



THE FLORIDA BAR

REPORT OF THE SPECIAL COMMITTEE ON LAWYER REFERRAL SERVICES

Final Report
July 2012

I. THE COMMITTEE

A. Origin and Mission

In the midst of explosive increases in advertising by for-profit lawyer referral services – many directed at victims of motor vehicle accidents covered by Florida’s no-fault insurance law which provides attractive personal injury protection benefits – The Florida Bar’s Special Committee on Lawyer Referral Services was created in January 2011 by then-president Mayanne Downs.

The genesis for creation of this special committee was noted in an earlier observation from The Florida Bar’s Program Evaluation Committee, that the Bar had received “numerous complaints regarding advertising by lawyer referral services in Florida in the past few fiscal years.” In recommending the creation of this study group, the Program Evaluation Committee highlighted concerns over “the proliferation of lawyer referral services, the lack of regulation of lawyer referral services, and that lawyer referral services have not followed Florida Bar rules that are applicable to Florida Bar members. Members of the Legislature also have indicated an interest in this issue.”

The January 13, 2011 letters from President Downs appointing the chair and members of this 15-person special committee especially noted Florida’s dramatic growth of for-profit lawyer referral services in recent times, along with a corresponding increase in public concerns over the potential harm from these entities and the misleading nature of their activities.

Downs observed: “The creative design of these services and the significant involvement of non-lawyers have posed particular regulatory challenges for The Florida Bar. Yet, people still look to this organization to assist in resolving some of the complex issues associated with responsible oversight of lawyer referral mechanisms in today’s world.”

The Bar president asked that the special committee “review the current practices of lawyer referral services, as well as all rules and regulations that may be applicable to such services.” The appointment letters additionally stated that the assignment would include “consideration of possible rules changes, and whether and to what extent The Florida Bar can or should directly regulate lawyer referral services.”

Consistent with that presidential statement, the special committee’s official scope of activities reads as follows:

The Special Committee on Lawyer Referral Services is tasked with reviewing the current practices of lawyer referral services, reviewing all rules applicable to lawyer referral services, and reviewing any other regulations that may be applicable to lawyer referral services. Included within this charge is reviewing the issue of whether and to what extent The Florida Bar can directly regulate lawyer referral services. The special committee is charged with making recommendations to The Florida Bar Board of Governors regarding any changes to the Rules Regulating The Florida Bar and any other action deemed necessary to protect the public and ensure compliance with the lawyer advertising rules.

Even though the impetus behind the creation of the special committee was related to the proliferation of for-profit personal injury lawyer referral services and their attendant advertising, the special committee recognized at the outset that the universe of lawyer referral services was much larger and included lawyer referral services offered through The Florida Bar, voluntary bar associations and non-personal injury referral services in arenas such as criminal law, credit counseling, loan modification and expert witnesses. The special committee therefore decided to include an analysis into all referral services involving lawyers in the initial phase of its work. However, the bulk of the special committee's focus throughout was consistent with its charge related to for-profit referral services.

B. Special Committee Membership

The membership of the special committee was diverse and included both lawyers and non-lawyers, members of the Board of Governors of The Florida Bar, the Citizen's Forum and lawyers in private practice. It included lawyers primarily representing plaintiffs in personal injury claims as well as personal injury defense lawyers. The special committee also included trial lawyers whose practice was not predominantly in the personal injury area.

The non-lawyer members of the special committee had extensive backgrounds in public relations, governmental consulting and banking. They brought a unique and valuable public perspective to the special committee function.

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II. HISTORY OF LAWYER REFERRAL SERVICES IN FLORIDA

The recognition and acceptance of lawyer referral services – or “lawyer reference services” – within our state’s organized bar is well chronicled in the pages of the May 1958 edition of *The Florida Bar Journal*. Notably, those events coincide with the transition of Florida’s legal profession during 1949 and 1950, from a private voluntary organization into a mandatory or unified bar, “integrated” under the state supreme court’s control, with regulatory authority over every Florida lawyer’s professional activities. And, as the new Florida Bar progressed in its development, enhancements to the lawyer referral service concept were to be expected – although they did not seem to proceed in an altogether coordinated manner.

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During the early stages of The Florida Bar's integration, and through publication of the 1958-59 Official Directory issue of The Florida Bar *Journal*, the state supreme court's "integration rule" and accompanying bylaws – intended to comprehensively regulate the legal profession – contained no discussion of lawyer referral services or the propriety of lawyer involvement in such activities.

But, at least one independent local bar within the state – the Jacksonville Bar Association, in 1952 – began running a lawyer referral service in its own community, inspired by model programs provided through the national resources of the American Bar Association (ABA) and caringly operated by responsible volunteer lawyer "panelists" from the association membership.

More significantly, that May 1958 Bar *Journal* included an 18-page presentation on a decision the Supreme Court of Florida rendered the previous month which, in considering Jacksonville's local bar lawyer referral service program, essentially validated lawyer referral services for the entire state. *Jacksonville Bar Association v. Wilson*, 102 So.2d 292 (Fla. 1958). The *Journal's* editorial treatment of the topic (including the court's full-text opinion, plus selected party and amicus brief extracts) allows for extensive understanding of the lawyer referral service phenomenon, nationally, from its 1930s origins through the late 1950s.

This was particularly noteworthy when one considers that, in the Florida Supreme Court proceedings reported in the 1958 *Journal*, The Florida Bar found itself alongside the appellant Jacksonville Bar Association and the amicus ABA, arguing for the reversal of a circuit judge's ruling that the local bar's operation of a lawyer referral service, with attendant publicity and advertising, was in violation of the court's Integration Rule and the ABA's Code of Ethics.

The Florida Bar's amicus brief, on direction of its governing board, referenced a long-range objective of the organization, adopted at its June 1952 Annual Convention, for: "The promotion and establishment within the legal profession of organized facilities for the furnishing of legal services to all citizens at a cost within their means." At that same convention – according to the Jacksonville Bar Association's separate filing – the Bar's first Committee on Lawyer Referral was created.

The Bar's brief also observed: "Lawyer Referral Services have the specific endorsement of The Florida Bar as a part of its program of public service devised and promoted in the public interest." The filing further noted:

The purpose of Lawyer Referral Service is to advise the public of the need and benefit of legal advice and guidance, the reasonable cost thereof; to aid in the selection of counsel and generally to encourage the employment of counsel to the end that rights will be protected, interests represented and affairs conducted in accordance with the law.

In further seeking to demonstrate the need for some agency to perform the functions of an lawyer referral service, the Bar's brief stated:

No one could seriously doubt that such plan and such agency requires the control and direction of those trained in the law, for without such control and direction such program would in effect result in the blind leading the blind.

Speaking for a unanimous Florida Supreme Court, Justice T. Frank Hobson observed that there was no violation of either of two different ABA canons at issue in the case. “We are of the opinion that neither canon has been violated by the activities of the Jacksonville Bar Association, but that, to the contrary, the plan before us was conceived and is being executed in the highest traditions of public service.” Thereafter, the opinion reversed the trial court’s declaratory decree and remanded the matter with directions to dismiss the suit.

Following that April 23, 1958 Supreme Court opinion, the chair of the Lawyer Referral Committee of The Florida Bar observed that the group’s activities “were largely confined to the adjustment of the Lawyer Reference Service idea and program to the guideposts indicated in the opinion of the Supreme Court of Florida in the case of the *Jacksonville Bar Association v. Wilson*.” And, consistent with that report, a petition from The Florida Bar to amend the Integration Rule with respect to lawyer referral services was noticed “on or prior to December 20, 1958,” then set for oral argument on February 3, 1959, and granted by the Supreme Court on February 6, 1959 with an effective date at 12:00 noon that same day. The new Integration Rule provision read:

Article XIV
Lawyer Reference Services

1. No local bar association or other group of attorneys shall establish a lawyer referral service in any city, community or other area of this State except upon application to and approval by the Board of Governors of The Florida Bar; provided, however, that any lawyer referral service in existence as of (date of order adopting this amendment) shall have six (6) months from such date within which to apply to and secure approval of the Board of Governors for the continuance of such service.

