

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580



Office of Policy Planning
Bureau of Economics
Bureau of Competition

May 26, 2006

via facsimile and first-class mail

Mr. W. John Glancy
Chairman
Professional Ethics Committee for the State Bar of Texas
1414 Colorado Street
Austin, TX 78701

Re: Comments on a Request for Ethics Opinion
Regarding Online Attorney Matching Programs

Dear Chairman Glancy:

We understand that the Professional Ethics Committee currently is considering whether it is ethical for a Texas attorney to participate in an online legal matching service. Specifically, we understand that you are considering whether Ethical Rule 7.03, which prohibits a lawyer from paying a non-lawyer to solicit prospective clients or to refer clients, except for paying reasonable fees for advertising, also prohibits attorneys from participating in online legal matching services. The staffs of the Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning, Bureau of Economics, and Bureau of Competition appreciate the opportunity to provide comments on this issue.¹

¹This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission or any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments.

Online legal matching services are a valuable option for Texans: they are likely to reduce consumers' costs for finding legal representation and have the potential to increase competition among attorneys. Further, we see no likely prospect of consumer harm that would justify the prohibition of online legal matching services in Texas.

The Federal Trade Commission has been entrusted by Congress with enforcing the federal antitrust laws.² Pursuant to this statutory mandate, the FTC encourages competition in the licensed professions, including the legal profession, both through enforcement of the antitrust laws³ and through competition advocacy.⁴ Indeed, one area in which the FTC enjoys substantial expertise is the analysis of the competitive implications of regulatory restrictions on advertising in the professions.

Although debate about how attorneys advertise involves important policy concerns, it is important to recognize that competition benefits consumers of both the traditional manufacturing and the professional services industries.⁵ Based on our experience, it is our view that absent

² Federal Trade Commission Act, 15 U.S.C. § 45.

³ See *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *In re South Carolina State Board of Dentistry*, FTC Docket No. 9311 (2003); *In re Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988); Bureaus of Consumer Protection and Economics, Federal Trade Commission, A COMPARATIVE ANALYSIS OF COSMETIC LENS FITTING BY OPHTHALMOLOGISTS, OPTOMETRISTS, AND OPTICIANS (1983); THE EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY, FTC Bureau of Economics Report (1980); see also C. Cox & S. Foster, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION, FTC Bureau of Economics Staff Report (October 1990).

⁴ See, e.g., Letter from the FTC and the Department of Justice to the Kansas Bar Ass'n (Feb. 4, 2005), at <http://www.ftc.gov/be/v050002.pdf>; Letter from the FTC and the Department of Justice to Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Ass'n (Dec. 16, 2004), at <http://www.ftc.gov/os/2004/12/041216massuplltr.pdf>; Letter from the FTC and the Department of Justice to Task Force on the Model Definition of the Practice of Law, American Bar Association (Dec. 20, 2002), at <http://www.ftc.gov/opa/2002/12/lettertoaba.htm>; letter from the FTC to the Supreme Court of Alabama (Sept. 30, 2002), at <http://www.ftc.gov/be/v020023.pdf>; Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Services Company of West Virginia*, No. 31706 (filed May 25, 2004), available at <http://www.usdoj.gov/atr/cases/f203700/203790.htm>; Brief *Amicus Curiae* of the United States of America and the FTC in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), available at <http://www.usdoj.gov/atr/cases/f201100/201197.htm>. The FTC also has studied the effects of restrictions on competition in the professions. See Bureaus of Consumer Protection and Economics, Federal Trade Commission, A COMPARATIVE ANALYSIS OF COSMETIC LENS FITTING BY OPHTHALMOLOGISTS, OPTOMETRISTS, AND OPTICIANS (1983); THE EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY, FTC Bureau of Economics Report (1980); see also Cox & Foster, *supra* note 3.

⁵ *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)) ("As the United States Supreme Court has observed, "ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long
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compelling evidence that consumers are likely to be harmed by online legal matching services, the Professional Ethics Committee should not issue an opinion that would have the effect of prohibiting Texas consumers from accessing these services.

Internet-based Client-to-Attorney Matching Services

We understand that currently several businesses provide Internet-based attorney/client matching platforms.⁶ Typically, these services recruit licensed attorneys who pay a one-time application fee and a regular annual or monthly flat fee to participate. In their applications, member attorneys may disclose their areas of practice, years of experience at the bar, affiliations, and any other pertinent information. The legal matching service usually conducts background checks to ensure that the attorney is in good standing with the Bar. We also understand that some of these services may provide attorneys with Web pages similar to an attorney's own Web page.

