

Testimony Before the Federal Trade Commission

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The American Bar Association has long been an advocate for the promotion of competition and consumer welfare in the nation's economy. Today, the Internet presents an exciting opportunity for creating new competition in distributing both physical and digital products, and in providing services. At the same time, the Internet may pose a threat to the public interest in other respects, by undermining sectors of the economy that serve the public efficiently and responsibly.

As the world's largest professional bar association, the American Bar Association realizes that there are substantial unmet legal needs in low and moderate income households. The ABA took steps to address this problem by convening a 1993 Comprehensive Legal Needs Study. The study demonstrated that a large percentage of the poor ignore and live with their legal problems, while those of moderate income too frequently try to solve the problems themselves, without a lawyer and often without the use of the justice system. The Study also demonstrated that people did not believe they had adequate access to sources of information about their legal problems.

Over the past few years, the Internet has made a significant impact on the legal community. Many law firms have utilized technology by developing Web sites or listing themselves in online directories. Both the Web sites and the online directories are perused routinely by people searching for legal representation or information. In addition, organizations that provide legal services, such as the Legal Services Corporation (LSC), are online and provide increased accessibility to those in underserved communities. Of course, the Internet provides an unparalleled opportunity for people to acquire information in general and to learn more about legal issues in particular. It gives them a full range of options to address those problems, often in more affordable ways.

People can obtain fundamental information about legal issues in order to make themselves more knowledgeable consumers and help them make decisions. People can obtain specific information about legal procedures that need to be followed to accomplish a legal task. They can download forms (i.e. domestic violence, paternity suits, and small claims cases) and even use document assembly software that creates their forms after they answer simple questions. When they need fact-specific advice, people can email lawyers or obtain access to legal hotlines for their insight.

The delivery of legal resources in the online world represents an evolutionary change from the delivery of legal resources in the off-line world. Some people are intimidated by lawyers and may be hesitant to engage in a face-to-face encounter with an attorney. And others those who have legal problems that they consider to be embarrassing may prefer to research their legal problems through the anonymity of the Internet.

While we have not quantified the impact of the Internet on the delivery of civil legal services to those of low and moderate incomes, anecdotal evidence suggests that it is substantial. However, at the same time we open the door for ready and affordable access to legal services through technology, we create an exponential expansion of the risks that consumers will be misled or abused by those who are not competent to provide needed legal services.

The Internet facilitates abuses through its anonymity. Consider the example of Marcus Arnold, the subject of a New York Times magazine article last year (Faking It: The Internet Revolution Has Nothing to Do With the NASDAQ, July 15, 2001). Marcus started participating in the Internet “knowledge exchange service” called AskMe. This is an online service where people would email questions to “experts” who would give their advice. Among those “experts” were Justin Anthony Wyrick, Jr., who stated “I am a law expert with two years of formal training in the law. I will help anyone I can. I have been involved in trials, legal studies and certain forms of jurisprudence...” Mr. Wyrick answered over a hundred legal questions a day. But unfortunately for anyone misled by his advice, he was actually Marcus Arnold, a 15 year-old whose source of legal information were television shows!

This example illustrates a threshold problem with the delivery of legal services: What constitutes legal information as opposed to legal advice? Is the distinction that legal *information* can be provided by someone who is not a lawyer whereas legal *advice* requires the skill and judgement of someone who is admitted to practice law? I have appointed an ABA Presidential Task Force on the Model Definition of the Practice of Law to provide direction on this issue. I did so because of the four way intersection. Where there is a collision of four issues: MDP, MJP, Access to Legal Services and the Unauthorized Practice of Law. When we have properly defined the practice of law, we will be far better able to determine the unauthorized practice of law. This is particularly important with the delivery of legal services via the Internet because of the proliferation of entities that provide people with legal assistance online.

As a result of the ability to enhance necessary access to legal services combined with the risk of abuses, our policies governing the Internet must be calculated to strike a balance that promotes the flow of legal commerce yet protects the consumer before he or she is irrevocably harmed. Such a balance can be achieved through the states’ adoption of the ABA’s Model Rules of Professional Conduct.

The Model Rules govern the practice of law. The ABA promulgates the Model Rules, which it then encourages the states to adopt. The use of the Internet to promote and provide legal services is subject to the states’ ethics rules, just as those rules apply to the off-line world.

This year, the ABA completed an initiative begun in 1997, known as Ethics 2000. The Ethics 2000 Commission was charged with reviewing the Model Rules and making recommendations for changes that might be necessary as a result of changes in the practice of law. This feat was undertaken, because the Rules were last revised on a

comprehensive basis back in 1983. The ABA's policy-making body, the House of Delegates, adopted many, but not all, of the recommendations forwarded by Ethics 2000. We have retained core values of the legal profession, some of which might inhibit with the ability to use the Internet to advance the delivery of legal services, but with a justifiable and consumer-centric rationale. But we have amended other rules in light of emerging technologies that are intended to expand access. For example, Model Rules 5.4 and 5.5 may impose limitations on the use of the Internet to deliver legal services, while changes to Model Rule 7.2 enable expansion.

ABA Model Rule 5.4 addresses the professional independence of a lawyer. It prohibits a lawyer from dividing fees or practicing with someone who is not a lawyer. These restrictions are in place in order to assure fidelity to the client. States have interpreted this rule to prevent fee-sharing arrangements with on-line client development mechanisms. As we balance the interests, we believe the legal profession's dedication to the client is paramount.

ABA Model Rule 5.5 prohibits lawyers from assisting others in the unauthorized practice of law. This rule has also been interpreted to prevent lawyers from participating in delivery mechanisms owned by corporate entities that are providing legal services. But this rule also represents a core value that maintains the qualifications, competence and integrity of those who provide legal services.

On the other hand, both ABA Model Rule 7.1 and 7.2 was amended, pursuant to recommendations by Ethics 2000, in ways that will enhance access to legal services.

- Rule 7.1 was amended to limit the prohibition regarding false and misleading statements. The new language strikes a better balance between lawyer free-speech interests and the need for consumer protection.
- Rule 7.2(a) now explicitly permits a lawyer to advertise through electronic communications;
- Prior Rule 7.2(b) required a lawyer to retain copies of advertisements and their dissemination for two years. The rule made little sense for those with Web sites or participating in online directories. In 2002, the rule was repealed.
- Rule 7.2(b) prohibits a lawyer from giving anything of value to someone who recommends the lawyer's services, with some exceptions. Prior to the 2002 amendment, lawyers could pay to participate in non-profit lawyer referral services. As a result, lawyers could not pay to participate in for-profit lawyer referral services. The newly adopted rule allows lawyers to pay to participate in not-for-profit or *qualified lawyer referral services*. This should open the door for participation in online referral services that demonstrate their ability to protect consumers.

We now encourage the states to adopt these Model Rules in our efforts to balance legal commerce with consumer protection.

Finally, we need to look at the use of the Internet as a resource permitting lawyers to interface with one another, as well as their clients. This too advances e-commerce and makes the practice of law more efficient, less expensive and, therefore, more widely available. Earlier this year, the ABA Louis M. Brown Award for Legal Access was presented to the Baltimore-based Civil Justice Network. This project uses listservs and online resources to refer cases, exchange information and enhance the capacities of those lawyers who participate. The benefits these lawyers receive allow them to provide legal services at more affordable costs. This expands the market to those who may not be able to otherwise pay for those services and who would, according to the legal needs studies, have no avenue to access our system of justice.