2. The Board of Governors may, upon good cause shown, revoke the authority of any bar association or other group of attorneys to operate a lawyer referral service, and may adopt such regulations governing the establishment, operation and revocation of permission of operate such a service as it may deem desirable.

It is pertinent to note that this new rule essentially acknowledged the existence of ongoing lawyer referral service programs throughout Florida at the local level. Bar records do not otherwise readily reveal how many other local bar associations may have actually operated lawyer referral service programs at that time but in a separate compilation of the Florida Council of Bar Association Presidents in the May 1958 *Bar Journal* lists a total of 50 such groups.

The September 1959 directory issue of the *Journal* contained not only the new lawyer referral service rule but a complementary bylaw that formalized the application process for local bar associations or other attorney groups to secure authority from the Board of Governors to operate lawyer referral services in their communities. The application required the bylaws and

regulations governing the proposed service, the number of participating lawyers and the number of all lawyers in the locality, and “an estimate of the condition that evidences a need for such services in the area.” The closing paragraph of that bylaw read thusly:

Article XV
LAWYER REFERENCE SERVICES

* * * *

Authority to conduct a lawyer reference service may be granted to an association or group of lawyers conducting such a service which is truly representative of the entire profession in the area of the service, which is of such size and number that the anonymity of the individual lawyers is secured and the identity of the individual members is submerged in the group, and the membership of which is open to all members of the profession on an equal basis. Such authority may be granted where a public need for a lawyers’ reference service has been demonstrated and where it appears that the possibility of benefits to any individual lawyer is so indirect and remote that such possibility of benefits cannot reasonably be said to be the inspiration and motive for the operation of the service.

This regulatory system for local lawyer referral services – consisting of rule and bylaw – continued through 1972 with no changes. But, during that year, The Florida Bar instituted its own statewide lawyer referral service in an effort to fill the gaps in service within those cities where no localized lawyer referral service was operational. According to a January 1972 *Journal* account, the new Florida Bar lawyer referral service was the ninth statewide service in the country and was patterned after the statewide lawyer referral service in Illinois. Each lawyer’s membership fee was \$25 for the first year, \$15 for the second, and \$10 for the third and successive years. Panel members also had to pay the lawyer referral service ten percent of each fee over \$25 received from any client referred to the lawyer by the service.

As the 1970s progressed, annual Bar Journal reports of lawyer referral service activity within the profession reflected continued fine tuning of the lawyer referral service concept. Recruitment of panelists and “no show” issues with clients were recurring themes. And, as further evidence of lawyer referral service growth in the state, this new passage appeared in the September 1977 *Journal*, at the conclusion of Article XV of the bylaws to the Integration Rule regarding applications for an authorized service:

The proposed lawyer referral service may not operate in a geographic area served by an existing lawyer referral service without the express written consent of the existing service and approval by the Board of Governors.

In early 1979, The Florida Bar’s statewide lawyer referral service expanded its scope by establishing three new topical area panels – for service to the elderly, the mentally disabled, and those with low income. But it was the historic United States Supreme Court opinion of *Bates v. State Bar of Arizona* – decided in June of 1977 and which authorized lawyer advertising – that truly reshaped the future of lawyer referral services for the remainder of the 20th Century and beyond.

The proliferation of attorney advertising – aside from its other implications – certainly increased consumer awareness of available legal services everywhere. And, it was not long into the 1980’s before some members of Florida’s integrated bar began to question the further necessity of operating a statewide lawyer referral service, utilized by only some members but supported by the mandatory fees of all. Additionally, cooperating advertising programs for lawyers, established in the wake of *Bates* by entrepreneurs outside the profession began to appear on the business landscape.

The Program Evaluation Committee of the Bar’s governing board – assisted by the Bar’s standing Lawyer Referral Service Committee – conducted a review of The Florida Bar Statewide Lawyer Referral Service culminating in the spring of 1985. At the same time, the appearance of “four or five” lawyer referral service-like programs operated by non-lawyers prompted focused study of the need for changes in the Bar’s code of professional conduct to cope with this new phenomenon. Coincidentally, The Florida Bar was also involved in a wholesale rewrite of its governing documents, to modernize its Integration Rule and bylaws into one set of guidelines to regulate The Florida Bar, incorporating new model rules of professional conduct developed by the American Bar Association instead of its former two-part arrangement of disciplinary rules and ethical considerations.

Minutes of the March 15, 1985 meeting of the Board of Governors of The Florida Bar contain an interim report of a Special Study Committee on Lawyer Referral Services. Its chairman, D. Culver (Skip) Smith, III, advised the board that – after review of one cooperative lawyer advertising program “embracing the principles of lawyer referral services” according to its owner – the special committee concluded that, under current rules, the Bar should not attempt to prevent a non-lawyer owned and operated lawyer referral service from conducting business “even though the present disciplinary rule [DR 2-103] prohibits Florida Bar members from serving on an lawyer referral service panel not approved by the Board of Governors.”

In discussing the review of non-lawyer owned lawyer referral services, the chairman of the Bar’s special study committee made these observations memorialized in its board’s March 15, 1985 minutes:

- (1) There are sufficient public policy reasons for lawyer referral services to be regulated in some fashion, and the Board of Governors is the logical body to do that;
 - (2) the Bar should not try to regulate lawyer reference services directly, whether they are Bar-operated or non-Bar-operated; and
 - (3) the Bar should regulate lawyers who participate in lawyer reference services.
- Mr. Smith advised the committee listed as the public policies considered the following: fee splitting, mismatching clients with lawyers, (misleading) advertising, (guarding against) UPL, territorial conflict and assuring minimum amount of professional liability coverage.

The Bar’s governing board essentially concurred, voting at its March 15, 1985 meeting to propose rules changes that would regulate lawyers who participated in any privately-owned or other bar-operated lawyer referral service (state or local). The board also voted to discontinue

the state bar's role in approving or regulating lawyer referral services other than The Florida Bar's Statewide Lawyer Referral Service.

However, two months later – when the Board of Governors next convened during May 16-18, 1985 to hear its Program Evaluation Committee's final evaluation of the Bar's statewide lawyer referral service – a new issue arose. Among the PEC's eleven recommendations (and the only one not approved) was a proposal that the Bar's statewide service eliminate the division of fees with participating attorneys, a practice which produced revenue to run the program in part.

The PEC report, appended to the board's May 1985 minutes, included as Recommendation #6 – Division of Fees, that: "The Statewide Lawyer Referral Service should eliminate division of fees with panel members as a revenue producing measure. It should attempt to raise substitute revenue through other existing methods of revenue production and attempt to develop new methods of funding."

In support of its recommendation, the board committee noted that "often, the time, trouble and expense of accounting for the division of fees is not worth the amount of the fee actually derived," further observing that the Massachusetts Bar's lawyer referral and information service dropped the division of fees as a revenue source for economic reasons. Additionally, the report said that, under certain circumstances, the lawyer referral service is actually profiting from funds intended to compensate a client. "While it may be true that the attorney fee also comes from the source," the report stated, "the attorney fee is a charge for producing the result." But, the report continued, "the service provided by the lawyer referral service is not productive of the result."

Yet, following that entry in the board's minutes, Skip Smith – reporting for the Special Committee on Lawyer Referral Services ("Study" no longer included in its name) – advised that his group "recommended retaining by a close vote an exemption for splitting fees for Bar-operated, not-for-profit lawyer referral services."