A potential client accesses the service via the Internet. The client can examine the service's Web site to learn how attorneys become members of the service and how the service can help the client identify an attorney to satisfy his or her legal needs. If the client would like to seek legal assistance from a member attorney, he or she typically completes a short online questionnaire describing the legal issues, the practice area of the attorney being sought, the amount of experience desired for the retained attorney, the geographic region or jurisdiction of the representation, and the requested fee range. The client also may send any other descriptive information he or she wishes to disclose. The client submits the questionnaire to the service, thereby inviting qualifying attorneys to contact him or her. Without disclosing the identity of the client, the service transmits the information disclosed in the questionnaire to member attorneys who fall under the delineated criteria of subject area and geographic region.

Interested attorneys may then post, through the service, a response to the client, which typically will contain information such as fees, experience, and other qualifications. With this information, the client determines which attorneys – if any – to contact, and initiates the contact. In some instances, the application may invite an attorney to contact a client directly.

⁵(...continued)

has been faith in the value of competition.”); *see also id.* at 689; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *United States v. Am. Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996).

⁶ Although not all services are identical, many share the same general business model. *See, e.g.*, LexisNexis/Martindale Hubbel's Attorney Match (http://www.lawyers.com/find_a_lawyer/am/am_aop_list.php); Casepost (<http://www.casepost.com>); LegalConnection (FindLaw) (<http://www.legalconnection.com>); LegalMatch (www.legalmatch.com); and Legal Fish (www.legalfish.com).

We understand that online legal matching services are not involved in the retainer agreement struck between the attorney and the client, receive no compensation from the attorney or client relative to the representation, and take no part in the representation.

Competitive Effects of Increased Consumer Information In Markets For Professional Services

When consumers face large costs to obtain information about marketplace prices and quality, businesses have less incentive to compete.⁷ Indeed, a large amount of empirical research has found that restrictions on advertising in professions lead to higher prices and either a negative or no effect on quality.⁸ In the same way that advertising has been shown to benefit consumers of professional legal services, online legal matching services are likely to make it less expensive for consumers to evaluate providers of legal services.⁹

The information sent to inquiring clients is likely to allow consumers to compare the price and quality among several competing attorneys more cheaply than other methods of comparison. For example, a referral service that assigns the next attorney on a predetermined list to a client requires the client to meet the attorney and then seek a second referral simply to formulate a basis for comparison. Similarly, a directory such as the yellow pages is time-intensive because it requires the client to search for several attorneys and formulate his or her

⁷ Several economists have developed models that predict firms will be able to charge higher prices when consumers face high costs of obtaining marketplace information. See, e.g., Dale O. Stahl, *Oligopolistic Pricing with Sequential Consumer Search*, 79 AM. ECON. REV. 700 (1989); Kenneth Burdett & Kenneth L. Judd, *Equilibrium Price Dispersion*, 51 ECONOMETRICA 955 (1983); John Carlson & R. Preston McAfee, *Discrete Equilibrium Price Dispersion*, 91 J. POL. ECON. 480 (1983); Steven C. Salop & Joseph E. Stiglitz, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV. ECON. STUDIES 293 (1977). Using these models as a theoretical framework, several authors have found evidence that the Internet has led to lower prices by reducing consumers' costs of comparing prices. See, e.g., Jeffrey R. Brown & Austan Goolsbee, *Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry*, 110 J. POL. ECON. 481 (2002); Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 49 MGM'T SCIENCE 563 (2000); James C. Cooper, *Price Levels and Dispersion in Online and Offline Markets for Contact Lenses*, FTC Bureau of Economics Working Paper (2006), at <http://www.ftc.gov/be/workpapers/wp283.pdf>.

⁸ See Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Return of Footnote 17*, 8 Sup. Ct. Econ. Rev. 265, 293-304 (2000) (collecting citations to empirical literature on the effect of advertising restrictions in the professions); *In the Matter of Polygram Holdings, Inc, et al*, FTC Docket No. 9298 (F.T.C. 2003), at 38 n. 52 (same).

⁹ A pair of studies find that consumers who use an online service that sends consumer requests to an affiliate car dealer that sells cars matching the consumer's inquiry pay approximately 2 percent less for the same car compared to those who did not. Also, the authors found that those who were likely to be poor negotiators were more likely to use these services to increase their bargaining power. See Fiona Scott Morton *et al.*, *Internet Car Retailing*, 49 J. INDUS. ECON. 501 (2001); Florian Zettelmeyer *et al.*, *Cowboys or Cowards: Why are Internet Car Prices Lower?* (2005), at <http://flomac.haas.berkeley.edu/~florian/Papers/selection.pdf>.

own method to evaluate lawyers. Indeed, these options may be more costly and yield far less relevant information than the lawyer matching services under review. By lowering consumers' costs of obtaining information about price and quality of legal services, online legal matching services are likely to allow consumers who use them to pay lower prices and/or obtain higher quality legal services than they would have had they used their next best alternative means for identifying a legal service provider.

