



**ILLINOIS STATE
BAR ASSOCIATION**

August 31, 2018

COPY

Mr. Jerry Larkin, Administrator
Attorney Registration and Disciplinary Commission
One Prudential Plaza
130 E. Randolph Drive
Suite 1500
Chicago, IL 60601-6219

Re: Comments to ARDC Matching Services Study

Dear Administrator Larkin:

On behalf of its more than 29,000 members, the Illinois State Bar Association (“ISBA”) is pleased to provide comments on the ARDC’s June 25, 2018 Study on “Client-Lawyer Matching Services” (“Study”). Unquestionably, matching service and lead generation issues are increasingly prevalent as new technologies and new service providers seek to enter the legal marketplace. As the Study demonstrates, these issues involve the complex interplay between a number of judicial, professional, private, and public interests. And while the ISBA appreciates the ARDC’s attention to these issues, as well as the resources expended in drafting the Study, the ISBA has serious and substantial concerns about the Study’s regulatory suggestions. Should those suggestions form the basis of formal regulatory proposals presented to the Illinois Supreme Court, the ISBA would strongly oppose them.

At the outset, the ISBA is expressing its comments in good faith. It hopes that its comments will not be misinterpreted as evidence of a “guild mentality” or mere professional protectionism. The public’s meaningful accessibility to legal services is a critical component of a society built on the rule of law. In this regard, there is common ground between the profession and the public. While the ISBA may have differing views than others as how best to accommodate accessibility and the delivery of legal services, it is committed to achieving a reasonable balance between the development of new avenues for the public to find and employ lawyers while preserving core and well-reasoned elements of lawyers’ professional obligations to clients, tribunals, and the administration of justice.

As procedural background to the ISBA's comments, the Study's first version was widely distributed to all ISBA section councils in advance of the ISBA's Annual meeting in June, 2018. The almost unanimous reaction from the section councils considering the Study was negative. In addition, I appointed a special committee to review the Study in depth and to prepare a report for the ISBA Board of Governors. That report was also critical of many aspects of the Study. In July, 2018, the special committee's report and the section councils' positions were presented to the ISBA Board. In addition, in a very helpful presentation and discussion, you addressed the Board. After considering the available information and presentations, the ISBA Board determined that the Study's suggestions were not in the best interests of the public or the profession and authorized submitting the following comments.

1. *The Study references no empirical data or studies to support its premise that for-profit matching services will have a positive impact on access to legal services, especially by the economically disadvantaged, nor does it address what may be the root cause of that access problem: cost.*

There is no reasonable debate that there are unmet legal needs in Illinois. However, for poor and lower income Illinoisans, the Study speculates, but provides no evidence, that facilitating the availability of nonlawyer for-profit legal services via Internet matching services is a satisfactory solution to the crisis of unmet needs. No data or study is identified in the Study to support its premise that nonlawyer for-profit legal services contributes to addressing unmet legal needs. Perhaps more significant, however, is that the Study does not elucidate the mechanism by which a percentage fee-based matching service would address the problem. The Study cites 31 year old correspondence from the Federal Trade Commission to suggest that for-profit matching services will provide consumers with "more useful information" to aid in their selection of legal help (see Study page 52) but does not elaborate on how or whether contemporary services deliver on this promise. Similarly, no study, data, or explanation is provided that indicates how a percentage fee based matching service would have a significant impact on reducing the number of self-represented litigants or improving access to justice in rural communities – both expressed goals of the Study's regulatory suggestions. Whether regulating nonlawyer for-profit matching services as suggested in the Study fosters a more *convenient* way for *some* legal consumers to identify and hire lawyers may be plausible. Whether such regulation will have an impact on addressing unmet legal needs is not clear.

In addition, nothing in the Study addresses the cost of legal services, unless there is an underlying assumption that placing pricing power in the hands of nonlawyers will reduce legal services prices to attract customers and, in turn, may have the effect of driving down legal costs. This, of course, is pure speculation and does not consider the impact of reduced legal prices on the need to foster a robust legal profession, the level of lawyer participation with matched clients, or the quality of a representation. In addition, it is possible that reduced legal prices, and the likely increase in time spent by lawyers seeking to make up for reduced income, may have a negative effect on the willingness or ability of lawyers to provide pro bono services – reported in 2017 as 1.9 million hours and \$17.5 million in contributions to pro bono service organizations.