The June 15, 1985 *Bar News* report of that May board session indicated that governors expressed doubt as to whether the state bar and local bar associations could maintain their custom of fee sharing if that option was specifically denied to non-lawyers who operated their own for-profit services. The board's minutes separately noted that the discussion centered around antitrust concerns if fee-splitting rules were to vary between bar-operated and non-lawyer-owned lawyer referral services. "A state action exemption would be a solution," the minutes state, "but does not apply to Bar-operated lawyer referral services since the state does not mandate its [sic] operation or actively regulate same."

Those board members who favored a continuation of fee sharing claimed that elimination of that revenue source would cripple local lawyer referral service programs although "the potential moral hazards" associated with fee splitting did not exist within a local bar or non-profit lawyer referral service. The board minutes state that the issue was referred to the Bar's Antitrust Task Force to craft a solution that would include local lawyer referral services in fee splitting.

Notably, at the same time on a national level, the American Bar Association was engaged in its own antitrust analyses of lawyer referral service funding and revenue streams in the wake of

various federal court opinions affecting professional groups – among them, *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). A June 1985 *LRIS Newsletter* (No. 15), published by the ABA’s Standing Committee on Lawyer Referral and Information Services, particularly noted concerns regarding the legality of lawyer referral service practices of having participating attorneys charge their referred clients a standard fee, established by the service, for their initial consultation.

The ABA newsletter discussed whether these standard fees constituted, for antitrust purposes, *per se* illegal price fixing, or whether a court rule or legislative statute regarding such practice would immunize it from any antitrust liability. The seven-page guidance closed by stating that, based on uncertainty as to how courts might apply *Maricopa*, additional steps should be taken to protect lawyer referral service programs and participating panel lawyers from antitrust liability pursuant to the state action doctrine: “The legislation or court rules must ‘clearly articulate and affirmatively express’ as state policy a set fee for LRIS programs and a structure must be implemented for the state to actively supervise the actual fees used by LRIS programs in the state.”

Consequently, at the August 1-2, 1985 meeting of the Board of Governors – even while the Bar’s proposed new lawyer referral service rules were before the state supreme court for consideration following their May 29 filings - the Board of Governors reversed its stance with regard to Bar control of local bar lawyer referral services. The minutes of that board session reflect that Mike Nachwalter, chairman of the Special Committee on Lawyer Referral Services, advised fellow governors that his committee had determined that at least half of the local lawyer referral service programs surveyed (8 of 16) participated in the division of fees with its participating attorneys, and “depend on those revenues to operate.” Referring to lawyer referral service antitrust considerations, Nachwalter further advised that “the Bar must assist those local bar associations by bringing them under the state action exemption clause.” And, after further consideration, the board approved a motion to withdraw its petition pending with the Florida Supreme Court which would have deleted Integration Rule and bylaws provisions requiring board approval of lawyer referral services.

The substantially reworked lawyer referral service rules proposal was finally approved by the Board of Governors in September of 1985 and then tendered to the Florida Supreme Court in November of that year, ultimately to become part of a still growing package of amendments to the “old” Integration Rule and bylaws and a parallel set of suggested streamlined “Rules Regulating The Florida Bar.” As the dispositive opinion in that case noted, the court had heard argument in the two separate matters that encompassed a total revision of bar rules but, since that time, “numerous petitions for revision of both the currently existing bar rules and of the proposed new rules have been filed with and considered by the Court, and the proposed new rules have been revised several times.” And, during oral argument on the Bar’s final lawyer referral service filing, the Board of Governors had asked that the court consider that petition in conjunction with the comprehensive rules rewrite. Finally, the court consolidated a fourth rules matter, concerning lawyer specialization, with those other three filings as well.

Remarkably, notwithstanding all the allied news coverage and official notices associated with such organic reform of the bar’s rules – and lawyer referral services in particular – the official

court files for those four cases contain only one comment from the membership of The Florida Bar regarding the lawyer referral service proposals. That two-page letter expressed opposition to the notion of non-lawyer-owned lawyer referral services and the specific cooperative advertising program that the Bar's governing board had considered. The commentator wrote: "My greatest concern is that if non-lawyers are allowed to advertise for cases, it may open the unregulated door for advertising for same, and that the situation would become quite a problem." The letter added: "I am all for attorney advertising. I think that attorney advertising is a modern day trend whose time has come. But I am not for non-lawyers advertising for cases. I am also against non-lawyers advertising for profit." [Emphasis in Original] No counterargument from the Bar appears in those court files, nor do they contain any other presentation in support of the Bar's final lawyer referral service proposals other than a six-page supplemental filing, requested by the court, which included 1984 survey information from the Bar regarding local bar association lawyer referral services throughout the state.

And, in a 145-page final opinion – *The Florida Bar re Rules Regulating The Florida Bar*, 494 So.2d 977 (Fla. 1986) – the court adopted the new lawyer referral service rules as part of a significant reorganization of The Florida Bar's charter document. Since that court action, there have been few changes in the basic features of the lawyer referral service concept as influenced by The Florida Bar or the Florida Supreme Court.

III. SUMMARY OF COMMITTEE ACTIVITIES

The special committee worked through at least five teleconference calls, three in-person meetings, two public hearings and numerous communications to conduct its investigation and analysis and to formulate its conclusions and recommendations.

In virtually every instance, meetings of the special committee were attended or monitored by stakeholders involved in lawyer referral services, to include: non-profit and for-profit lawyer referral services, private insurance professionals, governmental insurance regulators, and selected Florida Bar staff professionals variously involved in lawyer referral service matters. In most cases, those guests of the committee actively participated and contributed to the discussions.

The special committee held its first meeting by teleconference on February 23, 2011 during which President Downs welcomed the special committee and Chairman Wells discussed the course of its future work. That was followed by another brief organizational meeting of the group on March 9, 2011 in connection with a Florida Bar Board of Governors meeting in Orlando, involving those board members who sat on the special committee, in person – and in which the other special committee members who did not serve on the board participated by telephone. A subcommittee structure was initially established by Chairman Wells to address anticipated issues involving lawyer referral services. The subcommittees were: (i) Legislation, chaired by public member Alvin Alsobrook; (ii) Voluntary Bar Association Lawyer Referral Services chaired by Mary Ann Morgan; (iii) For-Profit, Non-Personal Injury Lawyer Referral Services chaired by Paige Greenlee; and (iv) For-Profit Personal Injury Lawyer Referral Services co-chaired by Jay Cohen and Carl Schwait. Thereafter, another conference call meeting of the

group was held on March 24, 2011 to hear updates and continue planning for the first public hearing scheduled for June in conjunction with the annual meeting of The Florida Bar.

The special committee conducted a full day of public hearings on June 22, 2011 during The Florida Bar's Annual Convention in Orlando. A short analysis of those proceedings by the group occurred on site immediately thereafter, followed by a more comprehensive post-convention review by teleconference call on July 14, 2011 which included a resolve for additional public hearings by the special committee. After further investigation and planning, the second series of all-day public hearings was held in conjunction with The Florida Bar's Midyear Meeting, on September 22, 2011, in Orlando. A brief post-meeting review of that hearing was also held the same day.

Following those activities, the special committee held an all-day working session at the Bar branch office in Tampa, on November 11, 2011, resulting in a series of preliminary recommendations to establish a benchmark for future deliberations.

The group met again by teleconference call on November 17, 2011, to further discuss recommendations and to assist in developing a response to a November 15, 2011 request from Florida's Chief Financial Officer Jeff Atwater to then Bar President Scott Hawkins, to "expeditiously institute a permanent ban against lawyer referral services." President Hawkins' response of November 22, 2012 noted the work of the committee, that the referral services in the center of the issues were non-lawyer owned and that many other lawyer referral services are administered by local bar associations within the organized bar. President Hawkins assured CFO Atwater that the Bar was committed to ensure public protection as well as access to lawyers.

