Responsive Law
The Consumer's Voice in the Legal System

Testimony on: Proposed Amendments to Rule 4-7.22, Rules Regarding the Florida Bar – Lawyer Referral Services

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Testimony to the

The Florida Bar,

Board of Governors Review Committee on Professional Ethics

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

We oppose the proposed amendments, which impose additional restrictions and obligations on designated Lawyer Referral Services. The proposed rules would impose considerable and unnecessary burdens on Lawyer Referral Services, other group advertising programs, and participating lawyers. These burdens will affirmatively harm legal consumers by discouraging referral services and effective lawyer advertising, thereby depriving ordinary consumers of essential information concerning legal representation.

A Lawyer Referral Service ("LRS") makes legal services more accessible and affordable. LRSs are able to recommend lawyers who are well-suited to provide a specific legal service. Such recommendations can be invaluable to ordinary consumers, who generally have little or no experience with the legal system and face considerable difficulty in determining which lawyer will best serve their given legal needs. In addition to directing consumers to particularly suitable lawyers, LRSs can provide other beneficial services to legal consumers, including uniform descriptions of lawyers' qualifications and experience and cost comparisons between lawyers offering similar services. The proliferation of competitive for-profit referral services also promotes the development of new and innovative forms of legal marketing. This allows legal advertisers to take advantage of emerging technologies to effectively communicate with consumers, and gives consumers the ability to quickly and efficiently access essential information concerning legal representation.

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

The proposed rules will impose unnecessary burdens on LRSs.

The proposed rules impose considerable regulatory burdens on designated LRSs, which are already uniquely subject to Bar oversight. For example, the existing rules obligate designated LRSs to quarterly furnish the Bar with the names of participating lawyers and all persons "authorized to act on behalf of the service."[1] Proposed Rule 4-7.22(a)(4) would further obligate designated LRSs to provide the Bar with "complete information" regarding, among other things, all relationships, financial arrangements, and agreements with all lawyers. The proposed rules would further require that all designated LRSs be "open to all lawyers licensed and eligible to practice . . . who meet reasonable . . . requirements."[2] Other novel obligations imposed by the proposed rules include periodically surveying participating lawyers' clients[3]; establishing admissions and removal procedures, including an appeal process[4]; and creating "subject matter panels" with "minimum experience" requirements.[5] Although some of these procedures may well improve the efficacy of some LRSs, every LRS should not be obligated to inflexibly enact them across the board. Imposing inflexible mandatory requirements of this sort does very little to protect consumers, but significantly stifles innovation and creativity in legal advertising.

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[1] New Rule 4-7.22(a)(5), (6), adapted from ABA Model LRS Rule XII.
[2] Proposed Rule 4-7.22(a)(15), adapted from ABA Model LRS Rule IV.
[3] Proposed Rule 4-7.22(a)(17), adapted from ABA Model LRS Rule VII.
[4] Proposed Rule 4-7.22(a)(18), adapted from ABA Model LRS Rule VIII.
[5] Proposed Rule 4-7.22(a)(19), adapted from ABA Model LRS Rule X.

In addition, as currently drafted, the proposed rules outline several possible restrictions on LRS fee structuring. The proposed comment to Rule 4-7.22 would, alternatively, permit or restrict "pay-per-click"[6] and "pay-per-lead."[7] Both fee structures should be permitted, however. In August 2012, the ABA specifically amended Model Rule of Professional Conduct 7.2 to permit both "pay-per-click" and "pay-per-lead" fees.[8] Both are reasonable, and increasingly common, mechanisms of determining advertising charges, especially in new and emerging media. Most important, neither fee structure encroaches on the independent judgment of the lawyer or intrudes on the client-lawyer relationship.

Finally, the proposed rules would also obligated designated-LRSs, as well as participating lawyers, to pay unspecified fees to "offset Florida Bar expenses" in administering and enforcing these rules.[9] The precise amount of these fees has yet to be determined; however, the administrative and enforcement expenses of the proposed Bar oversight regime is likely to be considerable. Requiring both LRSs and participating lawyers to offset this expense will simultaneously discourage the formation and expansion of LRSs in Florida, and dissuade Florida lawyers from participating in existing LRSs.

The proposed rules will also burden non-LRS group advertising.

The current LRS definition is extremely broad and encompasses a significant number of purely advertising programs. In Florida, a "Lawyer Referral Service" includes "*any group or pooled advertising program* . . . wherein the legal services advertisements utilize a common telephone number or website and potential clients are then referred only to [participating] lawyers or law firms."[10] This is distinguished from a "Lawyer Directory," which is limited to "a

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[6] Defined as a fixed sum for each time a consumer views information about a specific lawyer.

