

REPORT OF THE NYCLA TASK FORCE ON FOR-PROFIT, ONLINE LEGAL MATCHING SERVICES

INTRODUCTION

In mid-2018, the New York County Lawyers' Association's ("NYCLA") then-President Michael McNamara convened a Task Force to consider the legal, ethical and public policy issues presented by for-profit online legal referral or matching services (in singular or plural, "FPLMS"). This Task Force consisted of NYCLA Past Presidents Arthur Norman Field and James B. Kobak, Jr.; Ethics Institute Chair Sarah Jo Hamilton; current President-Elect Vincent Chang; Committee on Professionalism and Professional Discipline Co-Chair Ronald Minkoff; and NYCLA member Kathy Walter.¹

The Task Force did substantial research and conducted a half-day forum at NYCLA's Home of Law on October 16, 2018 (the "NYCLA Forum"). The forum addressed a wide-range of topics pertaining to lawyer referrals in general and FPLMS in particular. The forum was titled "*Should Online Legal Referral Services Be Regulated?*," and consisted of three panels, each followed by a question-and-answer session. In addition to the members of the NYCLA Task Force, panelists included: **James J. Grogan**, *Deputy Administrator and Chief Counsel of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois* ("ARDC"); **Joshua M. King**, *former Chief Legal Officer, AVVO, Inc.*; **Mirra Levitt**, *now Head of Products at Priori Legal*; **David P. Miranda**, *Past President, New York State Bar Association* ("NYSBA"); **Roy D. Simon**, *Professor Emeritus, Maurice A. Deane School of Law, Hofstra*

¹ All the Task Force members contributed to the drafting of this Report. The Task Force wants to give special thanks to Kathy Walter, who devoted considerable time to researching, drafting, editing and proofreading the Report. The NYCLA Board of Directors approved the following report as an Association report at its February 10, 2020 meeting.

University; Amy Widman, at the time Deputy Director, National Center for Access to Justice at Fordham University School of Law; and George D. Wolff, Executive Director, New York City Bar Association’s Legal Referral Service (“NYCBA”).

The three panels focused, respectively, on:

1. The Online Legal Referral or Matching Industry: How it Developed; How it Works; Is it Improving Access to Lawyers?
2. The Current Ethical Implications of Online Legal Matching Services.
3. Looking Forward: Do Consumers Need Protection and, If So, Who Should Play a Role? Do the Attorney Ethics Rules Need to be Changed? What are the Next Steps and Where Do We Go From Here?

Most of the Task Force members had also served on an earlier NYCLA Task Force on Online Legal Service Providers (“OLP Task Force”), which had studied the impact of for-profit online document providers (“OLP”) on the legal profession and the public, with a particular perspective on access to justice issues. The OLP Task Force’s Report: was approved by the NYCLA Board of Directors in June 2017,² which recommended a 19-point plan for regulating the online document industry, as well as best practices guidelines for the industry to follow pending the passage of appropriate regulation; was approved by the New York State Bar Association (“NYSBA”) House of Delegates in November 2017; and served as the basis for the NYSBA/NYCLA resolution to adopt *Best Practice Guidelines for Online Legal Document Providers* – a resolution approved by the American Bar Association House of Delegates at its

² The original OLP Task Force report can be accessed on NYCLA’s website here: [https://www.nycla.org/pdf/NYCLA%20Task%20Force%20Report%20-%20Online%20Legal%20Providers%20of%20Forms%20\(2017\).pdf](https://www.nycla.org/pdf/NYCLA%20Task%20Force%20Report%20-%20Online%20Legal%20Providers%20of%20Forms%20(2017).pdf)

Annual Meeting in August 2019. The knowledge, experience and perspectives gained on the OLP Task Force informed this Report as well.

EXECUTIVE SUMMARY

This Report comes at a time of great ferment in the legal industry. Both before and since the NYCLA Forum, the courts, bar associations and/or regulatory bodies of several states, including Arizona, California, Florida, Illinois, Utah, and Florida have issued reports or proposals recommending or suggesting sweeping changes in the way lawyers are regulated, and have questioned some of the most fundamental assumptions underlying the ethics rules. While the goals of this Report are more limited, focusing in depth on the issue of FPLMS, we cannot ignore what these states are suggesting, and as a result we discuss some elements of their work in the body of our Report. We do so because the perspectives and concerns articulated by attorneys, judges, bar regulators and members of the public performing, overseeing or receiving legal services in these states are the same as those we face in New York. Indeed, New York, with its varying practice settings (from international mega-firms to rural solo practitioners); its ethnic, religious and economic diversity; its broad range of practitioners; and its vast unmet legal needs, can serve almost as a microcosm of our nation when it comes to analyzing legal practice. Thus, in addressing FPLMS, we have paid close attention to what other states have done and are doing, and to the problems they are facing.

What are these problems? The most obvious is the “access gap”—the fact that upwards of 50% of middle-class Americans, and an even higher percentage of low-income Americans, receive inadequate or no assistance for their legal problems, and thus do not or cannot access our

system of civil justice.³ For many, it is because they cannot or will not pay for a lawyer. But for perhaps almost as many others, it is because they either do not recognize the legal dimensions of a problem they are facing or, even if they do, do not know how to find a lawyer.

At the same time, lawyers across our State, as well as elsewhere, are struggling to find work. This is true in every geographical region, but it is particularly true in rural areas – so much so that the NYSBA has recently formed a task force to study the problem. The problem is magnified in the case of young lawyers, burdened with student debt, who cannot find work in larger firms and hang out their own shingle without the network of referral sources required to sustain a practice.

So we have clients needing lawyers, and lawyers needing clients. They need to find each other, and online matching services provide a means for them to do so. In the Task Force’s view, the organized bar must recognize that FPLMS should play a meaningful, though not the only, role in helping clients find the help they need, and in helping new lawyers, lawyers in small-firm and solo practices, and lawyers in remote locations develop and sustain their practices.

All of this takes place against the backdrop of ongoing technological change, both within the profession and outside it. Although there are places in New York where broadband coverage remains unavailable, particularly upstate, the vast majority of New Yorkers have access to the Internet, either through computers or similar devices such as phones, tablets or laptops.

Moreover, many have already demonstrated an appetite and an ability to use that access to locate

³ See, e.g., J.P. Martinez, “President’s Letter,” ABA Journal, February-March 2020 at 6 (86% of low-income individuals’ legal needs are not met).

lawyers. FPLMS have developed over the past 25 years to meet that need. The Task Force recommends that present and continuing technological innovation be encouraged as a way of connecting lawyers to clients and meeting consumer needs for access to justice.

Our study recognizes the existence and important role of *non-profit* lawyer referral services, particularly those provided by the organized bar. There are many, sometimes overlapping, bar association legal referral services in New York State. NYSBA's referral service is the largest, covering the Albany area and approximately 40 more upstate counties. The NYCBA covers all five counties of New York City, while some county bar associations have their own referral services. These services provide tens of thousands of referrals each year, and can represent a significant source of revenue for local bar associations. They generally vet participants by subject area and are indisputably a valuable and reliable resource for consumers.

Nevertheless, the Task Force feels the existence of *some* referral services should not stand in the way of having more. As shown below, the number of referrals made through bar association legal referral services reflects only a small fraction of the unmet legal needs of New Yorkers. Moreover, FPLMS often have more resources for advertising to the public and recruiting attorneys, as well as resources and experience for developing and improving user-friendly technology, than non-profit services do. The Task Force fully supports expansion of bar association and other non-profit referral services, both for middle-class and lower income populations. But we recognize the Balkanized, resource constrained nature of these services.

Just as with OLPs, FPLMS reach more people more effectively, with better technology, than non-profit services. And we expect this will remain true for the foreseeable future.⁴

The Rules of Professional Conduct (“Rules”; with respect to specific provisions, “Rule ____”), specifically Rules 5.4 and 7.2 in New York, as well as the New York Judiciary Law, create potential obstacles for many FPLMS and attorneys wishing to participate in them. Rule 5.4 and for some matters N.Y. Jud. Law §491 prohibit a lawyer from dividing a fee with a “non-lawyer,” including an FPLMS.⁵ Rule 7.2(a) bars a lawyer from “compensat[ing] or giv[ing] anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation,” subject to certain limited exceptions (such as bar association referral services, union legal plans, and legal services and legal aid offices). As interpreted by ethics opinions in New York and across the country, these Rules have historically placed limitations on the business models FPLMS can use. In particular, they limit FPLMS to charging members of the public one-size fits-all flat amounts for their referrals, thus preventing FPLMS from sharing in any financial up-side the lawyers may legitimately earn from their work. Further, the Rules discourage FPLMS from using rating systems, no matter how bona-fide, to evaluate the lawyers using their services lest they be deemed to be making an improper “recommendation.” Our study has shown that these ethical limitations, among others, discourage many lawyers from joining FPLMS – which in general have gotten a chilly reception

⁴ For the reasons explained below, the Task Force predicts that bar association referral services will benefit from broadening the FPLMS market and the resulting technological innovations.

⁵ While some FPLMS may be owned by lawyers, to the extent they are independently incorporated businesses – and our review of the online offerings shows that the vast majority are -- they are “nonlawyers” within the meaning of the Rules. Of course, if a lawyer in her individual capacity refers a matter to another lawyer, any division of the fee between them is governed by Rule 1.5(g).

from bar regulators and ethics committees – and that in turn has discouraged businesspeople from creating or investing in these services. The extent to which the Judiciary Law may pose an additional obstacle for referrals of some matters is discussed at pages 47-49, *infra*.

Of course, this is symptomatic of the larger problem with the current advertising rules – rules which the NYSBA House of Delegates recently recommended changing significantly⁶. The current Rules and accompanying Comments are cumbersome to apply and inconsistently enforced and, as the cases and opinions below show, they have been for years. Part of the Task Force’s goal is to make the Rules relating to legal matching and referral services clearer – in particular with respect to the undefined terms “directories,” “group advertising” and “recommendations” – so lawyers can be on notice as to when they may participate in a particular FPLMS.

In a nutshell, the Task Force believes that the current Rules, when applied to FPLMS, are overly restrictive and should be changed, and that we should go even further than the recent NYSBA recommendations. Specifically, we recommend the creation of a new exception to the prohibition on referrals by non-lawyers in Rule 7.2 that would allow lawyers to participate in them as long as the following features are present: (a) the FPLMS fully and prominently disclose their criteria for choosing and rating lawyers; (b) they and the participating lawyer do not violate any of the other advertising Rules in their then-current form (*i.e.*, Rules 7.1, 7.3, 7.4 and 7.5); (c) the lawyers only accept matters they are competent to handle; (d) to the extent the services rate lawyers on their lists, those ratings are based on bona-fide criteria, not solely “pay-

⁶ See [NYSBA.org/State Bar News/2019/Fall/November House of Delegates Meeting to Discuss Mental Health-Attorney Advertising Rules](http://NYSBA.org/State%20Bar%20News/2019/Fall/November%20House%20of%20Delegates%20Meeting%20to%20Discuss%20Mental%20Health-Attorney%20Advertising%20Rules).

to-play;” and those criteria are disclosed to the prospective client and (e) FPLMS do not interfere with the lawyer’s professional judgment in determining what services to perform and how much to charge for them. We also recommend revising Section 471 of the New York Judiciary Law to correspond to these changes.