The special committee held another all-day action meeting in Orlando, on January 13, 2012, formulating additional recommendations for further consideration. After additional review and analysis of that product, the group met again on March 9, 2012, in Orlando, and produced more draft recommendations. Another work session was held on May 4, 2012 in Orlando during which the recommendations of the special committee were further refined, consideration given to the contents of a final report to be submitted to the Board of Governors, and preliminary plans were made to meet at the Bar's Annual Meeting in Orlando on June 21, 2012 to consider any final report. Because a draft of the report had not adequately evolved by that date, that meeting did not occur.

More detailed accounts of special committee's meetings are chronicled in *The Florida Bar News*. A comprehensive collection of the resource materials provided to the group, along with records of their proceedings – including audio of most meetings – support this report. That information can be found within the special committee's site on The Florida Bar's webpage at this link: <http://www.floridabar.org/cmdocs/cd001.nsf/WDOCS>. Other referenced materials within this report are also publicly accessible, much of which can be found on The Florida Bar website.

IV. INVESTIGATION BY THE COMMITTEE

Critical interest in lawyer referral services within the State of Florida – particularly for-profit services – parallels the growth of lawyer advertising, the increasing number of Florida lawyers, and greater interest in our no-fault insurance laws.

Indeed, chair Grier Wells noted that the special committee recognized there were different and competing elements of not only The Florida Bar but also the public that would likely be affected by the work of the committee. As Wells further observed, the special committee was committed to performing its mission by “engaging in the deliberative process of evaluating issues and recommending avenues to address the challenge.”

The special committee initially sought to determine what is a “lawyer referral service.” Rule 4-7.10(c) of the Florida Supreme Court’s Rules Regulating The Florida Bar, provides a rather specific definition, in stating:

A "lawyer referral service" is:

- (1) any person, group of persons, association, organization, or entity that receives any consideration, monetary or otherwise, given in exchange for referring or causing the direct or indirect referral of a potential client to a lawyer selected from a specific group or panel of lawyers; or
- (2) any group or pooled advertising program operated by any person, group of persons, association, organization, or entity wherein the legal services advertisements utilize a common telephone number and potential clients are then referred only to lawyers or law firms participating in the group or pooled advertising program.

The Florida rule additionally clarifies that: “A pro bono referral program, in which the participating lawyers do not pay a fee or charge of any kind to receive referrals or to belong to the referral panel, and are undertaking the referred matters without expectation of remuneration, is not a lawyer referral service within the definition of this rule.” R. Regulating Fla. Bar 4-7.10(c).

Although lawyer referral services are not uniformly defined among the various states, the American Bar Association (ABA) reports that a majority of states have adopted some form of the ABA’s Model Rule 7.2 whose language provides a limited description of typical lawyer referral service activities and purposes:

A lawyer referral service . . . is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements.

The ABA also notes that the majority of states regulate lawyer referral service programs solely by way of enforcement directed at attorney compliance, through their state lawyer disciplinary

authority. Florida is among this group, with two provisions in the Rules Regulating The Florida Bar most prominent:

RULE 4-7.2 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

(c) Prohibitions and General Regulations Governing Content of Advertisements and Unsolicited Written Communications.

(14) *Payment for Recommendations; Lawyer Referral Service Fees.* A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written or recorded communication permitted by these rules, may pay the usual charges of a lawyer referral service or other legal service organization, and may purchase a law practice in accordance with rule 4-1.17.

RULE 4-7.10 LAWYER REFERRAL SERVICES

(b) Responsibility of Lawyer. A lawyer who accepts referrals from a lawyer referral service is responsible for ensuring that any advertisements or written communications used by the service comply with the requirements of the Rules Regulating The Florida Bar, and that the service is in compliance with the provisions of this subchapter. It shall be a violation of these Rules Regulating The Florida Bar and a failure of such responsibility if the lawyer knows or should have known that the service is not in compliance with applicable rules or if the lawyer failed to seek information necessary to determine compliance.

With regard to non-profit versus for-profit lawyer referral service programs, Florida Supreme Court rules allow lawyer participation in both these types of lawyer referral services. Attorney involvement in local bar association-sponsored and other non-profit lawyer referral services has been recognized and allowed in the Sunshine State since 1959 when the concept was formalized in the Supreme Court's Integration Rule that once governed The Florida Bar. Where there are no such local bar programs, The Florida Bar operates a separate statewide lawyer referral service to serve those regions. The Supreme Court's policy statement regarding these non-profit lawyer referral service programs reads as follows with regard to R. Regulating Fla. Bar 8-1.1:

Every citizen of the state should have access to the legal system. A person's access to the legal system is enhanced by the assistance of a qualified lawyer. Citizens often encounter difficulty in identifying and locating lawyers who are willing and qualified to consult with them about their legal needs. To this end bona fide not-for-profit state and local bar associations are uniquely qualified to provide lawyer referral services under supervision by The Florida Bar for the benefit of the public. It is the policy of The Florida Bar to support the establishment of local lawyer referral services and to encourage those services to: (a) make legal services readily available to the general public through a referral method that considers the client's financial circumstances, spoken language, geographical convenience, and the type and complexity of the client's legal problem; (b) provide information about lawyers and the availability of

legal services that will aid in the selection of a lawyer; (c) inform the public when and where to seek legal services and provide an initial determination of whether those services are necessary or advisable; and (d) provide referral to consumer, government, and other agencies when the individual's best interests so dictate.

Within the framework for regulating non-profit lawyer referral service programs, The Florida Bar approves those referral services that are truly exempt from federal taxation under §§501(c)(3), 501(c)(4) or 501(c)(6) of the Internal Revenue Code of 1986, and that operate primarily for the benefit of the public. These non-profit referral services may publicize such approval and enjoy absolute immunity from civil liability for all official actions in furtherance of pertinent Bar rules. Approval of these programs is granted by the Bar's governing board following an application process that includes a review of a prospective lawyer referral service's stated public benefits, its non-profit status, proposed fee structure, and other operational details. The lawyer referral service or participating lawyers must carry a minimum of \$100,000 in professional liability insurance per claim or occurrence. Those lawyers can be temporarily held from lawyer referral service involvement during Florida Bar consideration of any probable cause determination of whether the member may have committed an ethical violation – but lawyers may return to the lawyer referral service if they are still a member in good standing following such disciplinary review. Non-profit referral services must file three quarterly reports and an additional annual report with the Bar, which further detail various other lawyer referral service activities during each period. Upon good cause shown, the Bar may revoke any bar association's authority to operate a lawyer referral service. R. Regulating Fla. Bar 8-2.2.

With regard to for-profit lawyer referral services, the ABA further reports that at least 26 states limit lawyer participation to only not-for-profit lawyer referral service programs, either directly in rule language or by interpretation. Involvement by Florida lawyers in for-profit lawyer referral services, however, has been authorized by the state Supreme Court since January 1987.

The rules in Florida allow lawyer involvement in a for-profit lawyer referral service, provided that the service uses an actual or a registered fictitious name in its communications; the service registers with The Florida Bar and submits quarterly reports that identify its authorized personnel and participating attorneys; the service affirmatively states that it is a lawyer referral service in any of its advertisements; the service complies with the Supreme Court's rules on lawyer communications and advertising (including the filing of proposed ads for Florida Bar review); there is no fee sharing between lawyers and non-lawyers; referrals are only made to lawyers who are authorized to practice in Florida; the service or participating lawyers maintain malpractice insurance in the amount of \$100,000 per claim, per occurrence; and the service responds in writing to official Florida Bar inquiries within 15 days. R. Regulating Fla. Bar 4-7.10

Any lawyer referral service may advertise its name, location, telephone number, referral fee charged, hours of operation, the process by which referrals are made, the areas of law in which referrals are offered, and the geographic area in which the lawyers practice to whom those responding to the advertisement will be referred. This information is the "safe harbor" that is presumptively permissible and non-misleading. Other content and forms of advertising for lawyer referral services are permissible if compliant with Florida's lawyer advertising rules and if the advertisement explicitly states that it is for a lawyer referral service. The "safe harbor"

information for a non-profit lawyer referral service includes its nonprofit status, its status as a lawyer referral service approved by The Florida Bar, and the logo of its sponsoring bar association. R. Regulating Fla. Bar 4-7(2)(b)(2). A for-profit lawyer referral service may not represent or imply to the public that it is “endorsed” or “approved” by the Bar. R. Regulating Fla. Bar 4-7.10(a)(8). All written communications from any lawyer referral service to prospective clients must be accompanied by a written statement detailing the background, training, and experience of each lawyer to whom the recipient may be referred. R. Regulating Fla. Bar 4-7.4(b).

