

## **Client-Lawyer Matching Services**

### **Study of the**

## **Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois**

Released for Comments on May 30, 2018

Version 2, Released on June 25, 2018

### Executive Summary and Call for Comments

The ARDC invites you to review and to provide comment on its study of client-lawyer matching services, which is attached. You may email your comments to [information@iadc.org](mailto:information@iadc.org).

Our profession has debated the propriety of participating in client-lawyer matching services for several years. The ARDC study has benefited from these discussions, particularly the insights shared by Illinois bar leaders, whose comments and studies have identified the justice gap and whose initiatives and regulatory proposals help to address that gap. The ARDC obtained perspective from productive meetings with Illinois bar leaders and chief legal officers of matching services. The ARDC also took advantage of national resources.

The ARDC study cites documented access to justice challenges in our state and in our nation. Two key excerpts demonstrate that:

- Three-fourths of the civil legal needs of the poor and up to three-fifths of the needs of middle-income remain unmet. *Issue Paper Concerning New Categories*, at page 15, American Bar Association Commission on the Future of Legal Service Providers (Oct. 16, 2015); and
- The majority of moderate-income individuals do not receive needed legal help.

Researchers have identified causes of this untapped legal market. Individuals may not hire a lawyer because they do not think of their problems as ones that would benefit from affordable legal solutions. Even when individuals recognize they have a legal need, 46% were likely to address their problems themselves, 16% did nothing, another 16% received help from a

family member or friend, and only 15% sought formal help. Rebecca L. Sandefuer, *Accessing Justice in Contemporary USA: Findings from the Community Needs and Services Study*, American Bar Foundation, at 12 (Aug. 8, 2014).

The access issue affects the administration of justice in Illinois. In 2015, 93 of the 102 Illinois counties reported that more than half of their civil cases had at least one self-represented litigant. *Advancing Access to Justice in Illinois: 2017-2020 Strategic Plan*, Illinois Supreme Court Commission on Access to Justice, at 1 (May 2017). The vast majority of self-represented litigants are not self-represented by choice; although they would prefer to have legal representation, they were either unable to afford it or unable to find an attorney. (*Id.* at 15).

This access issue persists even though many lawyers, especially recent law graduates, are unemployed or under-employed. In fact, a New York Times report showed that 43% of all 2013 law school graduates did not have long-term full-time legal jobs nine months after graduation. Editorial Board, *The Law School Debt Crisis*, The N.Y. Times (Oct. 24 2015), *available at* [https://www.nytimes.com/2015/10/25/opinion/sunday/the-law-school-debt-crisis.html?\\_r=1](https://www.nytimes.com/2015/10/25/opinion/sunday/the-law-school-debt-crisis.html?_r=1).

The ABA Commission on the Future of Legal Services has recommended that the legal profession “should support the goal of providing some form of effective assistance for essential civil legal needs to all persons otherwise unable to afford a lawyer.” Moreover, “[c]ourts should examine, and if they deem appropriate and beneficial to providing greater access to competent legal services, adopt rules and procedures for judicially-authorized-and-regulated legal service providers.” Commission on the Future of Legal Services, *Report on the Future of Legal Services*, at 6 (2016).

The ARDC study includes, for discussion purposes, a draft framework to regulate entities that would connect clients and lawyers, while preserving lawyer independence and other core

values of the profession. Matching service providers could be required to demonstrate their legitimacy by registering with the ARDC and could be subject to regulation carried out under the administrative authority of the ARDC. Significant registration fees could be required, with most of those fees being remitted to access to justice entities, as directed by the Supreme Court.

Recognizing and valuing the longstanding contributions of not-for-profit bar associations and access to justice entities, such matching services could be treated differently, either by exemption from the registration requirement or by fee exemption.

The regulatory framework could help to alleviate the access to the legal services issue by adding for-profit client-lawyer matching services to existing referral services, providing more options to bring together prospective clients and lawyers. Consumers instinctively search the web for solutions, often settling on “do it yourself” options. Online matching services have demonstrated capacity to show prospective clients the need for legal services and the availability of counsel to provide that legal service affordably.

The regulatory framework would recognize fee splitting with a registered matching service and would provide the means to exclude a boiler room operation. It would eliminate ambiguity regarding whether a lawyer runs afoul of rules prohibiting a payment to a matching service that is recommending the lawyer to a potential client or that involves splitting a legal fee with a non-lawyer. While Rule 5.4(a) prohibits fee splitting to maintain the independence of the lawyer, that fee splitting ban is not absolute. For example, Rule 5.4 has been interpreted to permit payments to bar association referral programs. Similarly, the core value of lawyer independence does not preclude a lawyer from providing services in connection with non-lawyer organizations, such as a group legal service or prepaid plan or a commercial indemnity insurer.

The study examines thoughtful proposals from the Illinois State Bar Association and the Chicago Bar Foundation that would also address that ambiguity. The ISBA lead generation proposal would prohibit lawyers from accepting a referral from a matching service if the fee is contingent on the person's use of the lawyer's services or if the fee is calculated based upon the amount of the legal fee. The CBF proposal would permit a lawyer to accept a client from a matching service that meets certain criteria and also recommends a "safe harbor" provision for a lawyer who accepts a referral from a client-lawyer matching service that registers with the ARDC.

The study includes significant legal research that addresses potential antitrust and constitutional challenges to regulations. In sum, that research suggests likelihood that regulatory action by the Supreme Court would survive such challenges.

The framework provided for discussion purposes does not contemplate authorization of alternate business structures (ABSs) for the practice of law. The United Kingdom permits ABSs, which allow for non-lawyer ownership of entities that provide legal services to clients. Rather, the framework would guard the independence of lawyers. The framework would not alter the requirement that only lawyers and law firms are allowed to deliver legal services.

The ARDC recognizes that the decision whether to allow client-lawyer matching services requires examination of competing core values of the profession. The obstacles consumers encounter in seeking lawyers to solve challenging legal problems and the under-employment of lawyers are among the circumstances warranting our attention and discussion.

The ARDC seeks your comment on its study. You may email comments to [information@iardc.org](mailto:information@iardc.org). Comments will be welcome through at least August 31, 2018.

Thank you.

## **ARDC Client-Lawyer Matching Services Study**

### **INTRODUCTION**

Currently, to address the issues with individuals accessing the legal marketplace, there are only a few states that have proposed modifying their Rules of Professional Conduct to allow lawyers to share fees with, or pay a referral fee to, for-profit lawyer referral services. Compared with for-profit services, states allow not-for-profit or bar association referral services to share fees with or receive payments from participating lawyers. The rationale behind permitting not-for-profits and bar associations to share fees, and excluding for-profit services from doing so, is the purported concern that a for-profit company will affect a lawyer's independence and will control the lawyer-client relationship.

Nevertheless, as seen in ethics opinions addressing guidelines for lawyers participating in for-profit prepaid legal service plans and insurance defense, the Illinois Supreme Court could amend the Rules of Professional Conduct to provide guidelines for lawyers participating in and sharing fees with lawyer-client matching services.\* Oregon and the Chicago Bar Foundation have proposed amending their Rule 5.4 to provide a safe harbor for attorneys participating in lawyer referrals services. But a more complete approach of directly regulating the matching service and the attorney—including by maintaining and publishing an index of registered and referral services, by prohibiting lawyers from participating in referral services not registered with the agency, and removing from the index any referral service that does not follow the registration, reporting, and minimum standards requirements—may further support client protections, cultivate attorney-client transactions, and maintain the integrity of the legal profession.

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\* The phrase “lawyer-client matching service” is a broad term encompassing not only referral services but also entities that match clients to attorneys without necessarily engaging in conduct that would constitute a referral.

As discussed below, regulating for-profit lawyer-client matching services most likely will not violate the Freedom of Speech or Right to Association under the First Amendment, nor violate Due Process under the Fourteenth Amendment. Likewise, the Illinois Supreme Court (and the ARDC as the Court's regulatory arm) would most likely be immune from antitrust liability under the Sherman Act if the Court amends the Rules specifying that a lawyer may participate and share fees with only qualified lawyer-client matching services and promulgating rules defining what constitutes a qualified lawyer-client matching service, because the Court would be a sovereign actor.

Below is a table of contents, followed by a detailed discussion of the current barriers to the legal marketplace, what states have proposed or discussed, how prepaid legal service plans and insurance defense could support amending the rules to regulating lawyer-client matching services, and a Sherman Act antitrust analysis.

## **TABLE OF CONTENTS**

I.	Barriers to Accessing the Legal Marketplace.....	4
A.	Unmet Legal Needs and Cost of Legal Representation .....	4
B.	Uneven Distribution of Attorneys and Un- or Underemployed Attorneys.....	7
C.	Legal Profession’s Approach to Matching Services .....	9
1.	Current Rules and Practice.....	10
2.	State Opinions.....	14
3.	Recent Bar Association Referral Panels or Matching Services .....	24
II.	Prepaid Legal Service Plans and Insurance Defense Show How to Manage a Lawyer’s Independence in For-Profit Matching Services.....	28
A.	Prepaid Legal Service Plans.....	32
B.	Insurance Defense .....	37
III.	Recent Proposals .....	41
A.	Florida.....	41
B.	North Carolina .....	44
C.	Oregon.....	46
D.	Chicago Bar Foundation .....	49
E.	Illinois State Bar Association.....	51
IV.	A Framework For Regulating For-Profit Lawyer-Client Matching Services .....	51
V.	Challenges to Regulating For-Profit Lawyer-Client Matching Services .....	57
A.	Constitutional Analysis.....	57
B.	Sherman Antitrust Analysis .....	57
1.	Sherman Act Liability.....	58
2.	<i>Parker</i> (or State Action) Immunity.....	64
	Appendix 1 - Table of States Directly Regulating Lawyer Referral Services .....	81
	Appendix 2 - Draft Framework for Discussion .....	84
	Appendix 3 - Preliminary Assessment of Constitutional Challenges .....	91

## **DISCUSSION**

### **I. Barriers to Accessing the Legal Marketplace**

The public faces several challenges in accessing the legal marketplace, which have contributed to individuals addressing their legal problems without an attorney: cost of representation; inability to determine if a problem is legal or would benefit from representation; unmet legal needs and lack of available services or lawyers; and the legal profession's approach to matching services.

#### **A. Unmet Legal Needs and Cost of Legal Representation**

A 2016 report by the American Bar Association Commission on the Future of Legal Services found that most people living in poverty and the majority of moderate-income individuals do not receive legal help.<sup>1</sup> “Well over 100 million Americans [are] living with civil justice problems, many involving what the American Bar Association has termed ‘basic human needs,’” such as matters relating to evictions, denials or termination of government payments or benefits, healthcare claims or access to treatment, and child custody.<sup>2</sup> According to the report, because the funding made available to the Legal Services Corporation, “accommodates only a small fraction of people who need legal services,...in some jurisdictions, more than eighty percent of litigants in poverty are underrepresented in matters,” such as evictions, mortgage foreclosures, child custody disputes, child support proceedings, and debt collection cases.”<sup>3</sup> The lack of basic civil legal needs is not limited to the poor; rather “the majority of moderate-income individuals do not receive the legal help they need, with conservative estimates estimating that

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<sup>1</sup> Commission on the Future Legal Services, *Report on the Future of Legal Services in the United States*, American Bar Association, at 5 (2016).

<sup>2</sup> *Id.* at 12 (citation and internal quotations omitted).

<sup>3</sup> *Id.* at 12.



“as many as half of American households are experiencing at least one significant civil justice situation at any given time.<sup>4</sup> Moderate-income individuals “often have fewer options than the poor because they do not meet the qualifications to receive legal aid.”<sup>5</sup>

Individuals of all income levels frequently do not seek legal assistance when they recognize that they have a legal need. According to a 2014 American Bar Foundation report, 46% of people were likely to address their problems themselves, 16% did nothing, another 16% received help from a family member or friend, and only 15% sought formal help.<sup>6</sup>

In Illinois, although 1.7 million residents live below the Federal Poverty level, another 2.1 million live just above it.<sup>7</sup> Those 2.1 million people face a barrier to accessing the legal market “as they are unlikely to qualify for legal aid or *pro bono* services that often tie eligibility to the FPL, but may not have financial resources to hire private attorneys as their wages have stagnated while attorney hourly rates have increased.”<sup>8</sup> Thus, in Illinois, the gap in accessing the legal marketplace is increasingly a problem for modest means and middle class families.<sup>9</sup>

Furthermore, in 2015, 93 of the 102 Illinois counties reported that more than half of their civil cases had at least one self-represented litigant.<sup>10</sup> The vast majority of self-represented litigants, however, are not self-represented by choice; although they would prefer to have legal representation, they were either unable to afford it or unable to find an attorney.<sup>11</sup>

In a May 2016 report on self-representation in family court, the Institute for the Advancement of American Legal Services (a national, independent research center at the

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<sup>4</sup> *Id.* (citation and internal quotations omitted).

<sup>5</sup> *Id.*

<sup>6</sup> Rebecca L. Sandefuer, *Accessing Justice in Contemporary USA: Findings from the Community Needs and Services Study*, American Bar Foundation, at 12 (Aug. 8, 2014).

<sup>7</sup> *Advancing Access to Justice in Illinois: 2017-202 Strategic Plan*, Illinois Supreme Court Commission on Access to Justice, at 13 (May 2017).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1.

<sup>11</sup> *Id.* at 15.

University of Denver), found that self-represented litigants in family court largely desire legal assistance, advice and representation, but that “is not an option for them due to the cost and having other financial priorities. Attorney services are out of reach, while free and reduced-cost services are not readily available to many who need assistance.”<sup>12</sup> Across the four studied counties (one each in Colorado, Massachusetts, Oregon, and Tennessee), the Institute found that over 90% of the participants indicated that financial issues were influential, if not determinative, in their decision to proceed without an attorney.<sup>13</sup> Likewise, “[t]he inability to afford an attorney was also the factor that court participants [court staff and judges] estimated to be the most common driver of self-representation<sup>14</sup>. The report concluded that attorneys “effectively removed themselves by pricing services out of the reach of these litigations.”<sup>15</sup>

As the ABA Commission on the Future of Legal Services has stated:

Access to affordable legal services is critical in a society that depends on the rule of law. Yet legal services are growing more expensive, time-consuming, and complex. Many who need legal advice cannot afford to hire a lawyer and are forced to represent themselves. Even those who can afford a lawyer often do not use one because they do not recognize their problem as having a legal solution or they prefer less expensive alternatives.<sup>16</sup>

Consequently, there is currently a “latent legal market—that is a market for legal services that is currently untapped.”<sup>17</sup> Approximately “three-fourths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet.”<sup>18</sup> Individuals may not hire a lawyer because they do not think of their justice problems as legal and do not

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<sup>12</sup> Natalie Anne Knowlton, Logan Cornett, et al., *Cases Without Counsel: Research on Experiences on Self-Representation in U.S. Family Court*, Institute for the Advancement of the American Legal System, at 2 (May 2016).

<sup>13</sup> *Id.* at 1, 12.

<sup>14</sup> *Id.* at 14.

<sup>15</sup> *Id.* at 15.

<sup>16</sup> *Issue Paper Concerning New Categories of Legal Service Providers*, American Bar Association Commission on the Future of Legal Services (Oct. 16, 2015).

<sup>17</sup> *Report on the Future of Legal Services*, *supra* note 1, at 14.

<sup>18</sup> *Issue Paper Concerning New Categories*, *supra* note 16 (internal citation and quotations omitted).

recognize their problems as having legal solutions, or, if they want to secure legal representation, they may not be able to afford it.

## **B. Uneven Distribution of Attorneys and Un- or Underemployed Attorneys**

Aside from the “untapped” market, another barrier to accessing the legal marketplace is that “[p]roviding legal representation for all litigants through legal aid or *pro bono* attorneys is simply not a workable solution.”<sup>19</sup>

For instance, in Oregon, the existing legal-aid providers can only meet 15% of the civil legal needs of Oregon’s poor.<sup>20</sup> According to John Grant (the co-chair of the Oregon State Bar Futures Task Force), law is a “classic seller’s market, where purveyors of a scarce resource, legal services, are naturally motivated to seek work at the high-end of the pricing scale. In the process, they naturally pass over lower value (or lower margin) opportunities.”<sup>21</sup> Apparently, to close the access to the legal marketplace gap in Oregon, every active lawyer in Oregon would have to handle nearly 100 *pro bono* cases every year.<sup>22</sup>

In Illinois, “[t]here are fewer than 400 legal aid attorneys in the entire state providing free legal services for the poorest Illinois residents. Seven of Illinois’ 24 judicial circuits have no legal aid offices located within their boundaries.”<sup>23</sup> Additionally, “[o]utside of Cook County, only one legal aid attorney exists for every 10,000 low-income residents.”<sup>24</sup> Although “*pro bono* attorneys are vitally important for increasing legal aid capacity, there are not enough of them [in Illinois] to fill the unmet need.”<sup>25</sup> Accordingly, the Illinois Supreme Court Commission advised

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<sup>19</sup> *Advancing Access to Justice in Illinois*, *supra* note 7, at 15.

<sup>20</sup> John Grant, *Open Letter to Oregon Bar Delegates*, Start Here HQ (Oct. 18, 2017), <https://www.startherehq.com/blog/2017/10/18/open-letter-to-oregon-bar-delegates>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Advancing Access to Justice in Illinois*, *supra* note 7, at 15.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

that “[l]imited scope representation is one tool that may help bridge the gap in the future,” but that “is not yet widely used.”<sup>26</sup>

Relatedly, many communities in Illinois face another barrier: “there are not enough attorneys of any kind, let alone legal aid or *pro bono* attorneys.”<sup>27</sup> There is uneven distribution of attorneys in Illinois, “a discrepancy that is becoming more pronounced each year.”<sup>28</sup> Cook County and the six collar counties contain 65% of the population and 90% of the state’s attorneys, whereas 52 counties admitted fewer than five new attorneys in the last five years and 16 counties did not admit any attorney.<sup>29</sup>

Interestingly, “[m]any lawyers, especially recent law graduates, are unemployed or under-employed despite the significant unmet need for legal services.”<sup>30</sup> In fact, a New York Times report showed that 43% of all 2013 law school graduates did not have long-term full-time legal jobs nine months after graduation.<sup>31</sup>

Therefore, as the ABA Commission on the Future of Legal Services has recommended, the legal profession “should support the goal of providing some form of effective assistance for essential civil legal needs to all persons otherwise unable to afford a lawyer.”<sup>32</sup> Moreover, “[c]ourts should examine, and if they deem appropriate and beneficial to providing greater access to competent legal services, adopt rules and procedures for judicially-authorized-and-regulated legal service providers.”<sup>33</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Report on the Future of Legal Services*, *supra* note 1, at 14.

<sup>31</sup> Editorial Board, *The Law School Debt Crisis*, *The N.Y. Times* (Oct. 24 2015), *available at* [https://www.nytimes.com/2015/10/25/opinion/sunday/the-law-school-debt-crisis.html?\\_r=1](https://www.nytimes.com/2015/10/25/opinion/sunday/the-law-school-debt-crisis.html?_r=1).

<sup>32</sup> *Report on the Future of Legal Services*, *supra* note 1, at 6.

<sup>33</sup> *Report on the Future of Legal Services*, *supra* note 1, at 6. Apparently the concerns of unmet legal needs and the need to provide legal services to those of moderate income are not new. As Elwyn C. Lee (then-vice president of the Houston Referral Service, Inc.) noted in the 1983 article “Lawyer Referral Services: A Regulatory Wasteland,”

### C. Legal Profession's Approach to Matching Services

Discussion of for-profit lawyer-client matching services implicates consideration of at least two important values: the core professional value of lawyer independence, which underpins Rule 5.4 fee splitting restrictions; and prospective clients' access to the legal market.

The Illinois Rules of Professional Conduct and decisional precedent support percentage fee-sharing with a bar association or other not-for-profit lawyer referral service. The Illinois Appellate Court determined in *Richards v. SSM Health Care, Inc.*, 311 Ill. App. 3d 560 (1st Dist. 2000), that public policy considerations underlying Rules 1.5 and 5.4 permit the lawyer to remit 25% of the fee to the bar association lawyer referral service. The Court found:

We conclude the public policy considerations reflected in RPC Rules 1.5 and 5.4 do not bar the percentage fee-sharing that took place in this case. On the contrary, there are strong policy reasons to hold percentage fee-sharing without the assumption of legal responsibility by a non-profit referral service is a positive force. People unfamiliar with the lawyer selection process can make informed decisions. They can receive affordable services they did not know existed. They can obtain critical information concerning legal issues that have impact on their lives.

In addition, referral services have a salutary effect on bar associations, resulting in furtherance of the public interest. A bar association is motivated to ensure the integrity and competency of the lawyers it refers. There is less likelihood the public will perceive these referrals as the sale of a client. In fact, improper solicitation (Rule 7.3) should be reduced.

None of the concerns expressed in the bar association opinions or in the letter and spirit of the RPC exists in this case.<sup>34</sup>

The ABA Commission on the Future of Legal Services noted that some legal regulators “have been hesitant to explore whether to allow new business models or limited licensing programs.”<sup>35</sup>

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these concerns existed in the 1940s. 37 Sw L.J. 1099, 1103-1104, 1105-1106 (1983). The “ABA considered the lawyer referral service to be the ideal way to reach those needing legal services because it attempts to eliminate the reasons for the perceived reluctance to use attorneys,” including fear of excessive fees, inability to recognize or categorize a legal problem, and ignorance about how to select a lawyer. *Id.* at 1107. There was also a desire around the 1950s and 1960s to aid the public and to improve the “economic condition of underutilized attorneys by inhibiting the unauthorized practice of law and inducing those able to pay reasonable fees to bring their problems to attorneys.” *Id.* at 1106.

<sup>34</sup> 311 Ill. App. 3d at 568.

Rules 5.4(a) and 7.2(b) do not literally permit a lawyer to share a part of a fee with a for-profit referral service. The question is whether the Supreme Court should regulate for-profit matching services and permit such a fee split with a regulated matching service, as a means to increase access to the legal market. While the purpose of a for-profit matching service may not otherwise further the public interest, the service would have an economic interest in providing proper referrals. The Supreme Court may require that the service apply a portion of its earnings toward the public interest, particularly to enhance access to justice programs.

### **1. Current Rules and Practice**

On August 1993, the American Bar Association Standing Committee on Lawyer Referral and Information Service drafted the Model Supreme Court Rules Governing Lawyer Referral & Information Services, in part, to ensure the public service orientation of some private, for-profit services, and to provide a level-playing field as well as strong and enforceable regulations to achieve minimal standards for all lawyer referral services, whether private or bar-sponsored.<sup>35</sup>

Under the ABA Model Supreme Court Rules, only a qualified service can call itself a lawyer referral service, and it must be operated in the public interest and provide referrals to lawyers, *pro bono* programs, and other legal service providers. The referral service “may be privately owned so long as the primary purpose is public service.” The Model Rules also require that the membership be open to all licensed attorneys in the geographic area served, that participating members carry malpractice insurance or provide proof of financial responsibility, and that the combined fees and expenses charged to a client shall not exceed the combined fees and expenses the client would have incurred if no referral service were employed. Also, the

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<sup>35</sup> *Report on the Future of Legal Services*, *supra* note 1, at 17.

<sup>36</sup> Model Supreme Court Rules Governing Lawyer Referral and Information Services, ABA, [https://www.americanbar.org/groups/lawyer\\_referral/publications/meets-aba-standards---model-supreme-court-rules-governing-lawyer.html](https://www.americanbar.org/groups/lawyer_referral/publications/meets-aba-standards---model-supreme-court-rules-governing-lawyer.html) (last visited June 21, 2018).

service must establish procedures for the admission, suspension or removal of a lawyer from any panel. Further, the service may (subject to the rules of the service's jurisdiction), "in addition to a referral fee, receive a percentage of the fee earned by the lawyer to whom a referral is made. Any such fees received may be used only for the reasonable operating expenses of the service or to fund public service activities of the service or its sponsoring organization." In the commentary to this last requirement, the Standing Committee notes that although "ABA policy has long prohibited the division of fees for legal services," ABA ethics opinions and other states have approved the financing of lawyer referral services sponsored by bar associations by charging a reasonable percentage of fees.

ABA Model Rule 7.2 provides, "A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may...(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority." Comment 6 to ABA Model Rule 7.2 incorporates the above model rules, stating that Rule 7.2(c) "only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services."

A significant majority of jurisdictions regulate the scope of a lawyer's involvement with referral services solely through Rule 7.2 (or the jurisdiction's equivalent), and have adopted some version of ABA Model Rule 7.2 and its related comments.<sup>37</sup>

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<sup>37</sup> Fifteen jurisdictions allow lawyers to pay the usual charges of a not-for-profit lawyer referral service (Alabama, Arkansas, Colorado, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Minnesota, Montana, New Jersey, North Dakota, Rhode Island, South Carolina, and Washington). Another 15 jurisdictions allow lawyers to pay the usual charges of a not-for-profit or a qualified lawyer referral service (Alaska, Arizona, Connecticut, Delaware, Idaho,

Some jurisdictions restrict a lawyer's participation to a lawyer referral service that satisfies certain criteria. For instance, South Carolina's Rule 7.2(c)(2) provides that a "lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may pay the usual charges of a legal service plan or a not-for-profit lawyer referral service, which is itself not acting in violation of any Rule of Professional Conduct."

Louisiana's Rule 7.2(c)(13)(A) states that a lawyer "may pay the usual, reasonable and customary charges of a lawyer referral service operated by the Louisiana State Bar Association, any local bar association, or any other not-for-profit organization, provided the lawyer referral service: (i) refers all persons who request legal services to a participating lawyer; (ii) prohibits lawyers from increasing their fee to a client to compensate for the referral service charges; and (iii) fairly and equitably distributes referral cases among the participating lawyers, within their area of practice, by random allotment or rotation."

For North Carolina, a lawyer may participate in a lawyer referral service provided that the service is not operated for a profit; the lawyer does not directly or indirectly receive anything of value other than legal fees earned from representation of clients referred by the service; the lawyer's payment to the lawyer referral service is limited to a reasonable sum which represents a proportionate share of the referral service's administrative and advertising costs; employees of the referral service do not initiate contact with prospective clients and do not engage in live telephone or in-person solicitation of clients; the referral service does not collect any sums from clients or potential clients for use of the service; that all advertisements by the lawyer referral

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Indiana, Iowa, Maine, Nebraska, New Mexico, Oklahoma, South Dakota, West Virginia, Wisconsin, and Wyoming). Two jurisdictions (Kentucky and Virginia) state that a lawyer may pay the usual charges of a not-for-profit qualified lawyer referral service, and five jurisdictions (D.C., Mississippi, Nevada, Pennsylvania, Utah) allow lawyers to pay the usual charges of a lawyer referral service.



service meet certain requirements; and that the lawyer is professionally responsible for its operation including the use of a false, deceptive, or misleading name by the referral service.

Still, other jurisdictions not only regulate lawyer participation in lawyer referral service programs but have established registration requirements, as well as minimum standards for referral services to operate and accept lawyers: California,<sup>38</sup> Florida,<sup>39</sup> Georgia,<sup>40</sup> Michigan,<sup>41</sup> Missouri,<sup>42</sup> Ohio,<sup>43</sup> Tennessee,<sup>44</sup> and Texas.<sup>45</sup> The degree to which these states control the structure, operation, and supervision of the referral programs vary widely, as the table in Appendix 1 shows. Whereas Michigan, Missouri, and Texas prohibit lawyers from participating in for-profit referral services or prohibit the operation of for-profit referral services, California, Florida, Georgia, and Tennessee seem to permit for-profit referral services.

As for fee sharing or referral fee payments, jurisdictions specifically allow not-for-profit or bar-operated or sponsored lawyer referral services to share fees, pursuant to Rule 7.2 (or the state's equivalent),<sup>46</sup> Rule 5.4,<sup>47</sup> or a combination of both rules.<sup>48</sup> None of the states specifically address for-profit referral services.

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<sup>38</sup> Cal. State Bar Lawyer Referral Rule, Chapter 3.

<sup>39</sup> Florida Rule of Professional Conduct 4-7.22; Fla. Bar Reg. Chapter 8 (Lawyer Referral Rule).

<sup>40</sup> Georgia Rules of Professional Conduct 5.4 and 7.3.

<sup>41</sup> Michigan Rules of Professional Conduct 6.3 and 7.2; Lawyer Referral and Information Services, State Bar of Michigan (Oct. 1, 2010).

<sup>42</sup> Missouri Rules of Professional Conduct 4-7.2 and 4-9.1.

<sup>43</sup> Ohio Gov. Bar R. XVI; Ohio Rules of Professional Conduct 5.4 and 7.2.

<sup>44</sup> Tennessee Supreme Court Rule 44; Tennessee Rules of Professional Conduct 5.4, 7.2, and 7.6.

<sup>45</sup> Texas Disciplinary Rules of Professional Conduct, 7.03; Occupations Code, Title 5, Subtitle B, Chapter 952.

