

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC19-2077

**THE FLORIDA BAR'S CORRECTED MOTION FOR LEAVE TO
RESPOND AND RESPONSE TO COMMENTS**

The Florida Bar (the bar) respectfully requests leave to correct its motion to respond to comments and, if granted, its response. The bar apologizes for its error in its prior motion and response to comments regarding its response to numbered paragraph 5. The only changes in this corrected motion are this initial paragraph, the paragraph that follows numbered point 5, and the dates.

The bar states:

The bar filed a petition to amend the Rules Regulating The Florida Bar by adopting Chapter 23 Registered Online Service Provider Program on December 12, 2019.

Florida Bar members filed 49 comments in response to the petition, 35 of which do nothing more than express support for the comment filed by another bar member (Maguire) and 1 of which was stricken by this Court for failure to file electronically.¹ The bar will not respond to in turn to each individual comment, but instead will respond to the main points raised in various comments. The 13 main points raised in the comments together with the bar's response are as follows:

¹ There was a concerted effort to urge Florida Bar members to file comments by a lawyer employed by The Ticket Clinic, including providing a form to agree with bar member Maguire's comments and instructions on how to file through the e-filing portal (see attached emails from Hollander to unknown bar members in Appendix A). Of the 49 comments filed, 10 were filed by lawyers owning, employed by, or representing law firms who primarily handle traffic ticket defense (Gold, Beller, Hollander, Mumford, Hauser, Maguire, Kowitt, Unger, Goldin and Hochman). Sixteen comments were filed by lawyers who are employed in 4 law firms: 6 comments were filed by lawyers owning or employed by The Ticket Clinic and a lawyer representing The Ticket Clinic in other litigation (Gold, Beller, Hollander, Mumford, Hauser, and Maguire). Six comments were filed by lawyers who own or are employed by CPLS, P.A. (Persad, Figueroa, Frank, Mihok, Zobel, and Ducker). Two comments were filed by the owners of Unger and Kowitt (Kowitt and Unger). Two comments were filed by the owners of Hochman & Goldin (Goldin and Hochman).

1. Online service provider advertisements will not be subject to the lawyer advertising rules, resulting in deceptive advertising.

The rule would not result in unfair or deceptive advertising. There are federal and state laws prohibiting businesses from engaging in unfair and deceptive trade practices that are applicable to all businesses. The proposed rule does not change federal and state law, which would apply to online service providers offering services in Florida. Additionally, online service providers would be subject to the lawyer advertising rules if the online service providers refer consumers to, match consumers with, or provide leads or tips to Florida Bar members.² Rule Reg. Fla. Bar. 4-7.22(d)(1) provides that a lawyer may not accept referrals if the online service provider advertises or solicits in any way that would violate Rules Regulating The Florida Bar on lawyer advertising.³ Therefore, lawyers would not be able to accept referrals unless the online service provider complies with substantive lawyer advertising rules. Currently, the bar has no authority to regulate the advertising of any person or entity other than lawyers and, indirectly, entities that meet the definition of qualifying provider under Rule Reg. Fla. Bar 4-7.22(b).

2. Online service providers will be able to directly solicit when no lawyer is involved.

This is true, but is already true under current law, and is true only if the online service providers do not refer consumers to lawyers. If an online service provider refers consumers to a lawyer, the online service provider cannot solicit prospective clients in person, by telephone, or by live electronic means such as Skype under Rules Reg. Fla. Bar 4-7.22(d)(1), 4-7.18(a), and 4-8.4(a). Additionally, online service providers may neither solicit nor advertise to provide services that constitute the unlicensed practice of law under Rule Reg. Fla. Bar 10-2.1(c).⁴

² Rule Reg. Fla. Bar. 4-7.22(b) provides that any person or entity that receives a benefit from directly or indirectly referring prospective clients to lawyers is a qualifying provider, which includes matching services, lawyer referral services, group or pooled advertising programs, directories, and tips and leads generators. For brevity, all these activities will be referred to as referring consumers to lawyers in the remainder of this response.

³ Rule Reg. Fla. Bar. 4-7.22(d)(1) prohibits a lawyer from accepting referrals from a qualifying provider if it advertises or solicits in violation of the Rules Regulating The Florida Bar.

