

June 12, 2009

Karen A. Gould, Esquire
Executive Director
Virginia State Bar
707 E. Main Street, Suite 1500
Richmond, VA 23219

Dear Ms. Gould:

I am writing to comment on proposed LEO 1851 – Participation in a Third Party Internet Website. I write to oppose publication of this LEO as currently drafted.

By way of background, I am a personal injury and medical malpractice attorney with over 25 years experience. I also run a consulting business where I teach marketing and entrepreneurship principles to solo and small firm attorneys across the United States and Canada. I have hundreds of newsletter subscribers and run marketing and practice building, coaching, and mastermind groups for lawyers and other small business owners. I am familiar with websites that would appear to fit the website described in LEO 1851 though, as I am sure you can imagine, these websites come in many different forms. (This, as you will see, is one of the reasons why the LEO 1851 will not help guide the Bar much.) I am a participant in InjuryBoard.com which, I do not believe, violates the opinion of LEO 1851, although it contains *some elements* mentioned in 1851.

In my view, LEO 1851 is not well-reasoned and is based on a flawed premise. I will suggest, however, a way that this opinion could be drafted to reach the appropriate goal concerning a free flow of information about the availability of legal services in a truthful and non-misleading manner.

First, I hope that we can agree that the fundamental reason that we have any rules at all limiting lawyer advertising is that we believe that it is *better* for the public if the selection of an attorney is based on reason. In other words, the more accurate and truthful information a member of the public has before hiring an attorney, the better opportunity that person will have of finding the right lawyer for them. Put another way, selection of an attorney based on *misleading* information cannot rationally be described as in the best interest of the consumer. However, ever since *Bates v. State Bar of Arizona* we have

Karen A. Gould, Esquire
Executive Director
Virginia State Bar
June 12, 2009
Page 2

recognized that advertising by lawyers can provide some of the information that consumers need to make an intelligent selection of an attorney.

The flawed premise of LEO 1851 is that the website described is making a *recommendation* for employment. The website described is clearly advertising and no reasonable consumer would conclude that a *recommendation of employment* is being made. Consumers use the Internet to find information. They get *recommendations* from trusted sources. Are the Yellow Pages recommending employment of the *only* advertiser on the back cover? Of course not. No reasonable consumer would see either the telephone directory or a website as anything other than advertising.

The leap that the proposed opinion makes in error is to suggest that because the number of lawyers in any area or specialty is limited, this equals a *recommendation*. This doesn't follow at all, in my view.

In any event, even if there was one person out there somewhere searching the Internet who saw such a website and thought *hey, they are recommending that I make contact, the solution* for that *problem* is to require notice to the consumer. Here's one I thought of:

NOTICE: THIS SITE IS ADVERTISING. WE ARE NOT MAKING A RECOMMENDATION FOR THE EMPLOYMENT OF SERVICES BY A LAWYER. WE ARE MAKING INFORMATION AVAILABLE TO YOU BY LAWYERS WHO HAVE PAID A FEE TO BE HERE AND WHO HAVE INDICATED AN INTEREST IN THIS AREA OF THE LAW. BY THE WAY, WE ALLOW NO MORE THAN FIVE LAWYERS PER GEOGRAPHIC AREA/SPECIALTY TO PARTICIPATE AND IN SOME CASES LAWYERS HAVE PAID AN EXTRA FEE TO HAVE AREA EXCLUSIVITY. BUT, IT'S ALL ADVERTISING. WE ENCOURAGE YOU DO YOUR OWN RESEARCH BEFORE MAKING A HIRING DECISION.

Or, something shorter:

ALL ATTORNEY LISTINGS ARE A PAID ATTORNEY ADVERTISEMENT, AND DO NOT IN ANY WAY CONSTITUTE A REFERRAL OR ENDORSEMENT BY AN APPROVED OR AUTHORIZED LAWYER REFERRAL SERVICE

Or, something else I found:

The following disclosures and disclaimers apply to all websites operated by TheAttorneyStore.com, Inc. and GetLegalTV, Inc. (collectively, "GetLegal"),

Karen A. Gould, Esquire
Executive Director
Virginia State Bar
June 12, 2009
Page 3

specifically including GetLegal.com, TheAttorneyStore.com, FuenteLegal.com and GetLegalTV.com (collectively the "GetLegal sites").

