

**IN THE SUPREME COURT OF FLORIDA**

IN RE: AMEMDMENTS TO THE RULES  
REGULATING THE FLORIDA BAR –  
4-7.12, 4-7.13, 4-7.16, 4-7.17, 4-7.22, and  
4-7.23 (LAWYER REFERRAL SERVICES)

CASE NO. SC16-1470

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**COMMENTS OF 1-800-411-PAIN REFERRAL SERVICE, LLC  
IN PARTIAL OPPOSITION TO FLORIDA BAR PETITION  
TO AMEND RULE 4-7.22 (LAWYER REFERRAL SERVICES)**

Interested party 1-800-411-PAIN Referral Service, LLC (“411-Pain”),  
through its counsel, Florida Bar member Timothy P. Chinaris, respectfully submits  
the following comments regarding The Florida Bar’s Petition to Amend Rule  
Regulating The Florida Bar 4-7.22 (Lawyer Referral Services).

411-Pain operates as a privately-owned lawyer referral service in  
compliance with current Rule 4-7.22, Rules Regulating The Florida Bar.

411-Pain objects to proposed Rules 4-7.22(d)(6) and 4-7.22(e)(2)(B) and  
respectfully urges this Court to reject those proposed amendments.

**GENERAL COMMENTS ON THE BAR’S PROPOSALS**

The “qualifying providers” at which the proposed rule changes are aimed  
operate in different ways, but they all share one defining similarity: they connect  
potential clients with lawyers through the use of advertising.

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The participating lawyers' use of qualifying providers as an advertising vehicle is protected under the First Amendment's commercial speech doctrine. Restrictions affecting commercial speech must be evaluated under the *Central Hudson* framework.<sup>1</sup> This requires the Bar to identify a substantial state interest and prove, with evidence, that the rule directly advances that substantial state interest. The Bar's burden is satisfied only by an evidentiary showing "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (state's "burden is not satisfied by mere speculation or conjecture"). A regulation on commercial speech cannot be sustained if it provides only ineffective or remote support for the government's purpose. *Central Hudson*, 447 U.S. at 564. Furthermore, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot stand. *Id.* There must be a reasonable fit between the ends and the means chosen to accomplish those ends, "narrowly tailored to achieve the desired objective." *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989). These standards allow restrictions on commercial speech only when they are factually justifiable and extend no farther than necessary.

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<sup>1</sup> *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-62 (1980).

The Florida Bar has attempted to comply with these legal requirements by taking an inclusive, far-sighted approach to regulating how and under what conditions lawyers may accept representation of clients who are connected with them through third party entities that the proposed rules call “qualifying providers.”

The Bar’s new approach is necessary because of tremendous changes in the legal marketplace in the past few years. The referral landscape described more than four years ago in the Report of the Bar’s Special Committee on Lawyer Referral Services has changed so much that it is almost unrecognizable today. The Report did not even mention online referral providers. Yet these online providers, most of which are national in scope, now dominate the marketplace and continue to grow. They annually generate hundreds of millions of dollars for themselves and their participating lawyers.

Over the same time period, the “traditional” lawyer referral services targeted by the Special Committee have become compliant with Bar rules and, as the Bar acknowledges, are cooperating with the Bar and its regulatory goals.<sup>2</sup> Even if the thin, anecdotal “evidence” of abuses in the Special Committee’s Report was

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<sup>2</sup> See “Changes Would Link Lawyers with Clients,” *Florida Bar News*, Apr. 15, 2016 (“While the Bar had contentious relationships with some lawyer referral services in the past, some have worked hard to comply with Bar rules.”).

accepted as true and correct (something that 411-Pain emphatically disputes),<sup>3</sup> it is undeniable that there have been *no* reported incidents of problems since the Report was issued in 2012.

The broad definition of “lawyer referral service” in current Rule 4-7.22(c) plainly includes online “matching” services. Inexplicably, however, The Florida Bar has chosen not to use the current rules to regulate online providers’ arrangements with Florida lawyers.<sup>4</sup> The Bar’s failure to apply its rules to online services that connect potential clients with lawyers creates substantial inequities because lawyers who participate with other referral services (such as 411-Pain) must follow these rules or risk discipline. The proposed rules are designed to end

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<sup>3</sup> The Special Committee was packed with lawyers whose personal injury practices competed with and were negatively affected by referral service advertising, along with lawyers with close ties to the insurance industry. Despite extensive efforts over a two-year period to find serious abuses by referral services, the Report cited just a few anecdotal incidents. If there were real problems, there is absolutely no doubt that they would have been found and widely publicized.