⁴ Rule Reg. Fla. Bar 10-2.1(c) provides that “it constitutes the unlicensed practice of law for a lawyer admitted in a jurisdiction other than Florida to advertise to provide legal services in Florida which the lawyer is not authorized to provide.”

3. Online service provider advertisements will not be subject to mandatory bar review, even when a lawyer is involved.

Although the proposal would not require bar review of advertisements, advertisements of online service providers would still be subject to state and federal law involving deceptive trade practices, regardless of any lawyer involvement. Advertisements of online service providers who refer consumers to lawyers must comply with substantive lawyer advertising rules, and the lawyers who accept referrals would be subject to discipline for the online service provider's failure to comply with substantive lawyer advertising rules under Rules Reg. Fla. Bar 4-7.22(d)(1) and (e)(2) and 4-8.4(a). Additionally, the bar would review advertisements if filed voluntarily under Rule Reg. Fla. Bar 4-7.19(d).

4. The proposal would allow fee splitting.

The proposal does not allow fee splitting. The online service provider may only collect the lawyer's fee directly from the consumer and must transmit the entire legal fee to the lawyer to whom a legal matter is referred. Although the bar agrees, as noted in the proposal, that a nonlawyer's collection of the lawyer's fee is a factor that could lead to the conclusion that a lawyer is engaged in improper fee splitting with the entity as prohibited by Rule Reg. Fla. Bar 4-5.4(a), that is a factor that is not necessarily dispositive of whether the lawyer is engaged in improper fee splitting. The bar believes that this incentive to voluntary registration is a transactional function that should be permitted in exchange for limited regulation of these entities that are currently unregulated.

5. The proposal would allow online service providers to set lawyer fees.

This is true, but lawyers would still be responsible for complying with Rule 4-1.15(a), which prohibits clearly excessive fees, and therefore would not be able to participate with an online service provider that set a clearly excessive fee for the lawyer's services. Lawyers would also be responsible for compliance with all rules regarding a client representation resulting from a referral, including competence and diligence.

6. The proposal will promote the unlicensed practice of law.

The proposal will not promote the unlicensed practice of law. The proposal clearly states that it does not change the current status of the law on unlicensed

practice. The proposal does not allow online service providers to engage in any activities not permitted under current law. The proposal does impose additional restrictions that do not currently exist on those online service providers that seek the “Registered With The Florida Bar” designation: they will be required to submit to a Florida forum to resolve consumer disputes, they will be required to provide copies of consumer complaints to The Florida Bar, and they will be required to notify consumers before they agree to use the online service providers that the attorney-client and work product privileges may not apply to information given to the online service provider, any ways in which the online service provider intends to use consumer’s personal and legal information, and how the consumer may submit complaints and have the complaints resolved by the online service provider. In the most recent Florida Bar survey (2019), 56% of bar members responding to the survey indicate that online or alternative legal service providers should be regulated.⁵ Additionally, lawyers who assist in the unlicensed practice of law are subject to discipline under Rule Reg. Fla. Bar 4-5.5(a).

7. The proposal will not increase access to legal services.

The bar’s proposal in part is an attempt to increase access to legal services, but it is speculative to state definitely that it will or will not increase access. Opponents of this proposal have no more ability to predict the future than the bar. The bar also believes this is a modest but valuable attempt to regulate these entities for both the protection of Florida’s citizens and the benefit of Florida lawyers. The proposal establishes safeguards for consumers that do not currently exist with online service providers, particularly those that have no connection to lawyers, as discussed more fully in the petition and summarized in numbered paragraph 6 above.

⁵ <https://www-media.floridabar.org/uploads/2020/01/2019-Membership-Survey-Report-Final.pdf>

8. The cost of legal services may or will increase.

Online service providers will still have to compete in the marketplace. If a consumer's main concern is price, the consumer will have options to choose the least expensive service. If an online service provider refers consumers to a lawyer, the comment to Rule Reg. Fla. Bar 4-7.22 indicates that the lawyer may not pass on the cost of doing business with the online service provider under Rules Reg. Fla. Bar 4-1.7(a)(2) and 4-1.5(a).