<sup>46</sup> *See. e.g.*, Hawaii Rule of Professional Conduct 7.2(b)(2) (“a lawyer may pay the usual charges of a not-for-profit lawyer referral service or qualified legal assistance organization, which charges, in addition to any referral fee, may include a fee calculated as a percentage of legal fees earned by the lawyer to whom the service or organization has referred a matter”); Comment 8 to South Carolina Rule of Professional Conduct 7.2(c)(2) (“The ‘usual charges’ may include a portion of legal fees collected by a lawyer from clients referred by the service when that portion of fees is collected to support the expenses projected for the referral service”); and Arizona Rule of Professional Conduct 7.2 (“a lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service, which may include, in addition to any membership fee, a fee calculated as a percentage of legal fees earned by the lawyer to whom the service or organization has referred a matter...”).

<sup>47</sup> *See e.g.*, Tennessee Rule of Professional Conduct 5.4(a)(6) (“A lawyer may pay to a registered non-profit intermediary organization a referral fee calculated by reference to a reasonable percentage of the fee paid to the lawyer by the client referred to the lawyer by the intermediary organization”); Oregon Rules of Professional

Although some jurisdictions state that a lawyer may share fees with or pay a referral fee to a qualified lawyer referral service, research did not locate any ethics opinions, or rules or regulations that specifically allow lawyers to share fees with or pay a referral fee to a for-profit referral service, aside from California.<sup>49</sup> In fact, in Arizona a qualified lawyer referral service can charge a percentage-fee to participating lawyers, but, because Arizona does not have any procedure in place to register or certify for-profit referral services, the *de facto* approach is to only allow not-for-profits to charge participating lawyers a percentage fee.

## 2. State Opinions

In the past couple of years, several states have issued opinions concluding that the for-profit Avvo Legal Services model violates their fee sharing and referral fee rules, among others; yet, not one of those opinions mentioned or proposed any rule changes to allow the Avvo model in whole or in part.

### New York<sup>50</sup>

The New York State Bar Association determined that a lawyer may not pay a marketing fee to participate in Avvo Legal Services, because the fee includes an improper payment for a

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5.4(a)(5) (“a lawyer may pay the usual charges of a bar-sponsored or operate not-for-profit lawyer referral service, including a fees calculated as a percentage of legal fees received by the lawyer from a referral”); and Ohio Rule of Professional Conduct 5.4 (“a lawyer may share legal fees with a nonprofit organization that recommended employment of the lawyer in the matter, if the nonprofit organization complies with Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio,” which provides that a “Lawyer Referral Service may require participating lawyer to pay a fee calculated as a percentage of legal fees earned by any lawyer panelist to whom the lawyer referral service has referred a matter, in addition to payment of a membership or registration fee...”).

<sup>48</sup> See e.g., Georgia Rules of Professional Conduct 5.4(a)(5) (“a lawyer may pay a referral fee to a bar-operated non-profit lawyer referral service where such fee is calculated as a percentage of legal fees earned by the lawyer to whom the service has referred a matter pursuant to Rule 7.3”), and 7.3(c)(2) (“a lawyer may pay the usual and reasonable fees or dues charged by a bar-operated non-profit lawyer referral service, including a fee which is calculated as a percentage of the legal fees earned by the lawyer to whom the service has referred a matter...”).

<sup>49</sup> See *Lawyer Referral Services*, The State Bar of California, <http://www.calbar.ca.gov/Public/Free-Legal-Information/Legal-Guides/Lawyer-Referral-Service> (last visited June 21, 2018) (“Some lawyer referral services are operated on a for-profit basis by businesses or lawyers. Both nonprofit and for-profit lawyer referral services are held to the same standards under the certification rules of the State Bar.”); see also Rules and Regulations of the State Bar of California Pertaining to Lawyer Referral Services, Rule 17 (Fees Charged by a Lawyer Referral Service).

<sup>50</sup> New York State Bar Association Committee on Professional Ethics, Op. 1132 (Aug. 8, 2017).

recommendation, in violation of New York Rule of Professional Conduct 7.2(a). In determining that the marketing fee is an impermissible payment for a recommendation, the Association noted that Avvo not only lists lawyers, their profiles, and their contact information, but that Avvo also gives each lawyer an Avvo rating (on a scale of 1 to 10), Avvo's ads "expressly state that the Avvo Rating enables a potential client to find 'the right' lawyer," and Avvo's website "extols the benefits of being able to work with highly-rated lawyers." Accordingly, the New York State Bar Association concluded that "the way Avvo describes in its advertising material the ratings of participating lawyers either expressly states or at least implies or creates the reasonable impression that Avvo is 'recommending' those lawyers." Further, the Association determined that "Avvo's satisfaction guarantee, by which the full amount of the client's payment (including Avvo's portion of the fee) is refunded if the client is not satisfied...contributes to the impression that Avvo is 'recommending' the lawyers on its service." Thus, the Association concluded that "lawyers who pay Avvo's marketing fee are paying for a recommendation, and thus violating Rule 7.2(a)."

### **Ohio<sup>51</sup>**

The Ohio Supreme Court addressed a proposed business model of an "online referral service that matches a prospective client with a lawyer for a particular legal service," and which "defines the types of legal services offered, the scope of representation, the fees charged, and other parameters of the legal representation."

The Court initially noted that a "lawyer may participate in a lawyer referral service only if it meets the requirements of the Rules of Professional Conduct, and it is registered with the Supreme Court of Ohio." Additionally, a lawyer must ensure that the referral service does not

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<sup>51</sup> The Supreme Court of Ohio: Board of Professional Conduct, Opinion No. 2016-3 (June 3, 2016).

interfere with the lawyer's independent professional judgment, and the lawyer is responsible for the conduct of the service's non-lawyers.

With regard to the business model at issue, the Ohio Supreme Court determined that the company, and not the lawyer, "controls nearly every aspect of the attorney-client relationship, from beginning to end." The company "defines the type of services offered, the scope of representation, and the fees charged." Thus, according to the Court, the business model "is antithetical to the core components of the client-lawyer relationship because the lawyer's exercise of independent professional judgment on behalf of the client is eviscerated."

Additionally, the Court concluded that a lawyer is not ethically permitted to participate in an online, nonlawyer-owned legal referral service, where the lawyer is required to pay a "marketing fee" to a nonlawyer for each service completed for a client. The Court determined that "a fee structure that is tied specifically to individual client representations that a lawyer completes or to the percentage of a fee is not permissible, unless the lawyer referral service is registered with the Supreme Court of Ohio."

### **Pennsylvania<sup>52</sup>**

The Pennsylvania Bar Association concluded that a lawyer could not ethically participate in a for-profit, nonlawyer owned lawyer referral service in which the client remits the entire fee to the business in advance, the business forwards the fee to the lawyer after confirming the requested services had been performed, and the lawyer pays the business a "marketing fee" for each completed assignment. The opinion discusses several rule violations, including that the lawyer's payment of the marketing fee constitutes impermissible fee sharing with a nonlawyer, in violation of Rule 5.4(a).

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<sup>52</sup> Pennsylvania Bar Association: Legal Ethics and Professional Responsibility Committee, Formal Opinion 2016-200 (Sept. 2016).

Noting that “the primary policy underlying RPC 5.4(a) is the preservation of the lawyer’s professional independence,” the Pennsylvania Bar concluded that “the assumption that the lawyer’s payment to a non-lawyer of marketing fees amounting to 20% to 30% of legal fees does not interfere with the lawyer’s professional judgment is, at a minimum, of questionable validity.”

The Pennsylvania Bar Association acknowledged that Rule 7.2(c)(1) allows lawyers to pay the usual charges of a lawyer referral service or other legal service organization, and that compared to other states, Pennsylvania does not restrict Rule 7.2(c)(1) to not-for-profits or approved referral services. It also noted that the model at issue fits within the definition of “lawyer referral service” set forth in Rule 7.7(b): “any person, group of persons, association, organization or entity that receives a fee or charge for referring or causing the direct or indirect referral of a potential client to a lawyer drawn from a specific group or panel of lawyers.”

The opinion opined that as long as the model fits within Rule 7.7(b)’s definition, a lawyer could potentially pay fees to the organization. However, the opinion determined that payments to lawyer referral services remain subject to Rule 5.4(a)’s prohibition against fee-sharing with non-lawyers.

A prior Pennsylvania Bar Association opinion “concluded that a lawyer could pay a percentage-based referral fee to a lawyer referral service sponsored by a county bar association, under the then-current RPC 7.2(c), which authorized payment of ‘the usual charges of a not-for-profit Lawyer Referral Service or other legal services organization.’” The Association concluded, though, that the rationale behind allowing such fees for not-for-profits (exclusively to cover operating expenses or otherwise for the public benefit) did not apply to for-profit businesses operating the referral service at issue.

The Association’s opinion addressed the flat fee service operator’s argument that unbundling legal services reduces the cost to clients, thereby making legal services more accessible. The opinion stated that although “[e]xpanding access to legal services is...an important goal that all lawyers, and the organized Bar, should support,” the way in which the flat fee service programs “currently operate raises concerns about whether they advance the goal of expanding access to legal services.” The Association further stated that “compliance with the RPCs should not be considered inconsistent with the goal of facilitating greater access to legal services” and that “[a]ny lawyer can offer ‘unbundled’ or ‘limited scope’ legal services at, or even below, the rates prescribed by an FFLS program, provided the lawyer can do so in a manner that complies with his or her professional and ethical obligations.”

### **South Carolina<sup>53</sup>**

The South Carolina Ethics Committee determined that Avvo’s model violates the prohibition of sharing fees with a non-lawyer (Rule 5.4(a)) and violates the prohibition of paying for a referral fee (Rule 7.2(c)). According to the Committee, even though there are separate transactions in which the service collects the entire fee and transmits it to the attorney at the completion of the work, and then receives a fee from the attorney related to the amount of the fee earned in the matter, the arrangement still constitutes impermissible fee-splitting. The Committee determined that “[a]llowing the service to indirectly take a portion of the attorney’s fee by disguising it in two separate transactions does not negate the fact that the service is claiming a certain portion of the fee earned by the lawyer as its ‘per service marketing fee.’”

Similarly, the Committee concluded that assuming the attorney’s listing is considered an advertisement, because the service based its “advertising charge to the lawyer on the fee collected for the work rather than having a fixed rate per referral or other reasonable cost for the

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<sup>53</sup> South Carolina Bar, Ethics Advisory Opinion 16-06 (2016).

advertisement,” the attorney cannot claim that the “marketing fee” is a reasonable cost of advertisements or communications” under Rule 7.2(c).

Finally, the Committee determined that Rule 7.2(c)(2) (lawyer may pay the usual charges of a not-for-profit lawyer referral service) did not apply, because the service at issue did not appear to be a not-for-profit lawyer referral service.

### **New Jersey<sup>54</sup>**

In a joint opinion, the Advisory Committee on Professional Ethics, the Committee on Attorney Advertising, and the Committee on the Unauthorized Practice of Law concluded that “New Jersey lawyers may not participate in the Avvo legal service programs because the programs improperly require the lawyer to share a legal fee with a nonlawyer...and pay an impermissible referral fee.” The Committees found that the marketing fee is not for “reasonable cost of advertising” but an impermissible referral fee, because the fee bears no relationship to advertising. Instead, “it is a fee that varies with the cost of the legal service provided by the lawyer, and is paid only after the lawyer has completed rendering legal services to a client who was referred to the lawyer by Avvo.”

Notably, the Committees addressed the argument that “Avvo directs or regulates the lawyer’s professional judgment,” in violation of Rule 5.4(c), because “it defines the scope of the legal services offered, receives payment from clients, sets the fee and pays lawyers only when legal tasks are completed.” The Committees rejected that argument, and determined that “Avvo does not insert itself into the legal consultation in a manner that would interfere with the lawyer’s professional judgment.”

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<sup>54</sup> Advisory Committee on Professional Ethics/Committee on Attorney Advertising/Committee on the Unauthorized Practice of Law, ACPE Joint Opinion 732/CAA Joint Opinion 44/UPL Joint Opinion 54 (June 2017).

The New Jersey Committees also addressed Avvo’s argument that it “claimed to be serving a public purpose of improving access to legal services.” The Committees acknowledged “that improving access to legal services is commendable, but participating lawyers must still adhere to ethical standards.”

Additionally, the New Jersey Committees concluded that Legal Zoom and Rocket Lawyer appeared to offer legal service plans, because they furnish and pay for limited legal services through outside participating lawyers to members who pay a monthly subscription fee. A member selects a participating lawyer who is not affiliated with the entity, and the member is the lawyer’s client. The Committees determined that LegalZoom and Rocket Lawyer operated otherwise permissible prepaid legal service plans, but because they had not complied with the applicable registration requirements, lawyers in New Jersey could not participate in Legal Zoom or Rocket Lawyer.

### **Utah<sup>55</sup>**

The Utah State Bar Ethics Advisory Opinion Committee determined that a referral service in which potential clients contract with the service for specified legal services for fixed fees and select a lawyer from a list of participating lawyers, and in which the service deposits the fees into the lawyer’s trust account and withdraws a fee for the agreed service which varies based on the type of service from the lawyer’s operating account, violates the rules prohibiting fee-splitting and restrictions on payment for recommending a lawyer’s services. In determining that the service violates Rule 7.2(f), the Committee concluded that the portion of the fee paid to the referral service is not a reasonable cost of advertising, because the portion of the fee varies based upon the type of service provided and is not reasonably tied to the actual cost of advertising. Interestingly, the Committee did not discuss whether the fee would constitute the “usual charges

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<sup>55</sup> Utah State Bar Ethics Advisory Opinion Committee, Opinion No. 17-05 (Sept. 27, 2017).



of a lawyer referral fee.” Comment 8 to Rule 7.2 states that the rule permits “a lawyer to pay the usual charges of any lawyer referral service. This is not limited to not-for-profit services.”

With regard to Rule 5.4(c), the Utah State Bar cautioned that, although that it did not appear that the referral service at issue “exercises any direct influence over the lawyer’s independent judgment,” the service may indirectly influence the lawyer’s independent judgment, given that the service sets the flat rate the client pays before the lawyer has reviewed the case. Thus, “the lawyer’s independence may be impeded if the case turns out more complicated or require[s] more work than initially believed, or if the amount of the fee interferes with the lawyer’s professional judgement as to how much time to spend on the matter.”

### **Virginia<sup>56</sup>**

In a proposed legal ethics opinion, the Virginia State Bar acknowledged that the “Virginia’s Rules of Professional Conduct do not prohibit a lawyer from participating in an Internet program operated by a for-profit [attorney-client online matching service], which identifies limited scope services available to the public for fixed fees.” However, according to the proposed opinion, a lawyer’s participation in the Avvo model violates Virginia’s Rules 5.4(a) and 7.3(d), because it involves sharing legal fees with a nonlawyer and giving something of value in exchange for recommending the lawyer’s services. The Bar acknowledged that Rule 7.3(d) prohibits a lawyer from giving anything of value in exchange for a recommendation, except that a lawyer may pay the reasonable costs of advertising or the usual charges of a legal service plan or a not-for-profit referral service. The Bar noted that the Avvo model is a “for-profit business that collects fees based upon the legal fees generated by lawyers who match with clients via” the business’s platform. The Bar concluded that the “marketing fee” does not constitute a reasonable cost of advertisement, because it is a “sum tethered” to the lawyer’s

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<sup>56</sup> Virginia State Bar, Legal Ethics Opinion 1885.

receipt and the amount of the legal fee paid by the client, whereas an advertisement cost “does not directly depend on the amount of legal fees paid or collected.”

In its proposed opinion, the Virginia State Bar acknowledged the concern that “the proposed opinion harms consumers and reduces access to justice by limiting the ways in which clients are able to locate and retain lawyers and limiting the ways in which lawyers are permitted to advertise their services.” It considered “whether it would be appropriate to amend Rules 5.4 and 7.3 to permit lawyers to share legal fees and pay referrals from, nonlawyer entities.” The Bar, however, ultimately declined to amend the rules, because “the risks to the lawyer’s independent professional judgment were so significant as to outweigh” the above concerns. According to the Bar, “[a]ccess to justice, while an important goal, is not accomplished when a third party controls the representation and influences the lawyer’s ability to provide diligent and competent representation.”

The proposed opinion was approved 59-6 by the Virginia State Bar Council on October 27, 2017, and was filed with the Supreme Court of Virginia on November 17, 2017.<sup>57</sup>

### **Indiana<sup>58</sup>**

In its first ever ethics opinion, the Indiana Supreme Court Disciplinary Commission concluded that a lawyer’s participation in an online legal referral service, to which the lawyer must pay a “marketing fee” for each service completed, risks violating Indiana’s Rules of Professional Conduct. The Commission determined that a lawyer violates Rule 5.4 by allowing the online company to charge a lawyer a “marketing fee” every time the lawyer earns a fee. The Commission also determined that lawyers risk abdicating their professional independence, in violation of Rule 5.4(c), by participating in the referral model, because the referral model locks

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<sup>57</sup> In the Matter of Legal Ethics Opinion 1885 (Vir. Nov, 17, 2017).

<sup>58</sup> Indiana Supreme Court Disciplinary Commission, Op. 1-18 (April 9, 2018).

in the client's legal needs without actual consultation when the client selects a service, and because the online company, in setting a fee based on an assumed time frame in which to complete a task, directs the length and time the lawyer should spend on representation. Likewise, the Commission cautioned that the referral model raises concerns about Rule 1.2(c) (limited scope representation), because the clients may not be informed of and may not give their consent to the limitation and objectives of the representation.

### **Michigan<sup>59</sup>**

In a proposed ethics opinion, the State Bar of Michigan has determined that, among other rule violations, participation in a for-profit online matching service, which for a fee matches prospective clients with lawyers, “constitutes an impermissible sharing of fees with a nonlawyer if the attorney’s fee is paid to and controlled by the nonlawyer and the cost for the matching service is based on a percentage of the attorney’s fee paid for the legal services provided by the lawyer.” The State Bar of Michigan examined two different lawyer-client matching service models: one marketing its matching services to consumers needing legal services, and the other targeting its matching services to businesses needing legal services. According to the State Bar of Michigan, “[f]or Michigan lawyers to participate in a lawyer referral service, it must meet the criteria in MPRC 6.3,” which includes the requirement that the service be not-for-profit. Thus, because the two discussed models are both for-profit services, an attorney would violate MPRC 6.3 if the attorney participated in either model.

According to the proposed opinion, in addition to engaging in impermissible fee sharing with participating lawyers, both business models “conflict with a lawyer’s ethical obligation to maintain independent professional judgment in rendering legal services as required by MPRC

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<sup>59</sup> State Bar of Michigan, Proposed Op. R-25 (Month \_\_, 2018); *SBM Solicits Member Comments on Proposed Ethics Advisory Opinion*, State Bar of Michigan, <https://www.michbar.org/News/NewsDetail/nid/5558> (last visited June 21, 2018).

5.4(c)” for the following reasons: the prospective client must interact with and respond to the matching services’ requirements before having any access to the participating lawyers; and both businesses define the services offered, the fees charged, when and how the participating lawyers are paid, and the refund policy. Specifically, the consumer-oriented business model determines the scope and length of the lawyer-client relationship, and specifies the time the lawyer will spend on the matter for a predetermined set fee. For the State Bar of Michigan, “[s]uch matters should be made by or directed by the lawyer after consultation with the prospective client regarding the client’s specific legal matter.”

### **3. Recent Bar Association Referral Panels or Matching Services**

In a September 2016 article, William Weisenberg, the Senior Policy Advisor at the Ohio State Bar Association, stated that “[r]ecognizing the severity of the justice gap and that more people, approximately 76%, find a lawyer online, and that there is an untapped market that may prove very profitable, Avvo, Legal Zoom and Rocket Lawyer have entered the market place.”<sup>60</sup>

In 2016, due to the competitive pressures from online legal services companies that already charged flat fees for simple document filing, the Los Angeles County Bar Association (California’s largest voluntary bar association) launched its own flat-fee service referral program through its existing lawyer referral service ([www.smartlaw.org/flatfee](http://www.smartlaw.org/flatfee)) “in an attempt to remain competitive with online companies that use the Internet to offer consumers low-cost legal services.”<sup>61</sup> According to the Director for the LACBA, the addition of flat fee services for uncontested divorces, filing limited liability company forms, and trademark registration is part of

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<sup>60</sup> William Weisenberg, *Access to Justice: Non-lawyer legal service providers are succeeding in their efforts to meet the demands of the public*, Ohio State Bar Association (Sept. 20, 2016), <https://www.ohiobar.org/Member-Center/Access-To-Justice/Pages/Non-lawyer-legal-service-providers-are-succeeding-in-their-efforts-to-meet-the-demands-of-the-public.aspx>.

<sup>61</sup> Kerry Goff, *LA Bar Association offers flat-fee options to consumers*, Northern California Record (Aug. 5, 2016), <https://norcalrecord.com/stories/510963257-la-bar-association-offers-flat-fee-options-to-consumers>.

the “larger picture of what consumers are used to experiencing in the market place. That’s what the legal services market has capitalized on.”<sup>62</sup> Attorneys pay an annual fee to receive referrals from the service, and customers are charged flat fees for three types of legal services: \$800 for an uncontested divorce, \$800 to file forms for a limited liability company, and \$500 to register a trademark.<sup>63</sup>

The Chicago Bar Association has also launched its own limited scope referral service. On August 24, 2016, the Illinois Supreme Court Commission on Access to Justice sent the Chicago Bar Association a letter discussing two proposals to partner with the CBA and the Chicago Bar Foundation regarding limited scope representation in Illinois.<sup>64</sup> The first proposal was to form a “new CBA committee dedicated to connecting and supporting attorneys who incorporate limited scope representation.”<sup>65</sup> The second was to explore the “establishment of a referral panel of attorneys offering unbundled legal services.”<sup>66</sup> The Commission explained that “[f]or many modest income litigants, limited representation may be the only option for legal representation.”<sup>67</sup> Thus, a “panel would provide a simple way to connect prospective clients with members of the bar who offer unbundled services.”<sup>68</sup>

On October 4, 2017, the CBA announced the creation of a Limited Scope Referral Panel program, which would help litigants find attorneys who practice in the following areas of law: landlord/tenant; consumer/collections; and domestic relations. According to the CBA, many people “want an attorney to handle the most important or most confusing parts of the case on a limited basis,” so “[l]imited scope representation is designed specifically for these situations,

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Advancing Access to Justice in Illinois*, *supra* note 7, at 78-82.

<sup>65</sup> *Id.* at 78.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

allowing attorneys to focus their expertise on discrete issues and actions, while the clients handle the other parts of the case independently.”<sup>69</sup> The CBF stated that prior to its limited scope referral panel, prospective clients did not have not a simple way to find attorneys who offer limited scope services.<sup>70</sup>

Attorneys who apply to the CBA’s limited scope referral panel must demonstrate at least two years of experience in one or more of the areas of law offered in the panel, they must possess a license to practice law in Illinois and remain in good standing, they must carry malpractice insurance, agree in writing to comply with the rules and regulations of the program, the Rules of Professional Conduct, and the Rules of the Circuit Court of Cook County, and attend a CBA training seminar on limited scope representation. Additionally, the attorneys must offer a variety of unbundled limited scope services at a fixed cost, including coaching, document review, document preparation, settlement negotiations, and limited scope appearances.

In February 2017, the New York State Bar Association launched a new online portal for individuals seeking a lawyer, developed “in partnership with Legal.io, a national provider of marketplace and referral management technology for the legal industry.”<sup>71</sup> The online service works as follows: an individual seeking a lawyer goes to <https://nysbalris.legal.io> and fills out a confidential questionnaire describing their legal issue and their location; the State Bar staff reviews the information and matches the individual with an attorney whose office is in the same or nearby community; the State Bar will forward the request to an appropriate county bar association if the individual lives in one of 17 counties with a locally-run lawyer referral service;

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<sup>69</sup> *CBA Now Accepting Applications for New Limited Scope Referral Panel*, Chicago Bar Foundation (Oct. 4, 2017), [https://chicagobarfoundation.org/news\\_item/cba-now-accepting-applications-new-limited-scope-referral-panel](https://chicagobarfoundation.org/news_item/cba-now-accepting-applications-new-limited-scope-referral-panel).

<sup>70</sup> *Id.*

<sup>71</sup> Lise Bang-Jensen, *February 14, 2017: Finding a Lawyer Made Easier For New Yorkers With New York State Bar Association’s Online Site*, New York State Bar Association, <http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=70837> (last visited June 21, 2018).

if the individual talks to the matched attorney, there is a \$35 fee for the first 30-minute consultation; and after the initial consultation, the individual can decide to retain the lawyer and additional fees would be determined by the client and lawyer.<sup>72</sup> Apparently, the online service utilizes “machine-learning algorithms to help parse and categorize consumer’s requests for legal help and then help match them to a local lawyer with the appropriate expertise.”<sup>73</sup> While the online service is available 24 hours a day, seven days a week, the State Bar will continue to operate the telephone service.<sup>74</sup>

On May 1, 2018, the State Bar of Arizona launched an online platform called “Find-a-Lawyer” (<https://azbar.legalserviceslink.com>) which matches attorneys with clients based on practice area, location, and rate categories specified by the consumer.<sup>75</sup> The executive director of the State Bar of Arizona has indicated that he hopes the program will assist people of modest or no means to find an attorney to represent them free of charge.<sup>76</sup> The program offers free subscriptions to attorneys who take only *pro bono* work from the site, but attorneys who seek paying clients must pay a \$300 per year fee.<sup>77</sup> Consumers do not pay anything to participate on the site.<sup>78</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> Robert Ambrogi, *New York State Bar and Legal.io Launch Portal to Expand Access to Justice*, LawSites (March 2, 2017), <https://www.lawsitesblog.com/2017/03/new-york-state-bar-legal-io-launch-portal-expand-access-justice.html>.

<sup>74</sup> *Id.*

<sup>75</sup> Melissa Heelan Stanzione, *Arizona Bar Plays Matchmaker; Aims for Pro Bono Uptick*, ABA/BNA Lawyers’ Manual on Professional Conduct, 34 Law Man. Prof. Conduct 249 (May 2, 2018).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* Also, the State Bar of Michigan has partnered with the online legal marketplace zeekbeek.com to develop and launch an enhanced membership directory, which allows lawyers to present a detailed profile (including practice areas), to authorize client reviews or endorsements, to advertise that the lawyer is accepting new clients, and to receive requests for consultation directly from consumers. *Expanded Member Directory Profile*, State Bar of Michigan, <https://www.michbar.org/programs/zeekbeek> (last visited June 21, 2018).

The “Find-a-Lawyer” program works as follows.<sup>79</sup> Consumers can post a summary of their legal needs or project for attorneys using criteria such as location of the project, area of law involved, and price. Or, consumers can search for an attorney and contact the attorney to seek representation. An attorney creates a member profile. Once the attorney has updated the profile, the attorney receives (via e-mail) legal projects submitted by potential clients in the attorney’s geographic location. If the attorney has a premium account, the attorney can respond to as many legal projects and connect with as many clients as the attorney would like. For those projects that the attorney is interested in, the attorney drafts and submits a message to the potential client. After reviewing the attorney’s message, if the client wants to hire the attorney, the attorney will receive a message indicating that the client would like to talk to the attorney about moving forward with the hiring and representation process, which is done entirely off-line. Alternatively, the attorney can locate legal projects outside the attorney’s listed geographic location and area of law by clicking a “Find Work” link on the program’s site; the attorney will then be directed to a page listing all legal projects posted on the site. The attorney can then review the project and contact the consumer.

## **II. Prepaid Legal Service Plans and Insurance Defense Show How to Manage a Lawyer’s Independence in For-Profit Matching Services**

None of the state opinions discussed above would permit their jurisdiction’s lawyers to share legal fees with, or pay a referral fee to, a for-profit lawyer referral service. The Ohio Supreme Court acknowledged that a lawyer referral service could establish a fee structure that is

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<sup>79</sup> *How it works: Attorneys*, Find-a-Lawyer, STATE BAR OF ARIZONA, <https://azbar.legalserviceslink.com/how-it-works/attorney> (last visited May 7, 2018); *FAQs for Attorneys*, Find-a-Lawyer, State Bar of Arizona, <https://azbar.legalserviceslink.com/faq/attorney> (last visited June 21, 2018); *Find-a-Lawyer - Lawyer Info Page*; *For Attorneys*, STATE BAR OF ARIZONA, <http://www.azbar.org/membertools/find-a-lawyer/find-a-lawyer-lawyerinfopage/> (last visited May 7, 2018); *FAQs for Clients*, Find-a-Lawyer, State Bar of Arizona, <https://azbar.legalserviceslink.com/faq/client> (last visited June 21, 2018); *Top Ten Frequently Asked Questions - For Lawyers*, State Bar of Arizona, <http://www.azbar.org/membertools/find-a-lawyer/find-a-lawyer-faqsforlawyers/> (last visited June 21, 2018).



tied to the percentage of a fee if the service is registered with the Supreme Court. Yet, Ohio's rules state that only not-for-profit lawyer referral services registered with the Court can charge a percentage of a legal fee.