These Rule and statutory changes would make it easier for lawyers to join FPLMS without fear of discipline, and thus would encourage the FPLMS industry generally, while protecting the core values of the legal profession and protecting the public. This solution helps everyone: lawyers, FPLMS and, most importantly, the public, by making it easier for them to find the qualified lawyers they need.

A. The Legal Marketplace – Demand

In recent years, it has become increasingly apparent that the United States faces a “justice gap,” a vast gulf between the availability and affordability of legal services for poor and middle-class people and small businesses, on the one hand, and wealthy individuals and large corporations, on the other. Legal services consumers and their legal challenges are not limited to particular income levels, areas of the country, or specific areas of law. According to the Legal Services Corporation’s (“LSC”) 2017 report, *Documenting the Justice Gap in America*,

“The justice gap – the difference between the civil legal needs of low-income Americans and the resources available to meet those needs – has turned into a gulf.”⁷

The report goes on to note that of the estimated 1.7 million civil legal problems for which low-income Americans seek LSC-funded legal aid, “1.0-1.2 million (62%-72%) received inadequate

⁷ Legal Services Corp., “Documenting the Justice Gap in America,” at 1, available at lsc.gov/media-center/publications/2017-Justice-Gap-Report.

or no legal assistance. That means for every 100 problems for clients served by LSC programs, between 62 and 72 of the problems are unable to receive the help they need.”⁸

A National Center for State Courts report in 2015 found that over 70% of low-income households experience at least one problem arising under civil law in the previous year, but only 20% sought assistance.⁹ For people who do not have frequent contact with the legal system, even understanding the basics can seem overwhelming when they are attempting to sort out what they need to do. Many times, an individual may just want to understand a legal document they are sent – or a document that appears to be a legal document, but is not. Some people are not even sure they have a legal problem and just want to ask basic questions to assure themselves they do not need an attorney for a particular matter. Others are aware they have a legal problem, but do not know attorneys, are distrustful or intimidated by them, or have no one to encourage them to connect with attorneys when they need assistance. All of these people – and they number in the millions in the U.S. on any given day – can get the help they need if connected to an appropriate attorney.

The legal market also faces real challenges. Clients, even wealthy ones, are voting with their feet. In January 2018, the Board of Trustees of the State Bar of California commissioned a broader “landscape analysis of the current state of the legal services market, including new technologies and business models used in the delivery of legal services” (the “Landscape

⁸ *Id.* at § 4, p. 9.

⁹ See Paula Hannaford-Agor, Scott Graves & Shelley Spacek Miller, *The Landscape of Civil Litigation in State Courts* (National Center for State Courts 2015) at 13.

Report”).¹⁰ The report summarized that in 2012, the legal services market generated approximately \$262 billion in revenue. While the market grew quickly between 1997 and 2002 (43%) and between 2002 and 2007 (32%), growth slowed between 2007 and 2012, the recession years, to just 9.3%. While the market for legal services has recovered since the recession, its dynamics have steadily shifted.¹¹ Clients are more willing to diversify their legal advisors – companies are growing their in-house legal teams, splitting matters between firms to encourage competition, and finding less expensive temporary attorneys and paraprofessionals on an “as needed” basis.¹²

Meanwhile, many individuals – lacking the resources or desire to find or pay for a lawyer – are avoiding lawyers altogether, looking to companies such as LegalZoom, RocketLawyer and Avvo to meet their legal needs. The Landscape Report noted the emergence of this wide array of Alternative Legal Service Providers (ALSPs) and the burgeoning LegalTech market, including companies providing automated contract review. It contends that the emergence of these new sectors “is driven by powerful economic forces” that show that “law is in the process of moving from a pervasive model of one-to-one consultative legal services to one where technology

¹⁰ See generally *California State Bar 2017-2022 Strategic Plan*, California State Bar (July 19, 2018), available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf>.

¹¹ Georgetown Law and Thompson Reuters, *2019 Report on the State of the Legal Market* (Feb 8, 2019), available at <http://www.managingpartnerforum.org/tasks/sites/mpf/assets/image/MPF%20FEATURED%20WHITE%20PAPER%20-%202019%20State%20of%20Legal%20Market%20-%20GeorgetownLaw-ThomsonReuters%20-%202-8-19.pdf>.

¹² Altman Weil, Inc., *2018 Chief Legal Officer Survey: An Altman Weil Flash Survey*, Nov. 2018 (“Altman Weil 2018 CLO Survey”), available at http://www.altmanweil.com/dir_docs/resource/154F22DC-E519-4CE2-991D-492A0448C74F_document.pdf.

enables one-to-many legal solutions.”¹³ The Landscape Report concludes that this is a “paradigm shift” that may require “a new regulatory structure” rather than simply “amend[ing] an ethics framework built for a bygone era.”¹⁴

PART II - BACKGROUND

Two interrelated phenomena led NYCLA to organize its forum. They are the “justice gap” and the “access gap”—and the changes in the legal marketplace over the past several decades that have caused them. These phenomena were discussed at the NYCLA Forum and have been the subject of research and reports conducted by others, both before and since the NYCLA Forum.

A. The Legal Marketplace – Supply

As potential clients face challenges finding lawyers, lawyers struggle to find clients. Specifically, although the legal needs of individuals and small businesses remain pervasive, fewer lawyers are making themselves available to service those needs. This is the “access gap.”

Over the past decade, and particularly since the recent recession, growth in the number of practicing attorneys has remained stagnant and the firms and areas of practice are changing. The Landscape Report noted that, based on Census data, non-partner legal employment remained virtually flat over the decade covered, from 1.16 million employees in 2002 to 1.15 million in 2012, with 94% of these employees working in law firms. This data, however, did not cover in-house lawyers, government lawyers, lawyers working in the “gig economy,” or lawyers working

¹³ *California State Bar 2017-2022 Strategic Plan*, California State Bar at 11 (July 19, 2018), available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf>.

¹⁴ *Id.* at 12 (July 19, 2018), available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf>.

in technology companies providing legal services. The Bureau of Labor Statistics reported that, from 1997 to 2017, the number of in-house lawyers tripled (up 203%), far outpacing growth in law firm (49%) and government (30%) legal employment.¹⁵

At the same time, the number of lawyers working in the “gig economy” who work as “independent contractors with no guaranteed flow of work and relatively little leverage to negotiate for higher rates or wages,”¹⁶ also increased during that same time period. Much of this work consists of contracted document review for major litigation that pays between \$32 and \$35 per hour. Other gig economy lawyers help fill needs of small and mid-sized firms facing demand surges or larger than expected projects. A number of online “lawyer-to-lawyer marketplaces” help match firms with freelance lawyers, including Hire an Esquire, LawClerk.legal, and Lawyer Exchange. These websites often skirt ethics concerns about multijurisdictional and unauthorized practice by purporting to be markets for paralegals rather than lawyers.¹⁷ The Landscape Report contends that the existence of these marketplaces, which have grown substantially in recent years, is “a telling sign that buyers and sellers need better pathways to find each other” and that any ethical tensions are “with the text of the existing rules rather than the underlying policy” of “safeguard[ing] lawyer independence.”¹⁸ The same considerations apply when these “gig

¹⁵ *Id.* at 4 (July 19, 2018).

¹⁶ *California State Bar 2017-2022 Strategic Plan*, California State Bar at 6 (July 19, 2018), available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf>.

¹⁷ State Bar of California, *Task Force on Access Through Innovation of Legal Services Report* at 9 (July 11, 2018), available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf>.

¹⁸ *Id.* at 9.

economy” lawyers – or private lawyers generally -- try to make themselves available to supply low-cost services to individual clients.

Two additional studies on the legal profession, Chicago Lawyers I and II, conducted in 1975 and 1995,¹⁹ respectively, shed light on how the legal services business has been moving away from servicing individual clients for decades. Chicago Lawyers I found the industry in 1975 neatly bifurcated between lawyers serving individual clients and those serving large organizational clients. But by 1995, the organizational “hemisphere” had surged, and by 2012, according to the Economic Census, spending on legal services by businesses was \$179 billion, about three times that spent by individuals (\$59 billion). In fact, the “PeopleLaw” market has been shrinking, down from \$66 billion in 2007, while the organizational sector grew by \$26 billion over the same period. In 2012, the average per capita amount spent on legal services by individuals was just \$187.²⁰

Typical small-firm lawyers serving individuals face a major capacity utilization problem, working just 2.3 hours per day, of which only 1.6 hours are billable.²¹ Average annual gross receipts (based on an hourly rate of \$260) are \$105,000. Of the remaining work time, 33% is focused on business development, and 48% is focused on administrative tasks. The Landscape Report contends that, given the difficulty of building a successful practice out of “low-stakes, high-volume cases” – the sheer cost and effort of effective advertising – the Rule 5.4 requirement

¹⁹ John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (1994) (“Chicago Lawyers I”); John P. Heinz et al., *Urban Lawyers: The New Social Structure of the Bar 6-7* (2005) (“Chicago Lawyers II”)

²⁰ *California State Bar 2017-2022 Strategic Plan*, California State Bar at 14 (July 11, 2018), available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf>.

²¹ See Clio Legal Trends Report (2017), Clio.com, available online at <https://www.clio.com/resources/legal-trends/2017-report/#download>

that lawyers must be the exclusive owners of businesses practicing law “may be a primary reason why the PeopleLaw sector has entered a period of serious decline.”²² Meanwhile, large law firms have been booming, with *The American Lawyer* reporting in 2012 that gross revenues for the top 100 firms had grown by nearly 900% in the prior 25 years (from \$7 billion to \$71 billion), while GDP grew by just 235%.²³

B. “Mine” the Gap – How the Demand and Supply of Legal Services Come Together

The inability to connect low and middle-income people who need lawyers and lawyers who might be available to service them – the “access gap” – is dramatically illustrated by two reports from Illinois: the Illinois Supreme Court Commission on Access to Justice report, “Advancing Access to Justice in Illinois: 2017-2022 Strategic Plan” (the “Illinois Access to Justice Report”), and the Supreme Court of Illinois Attorney Registration and Discipline Commission (“ARDC”) report a few months later focusing on FPLMS, the “Client-Lawyering Matching Services Study (June 2018)” (the “ARDC Report”). The principal author of the ARDC Report, James J. Grogan, spoke at the NYCLA Forum.

The Illinois Access to Justice Report looked closely at the issue of bridging the gap between clients and attorneys who can serve their legal needs. It found that even though many lawyers are unemployed or under-employed, the vast majority of Illinois counties report that

²² *California State Bar 2017-2022 Strategic Plan*, California State Bar at 15 (July 19, 2018), available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf>.

²³ *Id.*

more than 50% of cases have at least one pro se litigant.²⁴ The ARDC Report further stated that “[m]ore than eighty percent of litigants in poverty are underrepresented in [legal] matters,” as are “the majority of moderate-income individuals.”²⁵ After citing, and lamenting, the existence of the “justice gap,”²⁶ the ARDC Report posits several factors that lead individuals to address legal problems without an attorney: increased costs, inability to determine if a problem is in fact “legal”, lack of available services or lawyers, and the legal profession’s distaste for matching services.