<sup>4</sup> See “Board to Receive Wide-ranging Referral Service Report in March,” *Florida Bar News*, Feb. 15, 2016 (“Schwait also told the board that the Bar has received an inquiry from a lawyer asking whether Avvo’s service offering to connect callers to lawyers for a 15-minute consultation for \$39 – with Avvo keeping \$10 – falls under the Bar’s lawyer referral service rules. He said that inquiry has been postponed until the new rules are finished. Avvo has argued it is a ‘matching service’ and not a lawyer referral service.”); “Matching Services Rules go to the Court,” *Florida Bar News*, Aug. 1, 2015 (“On a related issue, Schwait said a lawyer has asked the Bar if it is permissible under Bar rules to participate in a service offered by Avvo that links lawyers to consumers with legal questions. The board unanimously approved the committee’s recommendation to defer the issue until the Supreme Court acts on the proposed rule amendments.”).

the Bar’s unjustifiable regulatory approach that has applied the rules to only certain referral services despite the fact that all of them – including online services – perform the same function of connecting potential clients to participating lawyers.

### **THE MULTI-PROFESSION REFERRAL BAN IS RIGHTLY REJECTED**

The Florida Bar correctly decided *not* to recommend to this Court that lawyers be prohibited from accepting referrals from qualifying providers that refer clients to more than one profession for the same incident or transaction. This concept was studied carefully by the Board of Governors, which twice voted to reject it.

Proponents of the defeated proposal characterized the situation as an “inherent conflict,” speculating that a lawyer’s affiliation with a qualified provider will affect the lawyer’s willingness or ability to provide the client with competent representation. The Board rightly rejected this attempt to penalize *only* lawyers who work with referral services, when potential conflicts of a similar or more serious nature are left to be addressed under the existing conflict rules. Can there be a greater “inherent conflict” than the conflict presented when a lawyer refers clients to a business in which *the lawyer* has an ownership or substantial financial interest? For example, a real estate lawyer is permitted to routinely refer clients to a title company that she owns as long as the conflict rules are followed.

Lawyers who work with qualifying providers should continue to be subject to the same rules that apply to every other lawyer. This Court’s long-standing precedent makes it clear that *all* lawyers, regardless of the source of their clients, must be subject to the same rules and that it would be improper to apply more restrictive rules to a segment of lawyers based on an employment or business relationship. In *In re Rules Governing Conduct of Attorneys in Florida*, 220 So. 2d 6 (Fla. 1969), the Bar asked the Court to adopt a rule that would restrict insurance companies from using lawyers who were salaried employees of the insurers to represent their insureds. The Bar asserted that this situation presented an inherent conflict, arguing that “the compulsive economic pressure of retaining one’s full time means of livelihood precludes the possibility that a lawyer under such circumstances can give unadulterated devotion to divergent interests” of insurer and insured. *Id.*, at 7. This Court flatly rejected that assertion as a form of discrimination against a class of lawyers with no reasonable basis.

The Court’s reasoning applies even more forcefully in the context of lawyers who work with qualifying providers. In *In re Rules*, the Court refused to impose different conflict rules on lawyers whose *entire client base* came from a single source – the insurance company that employed them as full-time employees. Lawyers who work with qualifying providers typically obtain only a fraction of their clients through the provider.

In deciding to reject a multi-profession referral ban, the Bar has chosen to recommend adoption of broad rules that are designed to remain viable regardless of future changes in technology. For example, online providers may offer a potential client the ability to connect with a real estate lawyer, a real estate broker, and a mortgage banker regarding the same transaction. This offers potential benefits to clients, but also might present potential conflicts. Wisely, the proposed rules recognize that the solution to potential conflict problems is found in our existing rules: the lawyer must disclose all relevant information to the client, obtain informed consent as needed, and exercise independent professional judgment in order to always place the client's interests first. The proposed rules make this clear.<sup>5</sup>

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<sup>5</sup> The Comment to Rule 4-7.22 summarizes the lawyer's ethical obligations: "A lawyer participating with a qualifying provider continues to be responsible for the lawyer's compliance with all Rules Regulating the Florida Bar. For example, a lawyer may not make an agreement with a qualifying provider that the lawyer must refer clients to the qualifying provider or another person or entity designated by the qualifying provider in order to receive referrals or leads from the qualifying provider. See rule 4-7.17(b). A lawyer may not accept referrals or leads from a qualifying provider if the provider interferes with the lawyer's professional judgment in representing clients, for example, by requiring the referral of the lawyer's clients to the qualifying provider, a beneficial owner of the qualifying provider, or an entity owned by the qualifying provider or a beneficial owner of the qualifying provider. See rule 4-1.7(a)(2). A lawyer also may not refer clients to the qualifying provider, a beneficial owner of the qualifying provider, or an entity owned by the qualifying provider or a beneficial owner of the qualifying provider, unless the requirements of rules 4-1.7 and 4-1.8 are met and the lawyer provides written disclosure of the relationship to the client and obtains the client's informed consent confirmed in writing."

