How the Proposed Regulations Comport With the First Amendment and Other Constitutional Doctrines

At each juncture and iteration of the proposal, the ARDC extensively researched and analyzed constitutional and other federal law pertaining to the proposed regulations. The ARDC has verified that the proposed regulations comport with the First Amendment's Freedom of Speech and Right of Association, with the Equal Protection doctrine, with the Commerce Clause, and with the Sherman Antitrust Act. The following is a brief discussion of how the proposed regulations comport with those doctrines. To further assist the Court, the ARDC can provide a more comprehensive analysis of these laws.

First, regulating a lawyer's participation in and payment to a for-profit intermediary connecting service would not offend the First Amendment's Freedom of Speech. The proposed regulatory framework restricts when a lawyer may compensate a nonlawyer in an effort to secure employment by a client. It would restrict an economic activity or commercial practice. *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third, & Fourth Dep'ts, App. Div. of the Sup. Ct. of the State of N.Y.*, 118 F.Supp.3d 554, 569 (S.D.N.Y. 2015); see also Sorrell, v. IMS Health Inc., 564 U.S. 552, 567 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."); *see also Keep Chicago Livable v. City of Chicago*, No. 16 C 10371, 2017 U.S. Dist. LEXIS 35231, at *17 (N.D. Ill., March 13, 2017) (concluding that because the Shared Housing Ordinance "does not target speech but rather the business practices associated with home sharing, only incidentally burdening speech if at all, the [ordinance] falls outside the purview of the First Amendment"); *see also International Franchise Association v. City of Seattle*, 803 F. 3d 389, 408-409 (9th Cir. 2015) (stating that Seattle's minimum wage ordinance is an economic regulation, and "[a]lthough the franchisees are identified in part as companies associated with a trademark or brand, the ordinance applies to businesses that have adopted a particular business model, not to any message the business expresses").

Second, regulating for-profit intermediary connecting services would not violate the First Amendment's Right of Association, because, as a for-profit company, an intermediary connecting service would be engaged in marketing lawyers for its and the lawyer's own commercial rewards. *See S.P.S. Consultants, Inc. v. Lefkowitz*, 333 F.Supp. 1373, 1376 (N.Y.S.D. 1971) ("While the inability to make referrals to a particular physician or facility may affect the profitability of plaintiffs' businesses, it does not abridge their First Amendment rights."). "In cases involving the substantial rights to associate for the advancement of a common purpose, the state's interests in regulating the 'solicitation' attending that association will generally be deemed insufficient to sustain the abridgment of the First Amendment rights." *Allison v. Louisiana State Bar Association*, 362 So.2d 489, 496 (La. 1978). Intermediary connecting services and the participating lawyers are likely not part of an advocacy group and are not associated for the advancement of a First Amendment-protected common purpose, other than perhaps their own economic gain. They are engaged in seeking out customers and clients for their own commercial rewards. Because there is "only minimal constitutional protection" for the sort of "commercial association" in which such a service is engaged, that commercial activity is subject to rationally related regulation. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 473 n. 16 (internal quotations omitted); *see also*

Roberts v. United States Jaycees, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) ("The Constitution does not guarantee a right to choose...those with whom one engages in simple commercial transactions, without restraint from the State.") A state regulation survives rational basis review if any reasonably conceivable set of facts could demonstrate that the statute is rationally related to a legitimate government purpose. *Vigilante v. Village of Wilmette*, 88 F.Supp.2d 888, 891 (N.D. Ill. 2000). As explained below, the proposed framework would satisfy the rational basis test.

Third, regulating for-profit intermediary connecting services, and not bar associations or legal aid organizations, does not raise an equal protection issue, because that regulation would be rationally related to the legitimate state interests of promoting the independence of lawyers. The proposal seeks to prevent nonlawyers from controlling how lawyers practice and to minimize the situations in which a for-profit intermediary connecting service might be motivated by economic incentives rather than by the client's best interests. Because intermediary connecting services are not a suspect class, and because restricting when a lawyer may participate in and pay a fee to an intermediary connecting service does not implicate a fundamental right, the proposed framework need only be rationally related to a legitimate state interest. *Lawline v. American Bar Association*, 956 F.2d 1378 (7th Cir. 1992); *City of Chicago v. Shalala*, 189 F.3d 598, 605 (7th Cir. 1999); *Dunagin v. City of Oxford, Mass*, 718 F.2d 738, 753 (5th Cir. 1983).

Common concerns with payments to for-profit nonlawyers compared to payments to not-for-profits or state bar associations are the commercialization of the law practice, the lack of independence of the lawyer, and the corporation's motive to increase its profits. *Richards v. SSM Health Care, Inc.*, 311 Ill. App. 3d 560 (1st Dist. 2000); *Inmates of the R.I. Training Sch. v. Martinez*, 465 F.Supp.2d 131, 134 (D. R.I. 2006). Compared to bar association referral services, a for-profit intermediary connecting service is far removed from the legal profession. Beyond marketing and connecting lawyers to customers, an intermediary connecting service has no real connection to the legal profession. Thus, that service would have minimal (if any) motivation to safeguard the public, to maintain the integrity of the profession, or to protect the administration of justice from reproach. Accordingly, the proposal's registration and regulatory framework, which dictates when lawyers may participate in and make a payment to a for-profit intermediary connecting service, meets the rational basis test.

Fourth, the proposal would not violate the Commerce Clause, because the proposed framework treats both in-state and out-of-state actors equally. "The Commerce Clause implicitly prevents state and local governments from passing laws that discriminate against or excessively burden interstate commerce." *Mo. Pet. Breeders Ass'n v. Cnty of Cook*, 106 F.Supp. 3d 908, 921 (N.D. Ill. 2015). The dormant Commerce Clause doctrine, therefore, applies only to laws that discriminate against interstate commerce, either expressly or in practical effect. *Park Pet Shop*, 872 F.3d at 501, citing *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1130-1131 (7th Cir. 1995). A state law does not offend the dormant commerce clause when the state law treats in-state and out-of-state entities equally. The proposed regulatory framework requires all in-state and out-of-state intermediary connecting services to register and follow the compliance requirements. Likewise, it treats services operated by both in-state and out-of-state bar associations or legal aid organizations the same. Thus, the regulatory framework does not

discriminate against out-of-state interests in favor of in-state interests and would not violate the dormant commerce clause.

Fifth, if the Court were to adopt the proposal, the Court (and the ARDC as its regulatory arm) would be immune from antitrust liability under the Sherman Act. "State legislation and 'decision[s] of a state supreme court, acting legislatively rather than judicially,' will satisfy this standard, and '*ipso facto* are exempt from the operation of the antitrust laws' because they are undoubted exercise of state sovereign authority." *N.C. Board of Dental Examiners*, 135 S. Ct. 1101, 1110 (2015), citing *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984). That is, "[w]hen the conduct is that of the sovereign itself...the danger of unauthorized restraint of trade does not arise," and there can be no cause of action under the Sherman Act. *Hoover*, 466 U.S. at 569; *see Lawline v. American Bar Association*, 956 F.2d 1378 (7th Cir. 1992) (holding that this Court had adopted Rule 5.4(a) and Rue 5.5(b) and acted in a legislative capacity, so this Court held the same position as a state legislature and was immune from Sherman Act liability, along with the ARDC as its agent).