

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

**COMMENT OF JAMES J. MCGUIRE
OPPOSING THE FLORIDA BAR’S PETITION TO AMEND
THE RULES REGULATING THE FLORIDA BAR**

This comment opposing the Florida Bar’s Petition to Amend the Rules Regulating the Florida Bar (the “Petition”) is submitted by James J. McGuire, a member of The Florida Bar in good standing. As discussed below, I oppose the Petition because it would likely injure consumers of Florida legal services and would not beneficially increase access to legal services in Florida.¹

Introduction

The Petition seeks to amend the Rules Regulating the Florida Bar (the “Rules”) by adding Chapter 23 relating to a Registered Online Service Provider Program (“Proposed Rule 23”). According to the Petition, unregulated online service providers have been operating in Florida for many years, but “[a]s

¹ My firm (Thomas & LoCicero PL) and I also represent Gold & Associates, P.A. d/b/a The Ticket Clinic, among others, as *amicus curiae* in the matter titled *The Florida Bar v. TIKD Services, LLC and Christopher Riley*, Case No. SC2018-149. In that matter, The Ticket Clinic supports The Florida Bar’s position that Respondents are engaged in the unlicensed practice of law (“UPL”). This Comment is not filed on behalf of The Ticket Clinic but is consistent with the positions taken by The Ticket Clinic in the UPL proceeding.

technology improves and advances, so do the services offered by online providers.” Petition at 1. The Petition ties such alleged improvement and advancement of services to the fact that unregulated online service providers now furnish consumers with (1) legal forms and (2) limited oral communications to assist those consumers in completing Supreme Court forms. *Id.* But Proposed Rule 23 would not merely regulate and establish a new rule for supplying online forms; rather, it would create an entirely new paradigm in which non-lawyers could advertise and sell legal services with next-to-no oversight from The Bar, could split fees with lawyers, and could establish the fees charged to the client by the lawyer. Proposed Rule 23 would put consumers at greater risk, would competitively disadvantage Florida Bar members, and would enable the even more widespread unlicensed practice of law. Accordingly, the Petition should be rejected.

Discussion

The ostensible purpose of Proposed Rule 23 is “to provide greater access to legal services and the legal system and greater protection of the public.” Proposed Rule 23-1. While that stated purpose may be laudable, it is not what Proposed Rule 23 will actually achieve.

I. Proposed Rule 23 Would Permit Unqualified and Untrained Persons to Sell Legal Services in Florida as “Registered Online Service Providers,” Putting Consumers at Risk.

Proposed Rule 23 is an open invitation to the unqualified, the untrained, and even the ethically compromised to market and sell legal services to Florida consumers. If adopted, Proposed Rule 23 would permit felons whose civil rights have not been restored, suspended or disbarred lawyers, law school graduates who failed the Bar Exam, law school graduates who passed the Bar Exam but were rejected for Florida Bar membership on other grounds, and anyone else so inclined to set up shop as Online Service Providers and charge a fee for matching consumers with Florida lawyers. Rather than providing greater protection to the public, Proposed Rule 23 would put the public at greater risk.

The opportunity to practice law in Florida – and to be responsible for protecting and enforcing the legal rights of clients – is not a right, but instead is a privilege limited to those who have demonstrated the requisite character and fitness: namely, members of The Florida Bar. In order to become a Florida Bar member, an applicant cannot simply point to a passing score on the Bar Exam. Rather, the applicant must submit a detailed application to The Bar and agree to an investigation into his character and fitness.

The Rules of the Supreme Court Relating to Admission to The Bar (the “Bar Admission Rules”) expressly state that the character and fitness investigation is intended “to protect the public and safeguard the judicial system.” Bar Adm. Rule

1-14.1. The investigation serves to ensure that each applicant satisfies the Bar Admission Rules “with regard to character and fitness, education, and technical competence.” *Id.* 1-14.2

To meet these standards, the applicant should have a background that “justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to him or her.” *Id.* 3-10. The applicant likewise should “produce satisfactory evidence of good moral character, an adequate knowledge of the standards and ideals of the profession, and proof that the applicant is otherwise fit to take the oath and to perform the obligations and responsibilities of an attorney.” *Id.* 2-12. Among other things, The Bar’s investigation seeks to discover whether an applicant is likely to “conduct financial dealings in a responsible, honest, and trustworthy manner,” and to “avoid acts that are illegal, dishonest, fraudulent, or deceitful.” *Id.* 3-10.1.c.3 & 3-10.1.c.5.