Only six states in addition to Florida have rules that speak to the conduct of the referral services in which lawyers may seek to join. The scope and detail of those rules vary widely. Florida presently does not directly regulate non-lawyer-owned referral services. Those other states with such regulations are California, Missouri, Ohio, Tennessee, Texas, and Wyoming. Additionally, both California and Texas regulate lawyer referral service programs by statute as well as bar rules, but in both those jurisdictions, the legal profession is co-regulated by the judiciary and the legislature.

With the growth of the internet, the definitions of what constitutes a lawyer referral service continue to evolve. One issue, according to the ABA, is whether companies that use the internet to match potential clients and lawyers are considered referral services. The State Bar of Utah uses LegalMatch as its official lawyer referral service and, thus far, the six states (Maine, North Carolina, Ohio, Rhode Island, South Carolina, and Texas) that have considered this question have determined that online lawyer-client matching services may not, under stated conditions, be prohibited under court rules that regulate lawyer referral services. The ABA indicates that five jurisdictions - Arizona, Colorado, Nebraska, New York, and Washington – that have looked at similar services have determined that they may be prohibited under their state lawyer referral service rules. The question of whether those matching services are considered a lawyer referral service often depends on whether there is a person connecting a potential client to the lawyer. Where states have found online for-profit matching services were prohibited, they have typically done so upon finding that such services utilize an intermediary, making discretionary attorney-client matching decisions – rather than merely using a computer system that makes automated matches based on client-selected criteria, without any human intervention. In Florida, many of these internet services are considered lawyer referral services – regardless of how the lawyer is matched up with the client – under the broad definition of these programs in the Supreme Court's rules that regulate The Florida Bar.

At the outset of its activities, the special committee recognized that for-profit referral services engendered competing – and polarizing – lines of thoughts. Concerns and complaints were raised from all quarters: some lawyers felt the activities of referral services were unethical; others thought lawyer referral services assist attorneys in marketing their legal services; people who generally dislike lawyer advertising had negative feelings about lawyer referral service ads; state investigators of PIP insurance fraud reported lawyer referral service involvement in those activities; and individual state legislators were contemplating their own separate statutory fixes for lawyer referral service problems they perceived. However, special committee members unanimously agreed that any recommendations that they might propose would not be based on anecdote or perception but rather would be true to the special committee’s mission and consistent

with its methodology as a fact-finding body. And, although the special committee did not have the benefit of extended time, subpoena powers or law enforcement assistance, the reports and information provided made to the group throughout their various meetings resulted in convincing evidence of professional misconduct among lawyers, health care providers and other individuals. From a fact-finding perspective, the special committee's public hearings at the Annual Meeting of The Florida Bar in 2011 and the Mid-Year Meeting in September, 2011 were particularly productive.

According to records maintained by The Florida Bar, as of June 2011, 71 referral services were registered with the Bar as of October 2011. More than half have registered in the past two years – 23 in 2010 and 20 in 2011. It is otherwise difficult to calculate an accurate number of different attorneys who are listed with the Bar as referral service participants; many lawyers are listed with multiple referral services and names of attorneys provided by the referral services are often incorrect. Moreover, a random check of several referral services by the committee found that many attorneys disavowed any affiliation or participation with the referral service that listed the attorney as a participating member. Conversely, as will be addressed below, by way of example, an attorney who disavowed any affiliation with a specific registered referral service which had listed the attorney as a participating attorney, is known to have obtained an engagement agreement from an accident victim who called that specific referral service for assistance.

Based on the foregoing, it seems clear that the information provided to The Florida Bar through its referral service registration process is often incomplete, inaccurate and even leads to the dissemination of misleading information. Furthermore, current Bar requirements for registration of referral services do not include disclosure of the type of legal services that the lawyer referral service may emphasize if it restricts referrals to certain topical areas, or the fields of practice of its various members although this may be apparent from the name of the service itself. Nor do current registration rules require disclosure of the ownership of the service or its financial arrangements with attorneys who participate in the lawyer referral service.

Review of lawyer referral service registrations within The Florida Bar indicates that most for-profit referral services are owned by persons or entities other than lawyers, particularly in the area of personal injury referral services. Non-lawyer owned entities are not subject to the Rules Regulating The Florida Bar. For example, 1-800-ASK-GARY ("ASK GARY"), one of the more heavily advertised and utilized referral services, operating extensively throughout Florida, is apparently a trade name, the ownership of which can ultimately be traced to Dr. Gary Kompothecras, D.C., a chiropractor in Sarasota. Entities owned or controlled by Kompothecras also own or control a chain of clinics operating throughout Florida and in at least two other states. Callers to the ASK GARY hotline are referred exclusively to the Kompothecras-controlled clinics. Although the referral service itself is not subject to the jurisdiction of The Florida Bar, approximately 76 members of The Florida Bar were listed as participating members of ASK GARY as of June, 2012.

Similarly, ownership of 1-800-411-PAIN ("411 PAIN"), another heavily advertised referral service operating throughout the state, can be traced to Robert C. Lewin, a Hollywood chiropractor. It appears that 411 PAIN recruits physicians to become independent contractors or

affiliates of its chiropractic clinics. Approximately 139 members of The Florida Bar are listed as participating in 411 PAIN as of June, 2012.

The first public hearing conducted by the committee, held on June 22, 2011 during the Annual Meeting of The Florida Bar, featured an agenda that essentially mirrored the structure and concerns of the group's four subcommittees – Legislation, Voluntary Bar Association Referral Services, Non-Personal Injury Referral Services and Personal Injury Referral Services. Focusing on the need and desirability of a comprehensive presentation, the committee extended invitations for testimony to representatives of several local bar associations involved in their respective referral services, various for-profit referral services – including both non-personal injury and personal injury services, accident victims involved with personal injury referral services, American Bar Association representatives, the former Florida Bar Board of Governors member involved in the review of for-profit lawyer referral services in 1985, investigators with the Florida Division of Financial Services who are heading up a statewide investigation of insurance fraud, and key legislators.

Responses to the special committee's invitations for presentations at its first public hearing were generally good, although most of the for-profit referral services either failed to respond, declined, or, in one instance, cancelled an appearance.

Representatives of the Jacksonville, Orange County and Hillsborough County Bar Associations appeared as a panel and provided information on their respective association's lawyer referral services. With additional commentary from Bar staff members present, the special committee felt that the referral services of those three local bars were representative of voluntary bar association lawyer referral services statewide. With some variation, most local bar association referral services charge lawyers a nominal fee for participating in the service, and then may charge prospective clients a similar fee for an initial consultation with a participating attorney. Most voluntary bar association referral services also charge some fee at the conclusion of an accepted case. Although some local bar lawyer referral service advertising is done in the form of websites and printed brochures, little is done in the way of large-scale media advertising. All of the panelists agreed that the volume of local bar lawyer referral service referrals is significant but has declined in recent years.

Sheldon Warren of Long Beach, California, chair of the American Bar Association's Standing Committee on Lawyer Referral and Information Services, provided information on the status of voluntary bar association referral services throughout the United States and the benefit such services offer to the consuming public.