**OBJECTIONS TO PROPOSED RULES 4-7.22(d)(6) AND 4-7.22(e)(2)(B)**

411-Pain objects to proposed Rules 4-7.22(d)(6) and 4-7.22(e)(2)(B)

because they violate established principles of reasonable notice and due process.

Proposed Rule 4-7.22(d)(6) provides:

A lawyer may participate with a qualifying provider as defined in this rule only if the qualifying provider:

\* \* \*

(6) provides the participating lawyer with documentation that the qualifying provider is in compliance with this rule unless the qualifying provider is The Florida Bar Lawyer Referral Service or a lawyer referral service approved by The Florida Bar pursuant to chapter 8 of these rules[.]

The problem with this proposal relates to a qualifying provider's

“*compliance* with this rule.” The rule effectively requires a qualifying provider to give lawyers some sort of unspecified “documentation” that it is in “compliance” with the rule. The Florida Bar, however, will *not* give any qualifying provider a certification of compliance, nor will it even issue an advisory opinion concerning compliance. Consequently, a qualifying provider could offer a participating lawyer only its own opinion regarding its own compliance. While some qualifying providers may be willing to do this, it seems like a meaningless step that would provide illusory assurance for a participating lawyer. Only the views of the Bar and this Court count when it comes to determining compliance with a rule. If the Bar will not provide a means by which a qualifying provider can secure a

determination of compliance from the Bar, proposed Rule 4-7.22(d)(6) should not be adopted.

Proposed Rule 4-7.22(e)(2)(B) provides:

A lawyer who accepts participates with a qualifying provider:

\* \* \*

(2) is responsible for the qualifying provider's compliance with this rule if:

\* \* \*

(B) the Florida Bar notifies the lawyer that the qualifying provider is not in compliance and the lawyer does not cease participation with the qualifying provider and provide documentation to The Florida Bar that the lawyer has ceased participation with the qualifying provider within 30 days of The Florida Bar's notice.

Under this proposal, if the Bar notifies a participating lawyer of a qualifying provider's non-compliance, the lawyer must cease working with the provider or be subject to discipline. Because few lawyers will risk discipline by continuing to participate with a provider if this happens, this gives the Bar the ability to severely disrupt a qualifying provider's operations by sending out a non-compliance notice.

411-Pain vigorously opposes this proposed rule. The rule does not specify how non-compliance will be determined, nor does it give qualifying providers notice and an opportunity to respond before the Bar makes such a determination. The lack of these basic notice and due process safeguards is particularly troubling given the fact that, as noted above, the Bar will not give a qualifying provider any type of assurance of compliance at any time.

In addition to putting a qualifying provider's business at risk through a notice of non-compliance that is unfounded, erroneous, or sent in bad faith, the proposed rule also impermissibly burdens a lawyer's ability to engage in constitutionally protected advertising by shutting off this avenue without fair notice and due process. Notice and due process are cornerstones of our legal process and of the disciplinary system. The Bar should be required to honor these principles before making a determination that could harm a lawful business and infringe on lawyers' First Amendment rights.

Before sending out a notice of non-compliance regarding a qualifying provider, at minimum the Bar should be required to give the qualifying provider notice of the Bar's concerns and a reasonable opportunity to respond to them. It is further suggested that a notice of non-compliance not be sent unless a grievance committee has found probable cause of a violation.

To help resolve the due process concerns, 411-Pain offers the following as a proposed addition to paragraph 7 of the proposed Comment to Rule 4-7.22:

If the bar is concerned that a qualifying provider may not be in compliance, the bar will provide the qualifying provider with notice of the bar's concerns and give the qualifying provider a reasonable opportunity to respond to those concerns before issuing notification of non-compliance to participating lawyers.

## ORAL ARGUMENT REQUESTED

411-Pain respectfully requests oral argument regarding this matter.

## CONCLUSION

For the reasons set forth above, 411-Pain respectfully requests that this Court decline to adopt proposed Rules 4-7.22(d)(6) and 4-7.22(e)(2)(B).

Respectfully submitted,

/s/ Timothy P. Chinaris

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was filed through the Portal and furnished to the persons listed below, by e-mail service, on this 14th day of September 2016 to:

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Florida Bar President 2016-17

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/s/ Timothy P. Chinaris

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Timothy P. Chinaris  
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**CERTIFICATE OF TYPE SIZE AND STYLE**

I HEREBY CERTIFY that this document is typed in 14 point Times  
New Roman Regular type.

/s/ Timothy P. Chinaris

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