In July 2015, the D.C. Bar concluded that a percentage-based fee constituted a "usual fee," under its Rule 7.2(b), and that a not-for-profit lawyer referral service (which would direct prospective low-income clients to a network of lawyers willing to work at modest rates) could require participating lawyers to remit 15% of any fees earned through the representation.<sup>80</sup>

Also, an Illinois Appellate Court in *Richards v. SSM Health Care, Inc.* concluded that the West Suburban Bar Association in Illinois, under Rule 7.2(b), could properly receive 25% of an attorney's fees from the attorney to whom the bar association referred the client.<sup>81</sup>

Conversely, the Pennsylvania Bar Association rejected the argument that a lawyer's payment to a for-profit non-lawyer owned referral service of marketing fees amounting to 20% to 30% of legal fees would not interfere with a lawyer's professional judgment, because the rationale behind allowing lawyers to pay a county bar association a percentage-based referral fee did not apply to for-profit businesses.<sup>82</sup>

The rationale behind prohibiting fee-sharing with for-profit referral services appears to be aimed at curtailing overreaching and control by the intermediary,<sup>83</sup> to limit the lack of independence, of the attorney,<sup>84</sup> and to avoid situations in which the choice of the attorney and

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<sup>80</sup> D.C. Bar, Ethics Opinion 369 (July 2015).

<sup>81</sup> 311 Ill. App. 3d 560 (1st Dist. 2000).

<sup>82</sup> Florida Rule of Professional Conduct 4-7.22.

<sup>83</sup> State Bar of Michigan, Ethics Op. RI-75 (March 8, 1991); *Emmons, Williams, Mires & Leech v. State Bar*, 86 Cal. Rptr. 367, 372 (1970).

<sup>84</sup> State Bar of Michigan, Ethics Op. RI-75; *McIntosh v. Mills*, 17 Cal. Rptr. 3d 66 (1st Dist. 2004).

the work by the attorney are guided by monetary concerns,<sup>85</sup> but not to restrict the associations between attorneys and potential clients or access to legal advice or the courts.

In a 2014 ethics opinion, the Maryland State Bar Association's Committee on Ethics, addressed its own Rule 7.2, and noted that:

Because a lawyer is required to exercise his or her judgment solely for the client's benefit, there is a concern that financial entanglements with third parties that relate to the representation both may provide an incentive to meddle in the relationship, and may impact the lawyer's judgments by raising concerns about the fee the lawyer will earn or pay and/or future referrals.<sup>86</sup>

The Ethics Committee acknowledged that “fee sharing could result in fees that are inflated in order to be high enough to provide all fee sharers with sufficient profits,” and that “[i]t is undisputed that protecting clients from overreaching, excessive fees, and undue pressure is a critical underpinning of the Rules.”<sup>87</sup> Yet, it recognized “that the profession has an obligation to ensure that all persons who require legal advice be able to access it.”<sup>88</sup> For the Ethics Committee, while “there is a low-risk” that not-for-profit lawyer referral services trigger any of the harms that the Rules seek to prevent, there is a high likelihood that fee-based lawyer referral service program charges will help “promote the important goal of insuring that those in need of legal services have access to lawyers and legal advice, a goal which is itself anticipated by the Rules.”<sup>89</sup>

The State Bar of Michigan has discussed the differences between a bar association lawyer referral service and fee-splitting between a lawyer and a layman, and has determined that

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<sup>85</sup> *Practice Management v. Schwartz*, 256 Ill. App. 3d 949, 953 (1st Dist. 1993); *Steinberg v. Ingram*, 302 Ill. App. 3d 845, 857 (1st Dist. 1998); *Trotter v. Nelson*, 648 N.E.2d 1150, 1154 (Ind. 1997); *see also* D.C. Bar, Ethics Opinion 369 (concluding that not-for-profit entities are unlikely to impair or control the independent professional judgment of the attorneys to whom referrals are made, so not-for-profit referral services can receive a percentage of fees paid to referred-to attorneys).

<sup>86</sup> Maryland State Bar Association Committee on Ethics, Ethics Docket No. 2014-08.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

“[p]rohibited fee-splitting between lawyer and layman carries with it the danger of competitive solicitations, poses the possibility of control by the lay person, interested in their own profit rather than the client’s fate, [and] facilitates the lay intermediary’s tendency to select the most generous, not the most competent, attorney.”<sup>90</sup> However, none of those “dangers or disadvantages characterizes the [local bar association’s] lawyer reference activity. The bar association seeks not individual but the fulfillment of public and professional objectives. It has a legitimate, nonprofit interest in making legal services more readily available to the public.”<sup>91</sup>

In fact, Hawaii requires that “any such percentage fee shall be used only to pay the reasonable operating expenses of the service or organization and to fund public service activities of the service or organization, including the delivery of *pro bono* legal services.” The same is true with Nebraska,<sup>92</sup> Ohio, Texas, and California.

Likewise, Arizona requires not-for-profit lawyer referral services to use the fees from the percentage-based fee structure “only to help defray the reasonable operating expenses of the service or organization and to fund public service activities, including the delivery of *pro bono* legal services.” According to the State Bar of Arizona, without restrictions, “[t]here would be no restriction on the amount of the percentage that could be paid, the purposes for which the fees could be used by the service, or the manner in which the service is to be operated.”<sup>93</sup> Consequently, “a lawyer, facing the prospect of reduced compensation, may be less willing to accept referrals or be tempted to increase the fee to be charged for the service provided,” and the referral service “would have an incentive to refer cases only to those lawyers willing to pay the

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<sup>90</sup> State Bar of Michigan, Ethics. Op. RI-75.

<sup>91</sup> *Id.* (internal quotations and citations omitted).

<sup>92</sup> See Nebraska Ethics Op. 14-01 (2014) (concluding that because Nebraska State Bar Association’s lawyer referral service will re-invest all proceeds received from the percentage-based fee structure back into the program itself or donate any surplus to public service activities, “the program is clearly a ‘not-for-profit’ referral service” for purposes of the rule, and a lawyer would be permitted to participate in the service).

<sup>93</sup> State Bar of Arizona, Ethics Op. No. 10-01 (Jan. 2010).

highest percentage.”<sup>94</sup> Accordingly, “[n]one of these actions would serve the public interest or protect the professional independence of lawyers.”<sup>95</sup>

The concern that a for-profit third party might interfere with a lawyer’s independence and professional judgment or with the attorney-client relationship is not unique to non-lawyer owned or for-profit lawyer referral services. In fact, prepaid legal service plans and insurance defense involve similar (and perhaps more prominent) concerns.<sup>96</sup> Despite the inherent risks of financial dependence and interference, lawyers are allowed to participate in for-profit prepaid legal service plans and to represent insureds as long as the lawyers follow certain guidelines.

#### **A. Prepaid Legal Service Plans**

Prepaid legal service plans typically are owned and operated by plan sponsors, which, for a monthly charge, offer plan members or subscribers certain covered legal services for no additional charge.<sup>97</sup> Participating attorneys typically provide telephone consultations, letter writing, and simple will preparation services to the plan members.<sup>98</sup> The plan may also offer other services outside of the plan at reduced fees, less than fees customarily charged by lawyers for similar services.<sup>99</sup>

“Prepaid legal service plans are seen by many to be a way to deliver legal services in noncomplex matters to an underrepresented client community.”<sup>100</sup> Accordingly, in approving of a lawyer’s participation in a for-profit prepaid legal service plan, opinions seem to balance the risks of such plans with their benefits, concluding that lawyers must follow certain guidelines.

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See Colorado Bar, Formal Opinion 81 (March 18, 1989) (stating that “[a] variety of ethical issues confront lawyers who participate in for-profit prepaid legal service plans,” including a lack of professional independence, but that “[i]t is the participating lawyer’s responsibility to insure that the plan complies with the Colorado Code of Professional Responsibility”).

<sup>97</sup> State Bar of Michigan, Ethics Op. RI -223 (Jan. 18, 1995).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> ABA, Formal Opinion 87-355 (Dec. 14, 1987).

Indeed, both the State Bar of Michigan and the Virginia Bar Association have announced that because prepaid legal service plans can offer “increased access to legal services,” the Committees would set forth guidelines to assist lawyers in assessing the propriety of their participation in for-profit legal service plans.<sup>101</sup>

As part of the guidelines, once an attorney-client relationship exists between the plan member and the participating lawyer, “that relationship must be no different from the traditional” attorney-client relationship, and that the plan must not involve “explicit outside direction or regulation of lawyers’ professional judgment in rendering legal services.”<sup>102</sup> Also, the lawyer must ensure that the plan’s advertising is not false or misleading, and a lawyer may not allow the entity to interfere with the lawyer’s independent professional judgment on behalf of the client or allow it to direct or regulate the lawyer’s professional conduct.<sup>103</sup> Further, a prepaid legal service plan “must not impose restrictions upon a lawyer’s ability to represent a member once the member becomes a client of the lawyer, or after the lawyer’s participation in the plan terminates.”<sup>104</sup>

The ABA has acknowledged that “there is certainly the potential for economic control of a lawyer who is sufficiently involved in a plan to become financially dependent upon it.”<sup>105</sup> But, that risk, alone, does not categorically prohibit an attorney from participating in the prepaid plan; rather, it is “a question of fact as to whether the lawyer’s financial dependence upon the plan’s sponsor is so extensive that it affects the lawyer’s judgment.”<sup>106</sup>

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<sup>101</sup> VBA, Advisory Ethics Opinion 87-02.

<sup>102</sup> ABA, Formal Opinion 87-355 (Dec. 14, 1987).

<sup>103</sup> State Bar of Michigan, Ethics Op. RI-223 (Jan. 18, 1995).

<sup>104</sup> *Id.*

<sup>105</sup> ABA Formal Opinion 87-355.

<sup>106</sup> *Id.*

Likewise, the State Bar of Michigan acknowledged that there may be “hidden pressures” from participating in a prepaid legal service plan, even though the arrangement may not direct or regulate a lawyer’s judgment in rendering legal services.<sup>107</sup> For instance, if a lawyer becomes financially dependent upon participation in the prepaid legal service plan, “to the extent that the participating lawyer or law firm’s practice is exclusively or predominantly dependent upon” the arrangement, a conflict of interest could arise.<sup>108</sup> “Other potential problems could occur if the plan or the plan sponsor undertakes to set limits on the amount of time a lawyer may spend with each client’s matter, or to fix the number of matters which must be handled by the lawyer, or to require the lawyer to commit to the plan that the lawyer will not represent a client beyond the scope of the agreement in the plan.”<sup>109</sup> The State Bar offered a solution to the latter problem by suggesting the plan offer different rates for enhanced or additional services.<sup>110</sup>

For the ABA and the State Bar of Michigan, a prepaid legal service plan’s fee arrangement does not constitute fee sharing. For-profit prepaid legal service plans charge members a monthly fee for certain covered costs. The plan’s sponsor may use the fees to cover administrative costs, as well as to cover profit, and to pay the participating lawyer for the services offered at no additional costs.<sup>111</sup> In other words, the plan is compensating the attorney, instead of the attorney compensating the plan, so there is no fee sharing.

To support their conclusion that a lawyer may participate in a for-profit prepaid plan without violating the fee sharing or referral fee prohibitions in Rules 5.4 and 7.2, the ABA and the State Bar of Michigan relied on the history of those rules and the rationale behind prohibiting

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<sup>107</sup> State Bar of Michigan, Ethics Op. RI-223.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> For instance, ARAGlegal.com (which labels itself a legal insurance provider) offers “Legal Protection” and covers basic services, including wills and trust, civil damages litigation defense, home improvement and contractor issues, adoptions and guardianships, landlord/tenant matters, IRS matters. Legalshield.com likewise provides plans that cover landlord/tenant, consumer finance, and traffic matters.

fee-sharing. The State Bar of Michigan noted that “[t]here is historical background which supports the conclusion that a lawyer may participate in a for-profit” prepaid legal service plan without violating the prohibition against fee-sharing.<sup>112</sup> Apparently, when Michigan adopted the Rules of Professional Conduct, “[t]he flat prohibition against the lawyer’s participating in for-profit plans previously contained in MCPR DR 2-103(D)(4)(a) was retained in MPRC 6.3(b) only as to lawyer referral services.” The State Bar noted that “a principle goal of the Model Rules of Professional Conduct was to allow ‘for experimentation in methods of delivering legal services.’”<sup>113</sup>

Additionally, according to the State Bar of Michigan, Rule 5.4 “contains the traditional limitations on nonlawyer involvement in the practice of law, including the prohibition against division of fees with nonlawyers,” and that Rule 5.4 assures that “the lawyer will abide by the client’s decisions concerning the objectives of the representation serving the interests of the client and not those of a third party.”<sup>114</sup> Both the State Bar of Michigan and the ABA concluded that two important reasons for prohibiting fee-sharing with nonlawyers are to avoid the possibility of a nonlawyer being able to interfere with the exercise of a lawyer’s independent professional judgment in representing a client, and to ensure that the total fee paid by a client is not unreasonably high.<sup>115</sup> The ABA determined that “[n]one of the evils that the prohibition against fee sharing with nonlawyers is meant to prevent is present in a typical for-profit prepaid legal service plan, provided that the participating lawyer’s independence of professional judgment and freedom of action on behalf of a client is preserved.”<sup>116</sup> The ABA and State of Michigan also determined that in light of the goal of the prepaid legal service plan “to make

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<sup>112</sup> State Bar of Michigan, Ethics Op. RI-223.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> ABA Formal Opinion 87-355; State Bar of Michigan, Ethics Op. RI-223.

<sup>116</sup> ABA Formal Opinion 87-355.

services more widely available at a lower cost to persons or entities of moderate means, the likelihood of an unreasonably high fee is low.”<sup>117</sup>

The D.C. Bar, like the State Bar of Michigan and the ABA, has expressed approval for prepaid legal services as an innovative approach that would increase the availability of necessary low-cost legal services to individuals who could not previously afford to employ an attorney.<sup>118</sup>

The D.C. Bar concluded that a law firm does not violate the D.C. Rules of Professional Conduct by participating in a prepaid legal service program under which a third party pays the law firm a fee for providing legal advice to individual subscribers. According to the D.C. Bar, because the company would pay the law firm’s fee for services under its contract with the firm, Rule 1.8(e) would require that the client (i.e., the subscriber) consent after consultation.<sup>119</sup> The agreement between the company and the subscriber, therefore, would have to explain that the law firm’s fees for services under the contract would be paid by the company; explain the nature of the relationship between the subscriber and the law firm; provide assurances that the company will not interfere with the attorney-client relationship; and require the subscriber to consent to the payment of fees by the company.<sup>120</sup> With regard to the lawyer, the lawyer’s obligations to individual subscribers include all of a lawyer’s usual duties to the client, including that the lawyer decline any representation that may conflict with the duty of loyalty or zealous representation of the client.<sup>121</sup>

What is significant about the ethics opinions discussing prepaid legal service plans is that they offer specific guidelines to assist lawyers in assessing whether they can ethically participate in such plans, because the opinions recognize that prepaid plans can offer access to legal

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<sup>117</sup> ABA Formal Opinion 87-355; State Bar of Michigan, Ethics Op. RI-223.

<sup>118</sup> D.C. Bar, Ethics Opinion 225 (Jan. 1992).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*



services. An important focus in the opinions is the independence of the lawyer. Thus, despite the inherent risks of control over the attorney, and that the plan's sponsor uses a portion of the member's fee to pay the lawyer, the opinions permit lawyers to participate in for-profit prepaid legal service plans, provided that the lawyer satisfies certain conditions, including that the lawyer is able to exercise independent professional judgment, does not permit the plan from directing or regulating the lawyer's professional judgment, does not increase the cost to the client,<sup>122</sup> and avoids conflicts of interest, and that the plan does not engage in false or misleading advertisement.

## **B. Insurance Defense**

In insurance defense, an insurance company may hire a lawyer to represent the insured, creating a "tripartite" relationship or the "eternal triangle." In many jurisdictions, including Illinois, when an insurance company hires a lawyer to represent an insured, the lawyer's client is the insured. Although the representation may be limited by the terms of the policy, the client is still the insured.<sup>123</sup> Accordingly, "[t]he attorney-client relationship between the insured and the attorney imposes the same professional obligations as if the insured personally retained the attorney."<sup>124</sup>

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<sup>122</sup> The prohibition against increasing the costs to clients and impacting a lawyer's independent professional judgment is also prevalent in situations in which law firms pay a temporary lawyer placement agency a fixed dollar amount or an hourly date as well as an additional fee based upon a percentage of the temporary lawyer's compensation. While this arraignment does not constitute a traditional sharing of fees, as the client does not make a payment to the temporary lawyer or the placement agency, the intervention of the placement agency cannot increase the actual cost to the law firm, and consequently the increase the fees charged to the client. Also, a temporary lawyer who is on a permanent roster maintained by the placement agency "may wish repeated placements by the agency" and could result in limiting the lawyer's "exercise of independent professional judgment...because of the need to maintain the goodwill of the placement agency." But, as long as the temporary lawyer avoids the excessive controls exercised by nonlawyers, the arrangement would be permissible under the rules. ABA, Formal Opinion 88-356 (Dec. 16, 1988).

<sup>123</sup> Illinois State Bar Association Ethics Op. No. 98-08 (May 1999).

<sup>124</sup> *Illinois Municipal League Risk Management Ass'n v. Seibert*, 223 Ill. App. 3d 864, 871 (1992).

A “lawyer retained by a liability insurance carrier to defend a claim against the company’s insured must represent the insured with undivided loyalty.”<sup>125</sup> Defense lawyers may have a formal or informal agreement with the insurance company, may have obligations to the company, and “may have closer ties with the insurer and a more compelling interest in protecting the insurer’s position, whether or not it coincides with what is best for the insured.”<sup>126</sup> The insured, though, “should have priority over the insurer whenever the interests of the insured and the insurer are inconsistent.”<sup>127</sup> Accordingly, “the lawyer’s duty under the Rules of Professional Conduct is to protect the interests of the insured while fulfilling the insured’s contractual obligations to the insurer in a situation where the insurer has control of the defense and a direct economic interest in the outcome.”<sup>128</sup>

If the lawyer determines that the representation violates any of the Rules of Professional Conduct, the lawyer would have to withdraw. For instance, in situations in which an insurance carrier retains a lawyer from a panel of defense counsel and pays for the legal fees, “an ethical issue arises because of counsel’s own interest in retaining the carrier’s good will.”<sup>129</sup> Consequently, when a material limitation exists, the lawyer should avoid the conflict by declining the representation.

Also, a fixed fee agreement to do all of a liability insurer’s defense work must provide reasonable and adequate compensation, and the set fee “must not be excessive or so inadequate

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<sup>125</sup> Colorado Bar, Formal Op. 91 (Jan. 16, 1993), addendum issued 2013.

<sup>126</sup> *Nandorf Inc. v. CNA Insurance Companies*, 134 Ill. App. 3d 134, 137 (1st Dist. 1985).

<sup>127</sup> ISBA Opinion No. 98-08.

<sup>128</sup> *Id.*

<sup>129</sup> NHBA Ethics Committee, *Control of Settlement by Third Party Paying the Lawyer’s Fees*, Practical Ethics Article (Dec. 8, 1993).

that it compromises the attorney's professional obligations as a competent and zealous advocate.”<sup>130</sup>

Further, “if an insurer’s proposed restrictions on the scope of the activity necessary for a defense of a claim compromises the lawyer’s professional judgment, continuing representation would be contrary to [1990] Rule 5.4(c) [lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services],” and would be grounds for mandatory withdrawal.<sup>131</sup>

According to the Indiana State Bar Association, a lawyer may enter into a contract to provide legal services that gives an insurance carrier “the right to control the defense of the insured, provided that such contract does not permit the carrier to direct or regulate the lawyer’s professional judgment in rendering such legal services and does not provide or encourage financial disincentives that likely would cause an erosion of the quality of legal services provided.”<sup>132</sup> If the negotiated financial terms between the carrier and the defense counsel “result in a material disincentive to perform those tasks which, in the lawyer’s professional judgment, are reasonable and necessary to the defense of the insured, such provisions are ethically unacceptable.”<sup>133</sup> Accordingly, a lawyer should seek acceptable modification of any proposed guidelines which the lawyer cannot ethically follow, but “[i]f such modification cannot be agreed upon, the representation must be declined.”<sup>134</sup>

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<sup>130</sup> *Control of Settlement by Third Party Paying the Lawyer’s Fees*; see also Ohio Supreme Court Board of Commissioners on Grievances and Discipline Op. 97-7 (December 5, 1997).

<sup>131</sup> *Id.*

<sup>132</sup> Indiana State Bar Association Legal Ethics Committee, Opinion No. 3 (1998).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

Similarly, as the ABA has stated, “[i]f the lawyer is to proceed with the representation of the insured at the direction of the insurer, the lawyer must make appropriate disclosure sufficient to apprise the insured of the limited nature of his representation as well as the insurer’s right to control the defense.”<sup>135</sup> Although the insurer’s right to control the defense and settle at its discretion may be set forth in the insurance policy, the lawyer cannot “assume that the insured understands or remembers, if he ever read, the insurance policy, or that the insured understands that his lawyer will be acting on his behalf, but at the direction of the insurer without further consultation with the insured.”<sup>136</sup> Thus, “[a] prudent lawyer hired by an insurer to defend an insured will communicate with the insured concerning the limits of the representation at the earliest practicable time,” such as part of a routine notice to the insured advising that the insurer has retained the lawyer.<sup>137</sup>

Moreover, even though lawyers working on a flat fee basis “may have a financial interest in disposing of any given case as quickly as possible with the minimum amount of time and effort,”<sup>138</sup> flat fee “arrangements are not *per se* prohibited.”<sup>139</sup> Rather, flat fee arrangements are prohibited when the agreement affects the attorney’s independent professional judgement<sup>140</sup> or the attorney’s competence and diligence,<sup>141</sup> or when the attorney allows the terms of the fixed fee arrangement to influence how the lawyer represents the client’s interests.<sup>142</sup> Accordingly, lawyers must be mindful to comply with “Rule 1.5 requiring that the fees be reasonable, Rule 1.8(e) requiring that costs remain ultimately the responsibility of the client...and Rules 1.7 and

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<sup>135</sup> American Bar Association, Formal Op. No. 96-403.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Colorado Bar Association, Ethics Op. 91 (Jan. 16, 1993), addendum issued 2013.

<sup>139</sup> State Bar of Georgia: Formal Advisory Opinion Board, Formal Advisory Opinion No. 11-1 (April 14, 2011); Utah State Bar, Ethics Opinion No. 02-03 (Feb. 27, 2002).

<sup>140</sup> The Florida Bar, Ethics Op. 98-2 (June 18, 1998).

<sup>141</sup> New Hampshire Bar Association Ethics Committee, Formal Ethics Opinion 1990-91/5 (Jan. 28, 1991).

<sup>142</sup> State Bar of Michigan, Ethics Op. RI-343 (January 25, 2008); Missouri Bar, Informal Ethics Op. 2002.

5.4(c) requiring that the lawyer maintain independent judgment with regard to representation of the client.”<sup>143</sup>

As with prepaid legal services, even though there might be certain inherent risks of interfering with a lawyer’s professional judgment or independence, as long as lawyers follow certain guidelines then lawyers are able to participate in those services.

### **III. Recent Proposals**

Although jurisdictions generally resist for-profit lawyer referral services and are seemingly reluctant to modify their Rules of Professional Conduct, Florida, Oregon, and North Carolina, as well as the Chicago Bar Foundation have proposed amendments to their jurisdiction’s Rules of Professional Conduct. Aside from Florida’s amendments, all the other proposals would allow lawyers to share fees with a lawyer referral service.

#### **A. Florida**

Florida has historically permitted both for-profit and not-for-profit lawyer referral services, as well as non-lawyer owned referral services.<sup>144</sup> Florida, however, does not permit for-profit lawyer referral services to share fees with lawyers; rather, fee sharing is limited to the Florida Bar Referral Service or not-for-profit referral services approved by the Florida Bar.<sup>145</sup> The Florida Bar does not directly regulate non-lawyer-owned referral services.<sup>146</sup>

In the past few years, the Florida Bar has twice proposed revisions to its lawyer referral service rules. With regard to its first proposal, the Florida Bar’s Special Committee on Lawyer Referral Services (which was created in 2011 after the Bar received several complaints pertaining to advertising by lawyer referral services in Florida) “was tasked with reviewing the

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<sup>143</sup> Colorado Bar Association, Ethics Op. 91.

<sup>144</sup> *Report of the Special Committee on Lawyer Referral Services*, The Florida Bar, at 14, 15 (July 2012).

<sup>145</sup> Rule 4-7.22

<sup>146</sup> *Report of the Special Committee*, *supra* note 144, at 16.

current practices of lawyer referral services” and “reviewing the issue of whether and to what extent the Florida bar can directly regulate lawyer referral services.”<sup>147</sup> In its July 2012 Report of the Special Committee on Lawyer Referral Services, the Committee raised several concerns about “for-profit lawyer referral services that are owned by persons or entities other than lawyers or law firms and that specialize in other occupational fields” and found that “some law firms that are affiliated with for-profit lawyer referral services steer clients towards other businesses operated by the owner of the referral service.”<sup>148</sup>

However, the Board Review Committee on Professional Ethics of the Board of Governors and the Board of Governors, proposed amendments to Florida’s Rule 4-7.22 that would “continue to allow lawyers to accept referrals from for-profit referral services that also refer clients to other businesses for services arising out of the same incident,” as long as the client signed an acknowledgment.<sup>149</sup> Accordingly, the Florida Supreme Court rejected the proposed amendments and it instructed the “Florida Bar to propose amendments to rule 4-7.22 that preclude Florida lawyers from accepting referrals from any lawyer referral service that is not owned or operated by a member of the Bar.”<sup>150</sup>

Thereafter, the Florida Bar drafted a set of new proposed amendments.<sup>151</sup> The new amendments sought to expand the entities that the Florida Bar would regulate (to address private matching companies like Avvo), by replacing its definition of lawyer referral service with a significantly broader term of “qualifying provider:” any person or entity who receives any benefit or consideration, for matching or connecting lawyers and clients, for publishing in any

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<sup>147</sup> *In re Amendments to Rule Regulating the Fla. Bar 4-7.22-Lawyer Referral Servs*, 175 So. 3d 779 (Fla. 2015) (internal quotations omitted).

<sup>148</sup> *Id.* at 780.

<sup>149</sup> *Id.* at 781.

<sup>150</sup> *Id.* at 781-782.

<sup>151</sup> Gary Blankenship, *Matching service rules go to the court*, The Florida Bar News (Aug. 15, 2016); *Lawyer Referral Service Rule Proposed Amendments (Rule Reg. Fla. Bar 4-7.22)*, The Florida Bar (April 29, 2016), <https://www.floridabar.org/ethics/etad/etad001>.

media a listing of lawyers or law firms together in one place, or for providing tips or leads for prospective clients to lawyers or law firms. The proposed amendments would have removed the requirement for carrying malpractice insurance. The proposal, however, maintained the fee-sharing exception for non-profit Florida Bar and voluntary bar lawyer referral services, and the requirement that the services adhere to Florida's advertising rules, and it would have required the referral service to provide a list of names of all participating lawyers quarterly.

The Florida Supreme Court dismissed the second proposal without prejudice, as the proposal did not comply with the Court's prior order and because the Court lacked sufficient background information on the services included in the proposal and their regulation.<sup>152</sup>

On March 8, 2018, the Florida Supreme Court approved amendments to the rules pertaining to lawyer referral services.<sup>153</sup> The amendments, effective April 30, 2018, are identical to the proposed amendments that the Court had previously denied, including replacing "lawyer referral services" with a broader definition of "qualified providers," and ending the malpractice insurance requirement.

The adopted amendments, however, do not appear to change Chapter 8 (Lawyer Referral Rule). Chapter 8 sets forth rules pertaining to bar association lawyer referral services and prohibits local bar associations from operating referral services if they do not apply to and receive approval from the Board of Governors of the Florida Bar pursuant to Chapter 8. Also, only lawyers participating in the Florida Bar Lawyer Referral Service or a referral service approved under Chapter 8 can share fees. Whereas the adopted amendments regulate (i.e.,

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<sup>152</sup> *In re Amendments to the Rules Regulating the Fla. Bar - Subchapter 4-7 (Lawyer Referral Servs.)*, Case No. SC16-1470, 2017 Fla. LEXIS 963 (Fla. May 3, 2017).