Attorney Directory Disclosures/Disclaimers

GetLegal's Attorney Directory is a PAID ADVERTISEMENT. The Attorney Directory is not a lawyer-referral service, pre-paid legal plan, legal-services organization or advertising cooperative. The Attorney Directory is not endorsed, approved or recommended by any State bar association. Attorneys pay a fee to be listed in the Attorney Directory.

The attorneys listed in the GetLegal Attorney Directory of lawyers may have paid a fee to be listed. The list of attorneys that appears on the screen in response to your search does not identify every attorney authorized to practice law in the practice area or ZIP code you select.

GetLegal sells advertising in the Attorney Directory in tiers. The attorneys pay varying amounts for each tier. The greater the amount paid by an attorney, the more prominent his or her listing will be in the results of your search. GetLegal limits the number of attorneys in each tier. The attorneys who pay the highest fees are listed at the top of the screen that displays search results. Five (5) attorneys may purchase a listing in the top tier. The attorneys who pay the second highest fees are listed after the attorneys in the top tier. Ten (10) attorneys may purchase listings in the second tier.

GetLegal makes no representation that attorneys listed at the top are superior to the other attorneys listed. You should not determine which attorney you select based on the tier in which he or she is listed or the prominence of his or her contact information in your search results.

The decision to hire or engage the services of an attorney should not be based only on the information contained in this advertisement. Any decision regarding which attorney to engage should be based on an independent investigation of all facts and circumstances that you deem relevant in making the decision.

You are not required to retain an attorney who meets your search criteria. GetLegal will never refer you to a specific attorney or service. You have complete discretion in deciding which attorney to retain, if any. Your selection of an attorney shall be your sole responsibility, and GetLegal shall not have any liability related to your selection. It is entirely your responsibility to make sure that the terms on which you engage an attorney listed in the Attorney Directory are acceptable to you. The Attorney Directory shall not share in any legal fees paid or payable by you to a listed attorney.

GetLegal makes no promise, warranty or other guarantee about the completeness, accuracy or truthfulness of the attorney information contained in the GetLegal Attorney Directory. The information in the Attorney Directory, including, but not limited to, each listed attorney's contact information and areas of practice, is provided and based on representations by, and is the responsibility of, the attorney. At the time an attorney submits an application to be listed in the Attorney Directory, the attorney must represent that he or she is a member in good standing in the State(s) in which he or she is admitted. GetLegal does not verify the attorneys' representations.

GetLegal does not recommend or endorse any listed attorney and/or the services he or she provides. GetLegal also does not guarantee or make any representations regarding the competence, integrity, honesty or trustworthiness of, the qualifications of, the quality of advice provided by or the ability or suitability of any attorney.

The fact that an attorney has indicated in the GetLegal Attorney Directory that he or she practices law in one or more areas of practice is not intended to imply or constitute a representation that such attorney is more expert or competent than any other attorney in that practice area. In addition, such an indication also does not mean that the attorney is a specialist in such practice area, possesses specialized knowledge in such practice area or has been certified by any State bar association or any other organization as a specialist or expert in such practice area.

The listed attorneys are not employed or screened by GetLegal. The fact that an attorney is listed in the GetLegal Attorney Directory is not intended to imply and should not be interpreted to mean that such attorney is more capable or more qualified than any attorney not listed in the GetLegal Attorney Directory.

The above disclaimers apply to all attorney listings that appear as sponsored links or featured attorney listings on pages in our Legal Information Center or elsewhere on GetLegal sites.

General Disclosures/Disclaimers

You shall utilize all GetLegal sites at your own risk. GetLegal makes no representation regarding the attorneys or other resources on the GetLegal sites. GetLegal does not guarantee the likelihood that you will find an attorney or other relevant or satisfactory information through the GetLegal sites.

