

## Comments on: Proposal to Regulate Intermediary Connecting Services

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**Illinois Attorney  
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Disciplinary Commission**

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Responsive Law thanks the ARDC for the opportunity to present these comments on its Proposal to Regulate Intermediary Connecting Services. Responsive Law is a national, nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its consumers. We appreciate the ARDC's effort to give consumers of legal services greater opportunity to connect with lawyers who can help them. However, the proposal as currently written puts too many obstacles in the way of those searching for legal help. We urge the ARDC to revise the proposal to remove regulatory barriers that restrict consumer information and consumer choice while providing little or no actual consumer protection.<sup>1</sup>

### **Consumers Have Little Awareness of Their Legal Needs or How to Find Legal Help**

Most low- and middle-income individuals, families, and organizations have little awareness of how to go about getting help for their legal matters. 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

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<sup>1</sup> Like many nonprofits, we are short-staffed due to the coronavirus outbreak, preventing us from presenting a fuller point-by-point analysis of the proposal. However, many of our criticisms of individual provisions align with those made by the CBA/CBF Task Force, and we largely agree with its recommendations for modifying the proposal.

promotional efforts by state bars have proven insufficient to raise public awareness of its need for legal assistance.<sup>2</sup>

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.<sup>3</sup> A significant factor in the justice gap stems from the difficulty inherent in identifying particular consumers' 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."<sup>4</sup> 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.<sup>5</sup>

### **Advertising Raises Public Awareness of Lawyer Services and Makes Those Services More Accessible.**

Advertising has 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

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

<sup>3</sup> Sandefur, Rebecca L., *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study* (August 8, 2014). Available at <https://ssrn.com/abstract=2478040>.

<sup>4</sup> 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>.

<sup>5</sup> Sandefur, *supra*, n. 2.

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.<sup>6</sup>

### **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.<sup>7</sup> 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.”<sup>8</sup>*

Attorneys don’t have an unfettered right to advertise in any way they desire. But protection of these important Constitutional interests

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<sup>6</sup> 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.

<sup>7</sup> 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).

<sup>8</sup> [Bates v. State Bar of Arizona](#), 433 U.S. 350, 364 (1977) (internal citations removed.)

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.<sup>9</sup>

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

*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.”<sup>10</sup>*

Any regulation of lawyer referral services should weigh the actual harm caused to consumers by such services against the value to the consumers of those services.

### **The U.S. Supreme Court’s *Dental Examiners* Decision Subjects Anticompetitive Self-Regulation to Antitrust Liability**

The U.S. Supreme Court’s decision in *North Carolina Board of Dental Examiners v. Federal Trade Commission* makes clear that when a controlling number of the decision makers on a state licensing board are active participants in the occupation the board regulates, the board can invoke state action immunity only if it is subject to active supervision by the state.<sup>11</sup>

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<sup>9</sup> [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.

<sup>10</sup> 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](#)).

<sup>11</sup> *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 135 S. Ct. 1101 (2015).

The ARDC is composed of a majority of lawyers. Therefore, any action it takes with regard to regulation of the legal profession is being made by market participants. Therefore, anticompetitive regulations proposed by the ARDC are subject to antitrust liability unless they receive a thorough review by the state.

Even if one assumes that the Illinois Supreme Court—which itself is composed of participants in the legal services market—can provide a review sufficient to meet the *Dental Examiners* standard, the ARDC should be careful not to engage in anticompetitive regulation. Handicapping new market participants would deny consumers the benefit of innovative ways of being linked to lawyers in favor of a stagnant status quo.

### **Consumers Are Not Stupid**

Putting aside, for a moment, constitutional, ethical, and antitrust analysis, the current proposal gives consumers too little credit. My wife, who isn't a lawyer, heard part of a conference call I was on recently with a state ethics committee. After hearing committee members parse the wording of a proposed ethics opinion and discuss whether certain words would be permissible in lawyer advertising, she asked, exasperated, "Do they think that people are stupid?"

Consumers are not stupid. In fact, they're smarter now than they have ever been. They expect a lot of information from anyone whom they're hiring, and understand how to evaluate the claims of anyone trying to sell them something. It's patronizing to tell them that they can only receive a lawyer referral under strictly proscribed circumstances because they would otherwise be hoodwinked by lawyers' Svengali-like argumentative skills into hiring the wrong lawyer. To the contrary, given that public opinion polls consistently place lawyers among the least trusted professions in America, consumers are more likely to exercise extra caution before spending hundreds or thousands of dollars on legal help.

Finally, the ARDC should keep in mind that even in the absence of regulation by the bar and courts, consumers would be protected against misconduct by lawyer referral services under state and federal consumer protection laws, as well as contract and tort law. (And lawyers operating through a referral service would still have

duties to their clients under the Rules of Professional Conduct.)  
Allowing this marketplace to operate would not lead to lawyer referral services being unregulated; it would only lead to them being regulated on an equal footing with other service providers.

### **Conclusion**

The ARDC has shown a desire to make lawyers' services more widely available to a public that currently is unable to find the right lawyer to help them. One of the most effective ways it can do so is to avoid overburdening lawyer referral services with superfluous regulations that provide no additional consumer protection. We hope the ARDC will streamline its proposal to achieve this goal.