2. *The Study's suggested elimination of the prohibition against fee sharing with nonlawyer for-profit matching services violates public policy established by the Illinois Supreme Court by: (a) allowing nonlawyers to control cases, (b) facilitating the unauthorized practice of law, and (c) displacing consideration of clients' best interest in legal matters with a nonlawyer entity's interest in earning a profit.*

In *O'Hara v. Ahlgren*, 127 Ill.2d 333 (1989), a case involving a fee sharing agreement between a law firm and the nonlawyer spouse of a deceased partner, the Illinois Supreme Court opined on the harms associated with nonlawyer fee sharing and found such fee sharing to be against public policy. A number of the Court's objections to nonlawyer fee sharing expressed in *O'Hara* remain relevant and applicable when analyzing nonlawyer fee sharing in a matching services context. First, the Study fails to address the fundamental harm that fee sharing with nonlawyers potentially places the legal welfare of the client – and the role of the lawyer in protecting that welfare - secondary to the interests of the nonlawyer for-profit matching service. The Illinois Rules of Professional Conduct require lawyers to put client interests above all others, even their own (at the risk of discipline and loss of livelihood). On the other hand, nonlawyer for-profit matching services are compelled by contractual and fiduciary duties to act in service to maximizing profit for their owners and shareholders. A nonlawyer for-profit matching service's interest in maximizing its own profit can be realized through any number of actions that do not serve the best interests of the public nor serve to bridge the perceived justice gap. For example, a for-profit entity may seek to restrict the scope of services to be provided by a lawyer, exclude necessary services to complete the representation in order to advertise a lower cost, limit a client's right to potential refunds, or, in general, have a greater focus on the quantity of consumers served rather than the quality of a representation, or ensuring that a client's legal rights are fully protected. The possibility of these actions, compelled by the duty to maximize profit, may result in diminishing the quality of legal services delivered to the public.

Second, the Study suggests very few, or no, restrictions on nonlawyer for-profit matching services controlling representations by such actions as setting fees or attempting to limit the specific types of legal assistance to be provided to a client without obtaining the client's informed consent.

Third, the Study does not suggest any meaningful means to avoid facilitating the unauthorized practice of law. In this regard, the ISBA has extensive institutional knowledge of the lengths to which some nonlawyers will abuse rules against the unauthorized practice of law – to the detriment of the public. Based upon that experience, it is not unreasonable to envision a nonlawyer business that currently operates on the fringes of practicing law, establishing its own matching service as a sham for funneling some aspect of legal “work” to its preferred lawyers while also taking a percentage of the legal fee.

3. *The Study's suggested regulatory scheme provides no meaningful public protection in critical areas such as confidentiality, selection methodology, resolving disputes, money handling, and liability.*

The Study's suggestions fail to address a nonlawyer for-profit matching services' obligations in such important areas as: client confidentiality; handling fees and payments, including refunds for services not performed; understandable disclosures about fees and costs; transparency concerning matching and selection methodology; transparency about entity liability and disputes; and others. The absence of meaningful public protections in these areas is particularly striking given the extensive regulation of lawyers in these same areas.

4. *The Study provides no meaningful guidance to lawyers wishing to participate in matching services on such topics as handling fees and costs, refunds, and providing additional services.*

Other than allowing lawyers to participate in certain registered nonlawyer for-profit matching services whose compensation is based on a percentage of a legal fee, lawyers are provided very little guidance. The Study reinforces that lawyers are at all times bound by the Illinois Rules of Professional Conduct. However, such general statements of responsibility do not answer lawyers' questions regarding more problematic aspects of participation in a for-profit matching service, such as how to handle fees or refunds, providing additional services, and others. The absence of greater guidance leaves lawyer participation up to a lawyer's individual interpretation of the Rules of Professional Conduct, and may serve as a disciplinary trap.

5. *The Study suggests no meaningful enforcement standards or any assurances that the ARDC will strictly enforce applicable standards.*

Although the Study suggests revocation of a nonlawyer for-profit matching service's registration for violating applicable requirements, such as making false or misleading statements about its services, details about how the ARDC would pursue the meaningful regulatory enforcement of such services are lacking. This concern may be highlighted by the ARDC's decreasing enforcement activity.