<sup>153</sup> *In re Amendments to the Rules Regulating the Florida Bar-Subchapter 4-7 (Lawyer Referral Services)*, No. SC16-4701 (Fla., March 8, 2018); Jason Tashea, *Florida Supreme Court Amends Referral Rules to Include Online Resources*, ABA JOURNAL (March 20, 2018), [http://www.abajournal.com/news/article/florida\\_supreme\\_court\\_amends\\_referral\\_rules\\_to\\_include\\_online\\_resources](http://www.abajournal.com/news/article/florida_supreme_court_amends_referral_rules_to_include_online_resources).

discipline) lawyers participating in a qualified provider, and require lawyers to engage in due diligence in determining whether the qualifying provider complies with the rules before participating,<sup>154</sup> Chapter 8 provides: (1) “The board of governors may approve or disapprove the application to operate a lawyer referral service;” (2) “The Florida Bar shall actively supervise the operation and conduct of all lawyer referral services established under this chapter...”; and (3) “Upon good cause, the board of governors may revoke the authority of any bar association to operate a lawyer referral service.”<sup>155</sup> Consequently, Florida’s rules appear to treat a for-profit lawyer referral service differently from the Florida Bar Association referral service or a local bar association lawyer referral service.

#### **B. North Carolina<sup>156</sup>**

In late July 2017, North Carolina issued a proposed Formal Ethics Opinion (allowing lawyers to participate in an online platform for finding and employing lawyers subject to certain conditions) and Proposed Amendments to Rule 5.4 (creating an exception to the fee-splitting prohibition to allow paying a portion of a legal fee to, in relevant part, an online platform for hiring a lawyer if the business relationship will not interfere with the lawyer’s independence or professional judgment on behalf of a client).

In its Proposed Formal Ethics Opinion, North Carolina concluded that lawyers may participate in Avvo Legal Services and other similar online platforms, provided that the online platform makes it “abundantly clear” that it “does not provide legal services to others and that its only role is as a marketing agent or platform for the purchase of legal services from independent lawyers.” Additionally, the online platform cannot act as a lawyer referral service, meaning that it cannot “exercise discretion to match prospective clients with participating lawyers.” Thus, as

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<sup>154</sup> *In re Amendments*, No. SC16-4701, at 19.

<sup>155</sup> Fla. Bar Reg. R. 8-2.3, 8-3.1, 8-4.1.

<sup>156</sup> North Carolina State Bar, Proposed 2017 Formal Ethics Opinion 6 (July 27, 2017).



long as Avvo would provide consumers with the names of all participating lawyers in a geographic area and would not match the consumers with the participating lawyers, lawyers would be able to participate.

Further, Avvo would not be able to interfere with the attorney-client relationship: Avvo could not “limit a participating lawyer’s freedom to advise a consumer that the legal services selected on the ALS platform is not appropriate given the consumer’s stated legal problem;” Avvo could not “limit the lawyer’s authority to recommend different or additional legal services not offered on the ALS platform;” Avvo could not “make recommendations to the lawyer relative to the legal representation of the client, including the nature and extent of the legal services that the lawyer determines are appropriate;” and Avvo could not “have a policy or practice of threatening to remove or removing a lawyer from the list of participating lawyers for the exercise of independent professional judgment.” Further, Avvo’s website would have to clearly indicate that the fee is a flat fee that is earned on receipt.

With regard to participating lawyers, they would, among other obligations, have to ensure that the fees set by Avvo are not excessive, have to ensure Avvo does not post any misleading information about them, have to decline representation if they determine the fee would be excessive, and have to comply with all ethical obligations including conflicts checks, communication with clients, confidentiality, and making sure the limitation on the scope of representation are reasonable under the circumstances.

Importantly, the proposed North Carolina opinion concluded that even though “the fact that the marketing fee is a percentage of the legal fee implicates the fee-sharing prohibition,” if Avvo does not interfere “in the professional judgment of a participating lawyer and the

percentage of marketing fees paid by the lawyer to Avvo are reasonable costs of advertising...the lawyer is not prohibited from participating in ALS on the basis of the fee-sharing prohibition.”

North Carolina also proposed to amend its Rule 5.4, by adding the following language:

(6) a lawyer or law firm may pay a portion of a legal fee to a credit card processor, group advertising provider or online platform for identifying and hiring a lawyer if the amount paid is for payment processing or for administrative or marketing services, and there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship.

Proposed new Comment 2 to Rule 5.4 would provide the factors for considering whether an advertising provider or online marketing platform for hiring a lawyer interferes with a lawyer’s independence of professional judgment, which would include considering “the percentage of the fee or the amount the platform charges the lawyer.” The comment also would state that:

The lawyer should have unfettered discretion as to whether to accept clients from the platform, the nature and extent of the legal services the lawyer provides to clients obtained through the platform, and whether to participate or continue participating in the platform. The lawyer may not permit the platform to direct or control the lawyer’s legal services and may not assist the platform to engage in the practice of law, in violation of Rule 5.5(a).

At the October 26, 2017 meeting of the Executive Committee of the council, however, the proposed amendments to Rule 5.4 were returned to the Ethics Committee for further study.<sup>157</sup> As of the date of this study, the North Carolina State Bar Ethics Committee is still studying the proposed amendments.

### **C. Oregon<sup>158</sup>**

Currently in Oregon, only bar-sponsored or non-profit lawyer referral services are allowed to engage in fee-sharing with lawyers.

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<sup>157</sup> Amendments Returned to Ethics Committee for Further Study, Proposed Rule Amendments, North Carolina State Bar, <https://www.ncbar.gov/for-lawyers/ethics/proposed-amendments-to-the-rules-of-professional-conduct> (last visited June 21, 2018).

<sup>158</sup> Oregon State Bar Futures Task Force, *Report and Recommendations*, at 30, 38-39 (June 2017), available at [https://www.osbar.org/\\_docs/resources/taskforces/futures/FuturesTF\\_Reports.pdf](https://www.osbar.org/_docs/resources/taskforces/futures/FuturesTF_Reports.pdf).

In 2017, the Oregon State Bar Board of Governors directed the Legal Futures Task Force to consider how it may “best protect the public and support lawyers’ professional development in the face of the rapid evolution of the manner in which legal services are obtained and delivered.” The Task Force recommended that the Oregon State Bar amend Oregon’s current fee-sharing rules to “allow fee-sharing between all referral services and lawyers, while requiring adequate price disclosure to clients and ensuring that Oregon clients are not charged a clearly excessive fee.” In making its recommendation, the Task Force was “mindful of the mission of the Oregon State Bar and the Regulatory Objectives proposed by the American Bar Association, which include protection of the public; delivery of affordable and accessible legal services; and the efficient, competent, and ethical delivery of such services.” The Task Force noted that alternative legal-services providers accounted for \$8.4 billion in legal spending, and that consumers “are demanding access to legal services in the same manner and with the same convenience as they purchase other services and products.”

The Task Force acknowledged that the historical justification for prohibiting fee-sharing with non-lawyers “has been a concern that allowing lawyers to split fees with nonlawyers and to pay for referrals would potentially compromise the lawyer’s professional judgment.” For instance, “if a lawyer agreed to take only a small portion of a broader fee paid to one who recommends the lawyer’s services, that modest compensation arguably could affect the quality of the legal services.” Likewise, “a percentage-fee arrangement could reduce the lawyer’s interest in pursuing more modest claims.” The Task Force, though, concluded that “the current rule is ill-suited to a changing market in which online, for-profit referral services may be the means through which many consumers are best able to find legal services.” Accordingly, the

rules should encourage “[i]nnovative referral-services models that could assist in shrinking Oregon’s access to justice gap.”

The Task Force recommended changing both Rule 5.4 and Rule 7.2 as follows:

**RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

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(5) a lawyer may pay the usual charges of a lawyer-referral service, including sharing legal fees with the service ~~pay the usual charges of a bar-sponsored or operated not-for-profit lawyer-referral service, only if:~~

(i) the lawyer communicates to the client in writing at the outset of the representation the amount of the charge and the manner of its calculation, and

(ii) the total fee for legal services rendered to the client combined with the amount of the charge would not be a clearly excessive fee pursuant to Rule 1.5 if it were solely a fee for legal services, including fees calculated as a percentage of legal fees received by the lawyer from a referral.

**RULE 7.2 ADVERTISING**

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may

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(1) pay the usual charges of a legal service plan or a lawyer-referral service in accordance with Rule 5.4;

The Task Force explained that the proposed changes to Rule 5.4 “would equal the playing field between for-profit, nonprofit, and bar-sponsored lawyer-referral services.” The proposed changes “would allow for-profit referral services to take advantage of the same fee-sharing exception currently offered to bar-sponsored and nonprofit lawyer-referral services, but would ensure consumer protection through fee-sharing disclosures and a requirement that the overall fee not be clearly excessive.” The changes to Rules 5.4 and 7.2 also would “allow lawyers to use a broader range of referral services, while increasing price transparency for consumers and continuing to ensure an overall reasonable fee.”

#### **D. Chicago Bar Foundation<sup>159</sup>**

The Chicago Bar Foundation is currently seeking to propose several amendments to the Illinois Rules of Professional Conduct, including Rule 5.4. According to the CBF, its proposal promotes the goals of protecting the public, protecting the lawyer’s professional independence of judgement, and promoting access to justice, “while providing clarity and flexibility to lawyers to help them use new approaches to better connect to potential clients and meet the growing unmet legal needs in communities throughout the state.” The CBF seeks to amend Rule 5.4 by adding two new subsections.

Proposed Rule 5.4(a)(5)), provides:

A lawyer or law firm may pay a portion of a legal fee to an entity that connects potential clients with lawyers if:

- (a) There is no interference with the lawyer’s professional independence of judgment or with the lawyer-client relationship;
- (b) The total fee charged to the client would not be an excessive fee pursuant to Rule 1.5 if it were solely a fee for legal services;
- (c) No services provided by the entity involve the practice of law;
- (d) The relationship between the entity and the lawyer or law firm is transparent to the client; and

Absent actual knowledge to the contrary, a lawyer may presume that an entity registered under Rule 5.4(a)(6) meets the requirements of Rule 5.4(a)(5).

Under the proposed amendment, a lawyer would have a “duty to use due diligence to ensure that the entity complies” with proposed Rule 5.4(a)(5) and all of its subparts, and that the entity is committed to protecting the public and is financially responsible.

Proposed Rule 5.4(a)(6) would require the ARDC to “maintain a list of entities connecting potential clients with lawyers or law firms that have agreed to comply with this Rule and have registered with the Commission,” and would require the entity to meet the following requirements:

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<sup>159</sup> The Chicago Bar Foundation, *Proposal to Amend Illinois Rules Relating to Marketing and Communications to Improve Access to Justice* (Jan. 2018).

- (a) That the entity operates in a manner that enables participating lawyers to comply with the Rules of Professional Conduct at all times;
- (b) That the entity discloses to the Commission, all participating lawyers, and the public all standards or requirements for participation, and specifically discloses whether participating lawyers are required to carry malpractice insurance, do in fact carry malpractice insurance, meet minimum experience requirements, and meet any other ongoing requirements to maintain their participation with the entity;
- (c) That the entity discloses to the public that the entity has a business relationship with the lawyer or law firm and, where applicable, that a portion of a client's fee will be paid to the entity;
- (d) That the entity has a transparent process to receive and address all complaints from customers of the entity that involve services provided by participating lawyers;
- (e) That the lawyer's participation in the service is open to all Illinois lawyers who are in good standing and meet the minimum eligibility requirements of the entity to participate;
- (f) That the entity has written procedures for the admission, suspension or removal of a lawyer from participation with the entity; and
- (g) That the entity complies with all applicable governmental consumer protection rules and meets basic standards of financial responsibility for the size and scope of its business.

The CBF's proposal does not directly regulate a lawyer's participation with the connecting entities. Rather, proposed Rule 5.4(a)(6) would establish "minimum standards that, when met, provide lawyers with a safe harbor for complying with Rule 5.4(a)(5). Accordingly, "[a]bsent actual knowledge to the contrary, a lawyer may presume that an entity registered under Rule 5.4(a)(6) meets the requirements of Rule 5.4(a)(5)." In other words, under the CBF proposal, a lawyer "may still pay an entity that connects potential clients with lawyers when that entity is not registered with the Commission, but the lawyer must use due diligence to evaluate whether participation with that entity complies with the requirements of this Rule."

#### **E. Illinois State Bar Association<sup>160</sup>**

The ISBA has proposed to amend certain Comments to Illinois Rules of Professional Conduct 1.5, 1.15, 1.18, 5.4, and 7.2 to provide clearer guidance to Illinois lawyers about participating in lead generation services. According to the ISBA, “[t]he proposal is designed to ensure a lawyer’s professional independence while providing maximum protection to clients and legal services.” The proposal involves four areas: fee sharing (Rule 5.4, Comment [1] and Rule 7.2, Comments [5] and [6]); handling client funds (Rule 1.15, Comment [3E]); fee disclosures (Rule 1.5, Comment [2]); and dealing with prospective clients (Rule 1.18, Comment [2]).

With regard to fee sharing, the ISBA proposal would expressly prohibit lead generation compensation models that are: (1) directly based upon a percentage of the legal fee charged a client, or (2) owed solely if a client uses the lawyer identified by the lead generator. Specifically, the proposal would add the following language to Rule 7.2, Comment [5]:

To comply with Rule 5.4, a lawyer may only pay a lead generator a fee that is reasonable in comparison to other types of similar advertising. A lead generation fee may not be contingent on a person’s use of a lawyer’s services or calculated as a percentage of a legal fee earned.

The proposal acknowledges “that fees for lead generation which reflect reasonable advertising costs are not prohibited.” The proposal would also not prohibit a “fee based on a subscription model or payable without regard to clients served or income received.”

#### **IV. A Framework For Regulating For-Profit Lawyer-Client Matching Services**

In concluding that percentage-fee sharing with not-for-profit referral services is a “positive force,” the Illinois appellate court in *Richards* stated that individuals “unfamiliar with the lawyer selection process can make informed decisions,” “[t]hey can receive affordable

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<sup>160</sup> E-mail from Charles J. Northrup, General Counsel of Illinois State Bar Association, to Jerome Larkin, Administrator of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (Feb. 21, 2018, 2:58 PM EST) (copy on file with the ARDC).

services they did not know existed,” and “[t]hey can obtain critical information concerning legal issues that have impact on their lives.”<sup>161</sup> Also, “referral services have a salutary effect on bar associations, resulting in furtherance of the public interest. A bar association is motivated to ensure the integrity and competency of the lawyers it refers,” and “[t]here is less likelihood the public will perceive these referrals as the sale of a client.”<sup>162</sup>

For-profit matching services could provide similar benefits to individuals seeking legal help and they could help increase access to the legal marketplace. For instance, as the Federal Trade Commission has remarked, permitting lawyers to accept referrals from for-profit services would help “consumers select an attorney qualified to provide the desired legal services.”<sup>163</sup> “For-profit referral services may be able to provide more useful information to consumers than nonprofit bar association referral services, which may be obliged to give referrals on an equal basis to all attorneys.”<sup>164</sup> Compared to not-for-profit referral services, “rather than having to make a random, uniformed choice, consumers [of for-profit services] benefit from the knowledge such services possess about the particular expertise of each member attorney.”<sup>165</sup> The profit motive of for-profit services “benefits consumers by creating an incentive to refer attorney who can most competently and efficiently handle the case, because dissatisfied customers will not continue to patronize services giving poor referrals.”<sup>166</sup> Accordingly, “the interests of for-profit

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Response to the Petition to Amend the Rules Regulating the Florida Bar, Federal Trade Commission, *In re: Petition to Amend the Rules Regulating the Florida Bar*, Case. No. 70,366, at 17 (Fla., n.d.).

<sup>164</sup> Letter from Director of Bureau of Competition, to Hon. Robert Stephens, Chief Justice of the Supreme Court of Kentucky, Comments to Proposed Kentucky Rules of Professional Conduct, 15 (June 8, 1987) (on file with the Federal Trade Commission).

<sup>165</sup> 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).

<sup>166</sup> *Id.*



referral services may coincide with those of consumers to a greater degree than is the case with nonprofit bar association referral services.”<sup>167</sup>

Bar associations have apparently recognized the advantage of flat-fee-based referral programs, and bar association and not-for-profit lawyer referral programs have long charged percentage-based fees to continue their operations. In fact, the Alabama State Bar Association in 1995 specifically concluded that a percentage fee program was “an ethically permissible way to generate funds for a lawyer referral service” for funding the operation of a bar association lawyer referral service that wanted to bring the referral service “into the computer age.”<sup>168</sup>

Prohibiting lawyers from compensating a for-profit service based upon the cases they receive or the fees they earn may not reflect the lawyer’s value and may result in some lawyers over paying, which could discourage lawyer participation.<sup>169</sup> Even the ABA recognized that implementing a “percentage program for all referred cases is inherently fair, since attorneys are only required to remit fees to the service when they have obtained a fee generating case.”<sup>170</sup>

Accordingly, prohibiting lawyers from participating in or sharing fees with for-profit services that refer clients to or match clients with participating lawyers is not a viable approach, because the prohibition would perpetuate the lack of access to the legal marketplace. The Supreme Court could elect to only regulate lawyer participating in matching services by only amending the Rules of Professional Conduct, as seen in the proposals of Oregon and the Chicago Bar Foundation. Alternatively, the Court could elect a dual approach by regulating lawyer participation as well as lawyer-client matching services. The Court could accomplish the latter

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<sup>167</sup> *Id.*

<sup>168</sup> Alabama State Bar Association, Ethics Opinion RO-95-08 (Oct. 11, 1995).

<sup>169</sup> Response to the Petition to Amend the Rules Regulating the Florida Bar, *supra* note 163, at 18.

<sup>170</sup> Alabama State Bar Association, Ethics Opinion RO-95-08, *quoting* ABA PAR report (Aug. 1, 1995).

approach by allowing lawyers to participate in and share fees with only those matching services that maintain an active registration with the ARDC.

The intent behind rules prohibiting referral fees or fee-splitting with for-profit lawyer referral services may be to avoid lawyers submitting to the pressure of the referral service, to maintain their independence, and to ensure that the total fee is not excessive. But, lawyers still have to follow the Rules of Professional Conduct, which already prohibit them from allowing a third party to direct or regulate the lawyer's professional judgment in rendering legal services and which prohibit lawyers from charging or collecting an excessive fee. Nevertheless, the Rules of Professional Conduct could be amended to provide guidelines for attorneys participating in lawyer-client matching services, whether for-profit or not-for-profit.

Still, as seen in California, Ohio, and Tennessee, instead of only regulating a lawyer's participation with a lawyer-client matching service, a regulatory agency could also directly regulate the service, by requiring the service to register with the regulatory agency, to satisfy certain registration requirements, and to satisfy certain minimum standards, and by revoking the service's registration for failing to satisfy the registration requirements or violating the minimum standards.

For instance, a regulatory agency could place an explicit limitation on the fees charged to the client: mandating that the total fee charged be reasonable, that it not exceed the amount the client could have been charged had no lawyer referral service been involved, or that the attorney not impose or increase any fee to cover the amount paid to the lawyer referral service.<sup>171</sup>

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<sup>171</sup> See The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1983-70 (stating that fee-splitting arrangements "should be structured to avoid the risk of increased costs to the clients," and concluding that an attorney cannot increase fees to cover an amount paid to a lawyer referral service).

Additional rules could require the service not to interfere with the attorney-client relationship or impose limitations on the representation, and could require the attorney to decline or withdraw from the representation if a material limitation exists or arises. Attorneys participating in a lawyer-client matching service could, as with insurance defense attorneys, be required to inform the customer of the attorney's relationship with the matching service at the outset of the representation, as well as confirm that the customer is the attorney's client, and what is the fee the client agreed to pay and the fees' basis. Applying such rules to both for- and not-for-profit services could further the public interest, help alleviate the concerns of undue influence, over-reaching, intimidation, and over-charging, help protect both the public and the legal communities, and invite more attorney-client transactions.

Potential features of the registration could include:

- Limiting registration to certain types of business entities;
- Requiring the entity to maintain insurance;
- Proving its presence in Illinois, as well as its status (e.g. providing a certificate of good standing or certificate of existence);
- Requiring the entity to submit to the jurisdiction of the Illinois Supreme Court and the regulation and supervision of the ARDC;
- Requiring the entity to appoint an agent, who is a licensed attorney and in good standing in any jurisdiction (as defined in Supreme Court Rule 763)

Potential features for the minimum standards for the entity could include:

- No in-person solicitation
- No false or misleading communication or advertising, including about a participating lawyer or the lawyer's services
- Mandating that information transmitted between a potential client and a participating lawyer, or between a client and a participating lawyer through the lawyer referral service shall be considered privileged and confidential communications on the same basis as those provided by law and the Rules of Professional Conduct for communications between attorney and client.

Potential features for refusing to register or revoking registration could include:

- Failure to supply all information required under the initial or annual registration requirements

- Failure to pay the initial or annual registration payment
- Attempt by any person, group of people, or organization associated with a previously disciplined referral service to register a new referral service
- Violation of a minimum standard

For discussion purposes, Appendix 2 contains a draft framework for how an attorney regulatory agency could directly regulate lawyer-client matching services and regulate attorney participation in such services.

Requiring lawyer-client matching services to register with a regulatory agency would “facilitate the establishment of a single, central repository of all such organizations in Michigan and of the terms and conditions under which they operate.”<sup>172</sup> By maintaining a repository of qualified matching services, the regulatory agency could prohibit lawyers from participating in any lawyer-client matching service that is not registered, thereby addressing client protection concerns. Lawyers would be able to view the published list of registered services to determine whether they can participate in the service. Likewise, the existence of a repository would make it possible for the regulatory agency “annually to prepare and make publicly available a directory of legal services and lawyer referral service organizations in the state” and for the public to have reliable information concerning the status of the state’s lawyer-client matching services. Indeed, Florida Bar Ethics Counsel Elizabeth Tarbert explained that the Florida Bar has direct control over a local bar-run referral service and can revoke such a service if it violates the Bar’s rules, thereby “eliminating the risk the service will meddle in how a case is handled.”<sup>173</sup>

To some extent, a for-profit service would need to use fees generated from its percentage-based fee structure to further its operations. Similarly, “high ranking officers, e.g. executive directors of commonly encountered ‘not-for-profit’ organizations, typically realize pecuniary

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<sup>172</sup> Michigan Rule of Professional Conduct Rule 6.3, Comment 8.

<sup>173</sup> *When is fee-splitting OK?*, The Florida Bar News (July 15, 2011), <https://www.floridabar.org/news/tfb-news/?durl=/DIVCOM%2FJN%2Fjnnews01%2FEns%2F8c9f13012b96736985256aa900624829%2Fc219aa5f955ec6c9852578c50055b089%21OpenDocument>.

gain, e.g. salary and bonuses much in the same form as gain is delivered to the officer/equity owners of private, ‘for-profit’ organizations.”<sup>174</sup> To require that all lawyer-client matching services use the surplus for public services, though, could limit the number of available matching services. So, one approach could be to require not-for-profit matching services to use the surplus fees for public services, as seen in California.

Given the advantages of requiring a lawyer-client matching service to register with a regulatory agency, directly regulating matching services along with indicating to lawyers when they can participate and pay for a referral or match (or share a legal fee with the matching service) would likely open access to the legal marketplace and protect the public more so than merely requiring such services to register and allowing lawyers to act under a safe harbor.

## **V. Challenges to Regulating For-Profit Lawyer-Client Matching Services**

The question, then, becomes whether a regulatory agency can regulate for-profit services.

### **A. Constitutional Analysis**

As the memorandum attached in Appendix 4 demonstrates, a state can most likely properly regulate referral fee payments without violating Freedom of Speech, Right of Association, or Equal Protection.

### **B. Sherman Antitrust Analysis**

With regard to antitrust concerns under the Sherman Act, a regulatory arm of a state supreme court may be able to avoid an antitrust claim under § 1 of the Act if it can show that there is no concerted action, and that the restraint does not have an adverse impact on the competition in the relevant market but, instead, has redeeming procompetitive value. Additionally, a claim under § 2 of the Sherman Act will likely fail if the regulatory arm demonstrates that it does not participate in the relevant market alleged by the plaintiff. Further,

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<sup>174</sup> Michigan Ethics Op. RI-223.

the state supreme court and the ARDC (the Court's regulatory arm) most likely will be immune to antitrust claims if the provisions at issue were enacted by the state supreme court in its legislative capacity.

### **1. Sherman Act Liability**

Section 1 of the Sherman Act prohibits “every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states.”<sup>175</sup> Section 2 of the Sherman Act provides, in relevant part, that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”

A plaintiff seeking to state a claim for a violation of either section must allege an “antitrust injury.” “The antitrust injury requirement obligates a plaintiff to demonstrate, as a threshold matter, that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice.”<sup>176</sup> Under both sections, the plaintiff must allege the relevant market in which trade was unreasonably restrained. The relevant market “is composed of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered” and “the geographic area where competition occurs.”<sup>177</sup> Additionally, “[t]he relevant product market must encompass all the sellers of the particular product at issue, as well as reasonable substitutes, regardless of who the sellers of those competing offerings currently have as their customers.”<sup>178</sup>

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<sup>175</sup> 15 U.S.C. § 1.

<sup>176</sup> *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139 (2nd Cir. 1998) (internal quotations and citation omitted).

<sup>177</sup> *Discon Inc. v. Nyex Corp.*, 86 F. Supp. 2d 154, 160 (W.D.N.Y. 2000) (internal quotations and citations omitted).

<sup>178</sup> *Discon*, 86 F. Supp. 2d at 161.

The first inquiry under § 1 of the Sherman Act is whether there is a conspiracy. That is, § 1 applies “only to concerted action,”<sup>179</sup> which “requires evidence of a relationship between at least two legally distinct persons or entities.”<sup>180</sup> Unilateral conduct, therefore, is “excluded from its purview.”<sup>181</sup> “Even where a single firm’s restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement.”<sup>182</sup> Courts, then, may only analyze liability on the basis of unilateral conduct under § 2 of the Sherman Act.<sup>183</sup>

As the Supreme Court of the United States has held, “[a] restraint imposed unilaterally by a government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law.”<sup>184</sup> Likewise, the mere fact that all third-party competitors have to comply with the same provisions of the law is not enough to establish a conspiracy among those competitors.<sup>185</sup> Also, internal agreements to implement a single, unitary firm’s policies do not rise to the level a concerted action under § 1 of the Sherman Act, and, therefore, “officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.”<sup>186</sup>

However, “in rare cases,” agreements made within a single firm can constitute concerted action “when the parties to the agreement act on interests separate from those of the firm itself,” such that “the intrafirm agreements may simply be a formalistic shell for ongoing concerted action.”<sup>187</sup> The inquiry is one of substance, and not form to determine whether an “entity is

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<sup>179</sup> *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010).

<sup>180</sup> *Okansen v. Page Memorial Hospital*, 945 F. 2d 696, 702 (4th Cir. 1991).

<sup>181</sup> *Id.*

<sup>182</sup> *Fisher v. Berkley*, 475 U.S. 260, 266 (1986).

<sup>183</sup> *Va. Vermiculite Ltd. v. Historic Green Springs, Inc.*, 307 F. 3d 277, 281 (4th Cir. 2002).

<sup>184</sup> *Fisher*, 475 U.S. at 267.

<sup>185</sup> *Id.*

<sup>186</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

<sup>187</sup> *American Needle*, 560 U.S. at 200.

capable of conspiring under § 1.”<sup>188</sup> The key inquiry, then, is “whether there is a conspiracy between ‘separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decision making.’”<sup>189</sup>

In the case of *North Carolina State Board of Dental Examiners v. FTC*, in which the State Board had attempted to prevent non-dentists from offering teeth whitening services, the Fourth Circuit upheld the Federal Trade Commission’s findings that the State Board had the capacity to conspire under § 1 of the Sherman Act.<sup>190</sup> The court stated:

[T]he FTC concluded that ‘Board members were capable of conspiring because they are actual or potential competitors.’ ... Specifically, the FTC found that ‘Board members continued to operate separate dental practices while serving on the Board,’ and that the ‘Board members had a personal financial interest in excluding non-dentist teeth whitening services’ **because many of them offered teeth-whitening services as part of their practices.** ... The FTC continued by noting its conclusion was ‘buttressed by the significant degree of control exercised by dentist members of the Board with respect to the challenged restraints.’ ....<sup>191</sup>

The Fourth Circuit noted that, aside from the consumer member on the State Board, five of the eight Board members were active dentists who were required by the Dental Practice Act “to be actively engaged in dentistry during their Board tenure.”<sup>192</sup> It determined that “the Board members’ active-service requirement can create a conflict of interest since they serve on the Board while they remain ‘separate economic actors’ with a separate financial interest in the practice of teeth whitening.”<sup>193</sup> Accordingly, any agreement between the State Board members would deprive the market of “an independent center of decision making.”<sup>194</sup>

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<sup>188</sup> *Id.* at 195.

<sup>189</sup> *Robertson v. Sea Pines Real Estate Co.*, 679 F.3d 278, 285 (4th Cir.2012), quoting *American Needle*, 560 U.S. at 195.

<sup>190</sup> *N.C. State Board of Dental Examiners v. FTC*, 717 F. 3d 359, 371 (4th Cir. 2013), *aff’d* 135 S. Ct. 1101 (2015).

<sup>191</sup> *Id.* at 371 (emphasis added).

<sup>192</sup> *Id.* at 371-372.

<sup>193</sup> *Id.* at 372.

