

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE RULES CASE NO. SC16-1470
REGULATING THE FLORIDA BAR –
SUBCHAPTER 4-7 (LAWYER
REFERRAL SERVICES)

**THE FLORIDA BAR'S MOTION FOR LEAVE TO RESPOND AND
RESPONSE TO COMMENTS**

The Florida Bar (the bar) respectfully requests leave to respond to comments filed in this case and states as follows:

The bar filed a petition to amend Subchapter 4-7, Rules Regulating the Florida Bar, relating to lawyer referral services, in this case on August 15, 2016.

Comments were filed by Charles D. Scott; Avvo, Inc.; Brad Salter; Robert J. Healy, Jr.; Bill Wagner; 1-800-411-Pain Referral Service, LLC (411-Pain); the Broward County Bar Association; and Responsive Law.

Many of the comments received are duplicative of comments received by the bar during the amendment process (provided to this Court in the bar's petition as Appendix D) and have been addressed by the bar's initial petition. The bar therefore will not address those comments that are discussed in the bar's petition and will not address each comment point-by-point. The bar also will not address positive comments filed with this Court, as those issues have also been addressed by the petition. However, the bar requests to respond to a few of the comments.

The comments filed by Mr. Healy state that the bar's proposal is a way for non-lawyer corporations to provide legal services in Florida. This contention is not correct. The bar's proposal in this petition does not allow a corporation to practice law or provide legal services in Florida. It merely continues to allow what is already permitted by the Rules Regulating the Florida Bar, which is for a nonlawyer, including a nonlawyer corporation, that is located either in or outside Florida, to match prospective clients with lawyers who are authorized to provide legal services in Florida.

Responsive Law comments that entities such as Lawyers.com and Martindale-Hubbell would be qualifying providers under the bar's proposed rule

SC16-1470

Florida Bar Motion for Leave to Respond and Comments

October 5, 2016

Page 1

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and therefore subject to the rule's requirements. Similarly, Avvo raises concerns that Google would be subject to the rule's requirements. These comments focus on the examples listed in subdivisions (b)(2) and (b)(3) of the proposed amendment to rule 4-7.22 and ignore the introductory language of proposed subdivision (b), which must be read in conjunction with proposed subdivisions (b)(2) and (b)(3). The amendments to rule 4-7.22 define qualified provider. The definition specifically requires that the entity must receive a benefit or consideration for the referral or matching of prospective clients to lawyers or law firms and then provides a non-exhaustive list of specific types of matching or referring that are included in the definition. Responsive Law and Avvo both focus on the list of examples rather than the specific elements of the definition, that require that the entity receive a benefit for the referral or matching.

To the extent that any entity mentioned meets the elements of the definition, that entity would be considered a qualifying provider. But entities that are paid to provide marketing or advertising of individual lawyers would not meet that definition. Otherwise, all marketers who create individual advertising for lawyers or law firms would be qualifying providers under the proposed rule. For example, if by Google, Avvo means a lawyer's purchase of Google AdWords, then Google is not a qualifying provider. Google is a search engine in which an individual lawyer pays Google to post the lawyer's advertisement, which is labeled an advertisement and markets only that individual lawyer's legal services, in the search result using specific words or terms. Entities which assist a lawyer in creating that lawyer's advertisements marketing that individual lawyer's services do not meet the definition of qualifying provider because they do not engage in any direct or indirect referral, but instead directly market the services of the lawyer to the public. Similarly, if Martindale-Hubbell does not receive a benefit for listing lawyers in their publication and website, it would not be a qualifying provider under the proposed definition, and would not be subject to the requirements of this rule.

Avvo also raises its concerns regarding commentary on the prohibition against division of fees with a qualifying provider.¹ Specifically, Avvo states that

¹ The bar notes that, although Avvo provided this Court with citations to ethics opinions from other jurisdictions that indicate that lawyers may participate with entities such as Groupon (which charges participants a percentage of fees collected), there are states that take the position that lawyers may not. *See, e.g.*, Alabama Ethics Opinion 2012-01 (Participation in Groupon is improper because it constitutes improper fee splitting with a nonlawyer); Arizona Ethics Opinion 13-01 (2013) (Lawyer should not participate in on-line coupon service, because of concerns

use of credit cards would violate the rule. That concern is erroneous. Lawyers' acceptance of credit cards is specifically permitted by another rule. Rule 4-1.5(h) of the Rules Regulating the Florida Bar explicitly permits lawyers to accept client payment by credit cards as long as the lawyer charges no additional fees or costs for participation. Consequently, accepting payment by credit card is not considered improper fee splitting in Florida.

While the lawyer referral service 411-Pain generally agrees with the proposed amendments, 411-Pain raises 2 points in opposition: first, that the proposed rule does not address the documentation that a qualifying provider must give to participating lawyers to show that the qualifying provider is in compliance; second, that there is no due process for qualifying providers if the bar notifies participating lawyers of noncompliance. 411-Pain suggests additional commentary to address the second issue. Neither concern should stop this Court from adopting the proposed amendments.