As previously indicated, D. Culver "Skip" Smith III of West Palm Beach – a former member of the Board of Governors who led the effort resulting in rule changes that permitted lawyers to accept referrals from private, for-profit lawyer referral services in 1985 – outlined the history of those activities, conducted when for-profit referral services had just begun appearing in Florida. At conclusion of his remarks, Smith acknowledged that issues involving for-profit lawyer referral services had arisen in recent years but encouraged the special committee and the Bar to evaluate the continued vitality and practicality of rules that permit the acceptance of referrals from these services.

Blaine McCarthy, an attorney from Jacksonville, operates Christian Legal Directory. Although McCarthy does not view his service as a lawyer referral service, he complies with Bar referral service rules because the Bar considers the directory a LRS. For participation in the Christian Legal Directory, lawyers pay a monthly \$50.00 fee for a basic listing or \$100.00 for an enhanced listing on the directory website. Visitors to the directory website view the information and then contact the lawyer of their choice. According to McCarthy, there is no initial contact or solicitation of clients by directory members.

Lisa Spitzer of Boca Raton, the director of AAA Attorney Referral Service, was unable to attend the public hearing but presented a prepared statement through Paige Greenlee, a member of the committee and chair of the Subcommittee on For-Profit, Non-Personal Injury Referral Services. Spitzer was critical of several for-profit referral services, claiming they only handle certain types of personal injury cases involving PIP insurance, utilize misleading advertising, and may not act in the client's best interest. Spitzer further advocated that referral services should disclose their ownership and how they are paid for the type of services they provide. Spitzer claimed that her service seeks to help both clients and lawyers.

Gregory A. Zitani, a member of The Florida Bar from Sarasota, represents ASK GARY. Zitani responded to concerns that lawyers who accept clients from a referral service might feel pressure, real or imaginary, to refer clients needing medical treatment to clinics owned or controlled by the referral service. Zitani maintained there is no pressure on lawyer members of the referral service to refer clients to such clinics, and further sought to refute the notion that there is some quid pro quo for cross referrals between clinics and lawyers. According to Zitani, a lawyer participating with ASK GARY pays a fee to ASK GARY only for advertising within a certain area code, zip code, or portion thereof. Zitani separately acknowledged that the ASK GARY network of clinics only accepts patients who are covered by personal injury protection insurance.

411 PAIN was also invited and initially confirmed its intention to speak at the June 2011 public hearing. However, just prior to the hearing, 411 PAIN advised the special committee that it would not be participating. Instead, Tim Chinaris, a member of The Florida Bar from Montgomery, Alabama, who represents 411 PAIN in certain contexts, provided the committee with a letter outlining the position of 411 PAIN regarding the Bar's review of lawyer referral services. Maintaining that private referral services follow applicable rules, including review and approval of their advertising by the Bar, Chinaris suggested that the heavy advertising by referral services had increased competition between lawyers participating in the services and in established personal injury law firms. Chinaris also queried whether the scrutiny of referral services by the Bar in the face of such increased competition with other lawyers was not coincidental. Although representatives of 411 PAIN had declined to speak at the hearing, Dr. Lewin and other representatives of 411 were in attendance.

Tracy Branham, a resident of Kentucky, was invited to attend the hearing because of her experience with a law firm that had significant involvement with ASK GARY. The law firm is headquartered in Florida and maintains law offices in both Kentucky and Florida. Following a serious automobile accident, Braham engaged the law firm because of its advertising in

Kentucky, but did not contact a referral service. According to Branham, the law firm advised her to use her personal injury protection insurance for treatment, never advising her that her health insurance was also potentially available to cover medical costs. At the law firm's advice, Branham was seen by doctors affiliated with a clinic owned by ASK GARY and eventually flown to Florida for surgery at another clinic affiliated with ASK GARY. Branham was advised that the treatment she needed was not available in Kentucky and would need to be performed in Florida. Ultimately, through her health insurance, Branham was seen by other doctors and advised that the treatment she had received in Florida was unnecessary and may have exacerbated her condition. A significant portion of her ultimate settlement was paid to the Florida clinic.

Kathy Wilson, an employee of a Head Start Early Childhood Education program in Jacksonville, appeared through a video statement. After being involved in a minor automobile accident, she thought she needed to get checked out and called 411 PAIN. Wilson provided information about the accident and her personal injury protection insurance to the referral service and was advised she would be contacted shortly. She was called the next day and arrangements were made for her to be picked up at her home and taken – with several other people – to a pain clinic in a neighboring community. When she got to the clinic, Wilson was surprised to be told she must first meet with an attorney before seeing a doctor. The attorney, who was waiting for her at the clinic, advised Wilson about the approximate length of the treatment that she would need, what she might expect from a personal injury claim, and then had her sign legal documents. Wilson then saw the doctor, who took x-rays, prescribed a 60- to 90-day program of massage and other treatments with a physical therapist, and indicated she would need four to five treatments a week. Wilson was also advised that she would be transported to and from the clinic. Wilson said she never went back because the process felt wrong to her, indicating there was a lot of pressure on her to sign up with the law firm, leaving her with a bad impression about attorneys. According to Wilson, it seemed the lawyers were trying to scheme her insurance company out of money and not trying to help her very much. Attorneys for the law firm that met with Wilson and who obtained engagement documents from her denied any affiliation with 411 PAIN when later contacted by the special committee.

Another member of The Florida Bar, Howard Pohl – along with Captain Steve Smith – investigates insurance fraud through the Florida Department of Financial Services. In their appearance before the special committee, Pohl and Smith advised of ongoing criminal investigations of lawyer referral services – both those registered with the Bar, as well as unregistered ones – for activities that include illegal solicitation, kickbacks, patient brokering and other unlawful activities. They acknowledged that while referral services are a significant part of their investigations, a majority of insurance fraud does not involve lawyer referral services. Pohl reported that his investigation has led him to believe that there are likely more for-profit lawyer referral services that have not registered with the Bar than those that have. Pohl and Smith also maintained that much of the problem with insurance fraud stems from personal injury protection insurance which, they noted, appears to be the exclusive insurance accepted by clinics affiliated with referral services.

The final appearance at the first public hearing was that of Rick Kriseman of Clearwater, a practicing lawyer and member of the Florida House of Representatives. Representative Kriseman

and Miami Senator Gwen Margolis introduced companion legislation in the Florida House and Senate which would have regulated private referral services. The legislation would have codified many of the Bar's advertising rules into statute and also would have required referral services to disclose to callers any financial links between the referral service and medical facilities or law firms receiving the referrals. The proposed legislation further provided that consumer complaints could be filed with the Department of Agriculture and Consumer Services. In the absence of action taken by the department, the complainant could have then gone to civil court with a complaint for damages. Subsequent violations by the referral service could have also subjected the service to criminal prosecution. According to Rep. Kriseman, the proposed legislation was motivated by his view that the advertising used by many referral services was skirting the rules of The Florida Bar and that the quality of medical care and legal representation provided through these services was deficient.

The second public hearing was held on September 22, 2011 in conjunction with the Mid-Year Meeting of The Florida Bar. The hearing included a presentation on Bar advertising and discipline rules as they relate to referral services and the unlicensed practice of law; a panel discussion by health care professionals on referral services; and presentations both critical and supportive of two of the largest referral services in the state.

Bar Ethics Counsel Elizabeth Clark Tarbert, Unlicensed Practice of Law Counsel Lori Holcomb, and Advertising Counsel Kathy Bible – from the Bar's Tallahassee headquarters – plus Jan Wichrowski, Chief Branch Discipline Counsel with the Bar's Orlando Office, all participated in a panel discussion on Bar advertising, disciplinary and the unlicensed practice of law rules. Chief among their concerns was that, under current rules, the Bar does not directly regulate non-lawyer-owned referral services but Bar rules do prohibit lawyers from belonging to services that do not follow Bar rules, including rules regulating advertising. The panelists also noted that any enforcement of violations of advertising, UPL or other Bar rules usually do not commence without a complaint to the Bar.