GetLegal is not a law firm, does not render legal services and does not intend to hold itself out as a law firm. GetLegal or the use thereof does not establish an attorney–client relationship. Also, GetLegal will not interfere with or influence your choice of attorney and will not have the ability to, nor will it, influence or affect any relationship between you and any attorney you choose to retain or with whom you choose to communicate. All communications between you and an attorney should not be shared with any person representing or employed by GetLegal.

The information contained in GetLegal sites does not, and shall not be construed to, constitute legal advice. The effectiveness of any legal advice rendered by an attorney should depend on the attorney's familiarity with the underlying facts; thus, nothing provided in any GetLegal site should be considered a substitute for the informed advice of an attorney. GetLegal also will not advise you on legal issues.

GetLegal is not and shall not be liable for any claim, loss, cost or liability that arises out of or relates to your use of the GetLegal sites or any attorney who provides or fails to provide legal services to you, the provision by an attorney of false or misleading information to GetLegal or the failure of an attorney to meet his or her responsibilities under the rules and regulations of the State(s) in which the attorney is licensed to practice law.

Karen A. Gould, Esquire
Executive Director
Virginia State Bar
June 12, 2009
Page 5

GetLegal fully disclaims any and all liability directly or indirectly arising out of or relating to the information contained in, the use of, or the services available through the GetLegal sites or for the results or consequences of any representation of you by an attorney listed in the GetLegal Attorney Directory or elsewhere on any GetLegal site.

GetLegal makes no representations or warranties in relation to the articles, guidelines, informational videos or other information offered via the GetLegal sites. The information is provided to the general public and is not intended to be directed at any specific legal issue. The information provided is not a substitute for legal advice from a licensed attorney. We recommend that you consult with an attorney if you want assurances that the information provided is appropriate for your particular situation.

GetLegal takes reasonable steps to ensure that the information contained on the website and in all forms and documents is accurate but does not make any guarantee as to the accuracy or completeness of any of the information contained on the website. The law changes rapidly, varies from jurisdiction to jurisdiction and is subject to varying interpretations. Also, general information provided on GetLegal sites and forms and documents available for purchase may not fit every circumstance, and GetLegal cannot guarantee that the information provided on the GetLegal sites fits your particular circumstances and needs.

No reasonable consumer could possibly think that a website with that disclaimer was making a *referral for the employment of legal services*, could they?

The *quid pro quo* portion of the opinion fails for the same reason.

Here's another problem with opening this *Pandora's Box*: Lawyers pay **Google** for ads run on search engine return pages (SERPS). The lawyers don't pay for the display of the ads. They only pay when someone clicks on the ad. There are typically only 8 places for ads down right hand side of a SERP and the lawyers who pay the most get ***premium positions*** at the top of the page.

Would any reasonable person believe that **Google** is making an attorney recommendation for which they are being paid *per referral*? I suggest that the answer is obvious.

The final false premise that the proposed LEO is based on is that a for profit lawyer referral service can never be used by a consumer to make a rational decision about the selection of counsel. Yes, I understand that there is a *rule* (Rule 7.2(c)) that says this; but, to say ***there is a rule*** is not a good argument. The rule prohibiting a for profit lawyer referral service is itself not rational. It does not stand that merely because the lawyer referral service is ***for profit*** that it is therefore ***not helpful*** to consumers any more than to say that a ***not for profit*** lawyer referral service is ***good*** for consumers. One can well-imagine a ***for profit*** lawyer referral service that is ***actually much more helpful to the***

Karen A. Gould, Esquire
Executive Director
Virginia State Bar
June 12, 2009
Page 6

consumer in the selection of counsel than the Virginia State Bar's own *not for profit* referral service.

Basing LEO 1851 rationale stated in the opinion as currently drafted leads to all sorts of issues and problems from the perspective of the practicing attorney who is trying to figure out what is allowed and not allowed.

