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August 25, 2016

The Florida Supreme Court
c/o Clerk of the Court
500 S. Duval St.
Tallahassee, FL 32399-1927

Re: Comments on Draft Amendments to Florida Rule 4-7-22 (SC16-1470)

Statement of Interest

Avvo, Inc. is an online resource for consumers of legal services. Since its launch in 2007, Avvo has become the web's largest and most heavily-trafficked legal resource, with over 8 million visits per month. Avvo offers a comprehensive directory of attorneys (including every licensed attorney in Florida), lawyer reviews, a question-and-answer forum, and thousands of legal guides and other legal resources. Avvo has recently started offering Avvo Legal Services: fixed-price, limited-scope legal services, fulfilled by local attorneys. We are submitting these comments because we are concerned that the Florida Bar's proposed Amendments to its Lawyer Referral Service Rules are overreaching, counter-productive, and contrary to the interests of the citizens of Florida.

1. **The Amendments to Rule 4-7-22 are Far Broader Than Necessary to Achieve the Regulatory Objectives**

   a. The Rules of Professional Conduct Must Be Animated By Real Concern for Consumer and Client Protection

Florida's Rules of Professional Conduct with respect to attorney advertising are fundamentally rules of consumer and client protection. They are intended to lead to outcomes where consumers are not deceived and clients are not harmed. This purpose is both intuitive and, to the extent the ethics rules affect speech rights, required by law. Starting in 1977 and continuing through a string of subsequent decisions, the United States Supreme Court has found that the First Amendment protects the right of attorneys to inform the public about legal service offerings.[1] For state regulation of advertising to survive constitutional review, such regulation must meet either the "intermediate

[1] *See, e.g.,* Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988); Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995).

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scrutiny" standard (for regulation of misleading advertising)[2] or a developing form of even-more-rigorous scrutiny (for restrictions on non-misleading advertising).[3]

For Florida's attorney advertising rules, the important governmental interest is the protection of the public from false and deceptive practices in the selling of legal services. In order to meet the *Central Hudson* "intermediate scrutiny" requirements, such regulation must be enacted with this purpose in mind, must be supported by evidence that the harm is real and the application actually works, and must not be any more extensive than necessary to achieve the goal.

b. <u>There are Legitimate Consumer Protection Concerns with Lawyer Referral Services</u>

As attorneys have a constitutional right to advertise – and consumers have a constitutional right to access information about legal services – what purpose is served by an attorney advertising rule limiting participation in lawyer referral services (as the current version of Florida RPC 4-7.22 does, and as the Florida Supreme Court has called for greater regulation of)? It must be due to some special risk to consumers from such services, and indeed, as the ABA Overview of LRS Regulation notes:

"This debate reveals that the defining characteristic of a lawyer referral service is generally understood, if not explicitly described in court rules, as the use of an intermediary to connect a potential client to a lawyer based on an exercise of discretion within stated guidelines."[4]

In other words, "lawyer referral services" are marketing programs that purport to match a potential client with the right lawyer for their specific legal problem, while actually referring that person to whichever lawyer has bought the right to that "lead" (often through geographic exclusivity). Many states have concluded, and not without reason, that special regulation is required due to the lack of consumer choice and strong potential for consumer deception inherent in such programs. That's why Florida has a specific lawyer advertising rule – RPC 4-7.22 – applying special regulation to lawyer referral services.

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[2] Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York, 447 U.S. 557 (1980).

[3] This test has been described as occupying a middle ground between "intermediate" and "strict" scrutiny. See Sorrell v. IMS Health, 564 U.S. 552 (2011); Retail Digital Network v. Appelsmith, 810 F.3d 638 (9th Cir., 2016).

[4] ABA Standing Comm. on Lawyer Referral & Information Service (2011) (discussing the regulation of lawyer referral services: a preliminary state-by-state review); see also New Jersey Ethics Opinion 13; 132 N.J.L.J. 267-1992.

c. <u>The Proposed Amendments Extend the Breadth of the Lawyer Referral Service Rules While Weakening Consumer Protections</u>.

The fundamental problem with the proposed amendments to RPC 4-7.22 is that they produce the maximally sub-optimal result. First, the amendments expand the applicability of the rule from "lawyer referral services" to "qualified providers,"[5] a category whose definition captures virtually all forms of attorney advertising. Then the amendments go on to remove some of the protections that currently apply to Florida attorney referral services.

In so doing, the amendments would bring far, far more entities – from Avvo to Google to American Lawyer Media – under the regulatory ambit of RPC 4-7.22, without any legitimate regulatory reason for so doing. At the same time, most lawyer referral services – those entities whose marketing practices drove the need for the regulation in the first place – get a lighter regulatory burden under the proposed rules.

This offends both the constitution and the common sense of regulation. Under the commercial speech doctrine, advertising regulation must directly advance an important government interest and be narrowly tailored toward that end. The current Rule 4-7.22 does this by focusing special regulation only on those enterprises that recommend lawyers in an atmosphere lacking in consumer choice. By watering down its LRS regulations and at the same time imposing those rules on a far wider group of participants, the Bar has proposed rules that are both bluntly tailored and ineffective at meeting the fundamental goal of lawyer referral service regulation.

2. The Proposed Amendments Overreach with Respect to Fee-Splitting.

The amendment and its comments also seek to expand the definition of unlawful fee splitting. While the prohibition on fee splitting has always been based on the potential threat to a lawyer's independent professional judgment, the Comment to the Amendments indicates a variety of ways such a prohibition would be mechanically applied to all manner of services. While the Comment notes that determinations would be made on a "case-by-case basis," the language goes far beyond those circumstances in which a lawyer's independent professional judgment would be at risk.