<sup>194</sup> *Id.*



The Fourth Circuit also concluded that there was an agreement, establishing the State Board's concerted action. "[T]o be concerted action, the parties must have a conscious commitment to a common scheme designed to achieve an unlawful objective."<sup>195</sup> Independent action is not enough; rather, there must be something more, such as "a unity of purpose or a common design and understanding, or a meeting of the minds."<sup>196</sup> The Fourth Circuit upheld the FTC's findings that the Board had discussed teeth whitening services provided by non-dentists on several occasions and had voted to take action to restrict those services.<sup>197</sup> Also, Board members had engaged in a consistent practice of discouraging non-dentists who offered teeth whitening services through issuing cease-and-desist letters, with the common objective of closing the market.<sup>198</sup>

The second inquiry under § 1 of the Sherman Act focuses on unreasonable restraints of trade. A restraint is unreasonable if it falls under the category of *per se* unreasonable, or if it violates the "Rule of Reason" test.<sup>199</sup> *Per se* unreasonable restraints "include agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry or restraint is needed to establish their illegality."<sup>200</sup> For instance, group boycotts are typically held *per se* unlawful. *Id.*<sup>201</sup> Group boycotts are unlawful *per se* because they are "naked restraints of trade" with no purpose except to stifle trade.<sup>202</sup> Cases involving group boycotts "have typically involved a concerted attempt by a group of competitors at one level to protect

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<sup>195</sup> *Id.* at 372, quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768. (1984).

<sup>196</sup> *Id.* (internal quotations and citation omitted).

<sup>197</sup> *Id.* at 373.

<sup>198</sup> *Id.*

<sup>199</sup> *Wilk v. American Medical Association*, 895 F.2d 352, 358 (7th Cir. 1990).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* However, in Illinois, under 740 ILCS 10/3, an allegation of a group boycott is not considered a *per se* violation; instead, the allegation must be analyzed under the rule of reason test. *Intercontinental Parts c. Caterpillar, Inc.*, 260 Ill. App. 3d 1085, 1093-1094 (1st Dist. 1994).

<sup>202</sup> *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76-78 (9th Cir. 1969).

itself from competition from non-group members who are attempting to compete at that same level.”<sup>203</sup> As the District of Columbia Circuit explained:

Typically, the boycotting group combines to deprive would-be competitors of a trade relationship which they need in order to enter (or survive in) the level wherein the group operates. The group may accomplish its exclusionary purpose by inducing suppliers not to sell to potential competitors, by inducing customers not to buy from them, or, in some cases, by refusing to deal with would-be competitors themselves. In each instance, however, the hallmark of the "group boycott" is the effort of competitors to "barricade themselves from competition at their own level." It is this purpose to exclude competition that has characterized the Supreme Court's decisions invoking the group boycott per se rule.<sup>204</sup>

Historically, though, the Supreme Court "has been slow to condemn rules adopted by professional associations as unreasonable *per se*.”<sup>205</sup> So, courts have tended to decline to analyze professional associations under the *per se* approach.<sup>206</sup>

The Rule of Reason test "includes agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business involved, the particular restraint's history, and the reasons it was imposed.”<sup>207</sup> Under the Rule of Reason, the issue is "whether the

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<sup>203</sup> *Justice v. National Collegiate Athletic Association*, 577 F.Supp.356, 379 (D. Ariz. 1983); see also *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810, 877 ("The type of group boycott that has classically been held unlawful per se is one in which either (1) two or more firms agree not to deal with a competing firm in an industry that requires horizontal dealing..., or (2) two or more firms agree not to deal with a firm which they are in a vertical relationship in an industry that requires vertical dealing.").

<sup>204</sup> *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978).

<sup>205</sup> *Id.*, citing *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 548 (1986); see also *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 778 n. 17 (1975) ("The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.")

<sup>206</sup> See, e.g. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692-96 (1978) (declining to apply the per se rule because the restraint was adopted by a professional association, but finding the restraint unlawful under an abbreviated rule of reason); and *Wilk v. American Medical Association*, 719 F.2d 207, 221 (7th Cir. 1983) (declining to apply the per se rule to a medical association rule that effectively limited competition from chiropractors partly because of the Supreme Court's historical reluctance to apply that test to professional organizations).

<sup>207</sup> *Wilk v. American Medical Association*, 895 F.2d 352, 358 (7th Cir. 1990).

challenged conduct promotes or suppresses competition.”<sup>208</sup> So, the plaintiff must show that the “restraint has an adverse impact on the competition in the relevant market.”<sup>209</sup>

In determining “whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition,” the court must “consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.”<sup>210</sup> Factors include “[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained.”<sup>211</sup>

Section 2 of the act “prohibits anyone from monopolizing, attempting to monopolize or conspiring to monopolize any part of interstate commerce.”<sup>212</sup> To establish that a defendant has engaged in monopolization, the plaintiff must prove: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>213</sup> To show attempted monopolization, the plaintiff must prove: “(1) that the defendant engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.”<sup>214</sup> Attempted monopolization requires a finding of specific intent.<sup>215</sup> Finally, a claim of conspiracy to monopolize requires: (1) an agreement or understanding between two or more economic entities;

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<sup>208</sup> *Id.*

<sup>209</sup> *Banks v. National Collegiate Athletic Association*, 746 F.Supp. 850, 858 (Ind. N.D. 1990); *Bi-Rite Oil Co. v. Indiana Farm Bureau Coop. Association*, 908 F.2d 200, 203 (7th Cir. 1990).

<sup>210</sup> *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918).

<sup>211</sup> *Id.*

<sup>212</sup> *Pontius v. Children’s Hospital*, 552 F.Supp. 1352, 1376-1377 (W.D. Penn. 1982).

<sup>213</sup> *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

<sup>214</sup> *Duty Free Americas v. Estee Lauder Companies*, 797 F.3d 1248, 1264 (11th Cir. 2015) (internal quotations and citation omitted).

<sup>215</sup> *New York ex rel. Schneiderman v. Actavis plc*, 787 F. 3d 638, 651 (2nd Cir. 2015).

(2) a specific intent to monopolize; and (3) the commission of an overt act in furtherance of the alleged conspiracy.<sup>216</sup>

Because monopoly power is the “power to raise prices, or exclude competition either by restricting entry of new competitions or by driving existing competitors out of the market<sup>217</sup> a key inquiry under § 2, as with § 1 claims, is determining the relevant market.<sup>218</sup> If the defendant does not offer the services that the plaintiff offers, then a § 2 claim fails, because the defendant does not compete in the market for that service; the defendant does not have market power in that market.<sup>219</sup>

## **2. Parker (or State Action) Immunity**

The state action doctrine immunizes state efforts to displace competition with regulation from federal antitrust laws. State anticompetitive conduct receives immunity under the Sherman Act when a state acts in its sovereign capacity.<sup>220</sup> “State legislation and ‘decision[s] of a state supreme court, acting legislatively rather than judicially,’ will satisfy this standard, and ‘*ipso facto* are exempt from the operation of the antitrust laws’ because they are undoubted exercise of

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<sup>216</sup> *Collins v. Associated Pathologists, Ltd.*, 676 F.Supp. 1388, 1404 (C.D.Ill. 1987).

<sup>217</sup> *Duty Free*, 797 F.3d at 1264; *Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1567 (10th Cir. 1991).

<sup>218</sup> See *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 104 (4th Cir. 1987) (plaintiff arguing that relevant market was CT scanning services, but court limiting market to “official interpretation of head scans,” as plaintiff’s complaint was “based on the denial of his request to interpret his patients’ head scans officially and charge for this service”).

<sup>219</sup> *Moecker v. Honeywell Int’l, Inc.*, 144 F.Supp.2d 1291, 1309 (M.D. Fla. 2001), citing, *Aquatherm Industries, Inc. v. Florida Power & Light Company*, 145 F.3d 1258, 1261 (11th Cir. 1998) (monopolization claim dismissed where no allegation that defendant increased its market share or erected barrier of entry into market in which it did not compete); see also *White*, 820 F.2d 98 at 104 (“One who does not compete in a product market or conspire with a competitor cannot be held liable as a monopolist in that market.”); see also *Little Rock Cardiology v. Baptist Health*, 573 F.Supp.2d 1125, 1140-1141 (E.D. Ark. 2008) (“No one can monopolize a market if he does not produce the product or deliver the services constituting that market, which is to say that no one can monopolize a market in which he does not compete. No one can attempt to monopolize a market without attempting to compete in that market. No one can conspire to monopolize a market unless at least one of the coconspirators competes in that market.”); see also *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1062 (2d Cir. 1996), *vacated on other grounds*, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (“[I]t is axiomatic that a firm cannot monopolize a market in which it does not compete.”)

<sup>220</sup> See *Parker v. Brown*, 317 U.S. 341, 350-351 (1943). Immunity may apply to both § 1 and § 2 claims. *Charley’s Taxi Radio Dispatch Corp.*, 810 F. at 876, 878; *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187, 1189 (9th Cir. 1988).

state sovereign authority.”<sup>221</sup> That is, “[w]hen the conduct is that of the sovereign itself...the danger of unauthorized restraint of trade does not arise,” and there can be no cause of action under the Sherman Act.<sup>222</sup> Conversely, if the actor is not the state legislature or the state supreme court acting legislatively, then that actor is considered nonsovereign and will not automatically be exempt from Sherman Act liability.

In *Goldfarb v. Virginia State Bar*, the Supreme Court determined that “it is not enough that...anticompetitive conduct is ‘prompted’ by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.”<sup>223</sup> In that case, an antitrust action was brought against a state bar challenging minimum-fee schedules published by a county bar association and enforced by the state bar, pursuant to its mandate from the Virginia Supreme Court to regulate the practice of law in Virginia. The state bar, an administrative agency of the Virginia Supreme Court, issued reports condoning fee schedules and issued ethics opinions indicating that an attorney who habitually disregards fee schedules is presumed to be guilty of misconduct and subject to disciplinary action. In response, a voluntary county bar association adopted a minimum fee schedule and advised attorneys that regularly charging lower fees would constitute an ethical violation.

The Supreme Court concluded that although the state bar was a state agency which had enforced the schedules pursuant to the state supreme court’s authority, no Virginia statute required their activities; “state law simply [did] not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; [and] although the Supreme Court’s ethical codes mention[ed] advisory fee schedules they [did] not direct either respondent to supply them, or

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<sup>221</sup> *N.C. Board of Dental Examiners*, 135 S. Ct. at 1110, citing *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984).

<sup>222</sup> *Hoover*, 466 U.S. at 569.

<sup>223</sup> 421 U.S. 773, 791 (1975).

require the type of price floor which arose from respondent's activities."<sup>224</sup> Consequently, the fact that the state bar was "a state agency for some limited purposes [did] not create an antitrust shield that allow[ed] it to foster anticompetitive practices for the benefits of its members."<sup>225</sup>

In contrast, the case of *Bates v. State Bar of Arizona* concerned a disciplinary rule restricting advertising by Arizona lawyers that the state supreme court had imposed and enforced.<sup>226</sup> The state bar association played an enforcement role according to rules adopted by the Arizona Supreme Court, but its role was "completely defined by the court" and it acted as an agent of the court under the court's continuous supervision.<sup>227</sup> The challenged restraint was an "affirmative command" of the Arizona Supreme Court under its Supreme Court Rules and disciplinary rules.<sup>228</sup> Also, the Arizona Supreme Court was the "ultimate body wielding the State's power over the practice of law."<sup>229</sup> Accordingly, the acts of the bar association were the acts of the State itself, and were entitled to state action immunity.<sup>230</sup>

In *Hoover v. Ronwin*, an unsuccessful candidate for admission to Bar of Arizona brought suit against four members of the Arizona Supreme Court's Committee on Examinations and Admissions.<sup>231</sup> The Supreme Court noted that the Arizona Constitution vested the state supreme court with the authority to determine who should be admitted to practice in Arizona, and that pursuant to that authority, the state supreme court established a committee to examine and

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<sup>224</sup> *Id.* at 790-791.

<sup>225</sup> *Id.* at 791.

<sup>226</sup> 433 U.S. 350 (1977).

<sup>227</sup> *Id.* at 361.

<sup>228</sup> *Id.* at 359.

<sup>229</sup> *Id.* at 360.

<sup>230</sup> *Id.* at 363. See also *In Foley v. Alabama State Bar*, 648 F.2d 355 (5th Cir. Unit B June 1981) (Alabama State Bar was subject to *Parker* immunity for its actions in disciplining attorneys for violating the state's advertising rules, because, similar to *Bates*, the rules of the Alabama State Bar were effectively the rules of the state's supreme court, and because the state bar was a component of the judiciary and subject to the supervision of the state supreme court).

<sup>231</sup> *Hoover*, 466 U.S. at 560-561.

recommend applicant for bar admission.<sup>232</sup> The members were part of an official body selected and appointed by the Arizona Supreme Court, and the court gave the committee members “discretion in compiling and grading the bar examination, but retained strict supervisory powers and ultimate full authority over its actions.”<sup>233</sup> Additionally, the state supreme court rules specified the subjects to be tested, and the general qualifications required of applicants for the Bar.<sup>234</sup> Further, the committee’s authority was limited to making recommendations to the state supreme court, and the court itself made the final decision to grant or deny admission to the practice of law.<sup>235</sup> Accordingly, the Supreme Court concluded that “although the Arizona Supreme Court necessarily delegated the administration of the admissions process to the Committee, the court itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona,” and, therefore, the challenged conduct “was in reality that of the Arizona Supreme Court,” which was “exempt from Sherman Act liability under the state-action doctrine.”<sup>236</sup> State action immunity attached to the Arizona Supreme Court regardless of its motives and regardless of whether it acted wisely after full disclosure from its subordinate officers.

In *Lawline v. The American Bar Association et al.*, an unincorporated association of lawyers, paralegals and laypersons challenged ABA Rules 5.4(b) and 5.5(b) that prevented lawyers from forming partnerships with nonlawyers, and from assisting such persons in the unauthorized practice of law.<sup>237</sup> Lawline answered legal questions from the public without charge over the telephone and assisted in representing individuals in routine legal matters.

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<sup>232</sup> *Id.* at 561.

<sup>233</sup> *Id.* at 572.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 572-573.

<sup>236</sup> *Id.* at 573

<sup>237</sup> 738 F. Supp. 288 (N.D.Ill. 1990), *affirmed*, 956 F.2d 1378 (7th Cir. 1992).

Lawline also referred members of the public with limited financial resources to young lawyers who charged reduced fees and created a prototype legal delivery system as an alternative to legal aid which was subsidized by referral fees.

In relevant part, Lawline argued that the alleged violations of Rules 5.4(b) and 5.5(b) “harmed Lawline by restricting it and other similar private law referral services from advertising” and that the plaintiffs were “prevented from forming a business entity to provide low-cost legal services.”

The Northern District Court of Illinois held, and the Circuit Court of Appeals for the Seventh Circuit agreed, that the justices of the Illinois Supreme Court and the ARDC were immune from antitrust liability under the *Parker* immunity doctrine. The Seventh Circuit noted that the Illinois Supreme Court had adopted the disciplinary rules at issue, and it concluded that the Illinois Supreme Court acted in a legislative capacity. Therefore, the Illinois Supreme Court held the same position as a state legislature, so that the activities in question were exempt from Sherman Act liability. Further, because the “ARDC serves as an agent of the Illinois Supreme Court,” the members of the ARDC also enjoyed antitrust immunity.

When the challenged action is not undertaken directly by the legislature or the state supreme court, a closer analysis is required.<sup>238</sup> Likewise, if a State has delegated control over a market to a nonsovereign actor, *Parker* immunity may not apply. For purposes of *Parker* immunity, “a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself;” it “requires more than a mere façade of state involvement.”<sup>239</sup> The rationale is that “active market participants cannot be allowed to regulate their own markets free

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<sup>238</sup> *Hoover*, 466 U.S. at 568.

<sup>239</sup> *N.C. State Board of Dental Examiners*, 135 S.Ct. at 1111.



from antitrust accountability.”<sup>240</sup> The court must, therefore, examine whether the nonsovereign’s actions are the product of procedures that suffice to show the conduct in question should be deemed conduct of the State. In the case of *North Carolina State Board of Dental Examiners*, the Supreme Court articulated a two-part test for this analysis: “A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct.”<sup>241</sup> This analysis also applies to private actors seeking *Parker* immunity.<sup>242</sup>

The clear articulation prong is satisfied when the provision in question “plainly show[s] that the legislature contemplated the kind of action complained of.”<sup>243</sup> This does not require the State to specifically authorize conduct with anticompetitive effects, so long as the anticompetitive effects are a foreseeable consequence of engaging in the authorized activity.<sup>244</sup> Thus, “where the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature, then “the State must have foreseen and implicitly endorsed” the anticompetitive effects of its delegation.”<sup>245</sup>

The active supervision requirement requires that state officials have the right “to review particular anticompetitive acts of private parties and disapprove those that fail to accord with the state policy.”<sup>246</sup> This requirement stems from the recognition that when “a private party is

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 1112, citing *California Retail Liquor Dealers Association v. Aluminum, Inc.*, 445 U.S. 444 U.S. 97, 105 (1980); compared to *Mariana v. Fisher*, 338 F.3d 189, 202 (3d Cir. 2003) (stating that “it is unnecessary to undertake a *Midcal* analysis if the alleged antitrust injury was the direct result of a clear sovereign state act”).

<sup>242</sup> *Southern Motor Carriers Rate Conference v. U.S.*, 471 U.S. 48, 60-62 (1985).

<sup>243</sup> *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 44 (1985) (quotations omitted).

<sup>244</sup> *LaSalle Nat'l Bank of Chicago v. DuPage County.*, 777 F.2d 377, 381 (7th Cir. 1985); see also *N.C. State Board Of Dental Examiners v. FTC*, 135 S. Ct. at 1112 (citation omitted) (“[T]he State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.”).

<sup>245</sup> *Phoebe Putney Health Services, Inc.*, 133 S. Ct. 1003, 1012-1013 (2013).

<sup>246</sup> *N.C. State Board of Dental Examiners*, 135 S. Ct. at 1112.

engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.”<sup>247</sup> It is also intended “to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies.”<sup>248</sup> To accomplish this purpose, the state must “exercise ultimate control over the challenged anticompetitive conduct;” the “mere presence of state involvement or monitoring does not suffice.”<sup>249</sup>

In the *North Carolina State Board of Dental Examiners* case, the Supreme Court determined that because a controlling number of decision makers of the State Board were active market participants, the State Board had to satisfy the active supervision requirement in order to receive *Parker* immunity. The Court concluded that the requirement had not been met. North Carolina delegated control over the practice of dentistry to the Board by statute, and the Act did not say anything about teeth whitening.<sup>250</sup> Also, the Board acted to expel the dentists’ competitors from the market by relying upon cease-and-desist letters threatening criminal liability rather than any of the powers at its disposal that would invoke oversight by a politically accountable official.<sup>251</sup> Thus, without any active supervision by the State, “North Carolina officials may well have been unaware that the Board had decided teeth whitening constitute[d] ‘the practice of dentistry’ and sought to prohibit those who competed against dentists from participating in the teeth whitening market.”<sup>252</sup>

With regard to the Illinois Supreme Court, the ARDC, and a regulatory scheme aimed at lawyer-client matching services, the *North Carolina State Board of Dental Examiners* case most

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<sup>247</sup> *Hallie*, 471 U.S. 34, 47 (1985).

<sup>248</sup> *Patrick v. Burget*, 486 U.S. 94, 100-101 (1988).

<sup>249</sup> *Id.* at 101.

<sup>250</sup> *N.C. State Board of Dental Examiners*, 135 S. Ct. at 1116.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

likely would not apply and both the Supreme Court and the ARDC would receive *Parker* immunity.<sup>253</sup>

The Illinois Supreme Court has “the inherent and exclusive power to regulate the practice of law in [Illinois] and to sanction or discipline the unprofessional conduct of attorneys admitted to practice” before the Court<sup>254</sup>. The “power to proscribe rules governing attorney conduct, and to discipline attorneys for violating those rules, rests solely” with the Illinois Supreme Court.<sup>255</sup> Pursuant to its power, the Court has “created a comprehensive program to regulate attorneys and punish their misconduct.”<sup>256</sup> Accordingly, “[t]he functions of the Disciplinary Commission and the Board of Law Examiners fall within the inherent, exclusive, constitutional powers of the Illinois Supreme Court.”<sup>257</sup>

In *Lawline*, the courts noted that the Illinois Supreme Court had adopted ABA Model Rules 5.4(b) and 5.5(b) and had acted legislatively, and thus was immune from Sherman Act liability. Currently, Illinois Rule of Professional Conduct 7.2 differs from the ABA Model Rule. Unlike the Illinois rule, the ABA counterpart allows a lawyer to pay the usual charges of a qualified lawyer referral service, which is a lawyer referral service that has been approved by an appropriate regulatory authority. Comment 6 to the Model Rule provides, “a qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public.”

As shown in Appendix 2, the Illinois Supreme Court could amend Illinois Rule 7.2 by adopting the qualified lawyer referral service section of the ABA Model Rule in whole or in part.

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<sup>253</sup> Relatedly, under *Lawline*, 738 F. Supp. 288 at 292, if the Illinois State Bar Association and the Chicago Bar Association participate in the process that leads to the Illinois Supreme Court adopting rules regulating lawyer-client matching services, those associations would most likely also enjoy absolute immunity.

<sup>254</sup> *People ex rel. Brazen v. Finley*, 119 Ill. 2d 485, 493 (internal quotations and citations omitted).

<sup>255</sup> *Finley*, 119 Ill. 2d at 494.

<sup>256</sup> *Id.*

<sup>257</sup> *Chicago Bar Association v. Cronson*, 183 Ill. App. 3d 710, 720 (1st Dist. 1989).

For instance, Rule 7.2 could be amended to provide that a lawyer may participate in and pay the usual charges of a qualified lawyer-client matching service, which would be a lawyer-client matching service that maintains an active registration pursuant to proposed Supreme Court Rule 723.

By amending Rule 7.2, the Illinois Supreme Court would be regulating the legal profession under its inherent authority: it would state when a lawyer may participate in and pay a fee to a matching service, and thus when a lawyer may not participate in and pay a fee to a matching service. Consequently, the Court's authority to regulate the legal profession must, as a logical and natural extension of that inherent authority, include the authority to regulate those non-lawyers who would be interacting with those admitted to practice before the Court.<sup>258</sup>

That is, in order for a lawyer to know what a qualified lawyer-client matching service is, and when it would be a violation of the Rules to participate in and pay such a service, the Court must be able to promulgate rules specifying what constitutes a qualified lawyer-client matching service. Such rules could impose certain registration and reporting requirements, minimum standards to follow aimed at protecting the public, and rules for revoking a registration. Accordingly, if the Court determines to regulate lawyer referral services by amending the Rules of Professional Conduct and by promulgating rules specifying what constitutes a qualified lawyer referral service, the Court (and the ARDC) would most likely receive *Parker* immunity, because the Court would be acting legislatively and pursuant to its inherent authority.

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<sup>258</sup> In *Frye v. Tenderloin Housing Clinic, Inc.*, 129 P.3d 408 (Cal. 2006) the Supreme Court of California stated that it “has the authority to consider imposing registration requirements and other restrictions on the practice of law by nonprofit corporations pursuant to its inherent responsibility and authority over the core functions of admission and discipline of attorneys.” 129 P.3d at 424 (internal quotations and citations omitted). The Court also noted that “[i]n the exercise of their authority to practice law, courts [have] concluded the interests of clients required that corporations not be authorized to practice law themselves *or* hire attorneys for the purpose of representing third parties,” but that there are exceptions to that general rule for professional for-profit corporations (subject to various restrictions intended to safeguard client interests against the profit motive, including registration with the State Bar of California and a requirement of corporate ownership and governance solely by attorneys), nonprofit group legal services, nonprofit corporate practice, and lawyer referral services. *Frye*, 129 P.3d at 417 (emphasis original).

In November 2017, TIKD Services LLC (a company that allows people to upload their traffic tickets, pay a fixed price, and obtain a lawyer to fight the ticket) filed an antitrust action against the Florida Bar and the Ticket Clinic (a Florida law firm), alleging, in part, that the Florida Bar has been conspiring with Ticket Clinic to drive it out of business, in violation of § 1 of the Sherman Act, and has monopolized, attempted to monopolize, or conspired to monopolize the relevant market of access to legal services to defend traffic tickets in Florida, by reducing consumer choice, reducing output of legal services, and raising prices, in violation of § 2 of the Sherman Act.<sup>259</sup>

On December 1, 2017, the Florida Bar filed a motion to dismiss the action, arguing, in part that the Florida Bar is entitled to *Parker* immunity (and distinguishing itself from the *North Carolina State Board of Dental Examiners* case).<sup>260</sup> The Florida Bar also argued that the plaintiff has failed to allege any facts sufficient to state an antitrust claim, because the Florida Bar does not participate in the relevant market of access to legal services to defend traffic tickets issued in Florida, and because the Bar does not engage in the practice of law and does not provide access to legal services, and, therefore, could not monopolize or attempt to monopolize the market.<sup>261</sup>

On March 12, 2018, the Department of Justice filed of Statement of Interest in the case of *TIKD Services LLC v. The Florida Bar* arguing that in order for the Florida Bar to establish *Parker* immunity, it “must act pursuant to a clearly articulated state policy to displace competition, and its alleged conduct must be actively supervised by the state,” pursuant to the

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<sup>259</sup> Complaint, *TIKD Services LLC v. The Florida Bar, et. al.*, Case No. 1:17-cv-24103-MGC (SD Fla., Nov. 8, 2017).

<sup>260</sup> The Florida Bar’s Motion to Dismiss at 4-12, *TIKD Services LLC v. The Florida Bar, et. al.*, (SD Fla., Dec. 1, 2017) (Case No. 1:17-cv-24103-MGC).

<sup>261</sup> *Id.* at 16-19.

*N.C. State Board of Dental Examiners* case.<sup>262</sup> Under the DOJ’s view, the Florida Bar is not a sovereign actor; it is a separate entity from the Florida Supreme Court, and it is controlled by active market participants: lawyers.<sup>263</sup> Also, according to the DOJ, Plaintiff TIKD’s suit was not in effect against the Florida Supreme Court, because it had not challenged a Bar rule or a State Supreme Court decision; instead, TIKD had alleged “that the Bar improperly *enforced* its rules and abused its authority, and that its improper enforcement had anti-competitive effects.”<sup>264</sup>

On March 23, 2018, the Florida Bar filed its response, disputing the DOJ’s conclusions and its case analysis, and stating that the *TIKD Services* “case involves a complaint about the FSC’s [Florida Supreme Court’s] investigative arm (TFB) performing its legally-mandated and specifically delegated duties resulting in its petition to the FSC for determination of whether TIKD is engaged in UPL.”<sup>265</sup> The Florida Bar argued “the rules at issue in this case—which expressly authorized issuance of ethics advice and conduct of UPL proceedings—were...created and approved” by the Florida Supreme Court.<sup>266</sup> Accordingly, for the Florida Bar, TIKD’s suit is in effect against the Florida Supreme Court, because TIKD’s claims pertain to the Florida Supreme Court’s rules; the Florida Supreme Court “is clearly a sovereign, and it acts through TFB to carry out certain functions, including investigating and prosecuting UPL and providing ethics advice.”<sup>267</sup>

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<sup>262</sup> Statement of Interest on Behalf of the United States of America, U.S. Department of Justice Antitrust Division, at 4, *TIKD Services LLC v. The Florida Bar, et. al.*, Case No. 1:17-cv-24103-MGC (SD Fla., Nov. 8, 2017), available at <https://www.justice.gov/atr/case-document/file/1042666/download>.

<sup>263</sup> *Id.* at 6-7, 10-11.

<sup>264</sup> *Id.* at 9 (emphasis original).

<sup>265</sup> Bar Defendants’ Response to Department of Justice’s Statement of Interest, at 2, *TIKD Services LLC v. The Florida Bar, et. al.*, Case No. 1:17-cv-24103-MGC (SD Fla., Nov. 8, 2017), available at [https://www.bloomberglaw.com/public/desktop/document/TIKD\\_Services\\_LLC\\_v\\_The\\_Florida\\_Bar\\_et\\_al\\_Docket\\_No\\_117cv24103\\_SD/5?1523301109](https://www.bloomberglaw.com/public/desktop/document/TIKD_Services_LLC_v_The_Florida_Bar_et_al_Docket_No_117cv24103_SD/5?1523301109).

<sup>266</sup> *Id.* at 3 (internal quotations omitted).

<sup>267</sup> *Id.* at 4.