Here are some that come to top of mind:

1. As noted above, it is not objectively obvious to me that merely because there are a limited number of attorneys participating that this is now a *recommendation*. The word *recommendation* is not, as far as I can see, defined in the rules.

2. What if instead of five lawyers per area there were 12? What about 20? What about 7? Why does the number of lawyers listed lead one website to be *making a recommendation* while site with more lawyers paying to be listed is *not* making a recommendation?

3. Why the emphasis on the fact that the site *automatically forwards* information to participating lawyers? Would it make any difference if a human being reviews the information and then forwards the information? It should not if the *reason* is that this is a *pay for referral* website.

4. Why, if when the consumer gives his information to the website and is in effect saying, *I am consenting to be contacted by lawyers who may be interested in my case* and who are then contacted by a lawyer considered to be a referral at all? The consumer is voluntarily asking to be contacted. The consumer is always free to hire or not hire the lawyer. Where is the *danger to the consumer*?

5. Why does it matter if the lawyer, instead of paying a set fee per month/year, pays per referral or client contact? For some lawyers, this is the only way they can afford a reasonable web presence. How does it rationally and objectively flow that this is bad for the consumer?

Thus, premising LEO 1851 on the basis that these websites are *making a recommendation* is, in my view, flawed for a number of reasons.

Let's fix the *problem* the RIGHT WAY.

Karen A. Gould, Esquire
Executive Director
Virginia State Bar
June 12, 2009
Page 7

As stated above, it really should not matter to the Bar in what form rational, non-misleading, truthful information is delivered to the public. We want the public to have good information, easily available, upon which to make a decision about legal representation.

The *problem* is addressed, or solved, by disclosure. This is mentioned somewhat in footnote 2 of LEO 1851. The problem with some of the lawyer directory websites is that ***what the websites are saying to the public about who will see their information is violative of existing rules which are reasonable related to preventing misleading advertising.*** The Bar doesn't need to issue another LEO, it just needs to enforce the existing rules.

Some of the websites talk about the attorneys being *specialists* or having gone through some *qualification process* where in fact the only qualification is an active bar license and a credit card. They mislead.

For example, one such website I found makes these statements:

Injured? Free Consultation from top Personal Injury Attorneys. Get the Money you deserve for accidents - experienced personal injury lawyers, law firms for car accident, medical malpractice, slip and fall, wrongful death.

* * *

Our attorneys specialize in car accidents, medical mistakes, slip and fall cases, drug recall, serious injuries that occur in public places, workplace injuries, wrongful death caused by pharmaceuticals or any other reason.

This site also says: Tragic birth injuries happen to often. You need an experience dbirth injury lawyer to help. [Company name] provides a top birth injury attorney to review your case

Obviously, the language *Top Personal Injury Attorneys* [who] *Specialize* violates Virginia's rules on lawyer advertising. Thus, it is not the fact that this website limits attorney participation and does operate on a pay per referral model that is the problem: that problem could be fixed by disclosure. The problem is that the public is potentially being misled. It makes no difference whether 2 or 3 or 107 lawyers have signed up to be listed at that directory.

It seems to me that a disclosure on that website to the effect of

Karen A. Gould, Esquire
Executive Director
Virginia State Bar
June 12, 2009
Page 8

We will send your information on to the five lawyers who have paid us to participate. We make no representation that these five lawyers are any better than any others and we urge you to do your own investigation

rationality and reasonably solves the perceived problem of pay for referral type services. The consumer knows exactly what he is getting into. The problem is not pay for referral but the potentially misleading statement that these are *Top Lawyer Specialists*.

Another popular site that operates on an *area exclusive* or *area limited* basis makes only these statements:

Immediately after you present your case, instant e-mail notifications are sent to lawyers in the specific practice area and geographic location you selected. In more urgent cases we will also telephone our [Company Name] Member Attorneys.

This website makes almost no reference to what type of attorney will be reviewing the case information except to say *in the practice area you indicated* and *in the geographic area you indicated*. Of course, this is almost exactly the same information that is told to consumers who call the VSB's lawyer referral service.