The same phenomenon was noted in the Landscape Report. It concluded that ethics rules around non-lawyer ownership and unauthorized practice have created a situation where “a sizable portion of the public struggles to afford a lawyer and a sizable portion of the bar struggles to find sufficient fee-paying client work.”²⁷ The impact is stark: in 2012, 76% of civil cases involved at least one *pro se* litigant, nearly twice the rate from twenty years ago.²⁸ This is largely due to the fact that the median value of money judgments in civil court is \$2,400, far less than

²⁴ Illinois Supreme Court Commission on Access to Justice, *Advancing Access to Justice in Illinois: 2017-2022 Strategic Plan*, at 13 (May 2017), available at https://courts.illinois.gov/SupremeCourt/Committees/ATJ_Comm/ATJ_Comm_Strategic_Plan.pdf.

²⁵ *Client-Lawyer Matching Services Study*, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois Commission on the Future Legal Services (July 2018), available at https://www.iardc.org/Matching_Services_Study_Release_for_Comments.pdf; see also *Report on the Future of Legal Services in the U.S.*, American Bar Ass’n, at 12 (2016).

²⁶ *Id.*

²⁷ *California State Bar 2017-2022 Strategic Plan*, California State Bar at 19 (July 19, 2018), available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf>.

²⁸ See Paula Hannaford-Agor, Scott Graves & Shelley Spacek Miller, *The Landscape of Civil Litigation in State Courts* (National Center for State Courts 2015) at 31.

the median cost per side of litigation, ranging between \$43,000 and \$122,000 depending on the type of action.²⁹ Few statistics illustrate so sharply the need for affordable lawyers.

So how do lawyers and the clients who need them come together? The first panel at the forum, “The Online Legal Referral Industry: How it Developed; How it Works; Is it Improving Access to Justice?”, focused in part on this question, looking at how current legal referral services models (both traditional and online) work and whether they are successful.

C. Traditional Legal Services

After Amy Widman, at the time the Deputy Director of the National Center for Access to Justice at Fordham University School of Law (and now a professor at Rutgers Law School), explained the “justice gap” discussed above, NYCLA President-Elect Vincent Chang described traditional bar association programs matching lawyers to potential paying clients. President-Elect Chang reported that bar associations have long considered it part of their mission to provide a vehicle by which potential clients could meet and possibly retain attorneys with experience in particular practice areas. The first bar association referral services originated in Chicago in 1874, with New York’s and Los Angeles’ referral services developing in 1937 and 1945, respectively.³⁰ The American Bar Association has written that:

“Lawyer referral services have been in operation in this country for more than 50 years, and were first established in response to requests by middle-income persons for assistance in obtaining appropriate legal counsel. Lawyer Referral and Information Services are designed to assist persons who are able to pay normal

²⁹ *California State Bar 2017-2022 Strategic Plan*, California State Bar at 20 (July 19, 2018), available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf>.

³⁰ The NYCBA’s referral service, founded in conjunction with NYCLA, has been in existence for over 70 years. *See generally*, NYC Bar, *About Us*, available at <https://www.nycbar.org/get-legal-help/about-us/>. Los Angeles’ legal referral service began in 1937. *See generally*, LA County Bar, *Lawyer Referral Services*, available at <https://www.lacba.org/benefits/smartlaw-lawyer-referral-service>. Chicago’s service is said to have begun in 1870. *See generally*, Chicago Bar, *Lawyer Referral Services*, available at https://www.chicagobar.org/chicagobar/CBA/CBA/Legal_Help_for_the_Public/Lawyer_Referral_Service.aspx

attorney fees but whose ability to locate appropriate legal representation is frustrated by a lack of experience with the legal system, a lack of information about the type of service needed, or a fear of the potential costs of seeing a lawyer.”³¹

Bar association legal referral services offer two important benefits to the public. First, they help a prospective client determine if the problem is truly of a legal nature by screening inquiries and referring the client to other service agencies when appropriate. The second, and perhaps more important, function is to provide the prospective client with an unbiased referral to an attorney experienced in the area of law appropriate to the client's needs. The public has come to equate the function of bar association legal referral programs with consumer-oriented assistance, and expects the program will be loyal first to the prospective client, and only secondarily to the participating attorney.³²

Historically, prospective clients contacted a bar association legal referral service by telephone, either directly or in response to an advertisement. A prospective client could be matched with one or more attorneys, based upon such factors as area of legal practice and geographic location.³³ Typically, a bar association legal referral service will not answer legal

³¹ See American Bar Association, *Lawyer Referral and Information Services Policy*, available at https://www.americanbar.org/groups/lawyer_referral/policy/.

³² https://www.americanbar.org/groups/lawyer_referral/policy/

³³ Among the specialty areas typically covered by one legal referral service are the following: Divorce and Family Law; Criminal Defense; Personal Injury; Motor Vehicle Accidents; Elevator-related Injuries; Immigration Issues; Business Matters, including Patents, Trademarks and other Intellectual Property; Credit and Collections; Foreclosure & Loan Modifications; Real Estate; Consumer Law; Bankruptcy; Wills, Trusts, Estates & Probate; Elder Law; Nursing Home Abuse; Landlord/Tenant; Labor and Employment; Medical Malpractice; Social Security; Disability; Workers' Compensation & Disability/SSD; Taxation; <https://brooklynbar.org/lawyer-referral-service>

questions posed by prospective clients.³⁴ Many such referral services offer low rates, such as \$35, for initial consultations between prospective attorneys and clients.³⁵

According to George D. Wolff, Executive Director of the NYCBA Legal Referral Service, lawyers who participate in these services often pay a fee for participation or a fee for each referral, and thus provide an important source of revenue for bar associations across New York State and nationally. Indeed, as discussed below, Mr. Wolff made it a point to caution against a rush to embrace for-profit matching services because it could hurt bar association revenue.

Attorneys sometimes, but not always, discount the rates charged to prospective clients introduced through a bar association's legal referral service. Typically, the referral service imposes no specific limit on the fees participating lawyers charge, relying on market forces to keep rates in line.³⁶ If a prospective client is unable to afford a lawyer, referral services may attempt to match the prospective client with a pro bono or public interest lawyer. In some cases, the prospective client will be able to choose from a list of attorneys, while in other cases the referral will be made to a specific participating lawyer. Often such referrals are made solely on

³⁴ <https://www.osbar.org/public/ris/>

³⁵ <https://www.nycbar.org/get-legal-help/>

<https://www.osbar.org/public/ris/>

<https://iris.philadelphiabar.org/>

<http://www.dallasbar.org/lawyerreferralservice>

³⁶ The ABA's Model Supreme Court Rules Governing Lawyer Referral & Information Services, approved by the ABA House of Delegates in August 1993, provide that: "The combined fees and expenses charged to a client by a service and the lawyer to whom the client is referred shall not exceed the combined fees and expenses the client would have incurred if no referral service were employed."
https://www.americanbar.org/groups/lawyer_referral/policy/

the basis of objective criteria such as geography and area of specialty so that the bar association does not get involved in the difficult business of recommending one seemingly similarly situated attorney over another.³⁷

There is no question that bar association legal referral services perform incredibly valuable work in narrowing the “access gap,” and the Task Force fully supports them. But some important statistical comparisons show their limitations.

For example, the NYCBA legal referral service lists approximately 350 attorneys in 160 practice areas.³⁸ The Chicago Bar Association legal referral service has some 200 attorneys.³⁹ The Brooklyn Bar Association’s legal referral service has approximately 150 attorneys. By comparison, online legal referral service Avvo had more than 2,200 attorneys nation-wide participating in its service in 2017, including 400 in California alone, according to Avvo officials at the time.⁴⁰

Similarly, the NYCBA Legal Referral Service last year referred over 22,000 potential clients to legal referral service lawyers. In the past 10 years, that referral service has referred matters to participating lawyers that have generated more than \$146 million in lawyers’ fees.⁴¹ Despite these impressive numbers, a \$14.6 million per year figure amounts to less than .004% or

³⁷ In the Pennsylvania Bar Association legal referral service, lawyers participate on a voluntary basis and have indicated the areas of law in which they will accept referrals. Computerization ensures lawyers are rotated automatically by county according to the type of case. <http://www.pabar.org/site/For-the-Public/Find-a-Lawyer>

³⁸ <https://www.nycbar.org/get-legal-help/about-us/our-lawyers/>

³⁹ https://www.chicagobar.org/chicagoBar/CBA/CBA/Legal_Help_for_the_Public/Lawyer_Referral_Service.aspx

⁴⁰ <http://www.calbarjournal.com/July2016/TopHeadlines/TH1.aspx>

⁴¹ <https://www.nycbar.org/get-legal-help/become-an-lrs-lawyer>.

\$1 out of every \$2,500 of the estimated more than \$250 billion in legal fees billed annually.⁴²

According to a 2015 report by market research firm IBIS World, the online legal services market generates more than \$4 billion a year and was expected to grow about 10 percent annually in the next decade.⁴³

D. The Limitations Faced by Bar Association Referral Services

Why this disparity? To distill it: not enough members of the general public know that bar associations provide these referral services. Six years ago, the ABA asked “how do people find legal services?” and the results were telling: 46% try to solve the problem themselves; 16% do nothing; and 16% get help from family and friends. Just 15% sought formal help and only 16% even considered consulting a lawyer for a referral, which includes (but is not limited to) bar association referrals.⁴⁴

As reported at the NYCLA Forum, most bar association legal referral services rely on telephone calls or rudimentary website access to promote their programs. This places them at an obvious disadvantage. Faced with competition from FPLMS and rapid technological change, the 600-member Winnebago County Bar Association in Rockford, IL made the decision to discontinue its 30-year-old-plus legal referral service. “Our lawyers were not participating, and the calls were dropping,” a Winnebago County Bar Association official explained. “[Other smaller bars] might find themselves in the same situation in a few years. Consumers are

⁴² <https://www.statista.com/topics/2137/legal-services-industry-in-the-us/>

⁴³ <http://www.calbarjournal.com/July2016/TopHeadlines/TH1.aspx>

⁴⁴ See Rebecca L. Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*, 2014 ABA J. 1 (Aug. 2014), available at http://www.americanbar.org/groups/delivery_legal_services/resources/programs_to_help_those_with_moderate_income.html, archived at (<https://perma.cc/QT6C-LPDR>).

becoming more particular about [legal services] shopping online.”⁴⁵ The North Carolina Bar Association, in fact, recently adopted changes in its legal referral rate structure, partly because of the fear that failure to do so would eventually lead to having to shut it down.⁴⁶

Similarly, a Florida Bar official stated that the Florida Bar legal referral service’s online presence was, until recently, “fairly anemic.”⁴⁷ As an ABA publication put it, calls to “traditional legal service phone lines” have been “stagnating or dropping in many places.” At the same time: “Technology-driven changes in the way the public seeks and pays for legal services over the last few years have prompted many bar-run [legal referral service programs] to reevaluate and revamp their business models.”⁴⁸

Indeed, the resources that bar associations can devote to these programs pale in comparison to the resources that online FPLMS can bring to bear. For example, former FPLMS Avvo raised more than \$132 million and four years ago achieved a valuation estimated at \$650 million.⁴⁹ Other online legal providers such as LegalZoom have also deployed many sophisticated marketing techniques and have billions of dollars in annual revenue.⁵⁰ FPLMS have used internet marketing to claim that they are superior to bar association referral services

⁴⁵ https://www.americanbar.org/groups/bar_services/publications/bar_leader/2015-16/july-august/time-to-hang-up-the-phone.html/

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ <https://www.geekwire.com/2015/legal-advice-startup-avvo-raises-71-5m-round-plans-to-hire-80-this-year/>

⁵⁰ <https://salesbenchmarkindex.com/insights/an-inside-look-into-legalzooms-marketing-campaign-success/>

because they provide attorney recommendations that are more targeted and merit-based than the more random attorney referrals provided by bar association programs.⁵¹

Further weakening the ability of bar association referral services to compete, particularly in New York, is their Balkanization. According to Mr. Chang, New York has more than twenty different lawyer referral services around the State, some of which overlap in regions served. Buffalo has one. Rochester has one. Nassau County has one. Suffolk County also has one. So do Albany, Syracuse, as well as Westchester, Dutchess, Orange and Putnam Counties. New York City has one, and it overlaps with referral services from the Brooklyn and Bronx Bar Associations. The New York State Bar Association's legal referral service does not cover the whole state, but just the areas *not* already listed (mainly counties north and west of Albany).⁵² All of this may have made sense in an earlier, less interconnected and technologically advanced age, allowing local bar associations to protect their members and provide local services. Today, it just limits what each referral service can do, and how far it can reach.