Additionally, the Florida Bar argued that even assuming that it be required to prove the clear articulation and active supervision elements of the *North Carolina State Board of Dental Examiners* case, the Florida Bar would still enjoy state action immunity, because there is a clearly articulated policy for UPL investigations set forth in Chapter 10 of the Rules Regulating the Florida Bar, the “Florida Legislature has declared the state’s public policy in prohibiting the unlawful and unlicensed practice of law,” and because the Florida Rules of Professional Responsibility set forth the Florida Supreme Court’s active supervision of the Florida Bar.<sup>268</sup> Moreover, the Florida Bar argued that the members of the Florida Supreme Court, “[a]lthough trained in the legal profession” are not active market participants.<sup>269</sup>

Of interesting note is the Florida Bar’s rejoinder of the DOJ’s apparent definition of “active market participant.” In its Statement of Interest, the DOJ asserted in a footnote that “[u]nder *Dental Examiners*, state officials need only practice in the ‘occupation’ regulated by the agency in order to be considered market participants. State officials need not be direct competitors of the plaintiff.”<sup>270</sup> The Florida Bar argued that the DOJ’s “definition would implausibly expand the principles set forth in *Dental Examiners*.”<sup>271</sup> For instance, if the definition of “active market participant” is “expanded to include anyone whose ‘occupation’ is attorney, then employment of attorneys by any sovereign agency, including for example, the legislature...could negate the sovereign agency’s state action immunity.”<sup>272</sup>

The following two cases decided after the *North Carolina State Board of Dental Examiners* case might help shed light on the definition of “active market participant,” and seem to suggest that the DOJ’s definition is too expansive.

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<sup>268</sup> *Id.* at 8-9.

<sup>269</sup> *Id.* at 10.

<sup>270</sup> Statement of Interest, *supra* note 262, at 11 n. 4.

<sup>271</sup> Bar Defendants’ Response, *supra* note 265, at 10 n. 11.

<sup>272</sup> *Id.*

In *Chicago Studio Rental Inc. v. Illinois Department of Commerce and Economic Opportunity*, No. 15 C 4099, 2017 U.S. Dist. LEXIS 50624 (N.D.Ill., April 3, 2017), Chicago Studio Rentals (which operated film and television production studio facilities and provided equipment to producers) alleged that the Illinois Department of Commerce and Economic Opportunity (IDCEO), the Illinois Film Office (IFO), and the former managing director of IFO conspired to steer film and television production work in the city of Chicago to Chicago Film Studio Holdings, LLC, in violation of §§ 1 and 2 of the Sherman Antitrust Act. The plaintiff asked the court to apply the *North Carolina State Board of Dental Examiners* two-part test to determine whether *Parker* immunity applied. The court had initially rejected application of that case, “because the cases in which courts have utilized [the *North Carolina State Board of Dental Examiners* case] dealt strictly with non-sovereign actors that were controlled by active market participants or were controlled by active market participants,” and the plaintiff in the *Chicago Studio Rental* case “had not alleged that any of the Defendants were active market participants or were controlled by active market participant[s].”<sup>273</sup> In response, the plaintiff amended its complaint, alleging that IDCEO and IFO acted as market participants.<sup>274</sup>

The court, however, determined that the plaintiff’s conclusory allegation that IDCEO and IFO were active market participants was “insufficient to trigger application of the *N.C. State* test.”<sup>275</sup> The court concluded that the defendants had “nothing in common with the entity in question in *N.C. State*.”<sup>276</sup> In that case, “[t]he Board was comprised of dentists who were actively engaged in the practice of dentistry, which the Board was created to regulate,” but “[i]n the present case there are no allegations that plausibly suggest that any Defendants are

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<sup>273</sup> *Chicago Studio Rental*, at \*8.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at \*9.

<sup>276</sup> *Id.*



participating in the Chicago Film Production Market.”<sup>277</sup> The court noted that “Defendants do not produce film or television programs, they do not employ film production staff, and they do not lease or otherwise provide production facilities or equipment.”<sup>278</sup> Accordingly, the court declined to apply the test from *North Carolina State Board of Dental Examiners* case.<sup>279</sup>

Also, in the case of *Century Aluminum of South Carolina, Inc. v. South Carolina Public Service Authority*, 278 F.Supp.3d 877 (D.S.C. 2017), Century Aluminum, which operated an aluminum smelting facility, filed suit against, claiming that Santee Cooper had leveraged a statutory monopoly to force it to purchase 25% of its electricity from Santee Cooper at supra-competitive prices, in violation of §§ 1 and 2 of the Sherman Antitrust Act, thereby forcing Century Aluminum to cut production at its facility by 50% and threatening the facility’s complete closure.<sup>280</sup> The South Carolina General Assembly established Santee Cooper in 1934 as a non-profit corporation that sells electricity directly to customers and wholesale to South Carolina’s retail electric cooperatives.<sup>281</sup> In 1974, the General Assembly established a service area for Santee Cooper which covered Century Aluminum’s facility.<sup>282</sup> Later, in 1984, the General Assembly granted Santee Cooper a monopoly in its service territory.<sup>283</sup>

In granting Santee Cooper’s motion to dismiss, the District Court of South Carolina concluded that the plaintiff failed to allege that Defendant Santee Cooper was controlled by active market participants, and that, as a matter of law, Santee Cooper was not controlled by active market participants.<sup>284</sup> According to the court, “the statutes governing Santee Cooper’s board of directors prevent board members from having private interests in the electric utility

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<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Century Aluminum*, 278 F.Supp.3d at 880.

<sup>281</sup> *Id.* at 879-880.

<sup>282</sup> *Id.* at 880.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 889.

marketplace,” “[b]oard members are political appointees chosen from across South Carolina,” “[c]andidates must be screened by the South Carolina Senate’s State Regulation of Public Utilities Review Committee before they may be appointed,” “[b]oard members’ compensation is set by senior elected state officials, not by marketplace actors, and board members have no equity interest in Santee Cooper,” and, “[p]erhaps most importantly, Santee Cooper board members are subject to a statutory best interest test that requires them to balance Santee Cooper’s proprietary interests with the public’s interest in economic development and job retention.”<sup>285</sup>

Also of note is that in September 2017, Consumers for a Responsive Legal System, an organization apparently representing Avvo and other attorney marketing and referral services, filed a petition for certification with the New Jersey Supreme Court in connection with the June 2017 joint committee New Jersey opinion, which determined that New Jersey attorneys could not participate in Avvo Legal Services because Avvo purportedly facilitates improper fee-sharing, but concluding that New Jersey attorneys could participate in Rocket Lawyer and LegalZoom provided those two services properly registered.<sup>286</sup>

In its petition, Consumers for a Responsive Legal System stated that “[i]nnovative business models such as lawyer-client matching services have the potential to narrow the enormous access to justice gap that consumers face,” and that “[t]he joint opinion would chill this innovation and others like it, leaving millions of New Jersey residents with fewer ways to find legal help.”<sup>287</sup> Also, Consumers for a Responsive Legal System argued that the New Jersey committees are not automatically immune to antitrust liability, because any action that the

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<sup>285</sup> *Id.*

<sup>286</sup> David Gialanella, *Will NJ Supreme Court Take Up Avvo Ethics Case*, New Jersey Law Journal (March 5, 2018), <https://www.law.com/njlawjournal/2018/03/05/will-nj-supreme-court-take-up-avvo-ethics-case>.

<sup>287</sup> *Id.*

committees take with regard to regulating the legal profession is being made almost entirely by market participants, as the members are selected by lawyers, i.e., the New Jersey Supreme Court appoints the members.<sup>288</sup>

The New Jersey Attorney General's Office, representing the ethics committees, filed an opposition brief on February 6, 2018, and a reply brief was due on March 19, 2018.<sup>289</sup>

On February 16, 2018, the New Jersey State Bar Association filed an amicus brief with the New Jersey Supreme Court opposing the certification petition.<sup>290</sup> In its amicus brief, the New Jersey State Bar Association argued, in relevant part, that although "access to legal services is a paramount concern...there is no need to sacrifice ethical compliance for that access."<sup>291</sup> The Association stated that the "Joint Opinion does not 'restrict new entrants and new means of delivery to the legal services industry' as Petitioner claims; rather, it serves as a reminder to attorneys seeking to participate in reduced-fee programs to ensure their participating keeps consumers' best interests as paramount."<sup>292</sup> The Association further argued that the *North Carolina State Board of Dental Examiners* case did not apply, because "the Committees do not have the necessary authority to 'regulate' attorneys. Rather they provide only advisory opinions, which are subject to review by the Supreme Court," and because "the Committees are not empowered with promulgating new rules or regulations, nor are they empowered to impose

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<sup>288</sup> *Id.*; Tom Gordon, *Comments on: Lawyer Participation in Attorney Client Matching Services-Appeal of Joint Opinion: Attorney Committee on Professional Ethics Opinion 732, Committee on Attorney Advertising Opinion 44, and Unauthorized Practice of Law Opinion 54*, at 4, Responsive Law (July 27, 2017), available at [https://www.responsivelaw.org/uploads/1/0/8/6/108638213/njsba\\_comments\\_-\\_responsive\\_law\\_format.pdf](https://www.responsivelaw.org/uploads/1/0/8/6/108638213/njsba_comments_-_responsive_law_format.pdf).

<sup>289</sup> *Will NJ Supreme Court Take Up Avvo Ethics Case*, *supra* note 286.

<sup>290</sup> Brief of Amicus Curiae New Jersey State Bar Association, In the Matter of the Advisory Committee on Professional Ethics Joint Opinion 732, the Committee on Attorney Advertising Joint Opinion 44, and the Committee on the Unauthorized Practice of Law Joint Opinion 44, No. 079852, available at [https://tcms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/Amicus%20cases/JointOpinionoftheACPEOpinion732etal\\_NJSBAbrief.pdf](https://tcms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/Amicus%20cases/JointOpinionoftheACPEOpinion732etal_NJSBAbrief.pdf).

<sup>291</sup> *Id.* at 11

<sup>292</sup> *Id.*

discipline based on their opinions interpreting the policy set by the Supreme Court.”<sup>293</sup> The Association, therefore, argued that the action of the Committees was more akin to the *Bates* Supreme Court case, in which attorneys were charged with violating disciplinary rules pertaining to advertising, rules that the Arizona Supreme Court had established. According to the Association, like in the *Bates* case, “[w]hile the Committees have issued an advisory opinion applying the rules the Supreme Court established, any enforcement of that opinion will ultimately fall to the Court itself.”<sup>294</sup> Accordingly, “the New Jersey Supreme Court adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. Committee members act as the Court’s agent and remain under its continuous supervision.”<sup>295</sup>

On June 1, 2018, the New Jersey Supreme Court entered an order, without opinion, denying the petition of Consumers for a Responsive Legal System.<sup>296</sup>

### **CONCLUSION**

Promulgating rules that directly regulate lawyer-client matching services and lawyer participation in such services would likely improve access to the legal marketplace, address the uneven distribution of lawyers in Illinois, and would protect the public from unscrupulous lawyer referral and matching programs that currently exist outside the regulatory arm of the Illinois Supreme Court and the ARDC. If the Illinois Supreme Court adopts rules regulating lawyer-client matching services, the Court and the ARDC would likely be immune from Sherman Act claims, and such regulation would most likely not offend freedom of speech, the right of association, or due process.

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<sup>293</sup> *Id.* at 12-13.

<sup>294</sup> *Id.* at 14.

<sup>295</sup> *Id.* at 14-15.

<sup>296</sup> Order Denying Petition for Review, In the Matter of the Advisory Committee on Professional Ethics Joint Opinion 732, the Committee on Attorney Advertising Joint Opinion 44, and the Committee on the Unauthorized Practice of Law Joint Opinion 54 (June 1, 2018).

**Appendix 1 - Table of States Directly Regulating Lawyer Referral Services**

	<b>Florida</b>	<b>Tennessee</b>	<b>Texas</b>	<b>Ohio</b>	<b>Georgia</b>	<b>California</b>	<b>Michigan</b>	<b>Missouri</b>
Registration	Not-for-profits		Government or non-profit entity	Intermediary organization: LRS, prepaid legal insurance provider, or similar organization that refers lawyers for fee-generating legal services to customers, members, or beneficiaries	Bar association or bar-sponsored	Individual, partnership, cooperation, association, or other entity which refers potential clients to attorneys		Service that refers lawyers to prospective clients
Public benefit requirement	Yes		Yes	Yes	Yes		Yes	Yes
List of attorney-members	Yes		Yes		Yes			
List of those responsible for or authorized to act on behalf of LRS	Yes	Yes						
Disclose Rates/charges		Yes			Yes			

	<b>Florida</b>	<b>Tennessee</b>	<b>Texas</b>	<b>Ohio</b>	<b>Georgia</b>	<b>California</b>	<b>Michigan</b>	<b>Missouri</b>
Limitations on client fees			Cannot be more than if no LRS involved	Cannot be more than if no LRS involved	Cannot be more than if no LRS involved	Cannot be excessive or act to decrease quality or quantity of services	Cannot be more than if no LRS involved	
Restrict use of fees			Only to pay reasonable operating expenses of LRS, or fund public service programs	Only to pay reasonable operating expenses of LRS, or fund public service programs		If not for profit: only to pay reasonable operating expenses of LRS, or fund public service programs		
Malpractice insurance	\$100,000 LRS or attorney-member (per occurrence)		Permissive	\$100,000 attorney-member (per occurrence) or \$300,000 (aggregate)	\$100,000 attorney-member (per occurrence) or \$300,000 (aggregate)	\$100,000 attorney-member (per occurrence) or \$300,000 (aggregate)	\$100,000 attorney-member (per occurrence) or \$300,000 (aggregate)	Yes
Advertising rules	Yes	Yes	Yes			Yes		
Grievance or discipline procedures	Yes	Yes	Yes	Yes	Yes			Yes
Fee sharing	Only for not-for-profit	Only registered		Only registered			State Bar of	

	<b>Florida</b>	<b>Tennessee</b>	<b>Texas</b>	<b>Ohio</b>	<b>Georgia</b>	<b>California</b>	<b>Michigan</b>	<b>Missouri</b>
	approved by Florida Bar	not-for-profit		nonprofit			Michigan LRS requires attorneys to remit 10% of any fee \$250 or greater	
Revoke, suspend, enjoin registration	Upon good cause	If not in compliance with LRS rules	Yes	Yes		Failure to comply with rules or other good cause	Violation of LRS rules	Material violation of LRS rules
Limit on ownership or to whom referral can be made		Yes		Yes		Yes	Yes	Yes
Cannot influence or infringe client relationship		Yes						
Cannot materially impair representation		Yes						
Cannot request/require member to violate Rules		Yes						
No UPL		Yes						
No false/misleading marketing		Yes		Yes				

## **Appendix 2 - Draft Framework for Discussion**

### Summary

The draft framework, provided for discussion purposes, is a mock-up for how both participating lawyers and referral services could be regulated. Under the draft framework, lawyers would participate and pay the usual charges of a qualified lawyer referral service only when that service has met certain requirements. Also, only qualified lawyer referral services would be able to operate as such and permit lawyers to participate in the service. As seen below, the framework would impose certain initial and annual registration requirements, as well as reporting requirements. It would also mandate minimum standards that qualified lawyer referral services must follow. Finally, the framework includes rules for revoking a registration and the effect of the revocation.

### **RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

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(5) a lawyer may pay to a qualified lawyer-client matching service a portion of a legal fee earned from a matched or referred matter, as permitted by Rule 6.3.

### **RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATION AND QUALIFIED LAWYER-CLIENT MATCHING SERVICE**

(a) A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

~~(a)~~(1) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b)(2) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

(b) A lawyer may participate in and pay the usual charges of a qualified lawyer-client matching service, which may include, in addition to any membership or registration fee, a portion of a legal fee earned by the lawyer to whom the service has referred or matched a matter, if the service

(1) maintains current registration with the Attorney Registration and Disciplinary Commission pursuant to Supreme Court Rule 723; and

(2) does not request or require the lawyer to act in violation of the Illinois Rules of Professional Conduct or engage in conduct that would violate those rules if engaged in by a lawyer.

(c) A qualified lawyer-client matching service is a lawyer-client matching service that is registered under Supreme Court Rule 723.



(d) A lawyer participating in a qualified lawyer-client matching service shall not accept a referral or match from the service:

(1) If doing so would

(i) violate the Rules of Professional Conduct; or

(ii) permit the lawyer-client matching service to limit the objectives of the representation to be provided by the participating lawyer or limit the means to be used to accomplish those objectives, if such a limitation would materially impair the lawyer's ability to provide the client with the quality of representation that would be provided to a client who had not been referred or matched to the lawyer by the lawyer-client matching service; or

(2) If the combined fees the lawyer and lawyer-client matching service charge the client exceed the total cost the client would have been required to pay had no lawyer-client matching service been involved.

## **RULE 7.2: ADVERTISING**

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan ~~or~~;

(3) as permitted by Rule 6.3, pay the usual charges of a ~~not for profit lawyer referral service~~ qualified lawyer-client matching service, which may include a portion of a legal fee earned by the lawyer to whom the service has referred or matched a matter;

~~(3)~~(4) pay for a law practice in accordance with Rule 1.17; and

~~(4)~~(5) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

## **Rule 723. Qualified Lawyer-Client Matching Services**

Except as provided below, only a qualified lawyer-client matching service may operate as a lawyer-client matching service. No attorney shall participate in a lawyer-client matching service unless that service is registered and qualified as hereinafter set forth.

### **I. Applicability**

(a) "Lawyer-client matching service" means 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.

**(b)** The definition in paragraph (a) does not apply to

(1) a plan of prepaid legal services insurance authorized to operate in the state, or a group or prepaid legal plan, whether operated by a union, trust, mutual benefit or aid association, corporation or other entity or person, which provides unlimited or a specified amount of telephone advice or personal communications at no charge to the members or beneficiaries, other than a periodic membership or beneficiary fee, and furnishes to or pays for legal services for its members or beneficiaries;

(2) individual lawyer-to-lawyer referrals;

(3) lawyers jointly advertising their services in a manner that discloses such advertising is solely to solicit clients for themselves;

(4) a *pro bono* referral program, in which the participating lawyers do not pay a fee or charge of any kind to receive referrals or to belong to a referral panel, and are undertaking the referred matters without expectation of remuneration;

(5) a local or voluntary bar association solely for listing its members on its website or in its publication; or

(6) any *pro bono* legal assistance program that does not accept any fee from clients for referrals.

## **II. Registration**

**(a) Initial Registration.** The lawyer-client matching service shall register and pay a fee of \_\_\_\_\_ to the Administrator of the Attorney Registration and Disciplinary Commission at least 15 days prior to commencing operation.

(1) The registration application shall include:

(i) State or government issued documents demonstrating the service's presence in Illinois, as well as its status;

(ii) The names, addresses, email addresses, and telephone numbers of any individuals responsible for the affairs of the lawyer-client matching service;

(iii) The names, addresses, and attorney numbers of all lawyers participating in the lawyer-client matching service;

(iv) A schedule of rates and charges for referrals or matches;

(v) A disclosure of membership or participation fees paid by participating lawyers; and

(vi) A signed statement by an individual listed in subparagraph (ii) above, who is an attorney licensed to practice law in Illinois or any other jurisdiction (as defined Supreme Court Rule 763) and in good standing, designating that individual as the agent of the lawyer-client matching service upon whom process may be served in any action or proceeding thereafter brought against the lawyer-client matching service, and acknowledging that the lawyer-client matching service and the agent are subject to Illinois Supreme Court's jurisdiction for regulatory and disciplinary purposes.

(2) The Administrator may deny a registration application that fails to comply with the requirements provided in paragraph (a)(1).

(b) **The Index.** The Administrator shall maintain an index of qualified lawyer-client matching services registered pursuant to this rule.

(c) **Annual Registration.**

(1) Every qualified lawyer-client matching service shall pay a fee of \_\_\_\_ to the Administrator annually on or before January 31 of each year.

(2) Annual registration requires that the qualified lawyer-client matching service provide all information specified under paragraph (a)(1) of this rule. A qualified lawyer-client matching service's registration shall not be complete until all such information has been submitted.

(3) On or before the first day of December of each year, the Administrator shall send to each lawyer-client matching service listed on the index a notice of the annual registration requirement. The notice may be sent to the designated agent's listed address or e-mail address. Failure to receive the notice shall not constitute an excuse for failure to register.

(4) Each qualified lawyer-client matching service must submit registration information and registration payment by means specified by the Administrator.

(d) **Refusal to Register.** The Administrator may refuse to register a lawyer-client matching service under this Rule if the individual or individuals associated with such lawyer-client matching service were associated with a lawyer-client matching service whose registration was revoked, pursuant to this Rule.

(e) **Reporting Requirements.** The qualified lawyer-client matching service shall

(1) Maintain and provide to the Administrator, upon request, current records for each participating lawyer, including:

(i) the participating lawyer's name and contact information;

(ii) the number and type of referrals made to the participating lawyer; and

(iii) any financial transactions with the participating lawyer.

(2) Advise the Administrator of new or additional information related to paragraph (a), and shall submit these disclosures in writing to the Administrator within 30 days of when the information becomes known to the lawyer-client matching service.

(f) All documents filed in compliance with this rule shall be deemed public documents and shall be available for public inspection during normal business hours.

### **III. Minimum Standards for Qualified Lawyer-Client Matching Services**

(a) The customer, member, or beneficiary of the qualified lawyer-client matching service, and not the lawyer-client matching service, shall be the client of the participating lawyer.

(b) The qualified lawyer-client matching service must:

(1) be open to all lawyers licensed to practice law in Illinois and in good standing;

(2) include the participation of not less than four (4) lawyers who are not associated in the same firm; and

(3) take reasonable steps to verify that all of its participating lawyers are licensed to practice law in Illinois and in good standing and to discontinue association with those participating lawyers that are not authorized to practice law;

(c) The qualified lawyer-client matching service must not:

(1) interfere with or attempt to interfere with the independent professional judgment of its participating lawyers regarding clients' legal matters;

(2) request or require that a participating lawyer to violate the Illinois Rules of Professional Conduct;

(3) be owned or controlled by any participating lawyer, a law firm with which a participating lawyer is associated, or a lawyer with whom a participating lawyer is associated in a firm;

(4) make a fee-generating referral to any lawyer who has an ownership interest in or who operates or is employed by the lawyer-client matching service or who is associated with a law firm that has an ownership interest in or operates or is employed by the lawyer-client matching service;

(5) engage in any conduct that would violate the Rules of Professional Conduct if engaged in by a lawyer, including, but limited to,

(i) by making any false or misleading statement about it, its services, its participating lawyers, or the services provided by participating lawyers; and

(ii) by soliciting employment for its participating lawyers by in-person, live telephone, or real-time electronic contact with a person who has not initiated the contact if a significant motive for the solicitation is the pecuniary gain of the lawyer-client matching service or its participating lawyers; or

(6) provide legal advice or services directly to prospective clients or otherwise engage in the unauthorized practice of law.

#### **IV. Removal, Revocation of Registration, and Unlicensed Operation of Lawyer-Client Matching Service**

(a) On or after March 1 of each year the Administrator shall remove from the index of qualified lawyer-client matching services the name of any lawyer-client matching service that has not registered for that year. A lawyer-client matching service will be deemed not registered for the year if it has not paid all required fees or has not provided the information required by Section I, paragraph (a) of this rule.

(f) A lawyer-client matching that has been removed from the index solely for failure to register and pay the registration fee may be reinstated to the index as a matter of course upon registering and paying the registration fee prescribed for the period of its suspension from the index, plus the sum of \$\_\_\_ per month for each month that such registration fee is delinquent.

(g) Lawyer-client matching services shall be subject to the disciplinary and unauthorized practice of law authority of the Supreme Court and subject to the administrative supervision of the Attorney Registration and Disciplinary Commission. The Administrator may initiate proceedings against a lawyer-client matching service for the revocation of the service's registration in the same manner as disciplinary proceedings may be instituted against an attorney under Rules 751 through 755, and the registration of such referral service may be revoked in the same manner as attorneys may be disciplined under such Rules.

(h) It shall be the duty of the lawyer-client matching service, its agent, or any other individual acting in the agent's stead, to respond expeditiously to requests for information from the Administrator. Failure to respond to the Administrator's requests may be grounds for revoking the service's registration.

(i) Conduct of a lawyer-client matching service which violates the minimum standards provided in Section III of this Rule shall be grounds for revoking the registration of the service.

(j) A lawyer-client matching service that is not listed on the index or whose registration is suspended or revoked:

(1) Shall not be a qualified lawyer-client matching service and shall not advertise or hold itself out as such;

- (2) Shall immediately cease any activity subject to these rules; and
- (3) Shall immediately notify all participating lawyers of the following:
  - (i) any action taken by the Administrator or the Supreme Court; and
  - (ii) that the service is not qualified and is not permitted to operate as a lawyer-client matching until it has been listed or reinstated on the index or until its registration is no longer revoked.

### **Appendix 3 - Preliminary Assessment of Constitutional Challenges**

#### **Summary**

A matching service most likely does not have any constitutional right to employ its matching services program without state intervention or regulation.

Specifically, the state can properly regulate or prevent referral fee payments without offending the First Amendment, because such payments are conduct, not speech.

Additionally, regulating or prohibiting referral payments to for-profit lawyer referral services does not violate the right of association, because as a for-profit company, it is engaged in selling access to legal services and lawyers for its and the lawyer's own commercial rewards. Research has revealed no case extending First Amendment protection to fee-sharing arrangements. Even though one could argue that these services might provide additional access to legal services or legal advice at a reduced price, it may not be able to establish a right of association because legal representation is not otherwise virtually unavailable or second-rate and unreasonably expensive, and because the service is not necessary for potential clients in order to realize or assert their rights. Attorneys can market and offer reduced-rate limited-scope services outside of such a referral service, and potential clients and attorneys can participate in lawyer referral services offered by not-for-profits or bar associations.

Furthermore, regulating or prohibiting referral fee payments to for-profit referral services does not raise an equal protection issue, because such regulation is rationally related to the legitimate state interests of promoting the independence of lawyers, by preventing non-lawyers from controlling how lawyers practice and of attempting to minimize the number of situations in which the referral service and participating lawyers will be motivated by economic incentives rather than by the client's best interests.

## **Discussion**

### **Freedom of Speech**

The First Amendment provides that “Congress shall make no law...abridging the freedom of speech,” (U.S. Const. amend. I), and it applies to the States through Section 1 of the Fourteenth Amendment. *Grossbaum v. Indianapolis-Marion County Building Authority*, 100 F.3d 1287, 1293 (7th Cir. 1996).

In most cases, the state “may regulate conduct without regard to the First Amendment because most conduct carries no expressive meaning of First Amendment significance.” *Schultz v. City of Cumberland*, 228 F.3d 831, 841 (7th Cir. 2000); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (“Restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct.”) For instance, in *People v. Guiamelon*, 140 Cal. Rptr. 3d 584 (Cal. App. 2012), a physician challenged her conviction under § 650 of the California Business & Professional Code for paying illegal fees to persons who referred patients qualified for federal and state programs to her practice. *Guiamelon*, 140 Cal. Rptr. 3d at 588-589. The physician argued, in relevant part, that § 650 violated her First Amendment right of freedom of speech. *Guiamelon*, 140 Cal. Rptr. 3d at 589. The court rejected the physician’s argument, concluding that § 650 imposed restrictions on economic activity, or nonexpressive conduct: it penalized “only the conduct of paying consideration for referring patients.” Thus, because the section only regulated the conduct of paying for patient referrals, it did not fall under any First Amendment protection. *Guiamelon*, 140 Cal. Rptr. 3d at 608-609.

Also, in *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), three defendants were charged with



violating a Pennsylvania Insurance Fraud provision that (similar to Illinois Rule of Professional Conduct 7.2(b)) prohibited lawyers from compensating or giving anything of value to a non-lawyer to recommend or secure employment by a client as a reward for having made a recommendation resulting in employment by a client, except that lawyers could pay the reasonable costs of advertising or written communication as permitted by the Rules of Professional Conduct, or the lawyers could pay the usual charges of a not-for-profit lawyer referral service or other legal service organization. *Stern*, at \*1-2.

The defendants in *Stern* argued, in relevant part, that the section violated the First and Fourteenth Amendments of the United States Constitution, because it abridged their freedom of speech. *Stern*, at \*3. The court acknowledged that, although the section placed “a restriction on conduct of attorneys in seeking employment by a client,” it did not abridge the right to free speech. *Stern*, at \*4. The court further determined that the section prohibited a lawyer from compensating a non-lawyer third party in an effort to secure employment by a client, but it did “not prohibit the act of soliciting a client for employment purposes.” *Stern*, at \*5. So, as long as an attorney acted in compliance with the Rules of Professional Conduct, there was no prohibition that prevented a lawyer from soliciting clients through third parties; only that a lawyer could not compensate or give anything of value to non-lawyer third parties. *Stern*, at \*5.