The point I am making here is that its not the *for profit model* or the *pay for referral* model that is offensive to the concept of getting *good information to consumers* but it is what those websites are saying about the attorneys who are getting the information.

This is a disclosure problem and not a *for profit lawyer referral problem*.

In short, LEO 1851 would give better guidance to the practicing bar and be more rationally protective of the public if it were premised not on the flawed assumption that *pay for referral* is wrong but if it was based on an analysis of what the consumer is being told about the lawyers to whom information is being passed.

Most simply, the LEO should state that a lawyer shall not participate in any type of lawyer referral service where the language used to describe what the consumer is *getting* is misleading. A Virginia lawyer should not therefore, participate in any group advertising where the *language* used to entice a consumer to use the group's referral services is misleading or violative of existing advertising rules that now limit a lawyer's own advertising. Moreover, if the information is being passed to a limited number of attorneys or attorneys who have paid for an exclusive listing then this should be disclosed to the public up front. If a lawyer is being paid per referral then this should be disclosed up front.

Karen A. Gould, Esquire
Executive Director
Virginia State Bar
June 12, 2009
Page 9

In my view this gets us to the same result but in more logical, rational way. A lawyer could more easily tell whether his participation in such a website would be violative of Virginia's lawyer advertising rules without using language like *very limited* or *appears to be a referral*.

I hope this helps and doesn't confuse. I can make myself available to the committee if that would be helpful.

Very truly yours,

Benjamin W. Glass, III

BWG/tgp

p.s. As I was finishing research to prepare this letter I came across the Federal Trade Commission's comments on similar proposed rules in Texas. While I am sure the Virginia State Bar is well aware of this opinion, I am attaching it to this letter just in case.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580



Office of Policy Planning
Bureau of Economics
Bureau of Competition

May 26, 2006

via facsimile and first-class mail

Mr. W. John Glancy
Chairman
Professional Ethics Committee for the State Bar of Texas
1414 Colorado Street
Austin, TX 78701

Re: Comments on a Request for Ethics Opinion
Regarding Online Attorney Matching Programs

Dear Chairman Glancy:

We understand that the Professional Ethics Committee currently is considering whether it is ethical for a Texas attorney to participate in an online legal matching service. Specifically, we understand that you are considering whether Ethical Rule 7.03, which prohibits a lawyer from paying a non-lawyer to solicit prospective clients or to refer clients, except for paying reasonable fees for advertising, also prohibits attorneys from participating in online legal matching services. The staffs of the Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning, Bureau of Economics, and Bureau of Competition appreciate the opportunity to provide comments on this issue.¹

¹This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission or any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments.

Online legal matching services are a valuable option for Texans: they are likely to reduce consumers' costs for finding legal representation and have the potential to increase competition among attorneys. Further, we see no likely prospect of consumer harm that would justify the prohibition of online legal matching services in Texas.

The Federal Trade Commission has been entrusted by Congress with enforcing the federal antitrust laws.² Pursuant to this statutory mandate, the FTC encourages competition in the licensed professions, including the legal profession, both through enforcement of the antitrust laws³ and through competition advocacy.⁴ Indeed, one area in which the FTC enjoys substantial expertise is the analysis of the competitive implications of regulatory restrictions on advertising in the professions.

Although debate about how attorneys advertise involves important policy concerns, it is important to recognize that competition benefits consumers of both the traditional manufacturing and the professional services industries.⁵ Based on our experience, it is our view that absent

² Federal Trade Commission Act, 15 U.S.C. § 45.

³ See *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *In re South Carolina State Board of Dentistry*, FTC Docket No. 9311 (2003); *In re Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988); Bureaus of Consumer Protection and Economics, Federal Trade Commission, A COMPARATIVE ANALYSIS OF COSMETIC LENS FITTING BY OPHTHALMOLOGISTS, OPTOMETRISTS, AND OPTICIANS (1983); THE EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY, FTC Bureau of Economics Report (1980); see also C. Cox & S. Foster, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION, FTC Bureau of Economics Staff Report (October 1990).

