawyers.com or Martindale-Hubbell's online portal, both of which provide a directory of attorneys and firms that users may peruse to find service providers that best suit their needs. These online forums provide contact information and direct users toward particular firms based on geographic location and practice area—guidance that offers no more incentive for users to select a specific provider than does a Yellow Pages directory. The internet is a fundamentally interactive and dynamic medium, but requiring online, non-LRS, group advertising to meet the standards imposed on traditional LRSs forces them to choose between inefficiency and burdensome regulation, drastically limiting legal consumers' ability to obtain essential information concerning legal representation.

The proposed amended rules fail to effectively protect consumers from the harms imputed to lawyer referral services.

The proposed rules impose considerable regulatory burdens on designated qualifying providers, relying on the dubious defense that such burdens are necessary to protect consumers from disreputable referral agencies that prioritize the agency's profit margin over the needs of individual consumers of legal services. This justification, however, fails, because the amendments do little to satisfactorily prevent the harms that they purport to address. Even without the proposed amendments, sufficient protections exist to protect consumers from potential harms. Under both the existing and

¹¹ Proposed Rule 4-7.22(d)(1).

proposed rules, fee-splitting between a lawyer and qualifying providers or LRS is impermissible.¹² Because qualifying providers receive a nominal and consistent flat fee from every lawyer participating in the referral service, there is little to no incentive for qualifying providers to furtively funnel users toward a particular lawyer or firm.

One of the primary policy considerations underlying the proposed amendments is the ongoing access to justice gap, particularly among low- and middle-income citizens.¹³ The proposed amendments would not only fail to address this shortcoming, they would actively worsen the problem. The increased burdens on qualifying providers will increase their operating costs, restrict the audiences to which they are accessible, and limit the scope of assistance they are able to provide.

Although the amended rules claim to increase “the ability of lawyers to participate in matching programs,”¹⁴ the actual effect of the rules will be to restrict lawyer involvement with qualifying providers. Despite relaxed disclaimer and reporting requirements, the amendments’ overall impact will increase burdens on qualifying providers, which will necessarily have an adverse impact on consumers.

Furthermore, individual lawyers remain subject to all rules of professional conduct and responsibility. Imposing additional regulations on referral services, directories, and online advertising programs in no way extends or broadens the protections available to clients, who already have recourses when a lawyer acts unethically. Where a qualifying provider acts unethically, the existing rules already provide for oversight by the Florida Bar, which has discretion to both limit the lawyers listed by a qualifying provider’s service and to require providers to respond to official inquiries.

Even without any amendments to Rule 4-7.22, the existing rules already obligate designated LRSs to regularly furnish the Bar with the names of participating lawyers and all persons “authorized to act

¹² Proposed Rule 407.22(d) (2).

¹³ Lawyer Referral Service Rule Proposed Amendments (Rule Reg. Fla. Bar 407.22), <http://www.floridabar.org/proposedlrsamend> (retrieved September 15, 2016).

¹⁴ Id.

on behalf of the service.”¹⁵ In attempting to reach varying referral service models operating in other jurisdictions, the proposed amendments to Rule 4-7.22 would expand this requirement beyond that which is necessary or desirable to address valid consumer protection concerns. Imposing inflexible mandatory requirements of this sort does very little to protect consumers, but significantly stifles consumer freedom in selecting legal service providers and accessing LRSs.

In contrast to the problems described above, a few of the proposed amendments will serve the attested goals of improving access to justice and eliminating unnecessary restrictions on the advertisement of legal services.

The amended rules will eliminate the requirement that all ads include disclaimers explicitly stating that the ad promotes a lawyer referral service¹⁶ in which lawyers pay to participate.¹⁷ The current requirements are unnecessary to protect even the most unsophisticated consumer; even consumers unfamiliar with the legal services market are intelligent enough to understand the nature of referral services, so that the risk of consumer harm flowing from a misunderstanding of this distinction is minimal at most. Eliminating regulatory requirements—such as these—that have no consumer benefit allows LRSs to streamline their operations and devote more resources to their services, thus improving the ability of Florida-based referral and online matching services to reach consumers without a significant decrease in consumer protection. As contrasted with the old rule, the lessened requirements of the amendments will improve access to justice for both Floridians and individual consumers in other jurisdictions, by permitting Florida Bar members to more easily collaborate with qualifying providers, thus enhancing the quality of service they can provide.

Another positive change included in the proposed amendments is the reduction of reporting requirements from a quarterly to an

¹⁵ Proposed Rule 4-7.22(d)(5), (6).

¹⁷ Rule 4-7.22(a)(11): this provision will be eliminated if the proposed amendments are approved by the Court.

annual obligation.¹⁸ Under the existing requirements, all LRSs and qualifying providers must submit quarterly reports to the Florida Bar detailing the names and bar membership numbers of all lawyers associated with the referral service. This loosened standard will encourage lawyers to participate in a wider range of referral programs, thus improving the variety of legal services available to consumers. Although some critics may claim this creates an increased likelihood of exploitation and corruption within the market for qualifying providers, the amended rules retain a requirement that all qualifying providers respond to official inquiries from the Florida Bar upon request.¹⁹ With such a failsafe in place, any possibility for potential abuse of the relaxed reporting requirements poses a minimal risk.

Conclusion

Additional barriers should not be placed between people and the lawyers who can assist them with their legal matters. **On behalf of the users of the legal system, we urge the Court to reject the proposed amendment to Florida Bar Rule 4-7.22(b) regarding the broadened definition of Lawyer Referral Services and to accept the proposed amendments to Florida Bar Rule 4-7.22(d)(5), 4-7.22(d)(10), and 4-7.22(d)(11) so as to increase consumer access to such services.**

¹⁸ Proposed Rule 4-7.22(d)(5)

¹⁹ Proposed Rule 4-7.22(d)(7).