[7] Defined as a reasonable pre-arranged, fixed sum fee per matter referred to the lawyer that is not contingent on the outcome and does not vary based on the type of matter or the amount at issue.

[8] ABA Model Rules of Professional Conduct, Rule 7.2, Comment 5.

[9] Proposed Rule 4-72(a)(14), (b)(6).

[10] New Rule 4-7.22(c)(2) (emphasis added). The ABA model rules by contrast, explicitly excludes "lawyers *jointly advertising their own services* in a manner which *discloses that such advertising is solely to solicit clients* for themselves." ABA Model Supreme Court Rules Governing Lawyer Referral and Information Services, Rule XIII(4) (emphasis added).

listing of lawyers *together in one place*, such as a common Internet address, . . . in which . . . the viewer is *not directed to a particular lawyer*."[11] Accordingly, a group advertising program that provides any form of direction to consumers – even direction based solely on location or practice area – is designated a LRS. Many of the current and proposed LRS rules, however, are wholly inapplicable to group advertising programs.

This scheme is particularly problematic in the age of internet advertising. The broad LRS definition sweeps up common online marketing methods, such as those provided by Total Attorneys, Groupon, or Martindale-Hubbell's Lawyers.com. The internet is a fundamentally interactive and dynamic medium; but online, non-LRS, group advertising is currently restricted to static websites that list "all the participating lawyers and their advertisements"[12] – a kind of virtual "Yellow Pages." Group advertising programs and marketing services that want to present consumers with something more efficient and user-friendly than a fixed directory are required to register as LRSs, with all the accompanying burdens that entails. Forcing legal advertisers to choose between inefficiency and burdensome regulation only serves to limit legal consumers' ability to obtain essential information concerning legal representation.

The Committee should carefully consider the continued vitality of the 1993 ABA Model LRS Rules.

Many of the current and proposed rules are based on the 1993 ABA Model Supreme Court Rules Governing Lawyer Referral and Information Services ("ABA Model LRS Rules"). Those Rules were promulgated two decades ago, however, and do not reflect recent changes in both marketing generally and lawyer advertising specifically. Most fundamentally, the ABA Model LRS Rules are predicated on a model of LRSs with a "public service orientation."[13] The Rules presuppose the "primacy of a public service intent" and consistently emphasize "the public service requirement of lawyer

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[11] New Rule 4-7.23(a) (emphasis added).
[12] New Rule 4-7.23(a).
[13] ABA Model LRS Rules, Introduction. Indeed, the very first proposed requirement is that "[a] qualified service shall be operated in the public interest. . ." *Id.*, Summary of Requirements, 1.
Rule II: ' '

referral programs." [14] This approach is unsurprising considering that when the ABA Model LRS Rules were drafted, ABA Model Rule of Professional Conduct 7.2 only excepted "the usual charges of a *not-for-profit* lawyer referral service."[15] The Rule has subsequently been amended to except "the usual charges of . . . a not-for-profit *or qualified* lawyer referral service."

In its last meeting considering these proposals, the Committee rejected the proposed adoption of ABA Model LRS Rule II, which requires that LRSs provide information about government, public service, and pro bono programs.[16] That requirement is a fundamental component of the "public service" framework outlined in the ABA Model LRS Rules.[17] In rejecting the requirement, the Committee has demonstrated its recognition that this framework is an insufficient model for LRS rulemaking. In keeping with that recognition, the Committee should carefully consider the practical consequences of adopting the other proposed ABA Model LRS Rules.

Additional barriers should not be placed between people and the legal system that is intended to adjudicate their disputes. **On behalf of the users of the legal system, we urge the Committee to reject the proposed amendments.**

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[14] ABA Model LRS Rules, Comment to Rule II.

[15] *See id.*, Comment to Rule IX.

[16] Old proposed rule 4-7.22(a)(15), requiring that a LRS "provide[] information to consumers on government and consumer agencies and pro bono and legal aid programs that may be available to assist consumers."

[17] ABA Model LRS Rules, Comment to Rule II ("The intent of this rule is to articulate the public service requirement of lawyer referral programs."); *Id.*, Summary of Requirements, 1 ("A qualified service shall . . . provide information regarding government and consumer agencies. . ., pro bono programs and other legal service providers."); id., Introduction ("Lawyer referral programs offer two important services to the public. First, they help the client determine if the problem is truly of a legal nature by screening inquiries and *referring the client to other service agencies when appropriate*." (emphasis added)).