To be sure, some bar associations are taking steps to meet the online challenge by ushering in technological improvements. The Florida Bar has prioritized technological upgrades and sought proposals from private enterprises to update and coordinate the program with other referral services in the state including partnerships with large metropolitan bar association referral services in Miami-Dade and Orlando.⁵³ The San Francisco Bar Association's legal referral service has launched a Google AdWords campaign designed to bring more traffic to its

⁵¹ <https://www.legalmatch.com/attorney-referral-services.html>

⁵² See NYSBA Public Resources webpage, *available at* <https://www.nysba.org/lawyerreferral/>.

⁵³ https://www.americanbar.org/groups/bar_services/publications/bar_leader/2015-16/july-august/time-to-hang-up-the-phone.html/.

website, along with a live web-chat feature that connects consumers with legal referral service operators.⁵⁴ The Philadelphia Bar Association launched a new legal referral service Facebook page, and a Google AdWords campaign led to more than 1 million impressions (the number of times a website has been viewed), helping drive an 18% increase in legal referral service calls.⁵⁵

Also, as the ABA has noted, changes in legal referral programs go beyond changes in technology. Many bar association legal referral services are beginning to offer innovative programs like modest means/reduced fee panels, programs for self-represented litigants such as unbundling/discrete task representation, flat fee programs⁵⁶ and call-a-lawyer instant advice,⁵⁷ and have specialty programming for minors, seniors, small business owners, and members of the military.⁵⁸

The Los Angeles Bar Association has been especially aggressive in responding to the challenge of FPLMS. Under a new flat rate program, consumer clients in the Los Angeles Bar's legal referral service 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

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ <https://iris.philadelphiabar.org/pages/flat-fee>

⁵⁷ <https://www.dallasbar.org/legalline>

<https://www.nycbar.org/get-legal-help/our-services/monday-night-law/>

⁵⁸ https://www.americanbar.org/groups/legal_services/publications/dialogue/volume/20/summer-2017/aba_iris_data_survey/

trademark. Those amounts cover only attorneys' fees and do not include extras, such as filing fees and postage. In return, attorneys pay an annual fee to get referrals from the service.⁵⁹

The Task Force urges bar association legal referral services throughout New York to explore all of these options, and consider a more efficient and centralized approach.

Nevertheless, no matter how the pie is sliced, it is likely that non-profit bar associations, many of which are facing their own financial struggles, lack the money, geographic scope and technological know-how to match the services of well-funded FPLMS. They do not have the advertising budgets to reach as many members of the public, or the capital to develop state of the art technology and innovative customer interfaces. These limitations mean that, valuable as these services are, they are likely to be only partially effective in bridging the "access gap."

Nevertheless, bar association and other non-profit referral services (such a labor union legal plans and legal services agencies) do have one advantage over FPLMS – an advantage that has severely limited FPLMS' ability to grow. This was addressed in the second panel of the Task Force forum and discussed more fully in the next section.

PART III - ETHICAL GUIDANCE ON ONLINE LEGAL REFERRAL SERVICES

A. Rule 7.2(b) and its Exceptions

Even before *online* FPLMS came on the scene, bar regulators struggled with how to place appropriate controls on those who operated more traditional referral services. At the forum, a panel of expert lawyers in professional responsibility (Ronald Minkoff, Sarah Jo Hamilton and Professor Roy Simon), joined by NYCLA Past President Arthur Norman Field, explained the most applicable ethics rule and its stated exclusions and exceptions.

⁵⁹ <http://www.calbarjournal.com/July2016/TopHeadlines/TH1.aspx>

The applicable New York Rule of Professional Conduct, Rule 7.2(b), states in pertinent part:

“A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client”⁶⁰

This Rule addresses two concerns. First, it is thought that, if payment for referrals is allowed, the public will be misled because referral sources will make referrals based on how much the lawyers are paying, not the lawyers’ competence or expertise. Second, there is concern that financial arrangements between lawyers and referral sources may interfere with the lawyers’ professional independence, especially if the arrangements involve fee splitting prohibited by Rule 5.4.⁶¹

Rule 7.2(a) has four principal exceptions, provided “there is no interference with the exercise of independent professional judgment on behalf of the client”: (a) “paying for advertisements or communications permitted by this Rule” (Rule 7.2, Comm. [1]); (b) receiving referrals from a legal services or legal aid agency (Rule 7.2(b)(1) and (2)); (c) receiving referrals from “a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule” (Rule 7.2(b)(3)); and (d) receiving referrals from a “bona fide organization that . . . pays for legal services for its members” meeting certain criteria, generally referring to labor unions, insurers and employers (Rule 7.2(b)(4)). Though the wording is

⁶⁰ A related, somewhat more limited prohibition on sharing fees or rewarding non-lawyers for referrals of damage claims appears at §491 of the N.Y. Judiciary Law and is discussed on pages 47-49 of this Report.

⁶¹ R. Simon & N. Hyland, *Simon’s New York Rules of Professional Conduct Annotated*, §7.2.2 at 1523 (Thomson Reuters 2019), citing The Restatement of Law Governing Lawyers § 10, comm. d (ALI 2010).

different in several respects, the general substance of the current New York Rule is the same as the Model Rule version, and the versions in almost all states.⁶²

More important for present purposes, the Comments to Rule 7.2 specifically *exclude* from the Rule’s prohibitions two important types of marketing: “directory listings” and “group advertisements” (Rule 7.2, Comm. [1]). The first, “directory listings,” including listings in telephone books, has not garnered a great deal of attention from bar ethics committees – there does not appear to be much dispute as to what a “directory listing” is for these purposes, at least in the print world. *See, e.g.*, N.Y. State 979 (2013) (Rule 7.2(a)) “is not meant to keep a lawyer from paying for advertising and communications permitted by the . . . Rules, including the use of print directories [and] online directory listings . . .” (citing N.Y. Rule 7.2, Comm. 1). In the online world, however, the continued use of this undefined term (“directory”) gives us pause, because consumers visiting an online “directory” may seldom scroll past the first few entries on a screen. Indeed, in directories such as the well-known Martindale-Hubbell (“Martindale”), lawyers can get prominent placement on that screen by paying more – the very type of “pay-to-play” scenario we want to avoid, at least without clear disclosure. This is particularly troubling given that (i) Martindale purports to rate lawyers as well (“AV ratings”), making it less like a mere listing of lawyers and more like a recommendation service,⁶³ and (ii) a recent California

⁶² As discussed below, the ABA recently amended the advertising provisions of the Model Rules, and the NYSBA has recommended the adoption of those amendments to the Administrative Board of the New York courts. We refer to the current version of the Rules in New York, because there is no guarantee the recent NYSBA proposals – which the Task Force supports, though they do not fully address all the issues we raise here – will be adopted.

⁶³ An online service claiming to be a directory but having a mechanism for listing some attorneys on the first screen or screens the consumer sees may be viewed as implicitly “recommending” those attorneys because of the unlikelihood that a consumer would scroll through potentially hundreds or thousands of names.

ethics opinion⁶⁴ treated an unidentified FPLMS whose model closely resembles Avvo’s as a “directory,” throwing further doubt on the notion that an online “directory” is necessarily different (and more permissible) than a FPLMS.

The second exclusion, which distinguishes between impermissible for-profit “legal referral services” and permissible “group advertisements,” has proven to be even more controversial. It came to the fore when analyzing a classic, pre-Internet FPLMS: the 1-800-LAWYER phone number. That service, and similar telephone-based services, would involve a lawyer paying either a flat fee or a fee based on the amount of work obtained in order to be listed by the service as the exclusive lawyer for a particular type of case (usually personal injury) in a geographical area. The potential client would call the 1-800 phone number and be referred to the lawyer assigned to the geographical area where the client resides. At least one early opinion regarding this model, issued by NYSBA in 1989, found “that a program in which an advertising agent runs generic ads for legal services and distributes prospective clients to participating lawyers who have been assigned the exclusive right to cases arising in particular geographical areas is more in the nature of a lawyer referral service than advertising by an individual lawyer,” and thus violated the predecessor to Rule 7.2.⁶⁵ With little explanation, this opinion found the service impermissible even though the lawyer paid a flat fee for being listed, as opposed to a fee based on the amount of work, and only one lawyer was listed for each geographical area, thus reducing the service’s discretion as to who would receive the referral. The opinion concluded:

⁶⁴ Cal. St. Bar Ethics Op. 2019-199 (2019) <http://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL-2019-199-%5B12-0003%5D.pdf?ver=2019-11-14-140103-927>.

⁶⁵ N.Y. State 597 (1989), found at <https://www.nysba.org/CustomTemplates/Content.aspx?id=7410>

“As long as the client is not choosing the particular lawyer, but only a geographic location, the referral is prohibited.”⁶⁶

The landscape changed, with equally sparse analysis, in 1995, with *Alabama St. Bar Ass’n v. Lynch*, 655 So. 2d 982 (Ala. 1995) (“*Lynch*”). Analyzing an “Injury Helpline” virtually identical to the service reviewed by the NYSBA in 1989, except that its television commercials explicitly said it was “not a lawyer referral service,” the Alabama Supreme Court ruled that this was a permissible “group advertisement.” This was an early example of a state court permitting a for-profit referral service, where the sole basis for the referral was the lawyer’s geographical location. We make a proposal to remedy that below.

In neither case did the law firm participants organize the service themselves – a third-party (whether a lawyer or not) did, and also created the criteria for picking lawyers out of the group. As with “directory,” the term “group advertisement” remains undefined in the Comments to Rule 7.2, making it harder for New York lawyers to discern when they are obeying the Rules (*i.e.*, participating in a permissible “directory” or “group advertisement”) or disobeying them (by directly or indirectly paying for a referral).