Two interviews of accident victims who sought help from 411 PAIN were presented by video. The accident victims, both from Orlando and interviewed by their respective attorneys, presented completely different views of their experiences with that referral service. One of the accident victims was complimentary of the medical treatment received through the referral service and of the services of her attorney to whom she was referred. The other accident victim recounted an experience similar to that of Kathy Wilson, who appeared at the first public hearing, of having been questioned about personal injury protection insurance, directed to a specific clinic and met by a paralegal of a law firm with which the victim had had no prior experience and who pressured them to engage the law firm before receiving any medical treatment.

Dr. Nabil El Sanadi, Chairman of the Council on Ethical and Judicial Affairs of the Florida Medical Association, Paul Lambert, General Counsel of the Florida Chiropractic Association, and Jason Winn, General Counsel of the Florida Osteopathic Medical Association, appeared as a panel and discussed medical ethics and referral issues. After expressing concerns that health care clinics affiliated with referral services created public relations problems for their respective professions, the panelists noted that federal laws govern much of the issues surrounding referral services and that essentially private health care associations and their voluntary membership can

be reluctant to get involved because of concerns for restraint-of-trade issues. The panelists suggested that state licensing and regulatory agencies might be the more appropriate entities to address these concerns.

Another panel consisting of Dr. Jeffrey Lauffer of Port Charlotte, a chiropractor, and attorneys John Uustal of Miami and Peter Brudny of St. Petersburg, discussed their involvement in legal challenges to two of the larger referral services. Uustal, who has filed suit against 411 PAIN, claims a significant number of his clients felt that the advertising of 411 PAIN promised they would receive compensation for their automobile accident injuries but that all the money instead went to clinics, and that clients wound up owing them money in some cases. Brudny, a sole practitioner, is being sued by ASK GARY for defamation. Although Brudny denied he had engaged in defamatory conduct, he acknowledged that he had undertaken significant investigation into the corporate structure and intricacies of the ASK GARY organizations and practices.

Dr. Lauffer worked both as a chiropractor and MRI technician for Physicians Group, LLC, the network of clinics affiliated with ASK GARY and which now operates in three states, including Florida. Lauffer indicated that all auto accident victim calls to ASK GARY are referred to Physicians Group clinics; those clinics do not accept non-automobile cases. According to Lauffer, Physicians Group allowed lawyers and corporate financial personnel to influence decisions regarding the levels of health care provided to individuals, maintained a “public” and “non-public” set of records on each patient, based financial incentives for physicians on the number of procedures they performed, and engaged in other questionable practices that he did not consider to be in the best interests of its patients. The day after Lauffer’s appearance at the public hearing, he received a cease and desist letter from ASK GARY’s legal counsel demanding he stop making “false and defamatory statements” about the company’s “billing practices, bonus structures and patient care” and threatening to sue him.

As part of audience questioning, it was acknowledged that some referral service lawyers are now dependent on particular medical providers for income, and can be conflicted because they have reasons to maintain the financial well being of those providers – a situation identified by the special committee when a referral service lawyer may be called upon to negotiate medical charges to the client/patient with the referral service’s clinics.

Howard Pohl and Captain Steven Smith, respectively counsel and investigator for the Florida Department of Financial Services, made another presentation at the second hearing. Speaking of their continuing investigations into insurance fraud, Pohl and Smith noted several trends they have encountered: some referral services have used advertising to disguise direct solicitations; some patients, in filling out purported medical care paperwork, have unknowingly signed undisclosed and unexplained law firm retainers; and some patients, unhappy with their medical treatment at a referral clinic, have gone to their referral-designated lawyer for help, only to be told – even in situations where the lawyer was already seeking PIP benefits for them from an insurance company – that the lawyer could not help them because the lawyer represents the clinic.

Pohl and Smith also confirmed they have discovered situations where patients were met at medical clinics by an attorney, even though none had been requested, and were told they must sign up with the attorney before being provided any medical treatment.

Again, Tim Chinaris, who represents 411 PAIN with respect to advertising issues, responded by observing that the Bar already has the tools to deal with attorney referral concerns and that it is just a matter of enforcement of Bar rules. Chinaris further emphasized that 411 PAIN follows all Bar advertising rules, claiming the company does not use any advertising methods that have not already been approved by the Bar for use by lawyers and law firms. Chinaris also opined that 411 PAIN may have been the victim of fraud itself, reporting that some accident victims had been improperly approached by people who falsely said they were affiliated with 411 PAIN. Finally, Chinaris pointed out that his research showed that lawyers participating with 411 PAIN were more experienced, based on years of practice, compared to lawyers participating in voluntary bar association referral associations.

Representative Kriseman appeared again and re-emphasized his concerns over the harm done to the public by medical-legal referral services, prompting his plans to again introduce a lawyer referral service bill in the 2012 Legislature to regulate such services. Rep. Kriseman and Sen. Margolis did, indeed, revise their companion 2011 bill and introduced them in the 2012 legislative session. However, the legislation was not enacted.

The public hearings conducted by the special committee were an integral element of the group's investigations. However, they by no means represented the special committee's only fact-finding activities. Additional information was provided through numerous communications from members of The Florida Bar, letters that not only voiced opinions in favor or opposed to referral services but which also provided analysis of Bar rules and issues. Florida Chief Financial Officer Jeff Atwater corresponded with 2011-2012 Bar President Scott Hawkins encouraging the Bar to implement rules banning lawyer participation in for-profit referral services because of the prevalence of fraud in the personal injury protection arena and the role of clinics affiliated with such referral services in the escalating PIP crisis. As noted previously, the CFO's letter was reviewed by the special committee which then assisted in a response by President Hawkins.

Information was also provided to the committee by members of the Bar which led to additional investigation. For example, a personal injury solo practitioner in northeast Florida advised the committee of a client who had been injured in an automobile accident and had received emergency room treatment. The client was met the following day by two individuals he did not know, who advised him they had been referred to him by a friend they could not identify, advised him he needed to go to a certain clinic and was given the card of an attorney in south Florida who worked through a referral service. It was concluded that the address of the accident victim was somehow obtained through the hospital emergency room. Similarly, in another instance, personal information of accident victims was obtained through a central Florida hospital emergency room and patients were actually called while in the hospital. Although it was suggested that patients needed to call a certain attorney, the scenario could not be connected to a specific referral service.

An attorney in southwest Florida provided a statement of a client who was being persistently solicited by callers from ASK-GARY. The client initially called ASK-GARY after an accident, went to Physicians Group for treatment but was not pleased. The client then went to another physician he selected. Even though the client was being treated satisfactorily by his own physician, the callers were insistent that he needed to go back to Physicians Group for better treatment.

Media reports were also a source of helpful information. Although many such reports focused on the Bar's efforts in addressing referral services and the special committee's public hearings in particular, some reports provided enlightening investigative results. In an article dated December 9, 2010, before formation of the committee, the *Miami New Times* published an article entitled "Crash Course: 411-PAIN Network Will Line Their Pockets With Your Insurance Money." In addition to outlining the history of 411-PAIN, the article also focused on its operational practices with a case history of unsophisticated accident victims who called 411-PAIN and received a variety of treatment modalities they did not understand and for which no explanation was given. They were ultimately referred to an attorney who provided little advice other than to explain a contingency fee agreement, after which the victims/clients dealt only with the attorney's secretary. Thousands of dollars in medical bills were incurred and partially paid through the personal injury protection insurance of the victim/clients. All proceeds therefrom went for medical expenses but the victim/client was still left with significant bills. The article further highlighted that 411-PAIN made no secret about courting African American and Latino consumers through R&B and hip hop radio stations, catchy jingles and outlandish spokespersons.