6. *The Study's regulatory suggestions may serve as a precursor to greater nonlawyer involvement in law practices such as nonlawyer investment, ownership, and nonjudicial government regulation.*

The ISBA is concerned that elimination of the nonlawyer fee-sharing prohibition will represent a step toward more sweeping nonlawyer involvement in legal practices such as nonlawyer ownership of, or nonlawyer investment in, law firms (generally referenced as "alternative business structures" or "ABS"). This concern is heightened in light of the Study's seeming preference for nonlawyer management of for-profit matching services over services owned and operated by lawyers. Also, the possibility that law firms or, more problematically, nonlawyer professional firms, could establish, operate, and profit from discrete market segment

matching services is not addressed. Any of the above possibilities could be disruptive to the legal profession, but especially to consumers of legal services.

In addition, it should be noted that a significant portion of the Study involves an analysis of anti-trust issues and the ARDC's (and the Court's) authority to regulate nonlawyer entities. While the ISBA is not commenting on the legal accuracy of this aspect of the Study, two general concerns are present. First, any attempt by the Court to regulate nonlawyer entities may only serve to lead the legislature or executive branch to seek to regulate such entities. Second, the extensive analysis on the regulation issue raises a concern about the likelihood -- and expense to be borne by the Court or the profession -- of litigation between the ARDC and a nonlawyer for-profit entity that is resisting such regulation.

7. *The Study advocates for only one type of solution (allowing for-profit nonlawyer entities to share legal fees) to "access to justice" concerns, with no consideration for other potentially viable solutions.*

The ISBA acknowledges that matching services, a form of lead generation, are entirely appropriate under the Illinois Rules of Professional Conduct. However, the Study only addresses one type of compensation model to achieve the Study's policy goals - a model that eliminates the prohibition on nonlawyer fee sharing. (It should be noted that this compensation model has been rejected by at least nine state bars that have examined it, and the primary industry example of a percentage fee business model, Avvo Legal Services, has been discontinued by its corporate parent.) No other compensation models are discussed. Funding mechanisms that have found support in other jurisdictions include set annual or monthly fees, fees based upon "pay-per-click," or even flat nominal amounts for "bidding" opportunities. In its February 21, 2018 lead generation proposal, the ISBA acknowledges the availability of other funding mechanisms. The list of possible acceptable forms of reasonable compensation for matching services will likely increase as technology continues to advance. However, the limited nature of the Study's regulatory suggestions impedes a more thorough consideration of a broader range of innovative solutions to the challenges of access to justice, client protection, and lawyer professionalism.

8. *The Study suggests that bar association referral services would become regulated entities.*

Although bar association referral services regulation may not be significant for the public or nonmembers, it would impact the work of bar associations, including the ISBA. Currently, bar associations may receive a percentage of a legal fee paid to a member participating in a lawyer referral service. The justification for this fee sharing exception is that bar associations use the collected fees to support their non-profit public oriented purposes. *Richards v. SSM Health Care*, 311 Ill.App.3d 560 (1st Dist. 2000). In addition, not only would the bars' good public works be impacted, but such regulation likely would be administratively burdensome. Also, the Study does not provide any rationale supporting the suggestion that bar associations need to meet the same regulatory requirements as nonlawyer for-profit matching services.

In closing, the ISBA again thanks the ARDC for its efforts in this matter. The ISBA recognizes that the Study, as well as the ISBA's February 21, 2018 proposal, raise serious issues affecting the future of the profession and the legal marketplace that require additional thorough and careful consideration. Nevertheless, the ISBA believes that the Study's suggestions as presented do not serve the best interests of the profession, the public, or the judiciary.

The ISBA appreciates the opportunity to provide comments on the Study and remains available to work with the ARDC, and other legal profession stakeholders, in shaping the future of the profession and legal services in Illinois.

Very truly yours,

A handwritten signature in black ink, reading "James F. McCluskey". The signature is written in a cursive style with a large, sweeping initial "J".

James F. McCluskey
President, Illinois State Bar Association