B. Private Legal Services Plans

Another relevant pre-Internet model of a legal referral service was the for-profit legal services plan. For-profit providers (*e.g.*, Amway and others) would charge potential clients a flat monthly or annual amount to participate in the plan. In return, the potential client would receive a set amount of legal services in a given time period (say, three consults and four demand letters

⁶⁶ N.Y. State 597 distinguished this from an advertisement which “presents in a meaningful fashion” the names and other information of separate lawyers or law firms participating in a group advertisement, so the client knows the identity of prospective counsel and can make the choice on his or her own. *See* N.Y. State 979 (2013) (approving a group online advertisement).

per year). The provider would not pay the lawyers, but lawyers who participated would agree to charge lower-than-normal rates in return for the referrals.

The Model Rules permit paid referrals by “qualified” legal services plans (MR 7.2(b)(2)). So, beginning in 1989, Oregon gave formal approval to these for-profit plans, subject to a regulatory scheme that still exists to this day. *See Legal Club.com v. Dep’t of Consumer and Business Services*, 182 Or. App. 494 (2002) (discussing the history). Considering the regulatory schemes more recently put in place in California, Florida, Ohio and other states for regulating FPLMS, discussed below, Oregon’s approach appears particularly far-sighted.

C. Early Impermissible Online Model No. 1: The Online Shopping Mall

The Internet began to be used for “for-profit” lawyer referrals in the early to mid-1990s. One early model was the online shopping mall. There, the referral service would be listed in a “one-stop-shop” website along with other, generally non-legal products and services. The potential consumer would click on the lawyer referral site and be guided to a lawyer based on practice area and geographical location. The lawyer would pay a fee for being listed, and the service would agree to limit the number of lawyers listed in a given geographical location for a particular practice area. This model was rejected in Neb. Ethics Op. 95-3 (1995), mainly because it was considered a for-profit service barred under Nebraska’s version of Rule 7.2 and was essentially identical to a 1-800-LAWYER model that had been deemed impermissible in an earlier Nebraska opinion.

D. Early Impermissible Online Model No. 2: The Online Advisor

Perhaps not surprisingly, more creative approaches to online referrals also ran into trouble in the 1990s. One example, addressed by the Arizona State Bar Ethics Committee in a

1999 ethics opinion⁶⁷, was a service that referred legal questions from clients to participating lawyers based on the lawyers' expertise and geographical location. The lawyers paid an annual deposit, which was reduced each time a question was posed to them. The lawyer could just answer the question, or could accompany the answer with an offer to provide services. The lawyer could join a bonus program, where the service would get paid based on the amount of work and the practice area involved.

The Arizona State Bar Ethics Committee distinguished this from the service deemed a "group advertisement" in the *Lynch* case. It noted that in *Lynch* the lawyer had paid a single flat fee, the service had not screened the inquiries to determine the appropriate subject matter, and no representations had been made about the lawyer's skill. This new service varied from this in every respect, including that it involved service employees "recommending" a lawyer for a fee. Significantly, however, the Arizona State Bar agreed with the Alabama Supreme Court in *Lynch* that an FPLMS could fall outside the strictures of Rule 7.2 if it adhered to certain basic characteristics: a flat fee, neutral selection criteria, and no screening by the service.

E. A Model That Worked: AmeriCounsel.com, Inc.

An online FPLMS found ethical approval in Nassau Co. Ethics Op. 2001-04 (2001)⁶⁸, which deemed permissible the business model used by AmeriCounsel.com, Inc. ("AmeriCounsel"). AmeriCounsel provided each prospective client with a menu of legal categories (family law, bankruptcy, etc.), as well as a menu of services within each category.

⁶⁷ State Bar of Arizona Ethics Opinions 99-06: Internet; Referral Fees; Division of Fees with Nonlawyers; Lawyer Referral Services; Advertising and Solicitation
<https://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=500>.

⁶⁸ <https://www.nassaubar.org/ethics-opinion/2001-4/>.

Once the prospective client (called the “user” in the Opinion) picked the category and services she wanted, the service would provide a list of up to four lawyers in the user’s geographical area, generally based on their proximity to the user’s home address. The user then would select a lawyer, and would be required to pay two separate charges: a “Legal Services Fee,” payable to the chosen *attorney* based on a rate agreed upon by the user and the attorney (who would charge a preferential low rate set by AmeriCounsel); and a “Technology and Administrative Service Fee,” a flat fee paid to *AmeriCounsel* solely for the use of its website. AmeriCounsel would receive no part of the “Legal Services Fee.” The service made clear that: (i) it was not providing legal services, (ii) information provided to it in advance of the creation of an attorney-client relationship might not be covered by the attorney-client privilege, and (iii) the attorney had to perform a conflict check before providing services.

The Nassau County Bar Ethics Committee agreed that “[s]ince attorneys do not ‘compensate or give anything of value’ to AmeriCounsel for participating in the Attorney Network, their participation is not prohibited by [the predecessor to MR 7.2(b)].” All payments to AmeriCounsel were made by the user, and giving the user a below-normal rate did not count as a payment by the lawyer to AmeriCounsel. Moreover, “AmeriCounsel does not ‘recommend’ lawyers or ‘obtain employment’ for them Rather, AmeriCounsel functions as an advertising service or directory for attorneys who meet certain criteria,” including agreeing to charge the below-normal rates, maintaining legal malpractice insurance, and other things. The fact that the user pays, and not the lawyer, and that the service uses neutral criteria in listing lawyers for the user to select, takes the AmeriCounsel service out of the “legal referral service” rubric.

It is important to note that this model, while complying with current Rules of Professional Responsibility, is not necessarily profitable. Mirra Levitt, the President and co-

Founder of Priori Legal, which began as an online FPLMS, and Josh King, former legal director of Avvo, told the Forum that this flat-fee model gives most of the financial up-side to the lawyer (who keeps all the fees from servicing the client), not the service provider (who gets a single, relatively small flat fee), and is thus not economically viable over the long-term. An Internet search confirms that AmeriCounsel, as described above, is no longer in business.

F. A More Radical Departure: The *Total Attorneys* Case

In a disciplinary action brought by the Statewide Grievance Committee of the Connecticut Bar Association a few years later, the Connecticut Bar regulators addressed a very different model in challenging Total Attorneys, a nationwide FPLMS. Total Attorneys would sign up a “Sponsoring Attorney” to handle a certain type of case in a specified geographical area; there often were several such areas in a given state. The attorney, once approved, would receive geographical exclusivity. The potential client would fill out an intake form online, and be referred to the lawyer with the necessary expertise in the client’s geographical area. The payment to Total Attorneys, however, came from the lawyer, who paid a flat monthly marketing fee adjusted on a “pay-per-click” basis.

The Grievance Committee’s complaint drew nation-wide attention from the professional responsibility bar. But a hard-fought hearing ended with a whimper: the Grievance Committee, without published explanation, found that the Connecticut attorneys who signed up with Total Attorneys violated no ethical rules.⁶⁹ This was a significant result, given that Total Attorneys charged the lawyers, not the clients, and the lawyers paid variable amounts based on the number of referrals received. At least in Connecticut, a lawyer-based fee model, when combined with

⁶⁹ *Zelotes v. Rousseau*, No. 99-0412 (Conn. Disciplinary Tribunal, Feb. 8, 2010).

geographical exclusivity, was found not to pose the dangers to professional independence that Rule 7.2(b) is supposed to prevent.

G. The Breakdown: Avvo Legal Services

Avvo Legal Services's FPLMS model met opposition and criticism in many jurisdictions, and failed to comply with various ethics rules as described in the summary of ethics opinions listed below. Professor *emeritus* Roy Simon spoke to the Task Force forum about these ethics opinions, which had a significant impact on the Task Force's analysis.

The most relevant New York opinion was N.Y. State 1132⁷⁰, which advises that a lawyer may not pay a "marketing fee" to participate in Avvo Legal Services because the fee includes an improper payment for a recommendation in violation of Rule 7.2(a). The problem resulted from Avvo's lawyer rating system, which was described in the opinion.

"Avvo assigns every lawyer in a jurisdiction an 'Avvo rating.' The rating is calculated based on information Avvo collects from lawyer websites and other public sources (such as the type of work the lawyer does and the number of years the lawyer has been engaged in that work), as well as on information the lawyer has chosen to add to the lawyer's Avvo profile (such as publications, CLE presentations, speaking engagements and positions with Bar associations and their committees). Avvo's website says that each attorney's rating 'is calculated using a mathematical model, and all lawyers are evaluated on the same set of standards At Avvo, all lawyers are treated equally.' Avvo does not seek or accept any payment for an Avvo rating. However, lawyers who supply more information may receive higher ratings than lawyers who supply less information. Avvo says it scores all information objectively, and does not use subjective data such as client reviews. Although Avvo assigns a rating to all lawyers in a jurisdiction, lawyers cannot offer their services through Avvo unless they meet Avvo's minimum criteria and sign up with Avvo to be listed on the site and agree to Avvo's pricing schedule and marketing fees. According to Avvo, the criteria for participation include a minimum Avvo Rating, a minimum client review score, and a clean disciplinary history.

⁷⁰ N.Y. State 1132 (2017) <https://www.nysba.org/EthicsOpinion1132/>.

“Avvo’s website does not say, ‘We recommend that you choose this lawyer,’ or ‘This lawyer is the best fit for your situation.’ Rather, Avvo furnishes information about lawyers (including client reviews, peer reviews, and Avvo ratings) and allows clients to choose the lawyer. Avvo describes its service as simply ‘facilitating a marketplace’ where consumers can choose from among all of Avvo’s participating lawyers.

“At the beginning of each month, Avvo pays each participating attorney all of the legal fees generated through Avvo by that attorney in the previous month, and separately charges each attorney a ‘marketing fee’ for each legal service the attorney has completed during the prior month (unless Avvo has refunded the client’s payment).”

