

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE RULES
REGULATING THE FLORIDA BAR –
CHAPTER 23 REGISTERED ONLINE
SERVICE PROVIDER PROGRAM

CASE NO. SC19-2077

COMMENTS IN OPPOSITION TO PROPOSED AMENDMENTS

Florida Bar member Timothy P. Chinaris respectfully submits the following comments in opposition to The Florida Bar’s Petition to Amend the Rules Regulating The Florida Bar by adding proposed new Chapter 23. The undersigned represents law firms and qualifying providers in Bar regulatory matters but offers these comments in his individual capacity.

The Florida Bar’s proposal seems to be a well-intentioned effort to improve access to justice, but it presents significant problems. These problems outweigh the purported benefits, which are largely speculative.¹ Accordingly, this Court should not approve the Bar’s proposal.

¹ The Bar’s Petition states that “it is not the unlicensed practice of law for a website to provide legal forms that are completed with answers to questions generated by the program.” Nonlawyer operators of such services are not constrained by many requirements that apply to lawyers (*e.g.*, licensure; rules governing advertising and marketing; disciplinary sanctions). This gives nonlawyer online service providers significant advantages. Because nonlawyer online service providers apparently are not disadvantaged by current Bar rules, there is no reason to believe that adoption of the proposed rules will encourage these providers to expand and, in doing so, concomitantly improve access to justice.

The Bar's Petition states: "For the most part, the online service providers are not regulated which means the public is not protected." If lack of regulation equates to lack of public protection, then the Bar's proposal for *voluntary* registration by *some* online service providers will not solve that problem.

The proposed rules define "online service provider" as an internet-based business that provides "legal services" to the public in three ways, two of which involve assistance of lawyers. Proposed Rule 23-2.1(a). The comments below address the Bar's proposal as it relates to activities of online service providers that involve lawyers. In this regard, the Bar's proposal has two major shortcomings: (1) it fails to properly protect the public from potentially harmful advertising and solicitation; and (2) it imposes different regulatory standards, without justification, on actors engaged in functionally equivalent conduct.

Deceptive advertising harms the public by disseminating false information and enticing prospective clients to hire lawyers based on false pretenses. The Bar has authority (as granted by this Court) to prosecute lawyers for unethical advertising. But rather than relying only on prosecution to prevent lawyers from engaging in deceptive advertising, since 1991 Bar rules have required Florida lawyers to file their advertisements with the Bar for review (the "filing requirement"). *See* Rule 4-7.19, Rules Regulating The Florida Bar (originally enacted as Rule 4-7.5, *The Florida Bar:*

Petition to Amend the Rules Regulating The Florida Bar – Advertising Issues, 571 So. 2d 451, 469 (Fla. 1990)).

The filing requirement also applies to qualifying providers, albeit indirectly. Rule 4-7.22(d)(1) prohibits lawyers from accepting referrals from a qualifying provider unless the qualifying provider “engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer.” Again, even though lawyers who accept referrals from qualifying providers are subject to discipline for the qualifying providers’ improper advertising,² the Bar and this Court have determined that filing and review of qualifying providers’ advertising is necessary to protect the public.

Under Proposed Rule 23-3.1, however, online service providers that use lawyers’ services or connect clients to lawyers would be completely *exempt* from the filing requirement. The Bar does not adequately justify this proposed departure from current regulatory practice. The Bar fails to explain how the public will be better protected by essentially trading advertising regulation for the consumer complaint resolution provisions encouraged under the proposed rules. In fact, this would be a poor trade. While the Bar’s proposal laudably encourages online service providers to

² Rule 4-8.4(a) provides: “A lawyer shall not: . . . (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, *or do so through the acts of another*” (emphasis added).

have a complaint resolution process, that process would prove to be “too little, too late” for consumers who are enticed into using an online service provider through false or misleading advertising that was not reviewed by the Bar.

The Bar might respond to these concerns by pointing out that the proposed rules eliminate the filing requirement for registered online service providers but still require them to follow the other lawyer advertising rules. This actually offers little meaningful public protection, for two reasons.