Under Proposed Rule 23, Online Service Providers seeking to register with The Bar would not undergo any type of background investigation and would not be required to demonstrate anything with respect to their character and fitness. They would not be required to disclose criminal charges, criminal convictions, civil complaints, bankruptcies, disbarments (in Florida or anywhere else), failed Bar applications, court-imposed sanctions, or any other potentially disqualifying characteristic. Incredibly, Proposed Rule 23 does not actually establish *any* disqualifying characteristics for Online Service Providers.

Under Proposed Rule 23, those who cannot demonstrate the fitness of character sufficient to justify the trust of clients will, nevertheless, be authorized to operate as Registered Online Service Providers. More remarkably, those who have affirmatively demonstrated that they should *not* be trusted (including, for example, disbarred lawyers) likewise will be authorized to operate and promote themselves as Registered Online Service Providers.

The Petition fails to explain how the complete absence of character investigation will lead to greater protection of the public. This failure likely is due to the absence of any rational basis. Proposed Rule 23, if adopted, will put consumers of Florida legal services at risk.

II. Proposed Rule 23 Will Not Improve Access to Legal Services.

One of the goals of Proposed Rule 23 is to provide greater access to legal services. But Proposed Rule 23 is unlikely to achieve that goal.

For members of the public, the single greatest obstacle to obtaining legal services is cost, particularly for low-income citizens.² There is little evidence, however, that lack of access to legal services results from technological deficiencies or the inability to identify lawyers. Indeed, the Petition never addresses how or whether consumers use technology (the internet, websites,

² See, e.g., Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* (June 2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> (last visited January 7, 2020).

smartphones, apps, etc.) to locate and access lawyers in Florida. But common sense teaches that technology is not the obstacle to legal access. The vast majority of Florida lawyers maintain websites through which consumers can identify them, learn about their practice areas, and obtain other contact information (or directly contact such lawyers through their websites, email addresses, or apps).

Likewise, The Bar's own website enables consumers to search for Florida lawyers by first or last name, location, and law firm name and provides contact information, website links, and disciplinary information for Florida Bar members. *See* <https://www.floridabar.org/directories/find-mbr/>. For a small fee, local Bar associations offer similar information online and via telephone. Websites such as Avvo, FindLaw, and LegalMatch likewise provide free online access to lawyer-search databases.

Moreover, Google and other online search engines make it simple to find Florida lawyers. A consumer in Orlando seeking a landlord/tenant lawyer need only search "landlord tenant lawyer Orlando" and literally hundreds of results are displayed identifying dozens of potential lawyer matches. Relevant Florida lawyers are easily found online.

Despite this fact, the only "access" issue apparently addressed by Proposed Rule 23 is online access through "Online Service Providers." Proposed Rule 23 enables such Online Service Providers to identify themselves as "Registered" with

The Bar, but otherwise takes a hands-off approach to their advertising. In this respect, Proposed Rule 23 is a solution in search of a problem.

As noted above, the real challenge with access to legal services is cost, but Proposed Rule 23 does nothing to reduce the cost of legal services. In fact, it may actually lead to an increase in such costs.

Proposed Rule 23 would permit Registered Online Service Providers to charge lawyers for access to clients referred by the Online Service Provider. The amount of the charge would be set solely by the Registered Online Service Provider, without any regulation by The Bar. *See* Proposed Rule 23-7.1(a). Permitting Registered Online Service Providers to charge lawyers any amount they deem “reasonable” will almost certainly increase the cost of legal services because, under such a system, consumers using a Registered Online Service Provider will pay not only for the lawyer rendering legal services but also for the Registered Online Service Provider. And since Registered Online Service Providers will be permitted to impose charges on lawyers for referrals even if those referrals do not result in an actual retained matter, *see id.*, lawyers’ costs will likely increase and these increases will necessarily be passed along to consumers. Rather than solving or partially solving the problem of access to legal services, Proposed Rule 23 is liable to exacerbate the problem.