Opinion 1132 concludes that:

“Through [Avvo’s public marketing] statements and through Avvo’s description of its rating system, Avvo is giving potential clients the impression that a lawyer with a rating of ‘10’ is ‘superb,’ and is thus a better lawyer for the client’s matter than a lawyer with a lower rating. Avvo is also giving potential clients the impression that Avvo’s eligibility requirements for lawyers who participate in Avvo Legal Services assure that participating lawyers are ‘highly qualified’ [T]he 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.”⁷¹

N.Y. State 1132 (2018) did not address, although it did identify, other issues raised by Avvo’s service model. Those included whether Avvo Legal Services violated rules prohibiting deceptive advertising [Rule 7.1(a), Rule 7.1(b)(1)], governing limited scope representations [Rule 1.2(c)], and proscribing fee sharing with non-lawyers [Rule 5.4]. Other jurisdictions have issued ethics opinions about Avvo and other FPLMS that directly address these issues. *See* State Bar of Michigan R-25 (2018) (finding impermissible fee-sharing when attorney’s fee is paid to and controlled by FPLMS and the FPLMS’s fee is based on a percentage of the attorney’s fee); Utah State Bar Ethics Advisory Opinion 17-05 (2017) (FPLMS model violates the rules prohibiting: fee sharing with a non-lawyer; paying a referral fee; and other rules relating to

⁷¹ Avvo has ceased providing legal services since this opinion was issued.

client confidentiality, lawyer independence and safekeeping of client property); N.Y. State 1131 (2017) (marketing fees paid by attorneys to generate leads to potential clients did not violate Rule 7.2(a), overruling earlier opinion); New Jersey Committees on Professional Ethics; Attorney Advertising; and Unauthorized Practice of Law (ACPE JOINT OPINION 732, CAA JOINT OPINION 44, UPL JOINT OPINION 54 (all 2017) (participation in Avvo legal service programs prohibited because the program requires improper fee sharing and payment of an improper referral fee; Legal Zoom and Rocket Lawyer models more acceptable); South Carolina Ethics Advisory Opinion 17-06 (2017) (a fixed fee legal referral service involves improper fee sharing and improper payment of referral fee); Pennsylvania Bar Association Formal Opinion 2016-200 (2016) (a fixed fee legal referral service involves improper fee sharing; impinges on participating lawyers' exercise of independent judgment; limits lawyers' ability to return unearned legal fees; and interferes with maintaining client confidentiality); Ohio Board of Professional Conduct Opinion 2016-3 (2016) (online FPLMS charging a "marketing fee" paid by participating attorneys violated rules prohibiting interference in independent judgment, fee sharing with non-lawyers, and improper advertising and marketing).

H. Fee-sharing and the Core Values of the Legal Profession

New York Rule 5.4, entitled "Professional Independence of a Lawyer," prohibits:

- fee-sharing with non-lawyers (except in extremely limited circumstances);
- forming a law partnership with a non-lawyer; and
- practicing with or in an entity authorized to practice law for profit if a non-lawyer has any authority or interest in the entity and if the entity permits a

third-party payor of legal fees to direct the professional judgment or compromise the duty of client confidentiality.⁷²

According to Rule 5.4's title, and Comment [1] of Rule 5.4, the Rules are to "protect the lawyer's professional independence of judgment." Yet a number of jurisdictions already recognize fee-sharing with non-lawyers within limits as a legitimate business model that does not violate ethical rules. Washington D.C. permits non-lawyer ownership of law firms under certain circumstances,⁷³ and the American Bar Association, the NYSBA, and the Philadelphia Bar Associations have opined that, depending upon circumstances, attorneys may share fees with D.C. lawyers in firms with non-lawyer partners.⁷⁴ Thus, bar ethics committees around the country vary in determining whether similar business models, and the attorneys participating in them, violate "core values" of the profession.

While some ethics opinions have opined that permitting FPLMS to set legal fees for services does interfere with the independent judgment of the attorney, one can question the rationale of these opinions. As long as the legal fees are reasonable, the safe harbor rule that the Task Force proposes below avoids these concerns because it would provide that the fees for legal services are fully and prominently disclosed, allowing consumers to make their own informed choices.

⁷² 22 NYCRR §1200, Rule 5.4.

⁷³ Rule 5.4(b) of the District of Columbia Rules of Professional Responsibility.

⁷⁴ ABA Formal Opinion 464 (2013); N.Y. State 889 (2011); Philadelphia Bar Association O 2010-7 (2010).

I. Payment for Referrals and Core Values

Ethics opinions discussing some FPLMS have also opined that the “marketing fee” is an improper referral fee because, as noted above, it supposedly interferes with a lawyer’s exercise of independent professional judgment. But concepts of what might interfere with a lawyer’s exercise of professional judgment change. As noted above, NYSBA opined in 2012 that payment of a marketing fee to obtain introductions to potential clients from a marketing firm violated Rule 7.2 because it interfered with the lawyer’s exercise of professional judgment, yet in 2017, the NYSBA withdrew that opinion by approving payment of a marketing fee for generating leads to potential clients, as long as the lead did not constitute a recommendation.⁷⁵

There are serious questions of whether existing rules actually relate to a “core value” of professional independence or what the most relevant core value actually is. As Professor W. Bradley Wendel stated in a Cornell Law Review article, “Lawyers seldom stop to ask, however, whether that posited characteristic is in fact a value from a disinterested standpoint.”⁷⁶ Is it more consistent with the core values of our profession for an attorney to refrain from paying a referral fee than to promote and help provide access to legal services for those who cannot afford legal representation in the classic (and expensive) manner? Since access to justice has lately emerged as a priority in defining attorneys’ ethical obligations and professional norms, how should we balance that value against the countervailing value of rigidly protecting independent legal judgment by limiting or prohibiting payment to recommend or obtain employment (and the gray areas between these two)?

⁷⁵ See N.Y. State 1132 (2017), reconsidering in part N.Y. State 938 (2012).

⁷⁶Wendel, W. Bradley, "In Search of Core Values" (2013). Cornell Law Faculty Publications. Paper 770. <http://scholarship.law.cornell.edu/facpub/770> at 351.

Given the proliferation of online legal services, both for-profit and not-for-profit, the differences among the rules and opinions of various jurisdictions, and the changing views on delivery of legal services, strict adherence to established concepts that fee-sharing and referral fees are necessarily unethical may no longer be appropriate.

PART IV - FINDING SOLUTIONS

This brings us to consideration of possible solutions that might alleviate the justice and access gaps, the subject of the third panel at the forum. The Task Force’s goal was to identify workable regimes that would be effective while adhering to core professional values such as professional independence and providing adequate protections for clients and the general public.

A. For-Profit Matching Services and the Independence of Lawyers

The ABA has noted, in discussing a legal services plan, that it is “a question of fact as to whether the lawyer’s financial dependence upon the plan’s sponsor . . . affects the lawyer’s judgment,”⁷⁷ and that these plans should not be categorically prohibited.⁷⁸ In these arrangements, members pay the plan sponsor a monthly fee for certain covered services, and the plan then pays the lawyer for the services. Since “the plan is compensating the attorney instead of the attorney compensating the plan . . . there is no fee sharing.”⁷⁹ Moreover, these plans do not typically risk interference with a lawyer’s professional judgment or charge unreasonably high fees to clients, so none of the policy concerns underlying Rule 5.4 apply.⁸⁰ The ABA ethics opinion allowing

⁷⁷ ABA Formal Opinion 87-355.

⁷⁸ *Id.* at 33.

⁷⁹ *Id.* at 34.

⁸⁰ *Id.*

these plans “offer[s] specific guidelines to assist lawyers in assessing whether they can ethically participate in such plans.”⁸¹

Each of the studies conducted by state bar associations, including the earlier referenced California and Illinois reports, recommends allowing fee-sharing with FPLMS and amending the respective states’ Rules of Professional Conduct to provide clearer guidelines for attorneys participating in lawyer-client matching services, whether for-profit or not-for-profit. Some also suggest allowing state or local bars to “directly regulate the [matching] service,” such as by requiring the service to register with the state bar or court system and by “plac[ing] an explicit limitation on the fees charged to the client.”⁸² Participating lawyers might be “required to inform the customer of the attorney’s relationship with the matching service.” These changes would “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.”⁸³ Mr. Grogan, principal author of the ARDC Report, emphasized both the needs of consumers who were already turning to these services and the interests of the many lawyers in Illinois struggling to find clients and spending much of their time trying inefficiently to develop a client base. He also noted the decline in the number of

⁸¹ *Id.* at 36.

⁸² *Client-Lawyer Matching Services Study*, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois Commission on the Future Legal Services at 54 (July 2018), available at https://www.iardc.org/Matching_Services_Study_Release_for_Comments.pdf.

⁸³ *Id.* at 55. The ARDC report also reviewed possible constitutional violations of the First or Fourteenth Amendments, as well as potential Sherman Act liability. Its conclusion was, first, that the ARDC (and by extension at least some state bar associations) will likely be immune to anti-trust claims because the proposed regulations would be state action by the Court acting in its legislative capacity. See *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). Even if not immune, bar associations would likely succeed on the merits of a Sherman Act claim, so long as there is no concerted action, the regulations do not adversely impact competition, and the regulator does not directly participate in the market being regulated.

lawyer complaints, which he attributed to greater use of non-traditional services. He emphasized that there did not appear to be a pattern of consumer harm from the use of these services.

Mr. King, the former General Counsel of Avvo, echoed these sentiments at the forum. He said that consumers had accepted FPLMS, but bar regulators and the organized bar in general had not. He cautioned against overly restrictive regulations that would discourage this much-needed service, noting that existing advertising rules – even the streamlined version recently adopted by the ABA (and, as noted, recommended for approval in New York) – were more than adequate to guard against false and deceptive actions by lawyers, while other agencies (*e.g.*, state consumer protection agencies) can guard against non-lawyer (FPLMS) misconduct. Rankings, meanwhile, can aid consumers in finding the lawyers they need. Mr. King felt that if any regulatory action was appropriate at all, it would be to create a safe harbor for companies and lawyers that comply with a few basic requirements – a view, as we shall see, echoed by other forum participants.

Mirra Levitt of Priori Legal, whose business includes matching in-house legal teams at enterprises and fast-growing companies with lawyers globally, emphasized the degree of resources, innovation and process of trial and error that were necessary to develop an efficient system and user interface that were actually useful to consumers. She noted that many users do not wish to invest a lot of time in retrieving information or searching for lawyers. Thus, while there would be a role for bar association referral services, few might have the resources or expertise of a well-financed, consumer-oriented business to develop and continuously refine services on a large, efficient, user-friendly scale.

David Miranda, Past President of the NYSBA, took a position contrary to Messrs. King's and Grogan's. He asked the audience to keep in mind that the ethics rules exist to protect the

public, not lawyers, and that members of the public are often at their most vulnerable when searching for a lawyer. He also reminded that N.Y. Jud. Law § 495 provides that for-profit corporations are prohibited from providing legal services, and that this statute was enacted more than a century ago because of misconduct by for-profit, non-lawyer-owned corporations that attempted to practice law. As he noted, there have long been recognized problems with payments to non-lawyers for referring vulnerable people to lawyers – the classic “ambulance chasers” and “runners” – and the gleam of modern technology should not distract us from those dangers. While he conceded that existing bar legal referral services are a “patchwork” that could use streamlining, he still feels those services are best equipped to serve and protect the public.

B. Recent State Bar Proposals

Mr. Miranda’s concerns are well-taken, and have been echoed by others who have addressed this issue. The Task Force does not in any way denigrate the valuable role that bar association referral services have played in the past and we hope will continue to play in the future. But the Task Force believes that, without restructuring and major capital infusions that bar associations are unlikely to be able to make, they simply cannot fill the full extent of the unmet needs of both consumers and lawyers when it comes to lawyer referrals. As we have shown, numerous states have begun to question the existing regulatory structure in light of the “access gap.” In the context of FPLMS, Florida, North Carolina, the Chicago Bar Foundation and Ohio have all amended, or proposed amendments to, their respective Rules of Professional Conduct to address these services, and all but Florida would permit some form of limited fee-sharing. Bar association referral services can supplement and co-exist with these growing services but will not supplant them.