Like in *Guiamelon* and *Stern*, current Illinois Rules of Professional Conduct 5.4(a) (lawyer shall not share legal fees with nonlawyer) and 7.2(b) (lawyer shall not give anything of value to person recommending lawyer’s services) regulate the conduct of paying a referral fee to nonlawyers; the rules do not regulate speech. See New Jersey Advisory Committee of Professional Ethics, Joint Opinion 732, at 6 (June 2017) (stating that the focus of the joint opinion’s focus was not on restricting Avvo’s marketing but “on the for-profit lawyer referral

model program and sharing of a legal fee with a nonlawyer, and that “[t]he First Amendment does not protect lawyers who seek to participate in prohibited attorney referral programs or engage in impermissible fee sharing”). Because Rules 5.4(a) and 7.2(b) restrict an economic activity or commercial practice, they fall outside the purview of the First Amendment, even if they impose an incidental burden on speech. *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third, & Fourth Dep'ts, App. Div. of the Sup. Ct. of the State of N.Y.*, 118 F.Supp.3d 554, 569 (S.D.N.Y. 2015); *see also Sorrell*, 564 U.S. at 567 (“[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.”); *see also Keep Chicago Livable v. City of Chicago*, No. 16 C 10371, 2017 U.S. Dist. LEXIS 35231, at \* 17 (N.D.Ill., March 13, 2017) (concluding that because the Shared Housing Ordinance “does not target speech but rather the business practices associated with home sharing, only incidentally burdening speech if at all, the [ordinance] falls outside the purview of the First Amendment”); *see also International Franchise Association v. City of Seattle*, 803 F. 3d 389, 408-409 (9th Cir. 2015) (stating that Seattle’s minimum wage ordinance is an economic regulation, and “[a]lthough the franchisees are identified in part as companies associated with a trademark or brand, the ordinance applies to businesses that have adopted a particular business model, not to any message the business expresses”).

### **Regulating Commercial Speech**

The First Amendment protects commercial speech from unwarranted governmental regulation. *Second Amendment Arms v. City of Chicago*, 135 F.Supp.3d 742, 755 (N.D.Ill. 2015). “[C]ommercial speech is speech that proposes a commercial transaction.” *Vrdolyak v. Avvo, Inc.*, 206 F.Supp.3d 1384, 1387 (N.D.Ill. 2016) (internal quotations and citation omitted). Displaying a product for sale is a type of commercial speech. *Second Amendment Arms*, 135

F.Supp.3d at 755. Likewise, “the communication of the message, ‘I will sell you the X prescription drug at the Y price,’ is commercial speech.” *Texans Against Censorship v. State Bar*, 888 F.Supp. 1328, 1342 (E.D. Tx. 1995).

Although speech that does no more than propose a commercial transaction falls within the core notion of commercial speech, other communications may also constitute commercial speech, even though the communication contains discussions of important public issue. *Vrdolyak*, 206 F.Supp.3d at 1387. Thus, for situations in which speech contains both commercial and non-commercial elements, the Court of Appeals for the Seventh Circuit utilizes a three-factor test (called the *Bolger* factors) to determine if the speech is commercial or non-commercial: (1) is the speech an advertisement; (2) does the speech refer to a specific product; and (3) does the speaker have an economic motivation for the speech. *Vrdolyak*, 206 F.Supp.3d at 1387, citing *U.S. v. Benson*, 561 F.3d 718, 725 (7th Cir. 2009).

In the case of *Vrdolyak v. Avvo, Inc.*, the plaintiff, an Illinois attorney, complained that Avvo used his identity for commercial purposes without his consent when Avvo displayed the profiles of competing attorneys (who had purchased advertising space from Avvo) on the plaintiff’s own profile page, in violation of the Illinois Right of Publicity Act (765 ILCS 1075/1 et seq.). *Vrdolyak*, 206 F.Supp.3d at 1386. Avvo argued that its conduct was speech that was fully protected by the First Amendment, contending that its listings were “simply a computerized version of the paper ‘yellow pages’ listings that received fully constitutional protection.” *Vrdolyak*, 206 F.Supp.3d at 1386-1387. The court agreed with Avvo, finding that it published non-commercial information, and sold and placed advertisements within that information. *Vrdolyak*, 206 F.Supp.3d at 1388. The court concluded that to hold that Avvo’s conduct was not akin to the yellow pages “would lead to the unintended result that any entity that publishes

truthful newsworthy information about individuals such as teachers, directors and other professionals, such as a newspaper or yellow page directory, would risk civil liability simply because it generated revenue from advertisements placed by others in the same field.” *Vrdolyak*, 206 F.Supp.3d at 1388.

Using Avvo Legal Services as an example, the lawyer listings may qualify as commercial speech. Avvo Legal Services requires a potential client to select a legal service and to select a lawyer.

The screenshot displays the Avvo Legal Services website interface. The main heading is "Divorce and separation" with a subtext "File for divorce or get separation advice with help from a local, experienced lawyer for". Below this, there are several service cards and lawyer profiles.

**Services:**

- 15-minute Divorce & Separation advice session:** \$39, 395 reviews. Description: "15-minute phone call. Ask questions and get advice from a local, experienced lawyer about your divorce or separation." 380 lawyers available today.
- Document review: Separation agreement:** \$199, 11 reviews. Description: "Review + 30-minute phone call. Select a local, experienced lawyer to review your separation agreement." 844 lawyers available today.
- File for unc:** \$995, 11 reviews. Description: "30-minute intro. Work with a local guide you through your separation agreement." 909 lawyers available today.
- Document review: Summary or simplified divorce:** \$395, 12 reviews. Description: "Review + 30-minute phone call. Have your simplified or summary dissolution divorce forms and documents reviewed by a local, experienced family law attorney." 238 lawyers available today.
- Summary or simplified divorce:** \$895, 12 reviews. Description: "30-minute intro call + start-to-finish help. Have a local, experienced family law attorney guide you through your simplified or summary dissolution divorce." 60 lawyers available today.
- Document (with child):** \$595, 12 reviews. Description: "Review + 30-min. Select a local, experienced lawyer to review your separation agreement." 270 lawyers available today.

**Lawyer Profiles:**


- Angela E. Peters:** Avvo Rating 10.0, 12 reviews. Chicago Kent College of Law, Arlington Heights, IL. Last active about 2 hours ago. Practice areas: Divorce and separation, Mediation, Animal law. About me: "There is life after divorce or other conflict. We help clients prepare for that future." Reviews: "I have had the great fortune and pleasure to have legal support and advice from Angela Peters for over 30 years in matters of family law as well as real estate. Angela is indefatigable and unwavering in her commitment to examine..."
- Elizabeth M. Feely:** Avvo Rating 10.0, 12 reviews. University of Illinois, Chicago, IL. Last active about 2 hours ago. Practice areas: Divorce and separation, Child custody, Family. About me: "Chicago & Suburban Offices. Superior Divorce Advocacy for Nearly 30 Years. Skillful & Compassionate." Reviews: "Words can not explained the jubilation and relief I felt after getting a favorable outcome dealing with an unwarranted child support suit. 6 months ago my world was turned upside down as I was served with a summons for child support..."

When the potential client selects the service and selects the lawyer, the cost of the service (and the lawyer) is clearly displayed.

### Document review: Separation agreement

**Your lawyer** edit

Availability: Within 1 business day



**Angela Peters**  
★★★★★ 3 reviews  
📍 Arlington Heights, IL  
📅 Licensed for 32 years  
**Practice areas:** Divorce and separation, Mediation

**Who will receive this service?**

\* **Name**

\* **Phone number**

What time is best?

**Order summary**

Document review: Separation agreement	<b>\$199</b>
<a href="#">Promo code</a> ▼	
<b>Total (tax included)</b>	<b>\$199</b>

100% satisfaction guaranteed

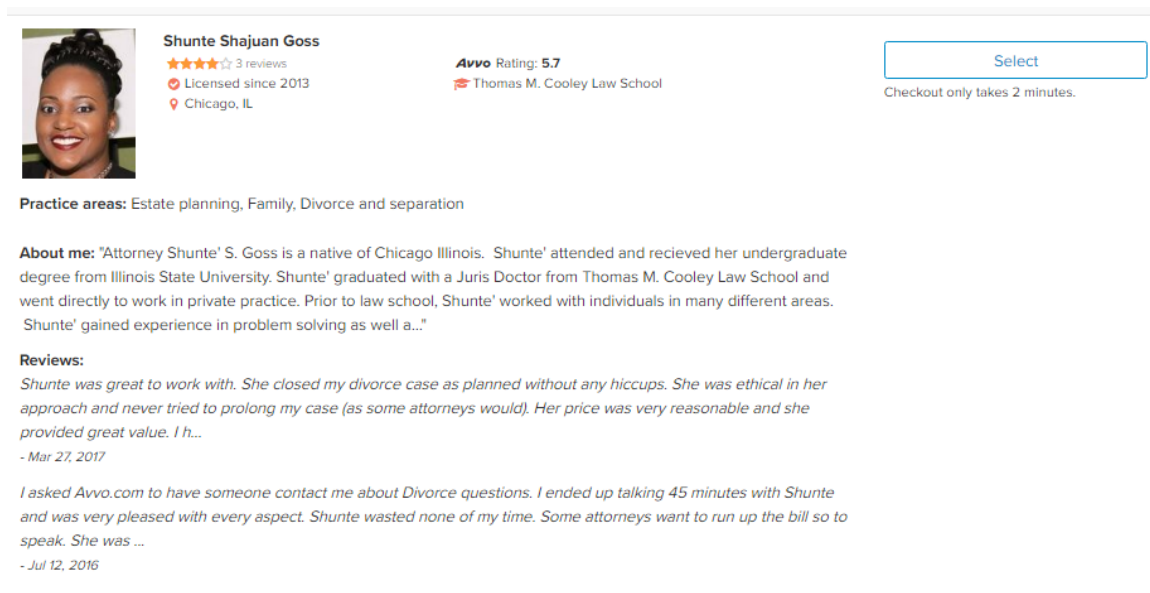
Accordingly, the listings propose a commercial transaction between the lawyer and the potential client; it would, therefore, likely fall within the core notion of commercial speech.<sup>298</sup>

Josh King, former Chief Legal Officer for Avvo, Inc., has argued in front of the Florida Supreme Court that Avvo Legal Services is akin to the yellow pages, a lawyer directory in which potential clients can select which lawyer to use for their service.<sup>299</sup> Josh King, Florida Supreme Court Oral Arguments: *In re: Amendments to the Rules Regulating the Florida Bar - Subchapter 4-7 (Lawyer Referral Services)*, SC16-1470, at 37:42-38:20 (April 5, 2017), <http://thefloridachannel.org/videos/4517-florida-supreme-court-oral-arguments-re-amendments-rules-regulating-florida-bar-subchapter-4-7-lawyer-referral-services-sc16-1470>. Even assuming that Avvo Legal Services and the lawyer listings involve both non-commercial and commercial

<sup>298</sup> As for Avvo’s numerical rating system, a United States District Court in Washington state found that it was protected speech under the First Amendment, finding that the numerical ratings cannot be proved true or false. *Browne v. Avvo, Inc.*, 525 F.Supp.2d 1249, 1252-1253 (W.D. Wash 2007).

<sup>299</sup> However, when a potential client selects an advice session service, the default attorney selected is a generic “Next available lawyer,” and the potential client only needs to enter a contact name and telephone number. If the potential client chooses to edit the pre-selected “lawyer,” the first entry the potential client can select is the generic “Next available lawyer,” with 4,339 reviews and a rating of 4.5 out of 5 stars. Even though the “Next available lawyer” is supposed to be based in Illinois, the first review is from a Texas customer, stating, “The lawyer that was **recommended** called me within 30 seconds of my request being made.” See Appendix One. So, Avvo Legal Services is a referral service at least for advice sessions.

elements, the listings most likely still constitute commercial speech. Under the *Bolger* factors, the lawyer listings are advertisements, because they promote something to potential clients. The listings advertise the lawyer's Avvo rating, how long the lawyer has been licensed, how many people have reviewed the lawyer, and what the lawyer's review rating is out of a total of five stars. The listing also identifies the lawyer's practice areas, provides a description of the lawyer, and includes reviews. Further, a potential client sees these listings after selecting the legal product. Clearly, the listings are advertisements.



**Shunte Shajuan Goss**  
 ★★★★★ 3 reviews  
 Licensed since 2013  
 Chicago, IL

**Avvo Rating: 5.7**  
 Thomas M. Cooley Law School

**Select**  
 Checkout only takes 2 minutes.

**Practice areas:** Estate planning, Family, Divorce and separation

**About me:** "Attorney Shunte' S. Goss is a native of Chicago Illinois. Shunte' attended and recieved her undergraduate degree from Illinois State University. Shunte' graduated with a Juris Doctor from Thomas M. Cooley Law School and went directly to work in private practice. Prior to law school, Shunte' worked with individuals in many different areas. Shunte' gained experience in problem solving as well a..."

**Reviews:**  
 Shunte was great to work with. She closed my divorce case as planned without any hiccups. She was ethical in her approach and never tried to prolong my case (as some attorneys would). Her price was very reasonable and she provided great value. I h...  
 - Mar 27, 2017

I asked Avvo.com to have someone contact me about Divorce questions. I ended up talking 45 minutes with Shunte and was very pleased with every aspect. Shunte wasted none of my time. Some attorneys want to run up the bill so to speak. She was ...  
 - Jul 12, 2016

For the same reasons, Avvo Legal Services may be offering a legal and lawyer product or service, and the listings may serve an economic purpose. Thus, even under the *Bolger* factors, the lawyer listings in Avvo Legal Services would likely constitute commercial speech.

Commercial speech does not receive full constitutional protection. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 506, 515 (7th Cir. 2014); *Vrdolyak*, 206 F.Supp.3d at 1387. Instead, governmental burdens on commercial speech are “scrutinized more leniently than burdens on fully protected noncommercial speech.” *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 515 (7th Cir. 2014). Thus, commercial speech is entitled only to intermediate scrutiny. *Central*

*Hudson Gas & Elec. Corp. v. Public Service Comm. of N.Y.*, 447 U.S. 557, 563-566 (1980). Commercial speech is entitled to some protection under the First Amendment because it “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. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.” *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

Commercial speech that is false, misleading, or deceptive is not entitled to any First Amendment protection. *Second Amendment Arms*, 135 F.Supp. 3d at 755. On the other hand, “regulations ‘that target more truthful, nonmisleading commercial messages rarely protect consumers from such harm,’ and thus draw a greater level of scrutiny.” *Second Amendment Arms*, 135 F.Supp.3d at 755, quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502-503 (1996). Accordingly, a regulation does not unconstitutionally burden protectable commercial speech, if the government restriction of that speech serves a substantial government interest, it directly advances the government interest asserted, and it is not more extensive than necessary to serve that interest. *RCP Publ’ns Inc. v. City of Chicago*, 204 F.Supp.3d 1012, 1018 (N.D.Ill. 2016), citing *Central Hudson*, 447 U.S. at 566.

If a regulation merely requires the removal of a service’s lawyer profiles for those who are not able to engage in the practice of law (for instance, because the lawyer has been suspended), then the regulation would fall outside the purview of the First Amendment, because the regulation would only be restricting false or misleading commercial speech. Any rule that would attempt to regulate the truthful and non-misleading information in profiles, however, would have to satisfy the *Central Hudson* test.

## Right of Association

The First Amendment prohibits the enactment of any law that abridges the right of the people peaceably to assemble, and to petition the Government for a redress of grievances (U.S. Const. Amend. I), and it applies to the states through Section 1 of the Fourteenth Amendment. *Denius v. Dunlap*, 209 F.3d 944, 954 (7th Cir. 2000). “It has long been recognized that the First Amendment prohibits the state from interfering with collective action by individuals to seek legal advice and retain legal counsel.” *Denius*, 209 F.3d at 954; *see also Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Dept’s*, 852 F.3d 178 (2nd Dist. 2017) (“[T]he First Amendment bears on some situations in which clients and attorneys seek each other out to pursue litigation.”)

For instance, the case of *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963) involved whether Virginia could ban improper solicitation of legal business. As construed by the state courts, a Virginia statute proscribed the NAACP’s practice of advising potential litigants to seek the assistance of particular lawyers who were NAACP staff and paid by the organization to represent plaintiffs in civil rights matters. *Button*, 371 U.S. at 420-423, 433. The Supreme Court held that enforcement of the statute to curtail the NAACP’s practices violated the right of the NAACP, its affiliates, and its lawyers to associate for the purpose of assisting people seeking legal redress for infringements of constitutional and other rights. *Button*, 371 U.S. at 428-429.

The Court stated that “[i]n the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.” *Button*, 371 U.S. at 429. The Court discussed the NAACP’s legal practices—including its goals, objectives, and funding—and it



recognized that no attorney received direct compensation from the members or clients they assisted in litigation. *Button*, 371 U.S. at 419-22. The Court acknowledged that the Virginia Supreme Court held that the statute’s “purpose was to strengthen the existing statutes to further control the evils of solicitation of legal business” and that the activities of the NAACP and the lawyers furnished by it violated, in part, Canon 35 of the American Bar Association’s Canons of Professional Ethics.<sup>300</sup> *Button*, 371 U.S. at 424-426. The Supreme Court, however, determined that the record was devoid of any evidence of the evils Virginia sought to limit as applied to the NAACP’s solicitation activities, “partly because no monetary stakes [were] involved, and so there [was] no danger that the attorney [would] desert or subvert the paramount interests of his client to enrich himself or an outside sponsor.” *Button*, 371 U.S. at 443-44. The Court distinguished between activities characterized as “oppressive, malicious, or avaricious use of the legal process for purely private gain” and activities of the NAACP, stating that “[r]esort to the courts to seek vindication of constitutional rights is a different matter.” *Id.* at 443.

Next, in *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964), the Supreme Court held that Virginia could not prevent union members from “gather[ing] together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in . . . the Federal Employers’ Liability Act.” *Trainmen*, 377 U.S. at 5. Virginia had obtained an injunction that would have, in relevant part, barred the labor union from recommending that its members, or their survivors, take workers’ compensation claims to particular lawyers which the union believed were competent and willing to charge reasonable

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<sup>300</sup> Canon 35 provided: “Intermediaries.—The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer’s responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer’s relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.” *Button*, 374 U.S. at 426 n. 8.

fees. *Trainmen*, 377 U.S. at 2. The Supreme Court concluded that the statute infringed the union members' first amendment rights to associate together and receive advice and assistance in obtaining remedies they were entitled to claim under statute. *Trainmen*, 377 U.S. at 8.

The Court in *Trainmen* noted that the record showed that injured workers and their families "often fell prey...to persuasive claims adjusters eager to gain a quick and cheap settlement for their railroad employers, or...to lawyers either not competent to try these lawsuits against the able and experienced railroad counsel or too willing to settle a case for a quick dollar." *Trainmen*, 377 U.S. at 3-4. Consequently, the union established a legal aid department to assist its injured members with their claims by advising them to obtain legal advice before settling their claims and recommending them to competent lawyers to handle such claims. *Trainmen*, 377 U.S. at 4.

The Court indicated that the union's referral program was not "ambulance chasing" and that the referrals were not recompensed by fee-sharing, and it distinguished the program from anything that could be described as "commercialization of the legal profession." *Trainmen*, 377 U.S. at 5 n. 9, 6. The Court then explained that within the context of the union's legal referral program, the interests protected by the right of association included "the right of individuals . . . to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Trainmen*, 377 U.S. at 7. The Court stated that "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries," which would obviously include their employers. *Trainmen*, 377 U.S. at 7. As applied to the union, the Court concluded that Virginia had "failed to show any appreciable public interest in preventing the Brotherhood [union] from carrying out its plan to recommend lawyers it selected to represent injured workers." *Trainmen*, 377 U.S. at 8. Central to the Supreme Court's holding was that

preventing union workers from using their cooperative plan to advise each other and recommend specific lawyers infringed on their ability to gain access to the courts to vindicate their legal rights. *Trainmen*, 377 U.S. at 7, 8.

Subsequently, in *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217 (1967), the Supreme Court held that the right of association permitted a union to hire a salaried lawyer to represent its members in workers' compensation claims. *Mine Workers*, 389 U.S. at 221-22. Similar to *Trainmen*, Illinois had passed a workers' compensation statute, but the mine workers were being deprived of the statute's full benefits—the workers “were required to pay forty or fifty per cent of the amounts recovered in damage suits, for attorney fees.” *Mine Workers*, 389 U.S. at 219. In response, the union established a legal department, hiring an attorney to represent members and their dependents “in connection with claims for personal injury and death” under Illinois's workers' compensation statute. *Mine Workers*, 389 U.S. at 219. The Court noted the terms of the attorney's employment, including the scope of legal services the attorney would provide, and that the attorney would receive no instructions or directions and have no interference from the District. *Mine Workers*, 389 U.S. at 219-220. The Court also acknowledged that the attorney received no compensation from any settlement proceeds reached on behalf of any worker, and that, instead, the attorney's entire compensation was “his annual salary paid by the Union.” *Mine Workers*, 389 U.S. at 220-221. The Court further noted that there was no instance of abuse, harm to clients, or “any actual disadvantage to the public or to the profession.” *Mine Workers*, 389 U.S. at 225.

Thereafter, in *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 585 (1971), the Supreme Court held that the above cases' “common thread...is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection

of the First Amendment.” The *United Transportation Union* case concerned the state of Michigan’s injunction that prevented the union from providing its injured members with legal advice on their federal claims. *United Transp. Union*, 401 U.S. at 577. The union provided its members with legal advice and other services to protect the members from excessive legal fees and incompetent counsel in suits brought under the Federal Employers’ Liability Act. *United Transp. Union*, 401 U.S. at 577. The union had secured commitments from lawyers representing its members that their legal fees would be capped at no more than 25% of the recovery. *United Transp. Union*, 401 U.S. at 577.

The Supreme Court rejected Michigan’s injunction, stating that “[i]n *Trainmen* we upheld the commonsense proposition that such activity is protected by the First Amendment.” *United Transp. Union*, 401 U.S. at 580. One of Michigan’s justifications for the injunction was that the state sought to prohibit fee sharing between the union and the recommended attorney. *United Transp. Union*, 401 U.S. at 583. However, the Court rejected that justification, because “[s]uch activity is not even suggested in the complaint. There is not a line of evidence concerning such practice in the record in this case.” *United Transp. Union*, 401 U.S. at 583. As in *Mine Workers*, the Court explained that the union “sought to protect its members against the same abuse by limiting the fee charged by recommended attorneys. It is hard to believe that a court of justice would deny a cooperative union of workers the right to protect its injured members, and their widows and children, from the injustice of excessive fees at the hands of inadequate counsel.” *United Transp. Union*, 401 U.S. at 585. According to the Court, at issue was “the basic right to group legal action” to secure “freedoms guaranteed by the Constitution.” *United Transp. Union*, 401 U.S. at 585.

The Supreme Court, however, has never held that “attorneys have their own First Amendment right as attorneys to associate with current or potential clients.” *Jacoby & Myers*, 852 F.3d at 186. Instead, “the Court has explicitly distinguished between the First Amendment protections enjoyed by attorneys who, as part of an advocacy group like the ACLU or the NAACP, have recognized associational rights, and attorneys who are engaged in litigation for their own commercial rewards, albeit in the context of advancing or protecting the interests of their clients.” *Jacoby & Myers*, 852 F.3d at 186; *see also Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (O’Connor, J., concurring) (“The proper approach to analysis of First Amendment claims of associational freedom is, therefore, to distinguish nonexpressive from expressive associations and to recognize that the former lack the full constitutional protections possessed by the latter.”)

At issue in *In re Primus*, 436 U.S. 412 (1978) was South Carolina’s decision to discipline an ACLU attorney for soliciting a woman for redress of an allegedly unconstitutional sterilization. *Primus*, 436 U.S. at 421-22. The Supreme Court rejected the state’s efforts “to draw a meaningful distinction between the ACLU and the NAACP: for the ACLU, as it was for the NAACP, “‘litigation is not a technique of resolving private differences’; it is ‘a form of political expression’ and ‘political association.’” *Primus*, 436 U.S. at 428, quoting *Button*, 371 U.S. at 429, 431. The Court, therefore, rejected South Carolina’s justification for disciplining the ACLU attorney under its disciplinary rules. The Court explained that the record did not support “undue influence, overreaching, misrepresentation, or invasion of privacy,” as the solicitation was not in-person, but, rather, through a follow-up letter providing information that would allow the potential litigant to make “an informed decision about whether to authorize litigation.” *Primus*, 436 U.S. at 435. Although the ACLU received an award of counsel fees in cases in

which it was successful, the Court noted that neither the ACLU nor its attorneys were motivated by financial gain, as the motivation for the ACLU's litigation was "vindicating civil liberties." *Primus*, 436 U.S. at 429-30. Also, the record did not demonstrate a serious conflict of interest or problems related to the attorney-client relationship. *Primus*, 436 U.S. at 436. Although the Court acknowledged that those interests may be justifiable in circumstances where a commercial transaction is proposed, the rules were not sufficiently tailored in application to organizations like the ACLU. *Primus*, 436 U.S. at 437-38. "[C]onsiderations of undue commercialization of the legal profession are of marginal force where...a nonprofit organization [the ACLU] offers its services free of charge to individuals who may be in need of legal assistance and may lack the financial means and sophistication necessary to tap alternative sources of such aid." *Primus*, 436 U.S. at 437.

Conversely, in the companion case of *Ohralik v. Ohio State Bar Association*, 436 U. S. 447 (1978), the Court upheld Ohio's restriction on a private attorney's solicitation of potential personal injury clients. The attorney in *Ohralik* "was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests." *Primus*, 436 U.S. at 438 n. 32. In distinguishing between the pursuit of expressive activity from the pursuit of commercial interests, the Court determined that "[a] lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." *Ohralik*, 436 U.S. at 459. Accordingly, because "ordinary law practice for commercial ends has never been given special First Amendment protection...no First Amendment interest stands in the way of a State's rational regulation of economic transactions by or within a commercial association." *Roberts*, 468 U.S. at 638 (O'Connor, J., concurring).

Recently, in *Jacoby & Myers*, a limited liability law partnership and a related professional limited liability company (the “J&M Firms”) challenged the constitutionality of a collection of New York regulations and laws that prevented for-profit law firms from accepting capital investment from non-lawyers. The J&M Firms contended that if they were allowed to accept outside investment, they would be able to (and would) improve their infrastructure and efficiency, and, as a result, reduce their fees and serve more clients, including clients who might otherwise be unable to afford their services. The J&M Firms argued that by impeding them from reaching this goal, the state was unconstitutionally infringing on their rights as lawyers to associate with clients and to access the courts, in violation of the First Amendment. The district court dismissed their complaint, because the J&M Firms failed to state a claim for a violation of any constitutional right, and, assuming that their claimed rights existed, the state’s regulations withstood rational basis scrutiny. The Court of Appeals for the Second Circuit affirmed. *Jacoby & Myers*, 852 F.3d at 181.

In affirming the dismissal of the J&M Firms’ complaint, the Second Circuit stated that New York’s prohibition of non-attorneys investing in law firms “is generally seen as helping to ensure the independence and ethical conduct of lawyers.” *Jacoby & Myers*, 852 F.3d 181. In rejecting the J&M Firms’ argument that the regulations infringed on their First Amendment rights to petition and of association, however, the Second Circuit noted that the Supreme Court “has explicitly distinguished between the First Amendment protections enjoyed by attorneys who, as part of an advocacy group like the ACLU or the NAACP, have recognized associational rights, and attorneys who are engaged in litigation for their own commercial rewards, albeit in the context of advancing or protecting the interests of their clients.” *Jacoby & Myers*, 852 F.3d at 186.

The Second Circuit in *Jacoby & Myers* further held that *Primus* and *Ohralik* foreclosed recognizing the right of access to courts and right to associate with clients to access courts “in a for-profit partnership or PLLC that is not itself engaged in its own political advocacy or expression.” *Jacoby & Myers*, 852 F.3d at 187. The court concluded that it was not aware of any judicial recognition of a First Amendment interest in a “lawyer’s generic act of pursuing litigation on behalf of a client.” *Jacoby & Myers*, 852 F.3d at 187. The court also held that “[l]awyers in a for-profit practice who act in their representative capacities do not themselves seek access to the courts to remediate their own grievances; rather they are doing so as part of a commercial transaction in which they serve, and are paid.” *Jacoby & Myers*, 852 F.3d at 187.

Accordingly, the Second Circuit concluded that that the J&M Firms could be regulated as businesses, because they were engaged in the practice of law as a business, and even though one of their functions was to help clients access the courts, the state’s regulations did not automatically trigger First Amendment protection. *Jacoby & Myers*, 852 F.3d at 188.

The Second Circuit further held that, assuming that the J&M Firms had some cognizable First Amendment interest to associate with clients or to access the courts on their client’s behalf, the state’s regulations were “supported by substantial government interests and impose[d] an insubstantial burden on the exercise of any such First Amendment rights.” *Jacoby & Myers*, 852 F.3d at 189. The court reasoned that although any law firm would like to attract more clients and any client would like to pay less for a lawyer’s service, the state’s regulations prohibiting non-lawyer investment in law firms simply did not deny the lawyers meaningful access to the courts. *Jacoby & Myers*, 852 F.3d at 190. Compared to the cases of *Button*, *Trainmen*, and *Primus*, no attorney in the *Jacoby & Myers* case risked censure or sanction for soliciting, meeting with, or representing a client. *Jacoby & Myers*, 852 F.3d at 190. Likewise, whereas an injunction in



*United Transportation Union* prevented clients from meeting with chosen attorneys, the state's regulations in *Jacoby & Myers* "at most" increased the cost of legal services. *Jacoby & Myers*, 852 F.3d at 191. Consequently, the regulations did not impose "severe burdens" on any assumed associational right of the J&M Firms, and the regulations survived a rational basis review because they served New York's "well-established interest in regulation attorney conduct and in maintaining ethical behavior and independence among the members of the legal profession." *Jacoby & Myers*, 852 F.3d at 191.