⁴ See, e.g., Letter from the FTC and the Department of Justice to the Kansas Bar Ass'n (Feb. 4, 2005), at <http://www.ftc.gov/be/v050002.pdf>; Letter from the FTC and the Department of Justice to Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Ass'n (Dec. 16, 2004), at <http://www.ftc.gov/os/2004/12/041216massuplltr.pdf>; Letter from the FTC and the Department of Justice to Task Force on the Model Definition of the Practice of Law, American Bar Association (Dec. 20, 2002), at <http://www.ftc.gov/opa/2002/12/lettertoaba.htm>; letter from the FTC to the Supreme Court of Alabama (Sept. 30, 2002), at <http://www.ftc.gov/be/v020023.pdf>; Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Services Company of West Virginia*, No. 31706 (filed May 25, 2004), available at <http://www.usdoj.gov/atr/cases/f203700/203790.htm>; Brief *Amicus Curiae* of the United States of America and the FTC in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), available at <http://www.usdoj.gov/atr/cases/f201100/201197.htm>. The FTC also has studied the effects of restrictions on competition in the professions. See Bureaus of Consumer Protection and Economics, Federal Trade Commission, A COMPARATIVE ANALYSIS OF COSMETIC LENS FITTING BY OPHTHALMOLOGISTS, OPTOMETRISTS, AND OPTICIANS (1983); THE EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY, FTC Bureau of Economics Report (1980); see also Cox & Foster, *supra* note 3.

⁵ *Nat'l Soc'y of Profl Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)) ("As the United States Supreme Court has observed, "ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long
(continued...)

compelling evidence that consumers are likely to be harmed by online legal matching services, the Professional Ethics Committee should not issue an opinion that would have the effect of prohibiting Texas consumers from accessing these services.

Internet-based Client-to-Attorney Matching Services

We understand that currently several businesses provide Internet-based attorney/client matching platforms.⁶ Typically, these services recruit licensed attorneys who pay a one-time application fee and a regular annual or monthly flat fee to participate. In their applications, member attorneys may disclose their areas of practice, years of experience at the bar, affiliations, and any other pertinent information. The legal matching service usually conducts background checks to ensure that the attorney is in good standing with the Bar. We also understand that some of these services may provide attorneys with Web pages similar to an attorney's own Web page.

A potential client accesses the service via the Internet. The client can examine the service's Web site to learn how attorneys become members of the service and how the service can help the client identify an attorney to satisfy his or her legal needs. If the client would like to seek legal assistance from a member attorney, he or she typically completes a short online questionnaire describing the legal issues, the practice area of the attorney being sought, the amount of experience desired for the retained attorney, the geographic region or jurisdiction of the representation, and the requested fee range. The client also may send any other descriptive information he or she wishes to disclose. The client submits the questionnaire to the service, thereby inviting qualifying attorneys to contact him or her. Without disclosing the identity of the client, the service transmits the information disclosed in the questionnaire to member attorneys who fall under the delineated criteria of subject area and geographic region.

Interested attorneys may then post, through the service, a response to the client, which typically will contain information such as fees, experience, and other qualifications. With this information, the client determines which attorneys – if any – to contact, and initiates the contact. In some instances, the application may invite an attorney to contact a client directly.

⁵(...continued)

has been faith in the value of competition.”); *see also id.* at 689; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *United States v. Am. Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996).

⁶ Although not all services are identical, many share the same general business model. *See, e.g.*, LexisNexis/Martindale Hubbel's Attorney Match (http://www.lawyers.com/find_a_lawyer/am/am_aop_list.php); Casepost (<http://www.casepost.com>); LegalConnection (FindLaw) (<http://www.legalconnection.com>); LegalMatch (www.legalmatch.com); and Legal Fish (www.legalfish.com).

We understand that online legal matching services are not involved in the retainer agreement struck between the attorney and the client, receive no compensation from the attorney or client relative to the representation, and take no part in the representation.