*North Carolina*⁸⁴

In July 2017, North Carolina issued a Proposed Amendment to Rule 5.4 that would allow limited fee-sharing with FPLMS as long as it does not threaten the lawyer’s independence or professional judgment.⁸⁵ The accompanying proposed opinion, focusing on Avvo, would require Avvo to make it “abundantly clear” that it “does not provide legal services” or refer lawyers. The opinion concluded that Avvo’s marketing fee is a reasonable cost of advertising under Rule 5.4. The North Carolina proposal has recently been adopted via a rule change; its Rule 5.4(a)(6) permits a lawyer to “*pay a portion of a legal fee to a credit card processor, group advertising provider, or online marketing platform if the amount paid is for payment processing or for administrative or marketing services*, and there is no interference with the lawyer’s independent professional judgment or with the client-lawyer relationship.” (Emphasis added). This model, which NYCLA endorses, focuses on the lawyer’s maintaining professional independence, not how he or she pays for the legal marketing service.

*Chicago Bar Association and Illinois ARDC*⁸⁶

The Chicago Bar is currently proposing changes to Rule 5.4 to allow payment of a partial fee to an entity that connects clients with lawyers if five conditions are met: (i) no interference with the lawyer’s judgment or with the lawyer-client relationship; (ii) the total fee charged to the client cannot be excessive; (iii) no legal services would be provided by the entity; (iv) the

⁸⁴ North Carolina State Bar, Proposed 2017 Formal Ethics Opinion 7 (July 27, 2017).

⁸⁵ *Id.*

⁸⁶ Illinois Supreme Court Commission on Access to Justice, *Advancing Access to Justice in Illinois: 2017-2022 Strategic Plan*, at 59-50 (May 2017), available at https://courts.illinois.gov/SupremeCourt/Committees/ATJ_Commnn/ATJ_Commnn_Strategic_Plan.pdf.

relationship between the entity and the lawyer or law firm be must transparent to the client; and (v) the lawyer would use a registered entity. The last element of the Chicago proposal would require that the Illinois State Bar Association maintain, and “regulate,” a list of “approved” entities that attorneys may use for these purposes; those entities would register under Rule 5.4(a)(6) and meet the requirements of Rule 5.4(a)(5). This portion of the Chicago Bar proposal, which the Task Force does not believe is either necessary or feasible in New York, would resemble the Ohio model described below – a model also used in Florida and California (the “Ohio model”).

Also seeking to emulate the Ohio model with a registration approach is the Illinois ARDC. At the forum, Mr. Grogan focused on the idea that requiring providers to register would allow Illinois attorneys to feel safe participating in them while giving regulators a jurisdictional “hook” for dealing with possible bad actors. Grogan stated that the ARDC generally supported liberalizing the rules governing FPLMS, since the burden of those rules falls most heavily on new lawyers trying to start their own practice – a group against which bar prosecutors have little appetite for pursuing ethics complaints – and FPLMS can prove valuable to consumers without ready access to attorneys or familiarity with legal matters. But, as Mr. Grogan reported, the Illinois State Bar Association had opposed permitting referral payments to non-lawyers, questioning whether a strong empirical basis exists for concluding either that access to lawyers would be significantly advanced or that potential harm to consumers would not occur.

*Florida*⁸⁷

⁸⁷ Jason Tashea, *Florida Supreme Court Amends Referral Rules to Include Online Resources*, ABA Journal (March 20, 2018), available at http://www.abajournal.com/news/article/florida_supreme_court_amends_referral_rules_to_include_online_resources.

On March 8, 2018 the Florida Supreme Court amended its rules to bring FPLMS under the regulation of the Florida Bar, but did not permit fee-sharing as a form of payment for the services. Thus, while these services are permitted to operate, it is not clear whether a viable business model exists under these new regulations.

*New York (COSAC)*⁸⁸

On November 4, 2019, the NYSBA House of Delegates unanimously recommended that the New York courts adopt comprehensive changes to the New York advertising rules (Rules 7.1-7.5). These proposed changes, following in large part those advocated by the Association of Professional Responsibility Lawyers, a nationwide group of prominent ethics lawyers, and adopted in substantial part by the ABA, would eliminate many of the hyper-technical requirements of the current New York rules in favor of greater reliance on truthfulness and prohibitions against false and misleading representations. The motivations and background for this proposed modernization and elimination of unnecessary restrictions are similar to those which have informed our proposed easing of actual or perceived restrictions on New York attorneys' affiliations with FPLMS.

In its recommendation to the House of Delegates, COSAC explained the three reasons for relaxing the advertising rules that the ABA had identified. First, relaxation of the advertising rules responded to the growth of multijurisdictional practice and the need to remove barriers that impede lawyers' efforts to expand their practices and thwart clients' interests in securing legal services. Second, widespread use of social media and the Internet allows lawyers to “ ‘use

⁸⁸ COSAC Memorandum to NYSBA Executive Committee and House of Delegates Sept. 11, 2019, at 21-22 (hereinafter “COSAC Memorandum”) citing ABA Report: Lawyer Advertising Rules of the 21st Century (Aug. 2018) (hereinafter “ABA Report”), at 1.

innovative methods to inform the public about the availability of legal services.”⁸⁹ And third, outdated or unnecessary restrictions on the ability to disseminate information raise potential First Amendment and even antitrust concerns.⁹⁰ All these considerations apply with equal, if not greater, force to the use of FPLMS to make clients aware of lawyers who can provide needed services and help bridge the justice gap.

COSAC did propose, and the House of Delegates adopted, some important recommendations concerning Rule 7.2. Its recommendations included changing the caption of the rule, eliminating an earlier proposed exception for nominal gifts not intended as compensation and, most important for our purposes, clarifying in a Comment the circumstances under which a lawyer may participate in an FPLMS.⁹¹ The Comment would make significant strides towards opening up the use of FPLMS:

“A lawyer may participate in a for-profit lead generation service if (i) the lawyer is selected by transparent and mechanical methods that do not purport to be based on an analysis of the potential client’s legal problem or the qualifications of the selected lawyer to handle that problem, and (ii) the selection of a particular lawyer is not based on whether the selected lawyer pays more than others for inclusion in the service.”⁹²

COSAC, however, retains in its proposal the confusing distinction between “directories,” “group advertising,” and “lead generation services,” with all those terms left undefined – a distinction which, as we have shown, has permeated ethics opinions in this area to no good effect

⁸⁹ *Id.*, quoting ABA Report at 1.

⁹⁰ *Id.*, citing ABA Report at 1-2 and Association of Professional Responsibility Lawyers Report on the Regulation of Lawyer Advertising Committee (2015) at 18.

⁹¹ COSAC Memorandum at 30-31, 35-36.

⁹² *Id.* at 32, Comm. 5.

for many years. But far more significantly, COSAC did not address the broader concept of fee-sharing with non-lawyers in the context of online matching services or any other context. As explained below, we believe that in many cases fee-sharing will be necessary to encourage the investment necessary to create robust, viable online FPLMS on a comprehensive scale. Finally, COSAC’s attempt to redress the ethical conundrums surrounding FPLMS is found in a comment, not in the official Rule itself – a distinction of less significance in the ABA model, where the Rules and Comments are expected to be adopted together, than in New York, where the courts adopt only the Rules, and leave the Comments to the NYSBA.

Ohio

Ohio was the first to adopt the registration approach that has since been espoused by the Florida Bar, the ARDC and the Chicago Bar Foundation, a regulatory program that attempts to balance the public’s need to find appropriate lawyers with the need for consumer protection. It is embodied in Rule XVI of the Rules of the Supreme Court of Ohio, and has several important features. First, it requires every legal referral service – profit or non-profit – to register with the Supreme Court’s Office of Attorney Services, and to file annual reports about its activities. Second, it must be open to all Ohio lawyers in the relevant geographic area who meet the service’s “reasonable, objectively determined experience requirements,” pay the “reasonable registration and membership fees established by the service,” and maintain appropriate malpractice insurance.⁹³ Third, participating lawyers must charge rates no higher than those they would charge clients not referred through the service – though they may discount their rates.⁹⁴

⁹³ Rules of Ohio Supreme Court, Rule XVI(A)(3).

⁹⁴ *Id.*, Rule XVI(A)(4).

Fourth, participating lawyers are prohibited from having an ownership interest in the service.⁹⁵

Fifth, the service must establish procedures for surveys or other procedures to determine customer satisfaction.⁹⁶ Sixth, the service may charge lawyers a percentage of the fees earned by the lawyer on referred matters.⁹⁷

In short, the Ohio regulatory program, administered by the Ohio courts, moves a considerable distance from the narrow limitations of Rules 5.4(a) and 7.2(b). It allows FPLMS to make referrals based on geography and legal specialization; to require lawyers, not clients, to pay for the service; and, perhaps most importantly, to split fees with the lawyer participants. Ohio's version of MR 7.2(b) – Ohio Rule of Prof'l Cond. 7.2(b)(3) – explicitly permits FPLMS which comply with Supreme Court Rule XVI.

Nevertheless, while we view the Ohio approach as having certain theoretical advantages over a more rules-based approach, we conclude that it would have real-world disadvantages in New York. It is not clear how or by what New York body any new registration regime would be established, and any regulatory body would require funding, staffing and oversight; this is untenable and unnecessary in New York. Moreover, a review of the legal referral services that have actually registered in Ohio shows that the vast majority are not-for-profit bar association legal referral services. Major players in the FPLMS industry are simply not registering and are not being regulated in Ohio. We fear that even if New York's Uniform Court System or State Legislature would implement a rule like this, the same thing would happen. To exert any

⁹⁵ *Id.*, Rule XVI(A)(6) and (9)

⁹⁶ *Id.*, Rule XVI(A)(5).

⁹⁷ *Id.*, Rule XVI(A)(7).

meaningful control on FPLMS, we have to regulate the lawyers who participate in them, not the FPLMS themselves. But the regulation must be more limited and more sensible than the current Rules.

GENERAL CONCLUSION AND RECOMMENDATIONS

After extensive study and discussions, the Task Force has reached the following conclusions and makes the following recommendations:

1. **There is a need for online matching services.** Whether or not formally considered a “justice gap” or “access gap” issue, there is no doubt that many consumers and even small and start-up businesses do not avail themselves of attorneys in traditional ways or fail to perceive that they need access to lawyers for many common legal problems. This phenomenon stems from the costs or perceived costs of traditional legal services, lack of knowledge or information about lawyers, a lack of understanding of when a lawyer’s help may be necessary, and an unwillingness to deal with attorneys in a traditional, time-intensive way. The rapid growth and proliferation of online matching services, as well as the online forms addressed in the OLP Task Force’s 2017 report, demonstrate the extent of the unmet need. At the same time, many lawyers, especially early in their careers, face what might be termed a “client gap,” in that only a small portion of their available time is actually spent on fee-paying work for clients. These attorneys need effective ways to reach clients and generate fees with relatively modest resource and time commitments – and clients need them (and their lower rates) as well.

2. **Online matching services have an important role to play in bridging the gap between lawyers and consumers/clients.** Based on the above, the Task Force believes that the time has come to recognize that FPLMS are not only here to stay but represent a necessary, though not the sole, vehicle for providing access to lawyers for many legal issues for a wide

swath of the public: persons of modest means, the middle class and many small or start-up businesses. These services can play a meaningful role in helping new lawyers, lawyers in solo or small-firm practice, and lawyers in remote locations develop and sustain their practices. All of this benefits the general public and the legal system as a whole, by having legal problems resolved with the help of lawyers, rather than by lay-people struggling on their own.