Regarding the first point, the qualifying provider merely must provide documentation that those requirements are being followed. Documentation could be as simple as the qualifying provider making an agreement with the participating lawyer that the qualifying provider is in compliance with all requirements of the proposed rule. For example, the qualifying provider can have a written or electronic agreement with the participating lawyer that includes the basis on which the lawyer will pay for the service, whether the qualifying provider requires the participating lawyer to make cross referrals, and that the qualifying provider makes referrals only to those authorized to provide the services to comply with proposed subdivisions (d)(2), (d)(3) and (d)(4). The qualifying provider also may provide the participating lawyer with additional documentation; for example, the qualifying provider could provide participating lawyers with a copy of its most recent listing of participating members to The Florida Bar to document compliance with proposed subdivision (d)(5). If a qualifying provider files advertisements for its services with the bar, the qualifying provider can provide copies of the filed advertisements and the bar's opinion to participating lawyers to comply with proposed subdivisions (d)(1), (d)(8) and (d)(11). The qualifying provider can

including conflicts, division of fees, independence of professional judgment, and compliance with lawyer advertising rules); Indiana Ethics Opinion [1 of 2012](#) (Lawyer participation in Groupon is improper because it constitutes improper fee sharing, permits someone other than the lawyer to hold client funds, permits prospective clients to create conflicts with current clients, and improperly delegates creation of lawyer-client relationship to third party); and Pennsylvania Ethics Opinion 2011-027 (2011) (Use of Groupon is impermissible fee-sharing).

SC16-1470

Florida Bar Motion for Leave to Respond and Comments

October 5, 2016

Page 3

provide copies of filings with the state in which the qualifying provider is incorporated to establish that the qualifying provider is using its actual or a registered fictitious name to comply with proposed subdivision (d)(9). If the qualifying provider merely follows the requirements of the proposed rule, the qualifying provider will be able to provide the necessary documentation.

411-Pain's second point is that the amendments violate the due process rights of the qualifying providers because the qualifying provider is not given an opportunity to respond to the bar's finding of noncompliance. As with most Rules Regulating the Florida Bar, the proposed amendments govern the conduct of Florida Bar members. For example, if the bar learns that the qualifying provider is advertising in a way that violates this Court's rules, the bar would inform the lawyers working with that qualifying provider. The participating lawyers then would have the option of asking the qualifying provider to change their advertisements and comply or leave the service within 30 days. For the most part, this is not a variation from current rules and procedures. If a lawyer referral service files an advertisement, receives an opinion that the advertisement does not comply with this Court's rules, and chooses to run the advertisement anyway, the bar would look to the lawyers receiving referrals from that service to take corrective action or be subject to discipline. Proposed subdivision (e)(2) changes this slightly by providing a safe harbor for participating lawyers, so that if the bar notifies participating lawyers of a qualifying provider's noncompliance, the participating lawyers can either obtain compliance by the qualifying provider and provide documentation of that to the bar, or the participating lawyer can stop participation with the qualifying provider and not be disciplined.

Rather than governing the lawyer's conduct, 411-Pain tries to move the bar's regulation from the lawyer to the qualifying provider. 411-Pain states that the bar should be required to provide notice to the qualifying provider regarding noncompliance so that the qualifying provider has an opportunity to respond before the lawyers take action. 411-Pain suggests an addition to the commentary that puts the bar in a position of regulating the provider, rather than the lawyer. The bar opposes the suggested addition to the comment. Unless the qualifying provider is engaging in the unlicensed practice of law, the bar does not have authority to address the conduct of the qualifying provider. It is the obligation of the participating lawyer and the bar to ensure compliance with the rules. The qualifying provider has the option to take steps to comply with the rule so that the participating lawyer is not required to leave the service, so no due process rights

are being violated. Instead, the proposed amendments keep the regulation where it should be, on the lawyer's conduct.

As noted in the petition, the proposed amendments broaden the scope of the bar's regulation of lawyer participation in various forms of indirect marketing of legal services, maintain necessary restrictions to protect the public, and eliminate unnecessary barriers to provide greater access to legal services. The comments do not provide any compelling basis to reject the proposed amendments or make additional changes to the bar's proposal. Therefore, the bar requests that this Court grant the bar's request for leave to respond to comments filed, accept this response, and adopt the amendments as proposed.

Respectfully submitted,

/s/ John F. Harkness, Jr.

John F. Harkness, Jr.
Executive Director
Florida Bar Number 123390

William J. Schifino, Jr.
President 2016-17
Florida Bar Number 564338

Michael J. Higer
President-elect 2016-17
Florida Bar Number 500798

Carl B. Schwait
Chair, Board Review Committee on
Professional Ethics
Florida Bar Number 221139

John Mitchell Stewart
Chair, Board Technology Committee
Florida Bar Number 120472

Lori S. Holcomb
Director, Division of Ethics and
Consumer Protection
Florida Bar Number 501018

Elizabeth Clark Tarbert
Ethics Counsel
Florida Bar Number 861294

The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
Tel: (850) 561-5600
Primary E-mail Address:
jharkness@flabar.org
Secondary E-mail Address: eto@flabar.org

CERTIFICATE OF TYPE SIZE AND STYLE

I certify that this petition is typed in 14 point Times New Roman Regular type.

/s/ John F. Harkness, Jr.

John F. Harkness, Jr.
Executive Director
Florida Bar Number 123390

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this motion has been sent. Petition has been sent by e-mail to the following individuals on this 5th day of October, 2016:

Alan F. Wagner (AlanWagner@WagnerLaw.com; Angela@WagnerLaw.com); Bill Wagner (billwagner@wagnerlaw.com; angela@wagnerlaw.com); Brad Salter (bsalter@salterhealy.com); Charles A. Morehead III (charles@floridainjurylawyers.com; Jane@floridainjurylawyers.com; pleadings@floridainjurylawyers.com); Charles D. Scott (itslegal@aol.com); Josh King (josh@avvo.com); Robert J. Healy, Jr. (rhealy@salterhealy.com); Timothy Patrick Chinaris (tchinaris@gmail.com); Thomas M Gordon (tom@responsivelaw.org; info@responsivelaw.org).

/s/ John F. Harkness, Jr.

John F. Harkness, Jr.
Executive Director
Florida Bar Number 123390