Like with the *Jacoby & Myers* case, a lawyer-client matching service is engaged in a business, and even though one of their functions may be to help potential clients access additional legal resources at reduced rates, regulating the matching service or preventing referral fees does not automatically trigger First Amendment protection. The current rules preventing fee-sharing with nonlawyer referral services do not deny potential clients meaningful access to the courts or to legal services. Rule of Professional Conduct 1.2(c) permits limited scope representation, which is aimed at improving access to court for people with limited means and to provide a person the possibility of hiring a lawyer to protect their interests without the burden of paying for complete representation. Joseph R. Tybor, Director of Communications, *Chief Justice Thomas L. Kilbride Announces Amended Rules Allowing Attorneys to Represent Clients on Limited Basis: Expected to Lower Fee Costs for Clients of Limited Means*, Supreme Court of Illinois (June 14, 2013). As the Supreme Court of Rhode Island has stated, "[a]s a policy, it is clear that allowing attorneys to provide limited-scope representation yields greater access to justice for pro se litigants who are choosing between either no contact with an attorney or some degree of a limited attorney-client relationship." *FIA Card Services, N.A. v. Pichette*, 116 A.3d 770, 783 (R.I. 2015). Yet, that the attorneys participating in a matching service would like to

attract more clients, and potential clients would like to pay less for legal services, nothing about preventing fee-sharing abridges either the First Amendment rights of either the potential clients or the participating attorneys. *See S.P.S. Consultants, Inc. v. Lefkowitz*, 333 F.Supp. 1373, 1376 (N.Y.S.D. 1971) (“While the inability to make referrals to a particular physician or facility may affect the profitability of plaintiffs’ businesses, it does not abridge their First Amendment rights.”)

“In cases involving the substantial rights to associate for the advancement of a common purpose, the state’s interests in regulating the ‘solicitation’ attending that association will generally be deemed insufficient to sustain the abridgment of the First Amendment rights.” *Allison v. Louisiana State Bar Association*, 362 So.2d 489, 496 (La. 1978). Nevertheless, a matching service and the lawyers who participate in the service are likely not part of an advocacy group and are not associated for the advancement of a common purpose, other than perhaps their own economic gain. They are engaged in seeking out customers and clients for their own commercial rewards.

Likewise, lawyer-client matching services do not involve associational acts of expressions. For instance, in a prominent lawyer-client matching service, services offered in its Employment and Labor section, include a 15-minute advice session and ten different types of document reviews, with the remaining services involving contracts, letters, or agreements. Similarly, the remaining sections of “Business legal services” do not involve hiring a lawyer to assist a client in accessing or petitioning a court. Also, the service’s “Real estate legal services” section offers 14 services, which only involve advice, document review, or document creation. Further, the services offered in “Estate planning legal services” also involve advice sessions, document review and document creation. With regard to “Divorce and Separation,” only six out

of the 19 other offered services in the “family legal services” section involve access to the courts (“File of uncontested divorce;” “Summary or simplified divorce;” “Legal separation (with children);” and “Uncontested divorce (with children); “Create a parenting plan;” “Modify a parenting plan””). Thus, regulating or prohibiting referral fee payments would not have any adverse impact upon any First Amendment associational rights of the potential clients or participating lawyers.

The association between a lawyer and a lawyer-client matching service is not necessary for potential clients to realize their rights independently protected by the First Amendment, or even to gain access to the courts. As seen in *United Mine Workers*, a layperson does not have the right to associate with lawyers in the abstract; rather, a layperson has a right to obtain meaningful access to the courts, and to enter into associations with lawyers to effectuate that end. The plaintiffs in *United Mine Workers* established “that the association prohibited by the state rule was necessary for the union members in order to realize their right to free speech, petition and assembly.” *Lawline v. American Bar Association*, 956 F.2d 1378, 1387 (7th Cir. 1992). Thus, the right of association “provides a right to join with others to pursue goals independently protected by the first amendment.” *Lawline*, 956 F.2d at 1387 (internal quotations and citation omitted).

Indeed, compared to *Button* (in which legal representation was virtually unavailable) and *Mine Workers* (in which legal representation was second-rate and unreasonably expensive) (*In re New Hampshire Disabilities Rights Center, Inc.*, 541 A.2d 208 (N.H. 1988), current and well-known lawyer-client matching services offer duplicative services that attorneys could offer outside of the program, and there is no indication that those same services are unreasonably expensive outside of the program. The Illinois Rules of Professional Conduct do not prohibit

attorneys from offering their own limited-scope services to potential clients outside of a referral service. The rules do not prohibit attorneys from offering those services in a for-profit setting, nor do the rules prevent clients from meeting with their chosen attorneys at all, provided that the attorney does not violate the Rules of Professional Conduct. A matching service may be unable to show that laypersons would be deprived of meaningful access to the courts if attorneys were unable to share fees with the service. Thus, the service would likely be unable to establish a right of association, and the ARDC would be able to regulate the economic transactions involved those services.

At best, a lawyer-client matching service is a commercial endeavor that seeks to connect attorneys with potential clients (or to refer clients to attorneys) to engage in mostly document review or document creation sessions.<sup>301</sup> The profit motive, therefore, distinguishes this service from *Button* and *Trainmen*, because the service participates in the fruits of its matching program. See *State ex rel. State Bar v. Bonded Collections, Inc.*, 154 N.W.2d 250 (Wis. 1967) (Defendants' activities in hiring attorneys to file actions on accounts assigned to the collection agency by creditors under agreements whereby the defendants and creditors divided the proceeds recovered in such actions after court costs were paid were not protected by the First Amendment, in part, because they participated "in the fruits of their collection efforts"); see also *New Hampshire Disabilities Rights Center*, 541 A.2d at 336 (a non-profit corporation which served disabled individuals pursuant to a state statute had an associational right under the First Amendment to engage in advocacy on behalf of the disabled, and their advocacy could take the

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<sup>301</sup> For example, Josh King's pronouncement in front of the Florida Supreme Court that Avvo is a marketplace, unintentionally, supports the conclusion that regulating or prohibiting referral fee payments does not impact a right of association. Josh King, Florida Supreme Court Oral Arguments: In re: Amendments to the Rules Regulating the Florida Bar - Subchapter 4-7 (Lawyer Referral Services), SC16-1470, at 24:09, 29:09-29:16, 31:42 (April 5, 2017), <http://thefloridachannel.org/videos/4517-florida-supreme-court-oral-arguments-re-amendments-rules-regulating-florida-bar-subchapter-4-7-lawyer-referral-services-sc16-1470/>

form of paying staff lawyers to provide legal services for the benefit of disabled people, whether or not the clients are poor, the court noting that the corporation was an “organization of lay people and lawyers associated together not for commercial gain, but to advance the interests of the disabled by means that include resort to litigation.”)

Because there is “only minimal constitutional protection” for the sort of “commercial association” in which a lawyer-client matching service is engaged, such commercial activity is subject to rationally related regulation. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 473 n. 16 (internal quotations omitted); *see also Rovers*, 468 U.S. at 634 (O’Connor, J., concurring) (“The Constitution does not guarantee a right to choose...those with whom one engages in simple commercial transactions, without restraint from the State.”) A state regulation survives rational basis review if any reasonably conceivable set of facts could demonstrate that the statute is rationally related to a legitimate government purpose. *Vigilante v. Village of Wilmette*, 88 F.Supp.2d 888, 891 (N.D.Ill. 2000).

Still, the Seventh Circuit has held that the First Amendment guarantee of speech, association and petition protects the right of an individual as well as a group to “consult with an attorney on any legal matter.” *Denius v. Dunlap*, F.3d 944, 954 (7th Cir, 2000); *see also Bates v. State Bar of Arizona*, 433 U.S. 350, 376 n. 32 (stating that underlying *United Transportation Union, United Mine Workers, Trainmen, and Button* “was the Court’s concern that the aggrieved receive information regarding their legal rights and the means of effectuating them. This concern applies with at least as much force to aggrieved individuals as it does to groups”); *see also Mothershed v. Justices of the Supreme Court*, 410 F.3d 602, 611 (9th Cir. 2005) (stating, “we recognize that--at least as a general matter--the right to right and consult an attorney is protected by the First Amendment’s guarantee of speech, association and petition”) (citation

omitted); *see also Jacoby v. State Bar of California*, 562 P.2d 1326 (Cal. 1977) (stating that “advertising and solicitation conducted by private attorneys deserves, if anything, more protection than that by attorneys affiliated with organizations like NAACP or the United Mine Workers, because “[p]otential clients who are do dispersed, disorganized, and powerless that they cannot organize their own litigation programs would seem to be in even greater need of information regarding their legal rights than those who at least possess the strength required to generate their own litigation activities”) (emphasis original, internal quotations omitted).

A lawyer-client matching service could, therefore, argue that the prohibition against fee sharing with non-lawyers would have a chilling effect upon a potential client’s right to consult with and hire an Illinois attorney. The service may argue that it and the participating attorney would incur a financial injury because the prohibition would prevent the service from populating its listings with Illinois attorneys and would prevent Illinois attorneys (especially those newly licensed) from obtaining clients. *See Inmates of the R.I. Training Sch. V. Martinez*, 465 F.Supp.2d 131, 140 (D. R.I. 2006) (stating that the effect of Rhode Island’s rules prohibiting fee-sharing with non-lawyers “is to restrict the compensation the ACLU Plaintiffs may receive when they prevail in a lawsuit,” so “it would be reasonable to argue that, because the ACLU relies on court-awarded legal fees as a significant source of funding for its activities, cutting off this funding results in a restrict as chilling to its First Amendment rights as a prohibition against solicitation,” but resolving the issue on other grounds). In other words, if a matching service requires participating attorneys to share legal fees, in violation of Rules 5.4(a) and 7.2(b), attorneys would be unwilling to participate, and advertise their services, and potential clients without the means to locate or meet the costs of legal representation would have no access to legal consultation or the courts. *See United Transportation Union*, 401 U.S. at 585-586 (stating

that the right of collective activity undertaken to obtain meaningful access to the courts “would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation.”); *see also Roa v. Lodi Medical Group, Inc.*, 695 P.2d 164, 175 (Cal. 1985) (Bird, C.J., dissenting) (stating, “economic activity that is essential to the effective exercise of a First Amendment right may be restricted *only* where necessary to serve a compelling governmental interest” (emphasis original)).

However, as the Arkansas Supreme Court has held, there is “no fundamental right to work as an attorney or at a law firm. The practice of law is a privilege to engage in commercial activity, not a right. As such, the freedom of association in the First Amendment does not apply.” *Cambiano v. Neal*, 35 S.W.3d 792, 798 (Ark. 2000) (Arkansas Supreme Court rejecting attorney’s argument that the interim suspension against him was unconstitutional).

Although research located no case analyzing the constitutionality of a regulation prohibiting fee-splitting with for-profit lawyer referral services, the Missouri Supreme Court in *American Civil Liberties Union v. Miller*, 803 S.W.2d 592 (Mo. 1991), concluded that Missouri’s total ban on fee-splitting did not violate the Constitution. In the *Miller* case, the ACLU sought to recover attorney’s fees awarded to attorney B. Stephen Miller, III while he was employed as a staff attorney for the ACLU. *Miller*, 803 S.W.2d at 529. At the time Mr. Miller worked as staff counsel, he earned a monthly salary, and the ACLU required that any attorney’s fees he received while employed would be given to the ACLU. *Miller*, 803 S.W.2d at 593. Mr. Miller received \$8,090.25 in attorney’s fees related a federal civil rights action. *Miller*, 803 S.W.2d at 593. Mr. Miller rejected the ACLU’s demand to hand over the funds, claiming that such action would violate the ethical prohibition against fee-sharing. *Miller*, 803 S.W.2d at 593. Missouri’s Disciplinary Rule 3-102 in effect at the time provided, with certain exceptions not

applicable to Mr. Miller’s situation, that “[a] lawyer or law firm shall not share legal fees with a non-lawyer.” *Miller*, 803 S.W.2d at 594. The ACLU, relying on *Button* and *Primus*, requested the Missouri Supreme Court to “hold that application of the fee-splitting prohibitions to its organization would infringe its First Amendment rights.” *Miller*, 803 S.W.2d at 594. The Missouri Supreme Court, however, declined to do so, stating that although “the State must tailor regulation so as not to abridge the associational freedom of nonprofit organizations such as the ACLU...the prohibition against fee-splitting does not infringe upon First Amendment rights so as to violate the Constitution.” *Miller*, 803 S.W.2d at 594.

The *Miller* court distinguished *Button* by noting that the “the United States Supreme Court held that Virginia had violated the First Amendment freedom of expression by *prohibiting* NAACP staff from *soliciting* prospective civil rights litigations and referring them to NAACP legal staff.” *Miller*, 803 S.W.2d at 594 (emphasis original). It also noted that in the *Primus* case, “the Court similarly held that South Carolina could not sanction a lawyer affiliated with the ACLU for *informing* a prospective civil rights litigant that legal assistance was available from the ACLU.” *Miller*, 803 S.W.2d at 594 (emphasis original). The court further acknowledged that “the Supreme Court has never expressly extended First Amendment protection to fee-sharing arrangements with nonprofit groups,” and the court found “no constitutional authority to strike down the firm policy of [Missouri] as decided by the legislature and by this Court in its rule against fee-splitting.” *Miller*, 803 S.W.2d 594-595.

The Supreme Court of the United States has emphasized that “the States have broad power to regulate the practice of law.” *United Mine Workers*, 389 U.S. at 222. The Court has explained that the “interest of the States in regulating lawyers is especially great since lawyers



are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts’” *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

The purpose of the prohibition against fee-sharing with for-profit lawyer-client matching services is not to restrict the associations between attorneys and potential clients or to restrict access to legal advice or the courts. Rather, the purpose is to curtail overreaching by the intermediary, to limit the lack of independence of the attorney, and to avoid situations in which the choice of the attorney and the work by the attorney are guided by monetary concerns. *See E&B Marketing Enters v. Ryan*, 209 Ill. App. 3d 626, 630 (1st Dist. 1991) (“There is a danger that a doctor, knowing that he had to split fees with one who did not render medical services, might be hesitant to provide proper services to a patient. Conversely, unneeded treatment might be rendered just because of the need to split fees. In either case, the interests of the patient would be compromised.”); *Practice Management v. Schwartz*, 256 Ill. App. 3d 949, 953 (1st Dist. 1993) (“One danger of fee splitting arrangements is that they may motivate non-professionals to recommend the services of a particular professional out of self-interest, and not because of the competence of the professional. Such arrangements are against public policy because the public is best served by recommendations uninfluenced by financial considerations.”); *Steinberg v. Ingram*, 302 Ill. App. 3d 845, 857 (1st Dist. 1998) (internal quotations and citations omitted) (“The policy against fee splitting stems from the concerns that an attorney who has agreed to split fees may be tempted to devote less time and attention to the cases of the clients whose fees they must share and that a layperson may have an incentive to recommend an attorney, not based on the lawyer's credentials, but on her own financial interest.”); *Emmons, Williams, Mires & Leech v. State Bar*, 86 Cal. Rptr. 367, 372 (1970) (citations omitted) (stating that fee-splitting facilitates the lay intermediary's tendency to select the most generous, not the most competent,

attorney, and the fee-splitting rule is to protect against the possibility of control by the lay person, interested in his own profit rather than the client's fate); *Trotter v. Nelson*, 648 N.E.2d 1150, 1154 (Ind. 1997) (internal quotations and citations omitted) (“[T]he client's choice of an attorney should result from a free and informed choice by the client, and, any recommendation should originate from a disinterested source. Furthermore, when a nonlawyer has a monetary interest in referring cases to an attorney, then it is the referrer's and not the client's best interests that are being considered.”)

Accordingly, at most, any alleged infringement on the First Amendment right of association through prohibiting fee-sharing is permissible as “incidental to the proper, important, and substantial general purpose” of the regulation. *Teague v. Regional Commissioner of Customs*, 404 F.2d 441, 445 (2nd Cir. 1968).

Addendum: On September 19, 2017, the United States District Court for the Middle District of North Carolina dismissed a right of association claim by Capital Associated Industries, Inc., a company seeking to provide employment-related legal advice and services to its members through North Carolina licensed attorneys that it employs, as part of the dues its members pay. *Capital Associated Industries, Inc., v. Stein*, 1:15cv83, 2017 U.S. Dist. LEXIS 151749, at \*28 (M.D.N.C. Sept. 19, 2017). Capital Associated, relying on *Button* and its progeny, argued that its members had a constitutionally protected right to associate to provide group legal services. *Capital Associated*, 2017 U.S. Dist. LEXIS 151749, at \*24. It also argued that it was being precluded from earning revenues by employing licensed attorneys to provide the employment-related legal advice and services to its members. *Capital Associated*, 2017 U.S. Dist. LEXIS 151749, at \*27.

The court discussed *Button* and its related cases and concluded that “North Carolina’s prohibition under the UPL Statutes as applied to CAI and its’ proposed provision of legal services does not violate the right of association because CAI’s proposal would not further the collective exercise of any activity entitled to First Amendment protection.” *Capital Associated*, 2017 U.S. Dist. LEXIS 151749, at \*\*26-27. The court noted that Capital Associated proposed to provide its members with employment-related legal advice and services that could include drafting employment, separation, and non-compete agreements; reviewing employment policies and handbooks; and representation before the EEOC. *Capital Associated*, 2017 U.S. Dist. LEXIS 151749, at \*27. The court determined:

Unlike the clear constitutional objectives advance by *Button* and its progeny, CAI has failed to provide evidence that any activity for which it claims a right to associate is deserving of First Amendment protection. The proposed legal services would not include associate with litigation or the vindication of any statutory rights....They would not further the right to free speech pertaining to political expression as in *Button* and *Primus*; nor would they further the right to petition the government for redress before a court or an agency as in *United Transportation Workers, Trainmen, or Mine Workers*, by, for example, advising CAI members as to how they might vindicate their constitutional or statutory rights. CAI’s characterization of *Button* and its progeny as establishing a First Amendment right to undertake a “broad range of group legal services” overstates the breadth of these holdings

*Capital Associated*, 2017 U.S. Dist. LEXIS 151749, at \*\*27-28. Accordingly, because its proposal “would not further the exercise of any protected First Amendment activity” Capital Associated was “not entitled to any corresponding First Amendment associational protection merely because the activities would be undertaken collectively.” *Capital Associated*, 2017 U.S. Dist. LEXIS 151749, at \*28.<sup>302</sup>

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<sup>302</sup> Also, based upon the professional speech doctrine, the court in *Capital Associated* dismissed CAI’s freedom of speech claim. The court concluded that North Carolina’s UPL Statues were a professional regulation that was not subject to First Amendment scrutiny: CAI sought to provide legal services to its members, which would have required it to exercise judgment on behalf of particular members in light of those members’ individual needs and

## Equal Protection

The Fourteenth Amendment provides that no state shall “deny any person within its jurisdiction the equal protection of the laws.” U.S. Const., amend XIV, § 1. A for-profit lawyer-client matching service could argue that any regulation of, or any prohibition against, fee-sharing unequally treats the service because states allow attorneys to share fees with not-for-profit referral services. Indeed, the West Suburban Bar Association in Illinois can, under Rule 7.2(b), properly receive 25% of the attorney fees from the attorney to whom the bar association referred the client an Illinois court. *Richards v. SSM Health Care, Inc.*, 311 Ill. App. 3d 560 (1st Dist. 2000). Likewise, Georgia’s Rule of Professional Conduct 7.3 provides that an attorney may pay a bar-operated non-profit a fee which is calculated as a percentage of legal fees earned by the lawyer to whom the service has referred a matter, provided that the non-profit has met certain criteria. *See also* Ohio Rule of Professional Conduct 5.4(a)(5) (“a lawyer may share legal fees with a nonprofit organization that recommended employment of the lawyer in the matter, if the nonprofit organization complies with Rule XVI of the Supreme Court Rules of the Government Bar of Ohio”); Oregon Rule of Professional Conduct 5.4(a)(5) (“a lawyer may pay the usual charges of a bar- sponsored or operated not-for-profit lawyer referral service, including fees calculated as a percentage of legal fees received by the lawyer from the referral”); Tennessee Rule of Professional Conduct 5.4(a)(6) (“a lawyer may pay to a registered non-profit intermediary organization a referral fee calculated by reference to a reasonable percentage of the fee paid to the lawyer by the client referred to the lawyer by the intermediary organization”); Louisiana Rule of Professional Conduct 5.4(a)(5) (“a lawyer may share legal fees as otherwise provided in Rule 7.2(c)(13)” [lawyer may pay usual, reasonable, and customary charges of a

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circumstances, and the UPL Statutes amounted to generally applicable licensing provisions. *Capital Associated*, 2017 U.S. Dist. LEXIS 151749, at \*\*20-23.

lawyer referral service operated by the Louisiana Bar Association, any local bar association, or any other not-for-profit organization, provided certain conditions are met]); New Hampshire Rule of Professional Conduct 5.4(a)(4) (“a lawyer may share legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter”); and South Carolina Rule of Professional Conduct 7.2 Comment 8 (“A lawyer may pay the usual charges of a...not-for-profit lawyer referral service, which is itself not acting in violation of the Rules of Professional Conduct...The ‘usual charges’ may include a portion of legal fees collected by a lawyer from clients referred by the service when that portion of fees is collected to support the expenses projected for the referral service.”).

Also, state bar opinions have specifically allowed not-for-profit referral services to share fees with participating attorneys, or have explicitly prohibited for-profit referral services from sharing fees. *See* South Carolina Bar, Ethics Advisory Opinion 16-06 (2016) (concluding that an attorney directory website which uses an attorney referral system was not a not-for-profit lawyer referral service, and, therefore, it could not engage in fee-splitting); Association of the Bar of the City of New York, Formal Op. 1994-3 (April 1994) (concluding, “if a referral service is a for-profit, private corporation the purpose of which is to advertise and solicit clients in exchange for referral fees from lawyers and other professionals” and if it is not operated, sponsored or approved by a bar association, then “it is not a referral organization form which an attorney may properly accept a referral in exchange for the payment of a fee”); and State Bar of Michigan, Informal Op. RI-75 (March 1991) (concluding, a not-for-profit lawyer referral service registered with the State Bar of Michigan may charge as a referral fee a percent of the fee collected by the referred to lawyer, noting that the referral service’s plan was to charge its benefitting referral

lawyers a 10% fee on any sum they collect over \$300 on each referral in order for the referral service to become more self-sufficient without increasing panel membership fees or client fees).

Nevertheless, a for-profit matching service's equal protection argument would likely fail, because the promise of equal treatment under the Fourteenth Amendment "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Accordingly, "if a law neither burdens a fundamental right nor targets a suspect class, [courts] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer*, 517 U.S. at 631; *see also Lawline*, 956 F.2d at 1385 ("Unless a governmental regulation draws a suspect classification or infringes on a fundamental right, the government need only show that its regulation is rationally related to a legitimate state interest.")

A regulation survives rational basis scrutiny 'if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *City of Chicago v. Shalala*, 189 F.3d 598, 605, quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993). Under rational basis review, the state does not need to "actually articulate the legitimate purpose or rationale that supports the classification at issue. Instead, a statute must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Shalala*, 189 F.3d at 606 (internal quotations and citations omitted).

Under the rational basis standard, classifications are "presumed to be valid," *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976), and the court is "required to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Shalala*, 189 F.3d at 606. "A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some

inequality.” *Shalala*, 189 F.3d at 606 (internal quotations and citations omitted). Further, incremental regulation does not violate equal protection. *See Brazil-Breashears v. Bilandic*, 53 F.3d 789, 793 (7th Cir. 1995) (noting that the Illinois Supreme Court could act incrementally in restricting judicial employee political activities, while exempting sitting judges from that restriction, “regardless of the probability that the government will ever address the rest of the problem”).

For purposes of an equal protection analysis, a suspect class is one that either possesses an immutable characteristic determined solely by accident or birth, or is “saddled with such disabilities, or subjected to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 639 (7th Cir. 2007). Lawyer-client matching services are not a suspect class, and the prohibition against fee-splitting with for-profit matching services does not implicate a fundamental right. Likewise, equal protection challenges to laws implicating only commercial speech require only minimal scrutiny. *Dunagin v. City of Oxford, Mass.*, 718 F.2d 738, 753 (5th Cir. 1983). Accordingly, the rule against for-profit matching services engaging in fee-sharing need only be rationally related to a legitimate state interest, and the rule is “invalid only if wholly irrelevant to the achievement of the State’s objectives.” *Dunagin*, 718 F.2d at 753.

If a regulation pertaining to attorneys or matching services is designed to safeguard the public, maintain the integrity of the profession, and protect the administration of justice from reproach, it will satisfy the rational basis test. *See Lawline*, 956 F.2d at 1385 (holding that the “partnership rule [Rule 5.4(b)] promotes the independence of lawyers by preventing non-lawyers from controlling how lawyers practice” and “attempts to minimize the number of situation in

which lawyers will be motivated by economic incentives rather than by their client's best interests").

A common concern with fee-sharing with nonlawyers compared to fee-sharing with not-for-profits or state bar associations is the commercialization of the law practice, the lack of independence of the attorney, and the corporation's motive to increase its profits. As the First District Appellate Court of Illinois in *Richards v. SSM Health Care, Inc.* stated, "[a] bar association is motivated to ensure the integrity and competency of the lawyers it refers. There is less likelihood the public will perceive these referrals as the sale of a client." 311 Ill. App. 3d at 568; *see also Inmates of the R.I. Training Sch. V. Martinez*, 465 F.Supp.2d 131, 134 (D. R.I. 2006) (stating that the prohibition against fee-sharing with nonlawyers is intended to "prevent corporations from offering legal services through salaried lawyers, where clients' fees would contribute to the corporate bottom line, thereby compromising lawyer independence").

Likewise, in *Emmons*, the court stated that "[t]here are wide differences—in motivation, technique and social impact—between the lawyer reference service of the bar association and the discreditable fee-splitting featured in the disciplinary decisions." *Emmons*, 86 Cal. Rptr. at 372. The court determined that none of the dangers or disadvantages of lawyer-layperson fee-splitting, such as the possibility of control by the layperson, interest in the layperson's own profit rather than the client's fate, or the layperson's tendency to select the most generous attorney, characterized the bar association's lawyer referral program. The bar association sought "not individual profit but the fulfillment of public and professional objectives." *Emmons*, 86 Cal. Rptr. at 372. It had a "legitimate, nonprofit interest in making legal services more readily available to the public." *Emmons*, 86 Cal. Rptr. at 372. *See also* D.C. Bar, Ethics Opinion 369 (July 2015) (concluding that a non-profit public interest legal service could receive a percentage



of fees paid to attorneys to whom the project referred clients and who had agreed to charge reduced fees because “such entities are unlikely to impair or control the independent professional judgment of the attorneys to whom referrals are made”).

Similarly, the Pennsylvania Bar Association, in its opinion considering the ethics of participating in fixed fee limited scope legal service referral programs, noted that prior Pennsylvania Bar opinions had concluded that a lawyer could properly pay percentage-based referral fees to lawyer referral services sponsored by a county bar association, because the not-for-profit services used the funds exclusively either to cover operating expenses or otherwise for public benefit. Pennsylvania Bar Association: Legal Ethics and Professional Responsibility Committee, Formal Op. 2016-200, at 5 (Sept. 2016). The Pennsylvania Bar determined that the rationale expressed in *Richards*, *Emmons*, and its prior opinions did not apply to for-profit referral services. PBA, Formal Op. 2016-200, at 5.

Compared to bar association referral services, a for-profit matching service is far removed from the legal profession. Beyond selling legal services and matching lawyers to customers who have bought a legal service, a matching service has no real connection to the legal profession. Thus, that service would have minimal (if any) motivation to safeguard the public, maintain the integrity of the profession, and protect the administration of justice from reproach. Accordingly, a rule that regulates or prohibits fee-sharing with for-profit matching services would most likely survive a constitutional challenge, because the rule is designed to promote the independence of lawyers by preventing non-lawyers from controlling how lawyers practice and to attempt to minimize the instances in which the referral service and participating lawyers will be motivated by economic incentives rather than by the client’s best interests.

### **Conclusion**

A for-profit lawyer-client matching service may be unable to argue that the First Amendment and Fourteenth Amendment prevent the ARDC from regulating it. Rather, because the for-profit matching service is a commercial endeavor, and because the ARDC would regulate the payment of referral fees to the service, any regulation would only need to relate to a legitimate state interest.

# Appendix One

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**Angela E. Peters**  
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