Competitive Effects of Increased Consumer Information In Markets For Professional Services

When consumers face large costs to obtain information about marketplace prices and quality, businesses have less incentive to compete.⁷ Indeed, a large amount of empirical research has found that restrictions on advertising in professions lead to higher prices and either a negative or no effect on quality.⁸ In the same way that advertising has been shown to benefit consumers of professional legal services, online legal matching services are likely to make it less expensive for consumers to evaluate providers of legal services.⁹

The information sent to inquiring clients is likely to allow consumers to compare the price and quality among several competing attorneys more cheaply than other methods of comparison. For example, a referral service that assigns the next attorney on a predetermined list to a client requires the client to meet the attorney and then seek a second referral simply to formulate a basis for comparison. Similarly, a directory such as the yellow pages is time-intensive because it requires the client to search for several attorneys and formulate his or her

⁷ Several economists have developed models that predict firms will be able to charge higher prices when consumers face high costs of obtaining marketplace information. See, e.g., Dale O. Stahl, *Oligopolistic Pricing with Sequential Consumer Search*, 79 AM. ECON. REV. 700 (1989); Kenneth Burdett & Kenneth L. Judd, *Equilibrium Price Dispersion*, 51 ECONOMETRICA 955 (1983); John Carlson & R. Preston McAfee, *Discrete Equilibrium Price Dispersion*, 91 J. POL. ECON. 480 (1983); Steven C. Salop & Joseph E. Stiglitz, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV. ECON. STUDIES 293 (1977). Using these models as a theoretical framework, several authors have found evidence that the Internet has led to lower prices by reducing consumers' costs of comparing prices. See, e.g., Jeffrey R. Brown & Austan Goolsbee, *Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry*, 110 J. POL. ECON. 481 (2002); Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 49 MGM'T SCIENCE 563 (2000); James C. Cooper, *Price Levels and Dispersion in Online and Offline Markets for Contact Lenses*, FTC Bureau of Economics Working Paper (2006), at <http://www.ftc.gov/be/workpapers/wp283.pdf>.

⁸ See Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Return of Footnote 17*, 8 Sup. Ct. Econ. Rev. 265, 293-304 (2000) (collecting citations to empirical literature on the effect of advertising restrictions in the professions); *In the Matter of Polygram Holdings, Inc, et al*, FTC Docket No. 9298 (F.T.C. 2003), at 38 n. 52 (same).

⁹ A pair of studies find that consumers who use an online service that sends consumer requests to an affiliate car dealer that sells cars matching the consumer's inquiry pay approximately 2 percent less for the same car compared to those who did not. Also, the authors found that those who were likely to be poor negotiators were more likely to use these services to increase their bargaining power. See Fiona Scott Morton *et al.*, *Internet Car Retailing*, 49 J. INDUS. ECON. 501 (2001); Florian Zettelmeyer *et al.*, *Cowboys or Cowards: Why are Internet Car Prices Lower?* (2005), at <http://flomac.haas.berkeley.edu/~florian/Papers/selection.pdf>.

own method to evaluate lawyers. Indeed, these options may be more costly and yield far less relevant information than the lawyer matching services under review. By lowering consumers' costs of obtaining information about price and quality of legal services, online legal matching services are likely to allow consumers who use them to pay lower prices and/or obtain higher quality legal services than they would have had they used their next best alternative means for identifying a legal service provider.

A regulation that limits competition may benefit consumers when it addresses a specific market failure that has been shown to harm consumers. Thus, in principle, a prohibition on Texas attorneys participating in online legal matching services could create net benefits for consumers if the restriction were necessary to provide an increase in the quality of legal services that consumers valued more than they actually would pay in higher legal fees, and the market otherwise would not provide this benefit. Given a strong presumption that competition is the best way to allocate scarce resources among competing needs,¹⁰ however, the burden should rest on the proponents of a restriction on competition to show that it is necessary to prevent significant consumer harm and that it is narrowly drawn to minimize its anticompetitive impact.¹¹

We understand that online legal matching services have operated in Texas for several years. We are unaware, however, of any evidence that online legal services have caused any consumer harm. The Texas Bar has informed us that they are unaware of any consumer complaints about online legal matching services. Further, the bars of North Carolina, South Carolina, and Rhode Island have issued ethics opinions explicitly allowing such services to operate,¹² and the Utah State Bar has partnered with such a service so as to help clients find a pre-screened Utah lawyer.¹³

Although we recognize that there may be legitimate concerns about allowing non-attorneys to refer potential clients to attorneys,¹⁴ such concerns do not appear to arise with respect

¹⁰ See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 (1978) (by enacting the Sherman Act, "Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country.").