First, the requirement that the advertising rules be followed would apply *only* to those registered online service providers who are *also* qualifying providers under Rule 4-7.22. Proposed Rule 23-3.1. Registered online service providers who are not qualifying providers would be *completely exempt* not only from the filing requirement but *from all of the advertising rules* that this Court has enacted for the protection of the public. *See* Proposed Rule 23-4.1 (containing no requirement that registered online service providers follow advertising rules that govern Florida lawyers and qualifying providers from which Florida lawyers accept referrals).³

³ Disturbingly, this means that online service providers who are not qualifying providers would be exempt from rules prohibiting in-person or other uninvited *solicitation* of legal business. Although the proposed rules define “online service providers” as entities that are “internet-based” businesses, they do not limit these businesses to only internet activity. An online service provider could make outgoing “cold calls” or visits to potential customers under the proposed rules. Of course, lawyers and qualifying providers are prohibited from engaging in solicitation.

Second, the Bar has not explained why public protection concerns require filing and review of advertisements run by Florida Bar members and qualifying providers but *not* of ads run by registered online service providers. Each of these actors advertises for legal work to be performed by lawyers. The same public protection rules should apply to all of them.

The Bar's proposal would create a favored group, called "registered online service providers," that would be permitted to engage in conduct that is *not* permissible for other similarly-situated persons or entities. This appears to be intentional, as a kind of "carrot" to induce voluntary participation by the online service providers. But the proposal will likely lead to unintended and undesirable consequences that should be considered by this Court.

Lawyers seek clients by advertising. Lawyers also seek clients by agreeing to accept referrals from qualifying providers that advertise on behalf of the participating lawyers. The proposed rules envision that at least some registered online service providers will engage in that same activity (*i.e.*, advertising for clients on behalf of their participating lawyers). Yet the proposed rules provide for significantly different regulatory treatment of actors engaged in the *same conduct* – advertising for legal business – that this Court has long held must be regulated to protect the public. The Bar offers little to justify such disparate treatment.

Allowing one particular type of advertiser to escape the filing requirement without adequate justification will weaken the entire system. The activity of seeking legal clients through advertising presents public protection concerns regardless of *who* does the advertising. If anyone deserves an exemption from the filing requirement, it logically would be Florida Bar members – the lawyers who are licensed by and personally subject to direct regulation by this Court. Instead, the proposed rules would exempt only nonlawyer-owned, internet-based businesses from this important regulation. That should concern this Court as well as the public that the Court protects.

The proposed exemption for registered online service providers, but not for others engaged in functionally equivalent conduct, heightens concerns about the legal status of the Bar's advertising review program. The Bar's Standing Committee on Advertising and Board of Governors issue compliance opinions on advertisements filed by lawyers and by qualifying providers who compete with lawyers in client generation. There is no provision for obtaining review of these decisions by this Court. This raises antitrust concerns due to the potential for anti-competitive behavior by market participants without sufficient Supreme Court oversight. *See North Carolina Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. ___, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015).

Finally, the disparate manner in which the proposed rules treat the issue of fee splitting with nonlawyers is problematic. Registered online service providers would be permitted to collect legal fees up front and then distribute the appropriate portion to participating lawyers. Proposed Rule 23-7.1(c). Sharing legal fees with nonlawyers has been prohibited by lawyer ethics rules for many years. *See, e.g.*, Rule 4-5.4, Rules Regulating The Florida Bar; DR 3-102, Florida Code of Professional Responsibility. While there are sound reasons to reconsider this ban, no compelling justification has been offered to support rescinding it for registered online service providers but not for qualifying providers who must comply with the more stringent requirements imposed by Rule 4-7.22 (*e.g.*, filing advertisements with the Bar for review; filing annual reports listing all participating lawyers).

CONCLUSION

The Florida Bar's goal of increasing public access to legal services is laudable. Unfortunately, there is no reliable indication that adoption of Proposed Chapter 23 would accomplish that goal. On the other hand, adopting the proposed rules would reduce public protection against false or misleading advertising and would impose different regulatory standards, without justification, on actors engaged in the same conduct. For these reasons, this Court should reject the Bar's proposed rules in favor of further study in light of the concerns discussed above.

ORAL ARGUMENT REQUESTED

The undersigned respectfully requests oral argument regarding this matter.

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 7th day of January, 2020 to:

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CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that this document is typed in 14 point Times
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/s/ Timothy P. Chinaris

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