3. **Bar association referral services can continue to play a necessary role and should be expanded.** Nothing in this report forecloses the development by bar associations of more robust, better funded, less parochial and more innovative and widely advertised online referral services. Indeed, the Task Force recommends that bar associations and funding organizations devote more resources to these services and find better ways to coordinate and integrate them – perhaps using the technological innovations of their for-profit competitors. We recommend that NYCLA, NYCBA, NYSBA and other bar associations create a separate task force to address this important issue.

4. **Even if better resourced, however, bar association referral services cannot be relied on to solve the access problem in themselves.** Nevertheless, our Task Force does not believe that bar association legal referral services, no matter how well run and well-intentioned, can be the sole solution to the “access gap.” They do not have the capital or geographical scope to do the advertising and consumer outreach (to say nothing of the constant innovation and consumer research described by industry representatives at the forum) to address consumer awareness and resistance to traditional legal services. Partnerships among bar associations and online services seem desirable in theory and might be explored further but, according to panelists, are unlikely in practice, given the different priorities of the entities involved as well as the costs to bar associations this would undoubtedly entail.

5. **A revised Rule of Professional Conduct would provide a safe harbor for attorneys and reduce uncertainty.** To avoid uncertainty for both the FPLMS industry and attorneys who want to be listed on an FPLMS, the Task Force is recommending a revised Rule of Professional Conduct that would provide a safe harbor for a lawyer dealing with an FPLMS that the lawyer reasonably knows meets certain criteria. This does not mean that other innovative services might not be offered without running afoul of ethical advertising or fee sharing rules or consumer protection issues. It does mean that lawyers would know that participating in the plans and programs that have seen the most growth and meet certain basic criteria would be permissible. These criteria would permit an FPLMS to “recommend” lawyers, as long as those recommendations are based on prominently disclosed, bona-fide criteria (*e.g.*, not undisclosed, and thus misleading, “pay-to-play”). They would also permit an FPLMS to have its lawyer-members pay a higher fee based on the amount of work generated, as long as the lawyer-members’ independent professional judgment remains unimpaired.

6. **Lawyers and online matching services should support innovative online matching and other services designed to serve the legal needs of the indigent.** The focus of the Task Force was on the access gap for consumers capable of paying at least modest, reasonable fees for legal services, not on the critical, well-publicized access to justice gap facing the indigent. Nevertheless, the Task Force became aware of a growing number of online sources aimed at various aspects of the access to justice issue, including information and self-help services and some referral programs aimed either at indigent clients or legal service providers and pro bono attorneys. Many of these were described by Amy Wildman who spoke in the first session of the Forum. The Task Force applauds and encourages the development of such services. It encourages bar associations, as well as lawyers, law firms and businesses, to support

the growth and development of innovative online services. Expanded bar association referral services might consider developing or partnering with such services; they can (and some already do) play a role in publicizing such services and connecting user populations with them. The Task Force also encourages FPLMS to provide support and assistance to the *pro bono* segment in a variety of ways -- financial, technical and experiential. Efforts in this area by these organizations could provide meaningful help and insight and would contribute positively to their reputation among regulators and their potential networks of lawyers and potential users.

7. **The Task Force’s Proposed Safe Harbor Rule and Statutory Considerations.**

The Task Force recommends the adoption of a new exception, Rule 7.2(b)(5), to the general rule against paid-for legal referrals in New York, which would provide a safe harbor for lawyers using an online FPLMS. On grounds of practicality and efficiency, the Task Force prefers this approach to requiring registration and regulation of each FPLMS. The new proposed exception would read as follows:

A lawyer or the lawyer’s partner or associate or any other affiliated lawyer may be recommended, employed or paid by . . .

5) any bona fide organization that provides prospective clients with lawyer referrals or recommendations, or a mechanism by which the organization chooses or recommends a lawyer from a listing of lawyers prepared by it, or provides a lawyer with a prominent and preferred place in an online directory, in return for a fee charged to the prospective client or [except to the extent prohibited by N.Y. Jud. Law § 491] to a lawyer receiving or seeking to receive a referral, including any fee paid by the lawyer to the organization for any services or benefits including for advertising related to referrals, only if the lawyer, after reasonable inquiry, knows or reasonably believes that each of the following conditions is met:

(i) the mechanism by which the organization chooses a lawyer, and the basis for any lawyer ratings, or for prominent and preferred placement in an online directory (which placement must be designated as “paid for” or the like on the listing itself) are fully disclosed in the manner set forth in

Rule 7.1(i) on the organization's website and in any agreement between the organization and the prospective client;

(ii) the organization does not otherwise violate Rule 7.1, Rule 7.3 or Rule 7.4 in advertising its or the lawyer's services;

(iii) the lawyer to whom the matter is referred is competent within the meaning of Rule 1.1 to perform all or a substantial portion of the work on the matter;

(iv) any rating system used by the entity is not affected by payments or other activities of the lawyer, directly or indirectly, to the organization for services or benefits relating to referrals, including for advertising on the organization's website;

(v) the fee, remuneration or other consideration charged to the prospective client by the organization regarding a referral is not dependent on whether the prospective client retains the lawyer receiving the referral; and

(vi) the fee, remuneration or other consideration charged to the lawyer receiving the referral by the organization may vary based on the amount of the fee the lawyer charges the client, provided (x) the referral fee arrangement is disclosed to the client, (y) the lawyer's fee is reasonable, and (z) the lawyer's fee, and services provided to earn that fee, are determined solely by the lawyer without interference by the organization.

The situation is more complicated in New York than in most other states because provisions of New York's Judiciary Law may also apply to conduct of lawyers and FPLMS. Provisions of this law prohibit and even criminalize some conduct apart from the ethical Rules applicable to New York lawyers and discussed above. The Task Force does not believe that § 495 of the Judiciary Law, mentioned by Mr. Miranda, would apply to the activities contemplated by our proposal. (Section 495, generally prohibits corporations and voluntary associations, with certain exceptions, from performing legal services or advertising that they perform legal services in New York, and we do not believe that FPLMS perform legal services.) A provision that could apply to some aspects of the conduct contemplated by our proposed rule, however, is Section 491. This statute, more than a century old, makes it unlawful, and in fact a

misdemeanor, for a non-lawyer to receive fees from or divide fees with a lawyer “as an inducement for placing, or in consideration of having placed, in the hands of such attorney-at-law, or in the hands of another person, a claim or demand of any kind for the purpose of collecting such claim, or bringing an action thereon, or of representing claimant in the pursuit of civil remedy for the recovery thereof.”

Section 491 is in some ways an anachronism: for example, it contains no exception for bar association or other non-profit referral services, which receive fees for exactly the types of referrals the statute prohibits. Nevertheless, the statute is still on the books, and some courts have even applied it in recent years in the context of litigation loans.⁹⁸ It does not in the Task Force’s view affect our proposed rule to the extent the rule applies to transactional work or civil or criminal litigation where the referred client would not be pursuing a claim for monetary relief. It could, however, prevent an FPLMS from charging the attorney a fee in many matters where such relief might be sought, including, *inter alia*, small claims court cases, small business disputes, and housing and matrimonial matters. In these cases the FPLMS could still charge a fee to the client but not to the attorney (as our rule would otherwise permit but not require).

It is possible to draft the rule in a way that accommodates Section 491 but it is sub-optimal (as well as cumbersome) to have to do so because it will reduce compensation and increase the complications for FPLMS and therefore reduce their incentive to deal with attorneys and consumers in New York. Indeed, as other states become more permissive, it will put New Yorkers at a disadvantage. The brackets in the proposed Rule set forth above are intended to show how the rule could be drafted to avoid conflict with Section 491. But the Task Force

⁹⁸ See, e.g., *Bonilla v Rotter*, 36 A.D.3d 534, 829 N.Y.S.2d 52 (1st Dep’t 2007).

strongly advocates eliminating or substantially revising § 491 to take account of the realities of the online environment.

The dangers of “runners” signing up clients in dire physical circumstances do not seem to the Task Force to be potent considerations in the online world, and in any event this conduct is already prohibited by other sections of the Judiciary Law. (*E.g.*, N.Y. Judiciary Law §§ 479-482.) Section 491 in its present form serves as an outdated barrier to bridging the access and justice gaps and disserves rather than protects the interests of both consumers and lawyers in New York State.

8. **Clarifying the Comments to Rule 7.2.** As noted above, one area of confusion that remains in the Comments to Rule 7.2 – both in the current version and the version recently adopted by the NYSBA House of Delegates – is the use of the terms “online directory listings” and “group advertising.” Comment 3 specifically states that a lawyer is permitted to “pay for advertising and communications permitted by this Rule, including the costs of print directory listings, *online directory listings*, newspaper ads, television and radio airtime, domain name registrations, sponsorship fees, Internet-based advertisements, and *group advertisements*.” (Emphasis added.) We have seen how ethics opinions have sometimes referred to an FPLMS, including Avvo, as a “directory” or a “group advertisement,” when it is neither. To end this confusion, we recommend amending the Comment to add the following immediately after the sentence quoted above: “An online directory shall mean a listing created by lawyers or non-lawyers which lists lawyers by name, geography or practice area, and which allows lawyers to pay for preferred ad size, font or placement, but does not otherwise refer or recommend specific lawyers to specific prospective clients; it shall not include a listing of search results under Google, Bing or other search engines. A group advertisement shall mean an advertisement

created by a group of lawyers or law firms which does not otherwise refer or recommend specific lawyers to specific prospective clients.”

CONCLUSION

This Task Force’s recommendations are intended to remedy three serious issues: (a) the inability of members of the public with relatively limited means, faced with a legal problem, to (in some cases) identify their problem as legal and to find an appropriate lawyer; (b) the need for lawyers wishing to service these members of the public to find clients; and (c) the existence of outdated ethical rules that make it difficult for lawyers to participate in FPLMS – which can help resolve the first two issues. We believe that FPLMS have the technological know-how and financial resources to provide this important service, and that the organized bar should encourage the general public to make use of FPLMS while still ensuring adequate protections for consumers. In New York, we believe this can best be accomplished by adding a new Rule of Professional Conduct 7.2(b)(5), clarifying some confusing terms in Comment 3 to Rule 7.2, and eliminating N.Y. Jud. Law § 491. These changes would, among other things, allow FPLMS to “recommend” attorneys to specific clients to address specific legal problems, to do so for a fee, and to allow that fee to be based on the amount of legal work the attorney provides. With the other protections our proposals provide, the normal dangers involved in fee-splitting do not apply in this area, and permitting more flexible fee models will encourage technological investment in this important area. Our Task Force’s proposals fall in line with those of other jurisdictions around the United States, including Florida, California, Illinois, Ohio and Utah, which also view FPLMS as a way to bridge the “access gap.” The solutions we propose are a “win-win-win”: a win for consumers who need help finding lawyers; a win for lawyers who need help finding

clients; and a win for our justice system which benefits when legal problems are solved through lawyers and courts.