A regulation that limits competition may benefit consumers when it addresses a specific market failure that has been shown to harm consumers. Thus, in principle, a prohibition on Texas attorneys participating in online legal matching services could create net benefits for consumers if the restriction were necessary to provide an increase in the quality of legal services that consumers valued more than they actually would pay in higher legal fees, and the market otherwise would not provide this benefit. Given a strong presumption that competition is the best way to allocate scarce resources among competing needs,¹⁰ however, the burden should rest on the proponents of a restriction on competition to show that it is necessary to prevent significant consumer harm and that it is narrowly drawn to minimize its anticompetitive impact.¹¹

We understand that online legal matching services have operated in Texas for several years. We are unaware, however, of any evidence that online legal services have caused any consumer harm. The Texas Bar has informed us that they are unaware of any consumer complaints about online legal matching services. Further, the bars of North Carolina, South Carolina, and Rhode Island have issued ethics opinions explicitly allowing such services to operate,¹² and the Utah State Bar has partnered with such a service so as to help clients find a pre-screened Utah lawyer.¹³

Although we recognize that there may be legitimate concerns about allowing non-attorneys to refer potential clients to attorneys,¹⁴ such concerns do not appear to arise with respect

¹⁰ See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 (1978) (by enacting the Sherman Act, "Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country.").

¹¹ Cf. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) ("Absent some countervailing procompetitive virtue," an impediment to "the ordinary give and take of the market place . . . cannot be sustained under the Rule of Reason.") (internal quotations and citations omitted).

¹² See North Carolina Bar, 2004 Ethics Op. 1 (Apr. 23, 2004); South Carolina Ethics Advisory Op. 01-03 (Jan. 3, 2001); Rhode Island Supreme Court Ethics Advisory Panel Op. 2005-01 (Feb. 24, 2005).

¹³ See Utah State Bar Referral Services, at http://www.utahbar.org/public/lawyer_referral_service_main.html.

¹⁴ For example, there may be concerns if a referral service were to mislead consumers about attorneys' qualifications or how they select the pool of attorneys from which they draw, and steer consumers only to
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to online legal matching services. These services do not advocate or recommend a particular attorney, but rather provide a conduit through which a consumer can invite attorneys to provide information about their ability to handle a consumer's particular legal issue.¹⁵ The information provided by attorneys who participate in these services, moreover, still is subject to existing prohibitions on misleading or deceptive advertising.¹⁶

If the Professional Ethics Committee has concerns, based on demonstrated consumer harm, that consumers may be misled with respect to the pool of attorneys to which their requests are sent, there are less restrictive alternatives than barring attorney participation in these services. For example, online legal matching services could be required to disclose the number of attorneys and firms that participate in their service and that requests are not sent to all Texas attorneys, but only to member attorneys. Further, online legal matching services could be required to explain explicitly whether, and if so how, they limit attorney participation.

Conclusion

Online legal matching services have the potential to lower consumer costs of obtaining information about the price and quality of legal services, which is likely to lead to more intense competition among attorneys, ultimately benefitting Texas consumers. At the same time, we see no indication that consumers are likely to suffer harm from online legal matching services that would justify banning them. We hope that the Professional Ethics Committee will consider the likely impacts on competition and on Texas consumers of a rule barring Texas attorneys from participating in online matching services.

We appreciate the opportunity to present our views. Please do not hesitate to contact us about this issue.

¹⁴(...continued)

those attorneys who offer the service at the largest fee.

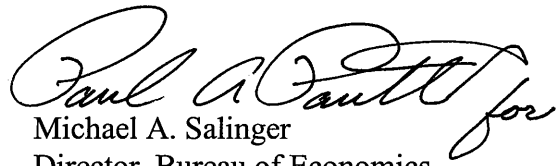
¹⁵ We understand that Ethics Opinion 561 prohibits participation in Internet sites that use "information about participating lawyers for the purpose of identifying or selecting a lawyer or a group of lawyers whose names are then suggested, offered, or recommended to a consumer for consideration." Although we take no position on whether the restriction in Ethics Opinion 561 is likely to provide net benefits to Texas consumers, we suggest that the Professional Ethics Committee clarify that this prohibition applies only to Web sites that actively "suggest, offer, or recommend," rather than those that merely act as a conduit for competing attorneys to present information to prospective clients.

¹⁶ See Disciplinary Rule 7.04(a)(3).

Respectfully Submitted,

Handwritten signature of Maureen K. Ohlhausen in black ink.

Maureen K. Ohlhausen
Director, Office of Policy Planning

Handwritten signature of Paul A. Salinger for in black ink.

Michael A. Salinger
Director, Bureau of Economics

Handwritten signature of Jeffery Schmidt in black ink.

Jeffery Schmidt
Director, Bureau of Competition