To take but one example: the fact that fees charged may vary by legal service type or size is unlikely to have any bearing whatsoever on a lawyer's independent professional judgment. All of those differences exist today. They exist because different markets have different competitive dynamics, some services are more lucrative to lawyers than others, and costs of acquisition, retention, and servicing vary widely. None of this is remotely

[5] See proposed amendment to Rule 4.7.22(b): *"A qualifying provider is any person, group of persons, association, organization, or entity that receives any benefit or consideration, monetary or otherwise, for the direct or indirect referral of prospective clients to lawyers or law firms."*

controversial or problematic in any way to clients. Yet any such variance would apparently be prohibited under the terms of the Comment, which states that "[a] fee calculated as a percentage of the fee received by a lawyer, or based on the success or perceived value of the case, would be an improper division of fees."

There's no question that a service provider fee calculated as a percentage of the fee received by a lawyer *may* be an improper division of fees, *if* the circumstances surrounding that calculation indicate a risk to the lawyer's independent professional judgment. But in the absence of such circumstances, the mere fact that such a split exists does not *in and of itself* provide a basis for proscribing lawyers from using such a service. Numerous bar ethics opinions have reached this conclusion when considering "deal of the day" websites like Groupon[6] and credit card transactions.[7] While we're sure the Bar didn't intend to revisit the practice of lawyers taking credit cards – a development which has greatly expanded access to justice and consumer choice – the processors' fees represent just the sort of mechanical fee split the Amendments would prohibit.

3. **Complying with the Proposed Amendments will be Costly to Florida Lawyers and the Bar, and Will Reduce the Availability of Information About Legal Services.**

Every attorney who uses advertising of any kind will need to engage his or her providers in discussions about compliance with the new rules. Many of these providers will be located out of state, and many will provide services to many businesses other than lawyers and law firms. Most will be unfamiliar with the Florida Rules, or reluctant to provide attorneys with the extensive "due diligence" materials that the proposed Amendments call for attorneys to obtain. These factors alone will greatly chill the availability of information about legal services for Florida consumers, as attorneys will be in violation of the Rule if they continue to use a marketing provider (like, for example, Google AdWords) without getting the necessary compliance assurances.

It is also hard to take seriously the Bar's finding of "*de minimus* financial impact" from the changes. As the amendments vastly expand the universe of entities that fall within the ambit of the Rule, the Bar will be taking on an exponentially larger burden of monitoring and compliance. For the regulations to be applied consistently and effectively, those obligations will need to be taken seriously – and they do not come for free.

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[6] *See, e.g.,* ABA Formal Opinion 465 - Lawyers' Use of Deal-of-the-Day Marketing Programs (2013); Nebraska Ethics Advisory Opinion for Lawyers No. 12-03 (2012); North Carolina Formal Ethics Opinion 10: Lawyer Advertising on Deal of the Day or Group Coupon Website (2011); South Carolina Ethics Opinion 11-05 (2011).
[7] *See, e.g.,* Arizona Ethics Opinion 89-10 (1989); Colorado Formal Opinion 99 - Use of Credit Cards to Pay for Legal Services (1997).

4. Expanding the Coverage of the Rules Increases the Risk of the Bar and its Sub-Entities Losing Antitrust Immunity.

In addition to the First Amendment and regulatory effectiveness and cost issues, there is also the fact that the Amendments greatly expand the reach of the Bar's regulation – to a wide swath of non-lawyer publishers and providers of legal information and services – while excluding the Bar's own operations. Last year's Supreme Court decision in *North Carolina State Board of Dental Examiners v. FTC*[8] brought increased focus to the question of industry self-regulation. The opinion in that case stated that the antitrust immunity of agency regulatory bodies controlled by active market participants – like the Florida Bar, and its related bodies such as the Board of Governors, the Board Review Committee on Professional Ethics, and the Standing Committee on Advertising – is in serious jeopardy unless the entity in question is "actively supervised" by the State. This may be a difficult standard to meet when Bar employees and committees comprised of industry participants have broad discretion to determine who is a "qualifying provider," and whether such providers are in compliance with the rules.

5. The Bar Has Many Options To Regulate More Narrowly and Effectively.

We know that the Bar is motivated by a desire to look out for the best interests of Florida consumers. However, in its attempt to "level the playing field" by applying a uniform set of rules to lawyer referral services and all other mediums in which attorneys might market and sell their services, the Bar has created regulations that are over-extensive, under-targeted, and out of step with the needs of consumers and clients.

Avvo urges the Court to direct the Bar to focus more clearly on the legal needs of Floridians, and any documented consumer harm caused by lawyer referral services. There are unique aspects of some lawyer referral service business models that may be harming consumers; the Bar should be focused on addressing those harms, and those entities, rather than trying to bring the wide universe of legal marketing under its regulatory umbrella.

For example, many of the eligibility, documentation, and malpractice insurance requirements may be appropriate, as applied to lawyer referral services that operate in an opaque manner lacking in consumer choice. Similarly, the Bar's proposal that qualified providers not require reciprocal referrals to other businesses might be a starting point for addressing the Court's concern with lawyer referral services pressing cross-referrals to other professionals or types of services.

Conclusion

The Bar's proposed amendments to Rule 4-7.22 expand the regulatory reach of the Bar without any legitimate purpose or rational assessment of the costs in money, time, and

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[8] 574 U.S. ___ (2015).

access to legal information. At the same time, the regulations relax the requirements for lawyer referral services to operate in Florida.

Such an outcome fails the test for constitutionality and the court's direction that the Bar regulate with an eye to some specific concerns around lawyer referral services. We urge this Court to reject the proposed amendments, and direct the Bar to craft a new proposal more tightly tailored to lawyer referral services and documented consumer harm.

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