9. There are no limitations on or screening of who may be an online service provider.

There currently are no limitations on or screening of or who may be an online services provider. The bar's proposal allows the bar to grant or revoke registration of any online service provider at the bar's sole discretion. The bar may decline to grant or revoke the registration of any online service provider for any reason, and the bar would decline or revoke registration of any service the bar has cause to believe either may harm or has harmed consumers.

10. The bar will not resolve any consumer complaints by online service providers.

This is correct, but the bar may revoke the registration of an online service provider based on consumer complaints, which creates an incentive for online service providers to correct problems with their services.

11. The bar should wait until the new special committee finishes its study.

An earlier special committee, the Special Committee on Technologies Affecting the Practice of Law, studied this issue for months before submitting its proposal to the Board of Governors. There is no reason for the new special committee to duplicate the work of the Special Committee on Technologies Affecting the Practice of Law. Additionally, this proposal offers more protections to consumers than currently exists, as discussed more fully in the petition and numbered paragraph 6 above.

12. The proposal allows online service providers to have the imprimatur of the bar and this Court (one comment referred to “court certification”).

The proposal is not a form of certification, and the word “certification” may not be used by registered online service providers under the proposal. Online service providers will not be permitted to make any mention of this Court in their advertising. The only phrase that may be used is “Registered with The Florida Bar.” In exchange for that designation, online service providers who are currently subject to little, if any, regulation must provide specified consumer protections, as discussed more fully in the petition and summarized in numbered paragraph 6 above.

13. The proposal violates antitrust laws.

This proposal does not violate antitrust laws. The bar is an arm of this Court for any regulatory function, and this Court’s exercise of its regulatory power through the bar cannot constitute an antitrust violation. Moreover, the proposal’s *voluntary* registration poses no anticompetitive threat.

The bar requests that this Court grant leave to respond and accept the above comments.

Respectfully submitted,

/s/ Joshua E. Doyle

Joshua E. Doyle
Executive Director
Florida Bar Number 25902

John M. Stewart
President 2019-20
Florida Bar Number 120472

Dori Foster-Morales
President-elect 2019-20
Florida Bar Number 849332

Elizabeth Clark Tarbert
Ethics Counsel
Florida Bar Number 861294

The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
Tel: (850) 561-5600
Primary E-mail Address:
jdoyle@floridabar.org
Secondary E-mail Address:
eto@floridabar.org

CERTIFICATE OF TYPE SIZE AND STYLE

I certify that this petition is typed in 14 point Times New Roman Regular type.

/s/ Joshua E. Doyle

Joshua E. Doyle
Executive Director
Florida Bar Number 25902

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this motion has been sent by e-mail to the following individuals on this 19th day of February, 2020:

Joel L. Mumford; Adam D. Harmelin; Alan Frederick Wagner; Bill Wagner; Timothy P. Chinaris; James McGuire; Karl M. Schmitz; Samuel M. Yaffa; Mary Jo Rivero; Robin L. Hoyle; David Luther Woodward; Eric S. Kolar; Dana Laganella Gerling; David R. Paz; Lawrence J. Navarro; Teeluck Persad; Evelyn J. Pabon Figueroa; Mark S. Gold; Rodney D. Gerling; Russell J. Frank; Melissa C. Mihok; John Olea; Russell Earl Warren; Nina T. Marano; Hallie L. Zobel; Harry G. Reid; William Falik; Eric M. Beller; Ted L. Hollander; George W. Chesrow; Jose Mauricio Bello; Curtis LeBlanc; Loretta A. Kenna; Louis C. Arslania; Sunny Goldin; Christy L. Glass; Sergiu Gherman; Barry D. Kowitt; Kevin M. Unger; Brian E. Pabian; Matthew Rosenfeld; Christopher J. Cona; Aubrey Harry Ducker; Scott G. Hochman; Cory G. Hauser; Cheryl-Dene Spring; William T. Cotterall; Erwin Rosenberg; and Gerald Salerno.

/s/ Joshua E. Doyle

Joshua E. Doyle
Executive Director
Florida Bar Number 25902