In an article dated November 15, 2011, a writer for *Bloomberg News*, who had, coincidentally, attended the second public hearing of the special committee, reported that an attorney who had worked for one of the law firms in the ASK-GARY network alleged that clients were steered to Physicians Group clinics for medical attention in exchange for the firm getting legal referrals. The article further traced the rise in insurance costs in recent years contrasted with the occurrence of fewer automobile accidents.

While large referral services such as ASK-GARY and 411-PAIN are more prominent in their advertising, they are not alone in the referral business according to an article in the *Daytona Beach News Journal* dated February 3, 2012. Services such as 855-LAW-HURT and "#PAIN" operate on a smaller scale but appear to be similar in practice. LAW-HURT is owned by a non-lawyer but refers accident victims to both lawyers and doctors who pay into an advertising fund for LAW-HURT. Uncharacteristically, however, #PAIN is owned by an attorney and is a referral service with about five doctors and lawyers as customers. Notably, the father and brother of the owner of #PAIN are both chiropractors.

In a scenario strikingly similar to that experienced by Kathy Wilson, as previously recounted, Orlando television station WKMG explored the experience of two accident victims in a piece dated February 14, 2012, entitled "State Leaders Probing Accident Referral Services Like 411-PAIN." Like Wilson, the accident victims featured in the article reported calling 411-PAIN following an accident, being referred to a specific clinic and being met by a paralegal from a law firm prior to receiving medical treatment. The treatment protocol was outlined which the victims were told would have to be followed before a lawsuit could be initiated. However, when one of

the victims began feeling better and ended her treatment, she was advised by her attorney to continue the treatment in order to continue the case.

The special committee acknowledges that the foregoing summary of its investigation is not intended to paint all for-profit referral services with the same brush. However, it is very clear that for-profit lawyer referral services, working in conjunction with other professional or occupational disciplines, have a great propensity to run afoul of the Florida Supreme Court's Rules of Professional Conduct that govern Florida Bar members and engage in activities that do not effectively or appropriately serve the interests of the public.

V. CONCLUSIONS

The history of lawyer referral services, both nationally and in Florida, teaches that the primary justification for fostering lawyer referral service programs and authorizing lawyers to engage in these activities is to serve the public interest. While informing the public about legal rights and the availability of lawyers are also admirable, it is clear that service to the public is of paramount importance to the basic lawyer referral concept and that any component of lawyer referral service activity that undermines the public interest should be closely scrutinized.

Lawyer referral services, or as originally known, lawyer reference services, were primarily authorized by The Florida Bar and voluntary bar associations to provide citizens access to attorneys who could assist, generally, with consumer problems in specific practice areas. Early on, even with the advent of private, for-profit referral services, the emphasis was still focused on referring consumers with particularized legal needs to attorneys who might address them. Moreover, the decision in *Bates v. State Bar of Arizona*, authorizing lawyer advertising, as monumental and expansive as it was, did not lead to an immediate change in the nature of lawyer referral services.

However, advertising, coupled with the expansion of for-profit, non-lawyer-owned referral services and the attractiveness of PIP benefits, evolved into the present day phenomena of hyper-specialized referral services, many of which have married up other professions and disciplines with attorneys for an endless array of potential consumer offerings. But when one of those marriage partners owns or controls one entire side of the referral equation, issues are bound to arise.

The special committee has unanimously concluded that its investigation of lawyer referral services points to three critical areas of lawyer behavior that may constitute violations of the Rules of Professional Conduct.

First, an attorney who communicates with a prospective client without a specific request from that individual has made an improper solicitation, violative of Rule 4-7.4(a). Referral of a prospective client to an attorney by another person, as avoidance of Rule 4-7.4(a), is of little avail because Rule 4-8.4(a) prohibits attorneys from violating the Rules of Professional Conduct through another. From the special committee's investigation, there appears to be an accepted practice within certain for-profit LRS networks for accident victims to be met at referral service clinics by attorneys or paralegals, or to be called by attorneys or paralegals, with whom the

accident victims have no prior relationship. As discussed above, at least some accident victims were only seeking medical treatment and had no intention of consulting an attorney.

Secondly, an attorney who accepts referrals from a referral source with the expectation of receiving additional referrals from that source – or who also refers clients to that same referral source – and who participates in non-legal decisions affecting the clients’ rights, or who assists the referral source with legal matters contrary to the clients’ rights, is or may be violating Rule 4-1.7(a)2 which prohibits a lawyer from representing a client where the lawyer’s personal interest or the interest of a third party are likely to adversely impact representation or the lawyer’s professional judgment. In addition to cross referrals of accident victims to clinics and lawyers, there is evidence of attorneys participating in decisions regarding medical treatment, and urging clients to continue treatment with referral clinics contrary to stated desires of the client. Although not specifically addressed by the special committee, it is noted that there was no evidence that a determination of the professional competency of either lawyers or doctors was customarily made by either a referral source or attorneys in their joint enterprise.

An employee of an attorney, or the representative of a non-lawyer-owned referral source, who counsels a client or prospective client on his or her legal rights, is or may be engaged in the unlicensed practice of law. A lawyer who allows or assists in the unlicensed practice of law violates Rule 4-5.5(a) – and potentially Rule 4.5.4(c). As determined by the special committee in its investigatory work, paralegals or other non-lawyer personnel meet with accident victims at referral clinics to discuss their legal rights as potential clients.

VI. RECOMMENDATIONS

The findings and conclusions of the special committee, as outlined above, compel the need for the implementation of changes to the Florida Supreme Court’s Rules Regulating The Florida Bar as they relate to lawyer referral services. While recognizing that The Florida Bar presently does not directly regulate non-lawyer owned services, the committee determined that greater regulation of attorneys who participate in for-profit referral services is mandated as in the best interest of the public.

During the course of the special committee’s deliberations, a variety of recommendations were considered, all of which addressed lawyer conduct while participating in for-profit referral services. After consideration of the various proposals, the committee made the following recommendations:

1. A lawyer shall not accept client referrals from any person, entity or service that also refers or attempts to refer clients to any other type of professional service for the same incident, transaction or circumstance, and shall furthermore be prohibited from referring a client to any other professional service in consideration of the lawyer’s receipt of referrals from any lawyer referral service.

In making this recommendation, the special committee recognized its scope and potential impact on for-profit referral services. The special committee also recognized the potential legal

implications of such a recommendation. Nevertheless, after consultation with outside legal counsel, the committee unanimously endorsed the recommendation.

2. A lawyer receiving or accepting client referrals from a referral service shall register such referral service participation with The Florida Bar, including all referral services with which the lawyer participates. In addition, any such lawyer shall provide complete disclosures regarding the lawyer's relationship with the referral service, ownership of the service, financial arrangements between the service and the lawyer, and the lawyer's affirmation of compliance with all Bar rules regarding referral services. Such attorney registration shall require payment of a fee as may be determined by The Florida Bar.

3. A lawyer participating with a referral service for the purpose of receiving or accepting client referrals must designate a lawyer within the lawyer's firm to serve as the responsible party for the firm for all cases referred to the firm or any attorney in the firm by a referral service.

4. A lawyer is prohibited from initiating contact with a prospective client referred by a referral service; all such contact must be initiated by the prospective client.

5. A lawyer accepting referrals from a lawyer referral service shall provide complete disclosures to clients of their participation in referral services, such as either a revised or addendum to the Client's Statement of Rights, notification in law firm reception areas and inclusion of the referral service participation in lawyer advertising;

6. The Florida Bar shall implement enhanced disciplinary enforcement of its rules and regulations related to lawyers participating in referral services..

7. The Florida Bar shall implement enhanced public education of its rules and regulations related to lawyers participating in referral services.

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