

Background and Overview of the ARDC's Intermediary Connecting Services Proposal

The ARDC's review of the legal profession's marketing rules, the lawyer-client connecting marketplace, and regulatory schemes pertaining to those services was initially prompted by calls from Illinois attorneys asking if they could ethically participate in Avvo Legal Services. Additionally, the ARDC's drafting of a registration and regulatory framework was in response to studies of bar associations discussing the future of the lawyers, as well as academic studies discussing topics in access to justice, that describe the marketplace inefficiencies for clients and lawyers. The drafting of a framework was also a response to several jurisdictions issuing opinions declaring that their lawyers could not ethically participate in Avvo Legal Services or similar lawyer-client connecting services.

Studies, including the 2016 Report and Recommendations of the Illinois State Bar Association's Task Force on the Future of Legal Services, show inefficiency in accessing the legal market that poses risks to the public, presents challenges to the courts, and reduces work for lawyers at a consumer level. In Illinois, there is a prevalence of self-represented litigants, impacting the court system. According to a 2016 report from the Administrative Office of the Illinois Courts, 93 out of 102 Illinois counties reported that more than 50% of their civil cases involved a self-represented litigant. Over half of Illinois's 24 judicial circuits likewise reported that 70% or more of litigants in civil matters were self-represented. Self-represented litigants appeared most commonly in dissolution, municipal, small claims, orders of protection, and family matters.

Also, many consumer-level legal needs remain unmet. On the one hand, there is an uneven distribution of lawyers in Illinois, affecting the ability of rural residents to locate legal aid. In August 2019, the Court's Commission on Professionalism published an article entitled "The Disappearing Rural Lawyer." The article noted that "[t]he uneven distribution of practicing attorneys in the state is alarming." Cook County and its six collar counties account for 65% of the state's population, but 90% of the state's lawyers. The remaining 10% are spread throughout the remaining 95 counties. Apparently, this uneven distribution "is becoming more pronounced by the year."

On the other hand, many individuals choose not to seek legal assistance, because they may not recognize that they are faced with a legal problem or that they would benefit from legal representation. According to an often-cited 2014 study by Rebecca Sandefur (Associate Professor of Sociology and the Law at the University of Illinois at Urbana-Champaign at the time, American Bar Foundation fellow, and 2018 MacArthur Foundation Genius Grant recipient), of a surveyed random sample of adults in a middle-sized American city, the most common way to handle a civil justice situation (*e.g.*, money, housing, benefits, or personal injury) was to seek self-help. According to the 2014 study, the most common reason why an individual would not seek legal assistance was because the individual did not see the need for legal help. Additionally, more than half of those surveyed viewed their civil justice situation as "bad luck," and nearly a quarter viewed their situation as a private, family, or community matter. But, when they did believe that their situation was legal in nature, they were more likely to use or consider using a lawyer. Likewise, a 2018 Clio Legal Trends Report, which explored how

consumers approach their legal problems, noted that more than half of over 1,000 surveyed consumers, who had dealt with a life issue that could have been handled legally, chose to ignore or handle the matter outside of the legal system.

Additionally, there is often a lack of transparency in terms of legal needs and cost of legal services, likely affecting the decision to hire a lawyer or creating difficulties in a lawyer to attract new clients. Some states—such as Utah, Texas, and Michigan—have noted a lack of sufficient information about price, value, usefulness, and quality of legal services; a finding that is echoed in the 2018 Clio Legal Trends Report. In light of these concerns, the Texas Commission to Expand Civil Legal Services recommended in 2016 that lawyers be permitted to list their fee type on their State Bar of Texas lawyer profile and that the State Bar create an online matching portal to provide accurate and transparent information. Similarly, the 2018 Clio Legal Trends Report concluded that consumers are worried about price transparency and the overall benefit of legal services.

Further, some reports on lawyer income have raised concerns regarding solo and small-firm lawyer compensation. For instance, a 2017 Clio Legal Trends Report, which analyzed data from over 60,000 Clio users, concluded that lawyers on average collected less than two hours of billable time per eight-hour work day. The report determined that just over 80% of the work day that could have been spent on billable tasks went to running the business or obtaining clients. Also, Benjamin H. Barton (a Helen and Charles Locket Distinguished Professor of Law at the University of Tennessee) analyzed data from the Internal Revenue Service and determined that in 1988, solo practitioners had earned an inflation-adjusted \$70,747. However, by 2012, the earnings of 354,000 solo practitioners had fallen to an average of \$49,130, a 30% decrease. Likewise, according to the 2018 Solo & Small Firm Compensation Report from Above the Law and Clio, 26% of 300 surveyed solo practitioners earned less than \$50,000, and another 28% earned between \$50,000 and \$100,000. That report also noted that 52% of 430 surveyed small-firm lawyers earned \$100,000 or less. In short, clients and lawyers face several market inefficiencies.