¹¹ Cf. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) ("Absent some countervailing procompetitive virtue," an impediment to "the ordinary give and take of the market place . . . cannot be sustained under the Rule of Reason.") (internal quotations and citations omitted).

¹² See North Carolina Bar, 2004 Ethics Op. 1 (Apr. 23, 2004); South Carolina Ethics Advisory Op. 01-03 (Jan. 3, 2001); Rhode Island Supreme Court Ethics Advisory Panel Op. 2005-01 (Feb. 24, 2005).

¹³ See Utah State Bar Referral Services, at http://www.utahbar.org/public/lawyer_referral_service_main.html.

¹⁴ For example, there may be concerns if a referral service were to mislead consumers about attorneys' qualifications or how they select the pool of attorneys from which they draw, and steer consumers only to
(continued...)

to online legal matching services. These services do not advocate or recommend a particular attorney, but rather provide a conduit through which a consumer can invite attorneys to provide information about their ability to handle a consumer's particular legal issue.¹⁵ The information provided by attorneys who participate in these services, moreover, still is subject to existing prohibitions on misleading or deceptive advertising.¹⁶

If the Professional Ethics Committee has concerns, based on demonstrated consumer harm, that consumers may be misled with respect to the pool of attorneys to which their requests are sent, there are less restrictive alternatives than barring attorney participation in these services. For example, online legal matching services could be required to disclose the number of attorneys and firms that participate in their service and that requests are not sent to all Texas attorneys, but only to member attorneys. Further, online legal matching services could be required to explain explicitly whether, and if so how, they limit attorney participation.

Conclusion

Online legal matching services have the potential to lower consumer costs of obtaining information about the price and quality of legal services, which is likely to lead to more intense competition among attorneys, ultimately benefitting Texas consumers. At the same time, we see no indication that consumers are likely to suffer harm from online legal matching services that would justify banning them. We hope that the Professional Ethics Committee will consider the likely impacts on competition and on Texas consumers of a rule barring Texas attorneys from participating in online matching services.

We appreciate the opportunity to present our views. Please do not hesitate to contact us about this issue.

¹⁴(...continued)

those attorneys who offer the service at the largest fee.

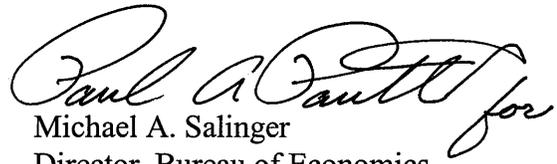
¹⁵ We understand that Ethics Opinion 561 prohibits participation in Internet sites that use "information about participating lawyers for the purpose of identifying or selecting a lawyer or a group of lawyers whose names are then suggested, offered, or recommended to a consumer for consideration." Although we take no position on whether the restriction in Ethics Opinion 561 is likely to provide net benefits to Texas consumers, we suggest that the Professional Ethics Committee clarify that this prohibition applies only to Web sites that actively "suggest, offer, or recommend," rather than those that merely act as a conduit for competing attorneys to present information to prospective clients.

¹⁶ See Disciplinary Rule 7.04(a)(3).

Respectfully Submitted,

Handwritten signature of Maureen K. Ohlhausen in black ink.

Maureen K. Ohlhausen
Director, Office of Policy Planning

Handwritten signature of Paul A. Salinger for in black ink.

Michael A. Salinger
Director, Bureau of Economics

Handwritten signature of Jeffery Schmidt in black ink.

Jeffery Schmidt
Director, Bureau of Competition