In fact, the only realistic way for Proposed Rule 23 to lower costs to consumers is if more and more legal work is undertaken for Registered Online

Service Providers by the lowest bidder. The least expensive lawyers, regardless of qualifications, experience, or talent, will be most likely to obtain work from Registered Online Service Providers. And for those lawyers who obtain work from Registered Online Service Providers, the easiest way to keep costs down is to cut corners. This is especially true because Proposed Rule 23 authorizes the Registered Online Service Provider to set the fee that *the lawyer charges to the client*. See Proposed Rule 23.7-1(a) (“[T]he registered online service provider may set the fee the lawyer charges.”). There are very few truly “cookie cutter” legal matters in which the lawyer knows in advance precisely what work will be involved and what the costs of such work will be. But because Registered Online Service Providers will unilaterally set legal fees upfront (which lawyers cannot change), lawyers inevitably will face situations in which providing their clients with the most appropriate legal service will simply be cost prohibitive. Rather than zealously advocating for their clients, such lawyers will have an incentive to meet the financial constraints imposed by the Registered Online Service Providers. In theory, this might result in slightly greater access to lawyers, but it will almost certainly result in the less-than-optimal provision of legal services to consumers.

Greater consumer access to competent legal services is an important goal. Proposed Rule 23 will not achieve it.

III. Proposed Rule 23 Likely Will Increase Misleading Legal Advertising.

Proposed Rule 23 purports to establish certain limited requirements for Registered Online Service Provider advertising, but the requirements are both weak and illusory. Proposed Rule 23 states:

(a) Designation. A registered online service provider may use the designation “Registered with The Florida Bar.”

(b) Prohibited Communications. A registered online service provider may not state or imply that its services, including forms that are provided, are a substitute for the advice of a lawyer. A registered online service provider may not state or imply that the bar has approved an advertisement, the registered online service provider, any participating lawyer, or the services offered by the registered online service provider or any advertising lawyer.

Proposed Rule 23-5.1.

Subsection (b) appears to prohibit a Registered Online Service Provider from stating or implying that it – or its advertisements – are approved by The Bar. But subsection (a) permits the same Registered Online Service Provider to declare itself “Registered with The Florida Bar,” which, paradoxically, functions to imply that The Bar *does* approve of the Registered Online Service Provider or its advertisements. It seems highly probable that many consumers of legal services, particularly unsophisticated consumers, will construe the phrase “Registered with The Florida Bar” as synonymous with “approved by The Florida Bar.” Indeed, the Proposed Rule necessarily raises an awkward but important question – what purpose is served by notifying the public that an Online Service Provider is “Registered with The Florida Bar,” other than to suggest that The Bar somehow

sanctions the services of the Online Serviced Provider? No clear or useful answer is apparent in the Proposed Rule or the Petition.

The purpose of the Proposed Rule is further called into question by the fact that, if it is adopted, Registered Online Service Providers would “*not* [be] required to file advertisements with The Florida Bar for review.” Proposed Rule 23-3.1 (emphasis added). Without review by The Bar and some type of enforcement mechanism, the Proposed Rule’s purported advertising requirements are merely illusory.

The Bar may argue that because Registered Online Service Providers are also Qualifying Providers under Rule 4-7.22, Rule 4-7.22 will provide a sufficient process for policing their advertisements. But the problem with this argument is that Rule 4-7.22 *itself* does not empower The Bar to review and challenge the advertisements of Qualifying Providers. Rather, it requires that the lawyer who is considering working with a Qualifying Provider engage in due diligence to determine if the Qualifying Provider’s advertisements would be permissible if made by a lawyer. And it requires that the lawyer do this *before* working with a Qualifying Provider. Rule 4-7.22(d)(1) & 4-7.22(e)(2)(A). Once the relationship begins, the lawyer has no further affirmative duty to ensure that the Qualifying Provider’s advertisements comply with the Rules.

In fact, to the extent that Rule 4-7.22 theoretically requires lawyers to police the advertisements of those Qualifying Providers with whom they work, it again

increases the costs borne by lawyers, costs that are likely to be passed on to clients. As noted above, increasing the costs faced by lawyers is likely to drive up costs to consumers, thereby undercutting a key purpose of Proposed Rule 23 – increasing access to legal services.

IV. Proposed Rule 23 Authorizes Fee-Splitting and Decreases the Likelihood of UPL Sanctions.

Under the current Rules, “[a] lawyer or law firm shall not share legal fees with a nonlawyer.” R. Reg. Fla. Bar. 4-5.4(a). As The Florida Bar’s Ethics Counsel has explained:

‘The reasons that we prohibit fee-sharing with nonlawyers generally are to stop a nonlawyer from having control over the lawyer’s independent professional judgment in representing clients and providing active counsel and good competent advice to their clients. . . . Generally, the control follows the money, and if the nonlawyer has the money, the nonlawyer is the one calling the shots.’