Currently, the internet is filled with for-profit online lawyer-client connecting services, such as Martindale-Hubbe, Avvo, Legal Zoom, Rocket Lawyer, BasicCounsel.com, CourtBuddy, Up Counsel, LegalMatch.com, MyLawSuit.com, SmartLegalForms, JDivorce, LawCo, Text-A-Lawyer, Lawguru, Legal Services Link, and LegalMatch.com. The current Rules of Professional Conduct do not adequately address which types of services are permitted, or how a lawyer may participate or interact with the for-profit services. The rules also do not sufficiently address how the public, or their information, would be protected if lawyers and potential clients were to participate in these types of services.

Some states have adopted (North Carolina and Utah) or advanced (Arizona, California, Oregon) proposals or rule changes that would allow more lawyer-nonlawyer interaction in the legal services marketplace. Still, several other states and bar associations—Indiana, Michigan, Maryland, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Virginia, and the Illinois State Bar Association—have either prohibited their lawyers from participating in, or raised concerns about, for-profit lawyer-client connecting services. Those states have cited to

longstanding concerns of fee-splitting, paying for a referral or a recommendation, the lack of lawyer independence, and a third party's control over an attorney's legal fee and representation.

To address the above issues, and to seek to increase the opportunities for lawyers throughout Illinois to connect with potential clients for the performance of legal services, the proposed framework is focused on the concept of expanding the available means to advertise a lawyer's services. The proposal is, in effect, part of a steady progression in opening a lawyer's ability to advertise, and it recognizes that market inefficiencies still persist despite prior opportunities for lawyers to bolster their presence in the market.

In concluding that lawyer advertising was protected as commercial speech under the First Amendment, the Supreme Court of the United States, in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), rejected several arguments that would have restricted lawyer advertising. The Court cautioned that prohibiting advertising would serve only to restrict the information that flows to consumers. The Court also noted that advertising could help solve the inefficiencies in the market at the time, in which the middle 70% of the nation's population was not being "reached or served adequately by the legal profession," and in which the underutilization of legal services was due to "fear of the cost, and an inability to locate a suitable lawyer." *Bates*, 433 U.S. at 376

Bates and its progeny, which established that lawyer advertising is commercial speech, have led to an opening of the marketing opportunities available to lawyers. In fact, Comment [5] to Rule 7.2, which was amended in 2015, references the most recent expansion of lawyer marketing opportunities: lead generation. Nonetheless, inefficiencies still exist in the market. The ARDC's proposal, therefore, builds upon *Bates* and its progeny and upon Rule 7.2's comments, by further expanding the marketing opportunities for lawyers to connect with clients for the performance of legal services.

Proposed amendments to Rule 7.2 would permit lawyers to participate in registered and regulated for-profit intermediary connecting services, and would permit lawyers to pay a fee for every connection resulting in a potential client hiring the lawyer. Additionally, proposed amendments to Supreme Court Rule 730 would define the scope of "intermediary connecting services," and would seek to protect the public and the legal profession with both a registration component and a regulatory component. The registration component would be designed to weed out shady services that may engage in deceptive or pressure tactics. Intermediary connecting services would have to register and maintain an annual registration. They would also have to submit a certified statement that it complies with a list of requirements that pertain to the regulatory component.

The regulatory component is three-fold. First, the proposed framework would require registered services to comply with certain requirements. The main restrictions would be that an intermediary connecting service could not provide false or misleading information, could not recommend or refer a particular attorney, could not offer contingent fee matters, and could not control or influence a participating lawyer's judgment or representation. Second, the proposed framework would provide the Court with jurisdiction over a registered intermediary connecting service, and to discipline the service for violations of the compliance conditions. Discipline could include a censure, a suspension, or revocation of a service's registration. Third, the

Administrator would have the discretion to initiate any disciplinary investigation or proceeding against a registered intermediary connecting service in the same manner as investigations and proceedings against licensed attorneys. As with licensed attorneys, the list of registered intermediary connecting services and their disciplinary status would be publicly available so that potential clients and lawyers could identify services with which they could participate.

The proposal also seeks to increase transparency of offered legal services and prices. It would require intermediary connecting services to disclose, or to permit their participating lawyers to disclose, the basis or rate of the lawyer's fee for the offered legal services.

The proposal recognizes the value in bar associations, legal aid organizations, and the Court's access to justice initiatives. Thus, the proposed framework would completely exempt bar associations and legal aid organizations from registration and regulatory requirements. A proposed amendment would also seek to support public service and access to justice initiatives, by requiring registered intermediary connecting services to remit to the ARDC a certain, low percentage of their prior year's revenue that was generated from the fees they charge and collect for connections. At this Court's direction, the ARDC would then transfer those funds access to justice programs or entities that the Court designates.

The proposed framework is a measured approach, a step toward addressing the market inefficiencies for both lawyers and clients. The objective of the proposed framework is that, by expanding the available services in the market that would advertise lawyer's services and expand a lawyer's availability to the public, by permitting lawyers to pay an intermediary connecting service a reasonable connecting fee, and by prohibiting the service from having any control over the lawyer's fee, the Court can strike a reasonable balance between addressing the current state of the market, the current ambiguity in or uncertainty of the Rules, and the longstanding concerns of for-profit entities controlling the lawyer or the lawyer-client representation.