When is Fee-Splitting OK?, The Florida Bar News (July 15, 2011), available at <https://www.floridabar.org/the-florida-bar-news/when-is-fee-splitting-ok/> (last visited January 7, 2020). *See also Patterson v. Law Office of Lauri J. Goldstein, P.A.*, 980 So. 2d 1234 (Fla. 4th DCA 2008) (“The restrictions on fee-sharing enacted in the Rules were intended ‘to protect the lawyer’s professional independence of judgment.’”) (citing R. Reg. Fla. Bar 4-5.4, cmt.).

Proposed Rule 23 would override this fee-splitting rule and its goal of fostering lawyer independence. In particular, Proposed Rule 23 states that a “registered online service provider may collect the participating lawyer’s fee

directly from the consumer, retain its charge imposed on the participating lawyer from the fee collected from the consumer, and remit the remainder to the participating lawyer.” Proposed Rule 23-7.1(c). As the comment to Proposed Rule 23-7.1 acknowledges, this method of collecting and disbursing fees would constitute improper fee-splitting under the current Rules. *See* Proposed Rule 23-7.1, cmt. (“Collecting the payment and remitting it to the lawyer mitigates in favor of a conclusion that the charge is impermissible. Therefore, an online service provider who is not registered with the bar may not collect the payments due to the lawyer.”). By authorizing otherwise improper fee-splitting, the Proposed Rule simply overlooks the challenge to a lawyer’s independence that is guarded against by the current fee-splitting prohibition.

Proposed Rule 23 similarly turns a blind eye to the hazards implicit in the Unlicensed Practice of Law (“UPL”). To be sure, Proposed Rule 23 repeatedly states that it is not intended to change the legal landscape with respect to UPL claims. *See, e.g.*, Proposed Rule 23-1 (“Nothing contained in this chapter may be used in an unlicensed practice of law proceeding under these rules or may be construed to permit any activity that is otherwise prohibited as the unlicensed practice of law, as that is determined by the Florida Supreme Court.”). And yet, as noted above, under the Proposed Rule, non-lawyers (including disbarred lawyers) would be permitted to create the relationship with the client, to split fees with the lawyer, to establish the total fee charged to the client, and to determine the amount

received by the lawyer. Granting non-lawyers this level of control is not only likely to interfere with the lawyer's independent judgment, it is likely to cause the non-lawyer's judgment to take precedence over the lawyer's, at least in some instances. Such influence and decision-making authority in the hands of non-lawyers sounds strikingly like UPL as defined by this Court. For instance, in *The Florida Bar v. Consolidated Business & Legal Forms, Inc.*, 386 So. 2d 797 (Fla. 1980), the Court found that the Respondent was engaged in UPL where it was:

a Florida corporation for profit, . . . engaged in the business of offering legal services through members of The Florida Bar who are its full time employees. The officers and stockholders of the respondent are non-lawyers with no legal training who supervise and control the day to day business of the corporation for the sole purpose of personal financial gain derived from providing legal services to individuals who have no other business relationship with the respondent to which such services are related.

Id. at 798 (quoting referee's recommendation). Under the Proposed Rule, such conduct likely would be permitted (at least if the attorneys were not technically *employed* by the Registered Online Service Provider).

Despite what Proposed Rule 23 says about not changing the standards for UPL, The Bar itself has acknowledged that Registered Online Service Providers are *less likely* to "face sanctions for the unlicensed practice of law." *See Board to Discuss Online Legal Service Providers*, The Florida Bar News (May 10, 2019), available at <https://www.floridabar.org/the-florida-bar-news/board-to-discuss/> (last visited January 7, 2020). Permitting more entities to engage in UPL is likely to

harm Florida consumers and lawyers. It will not further the Proposed Rule's goal of providing greater protection to the public.

Conclusion

WHEREFORE, I oppose the Petition and respectfully request that the Court deny the Petition and not adopt Proposed Rule 23.

Dated: January 7, 2020.

Respectfully submitted,

s/ James J. McGuire

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been filed on this 7th day of January 2020, via the statewide e-portal and true and correct copies were furnished via email using the statewide e-portal to:

Joshua E. Doyle
Executive Director, The Florida Bar

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Dori Foster-Morales
President-Elect, The Florida Bar

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CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.210

Undersigned counsel hereby certifies that this comment is typed in 14-point (proportionately spaced) Times New Roman and otherwise meets the requirements of Florida Rule of Appellate Procedure 9.210.

/s/ James J. McGuire
Attorney