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English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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Working Party No. 2 on Competition and Regulation

COMPETITIVE RESTRICTIONS IN LEGAL PROFESSIONS

-- United States --

4 June 2007

The attached document is submitted by the delegation of the United States to Working Party No. 2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 4 June 2007.

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English - Or. English

1. Introduction

1. In the United States, there is no national license to practice law. Rather, each state and the District of Columbia has adopted different standards for licensing attorneys to practice law.[1] Some states and the District of Columbia have entered into reciprocity agreements that allow individuals who have been admitted into one state's bar to qualify to become members of another state's bar.[2] Attorneys are required to pay annual dues and, in some states, to attend continuing legal education seminars to maintain their licenses.

2. In addition to setting licensing standards, state bar associations have developed and implemented ethics rules to govern the practice of law. Among other things, these rules restrict the performance of certain tasks to licensed attorneys and govern attorney advertising. Although some regulation of the legal profession is undoubtedly necessary to protect consumers, on occasion state bar associations, legislatures, and courts have adopted rules that unduly restrict competition among attorneys and competition between attorneys and non-attorneys.

3. The U.S. Supreme Court has made it clear that, notwithstanding state regulation, U.S. federal antitrust law applies to the legal profession.[3] Further, state restrictions on attorney advertising are subject to First Amendment (freedom of speech) scrutiny.[4] However, certain actions by state bar associations, legislatures, and courts may be beyond the reach of the antitrust laws.[5] Accordingly, the antitrust agencies have engaged in competition advocacy to prevent anticompetitive advertising and practice of law restrictions from going into effect.

4. To avoid duplicating the Agencies' 2005 Global Forum submission[6] on unauthorized practice of law (UPL) restrictions, this comment will repeat in Section 2 only the brief UPL discussion from the U.S. submission to the February 2007 roundtable on improving competition in real estate transactions, and then focus on recent agency experience in the form of advocacy relating to restrictions on attorney advertising. Section 3 explains the FTC's framework for evaluating such restrictions, and Section 4 discusses recent FTC advocacy concerning attorney advertising. Section 5 describes a recent DOJ enforcement action relating to the American Bar Association.

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1 Every state determines the qualifications necessary to take the state bar exam, which typically include completing law school and meeting the state's requirements for character and fitness. Law school accreditation is done by the American Bar Association, which has established criteria to determine if a law school should be accredited. To be admitted to the bar, a person must pass the requisite state exam and swear an oath before the highest court of that state.

2 This type of qualification may involve several years of practice by the attorney, a letter of good standing from the state in which the attorney is already licensed, satisfying character and fitness requirements, and payment of an admission fee.

3 *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975)

4 *Bates v. Arizona State Bar*, 433 U.S. 350, 364 (1977)

5 *Id., see also Hoover v. Ronwin*, 466 U.S. 558, 568 (1984).

6 DAF/COMP/GF/WD(2005)35.

2. Restrictions on Use of Non-Attorneys to Close Real Estate Transactions

5. Pursuant to unauthorized practice of law (UPL) statutes, states determine the tasks that only an attorney legally can perform. In the majority of states, non-lawyers compete with lawyers to provide real estate closing services, such as performing title searches and completing mortgages and deeds. Some states, however, have restricted anyone other than licensed attorneys from performing many of the tasks associated with closing a residential real estate transaction.

6. Through competition advocacy, DOJ and FTC (the Agencies) have encouraged state legislatures, bar associations, and courts to eliminate or narrow restrictions on competition between attorneys and non-attorneys in performing tasks related to a real estate closing.[7] Separately, the Justice Department has obtained injunctions prohibiting bar associations from unreasonably restraining competition from non-attorneys in violation of the antitrust laws.[8] The Agencies have argued that these UPL restrictions are likely to reduce consumer welfare. First, they reduce consumer choice and increase the price of closing services for consumers who otherwise would hire a non-attorney. Second, to the extent that non-attorneys provide a competitive constraint on attorney pricing, these restrictions also are likely to raise the price that

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7 *See* letter from the Justice Department and the FTC to New York Assemblywoman Helen Weinstein (Jun. 21, 2006); letter from the Justice Department and the FTC to Executive Director of the Kansas Bar Ass'n (Feb. 4, 2005); letter from the Justice Department and the FTC to Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Ass'n (Dec. 16, 2004); letter from the Justice Department and the FTC to Unauthorized Practice of Law Committee, Indiana State Bar Ass.n (Oct. 1, 2003); letter from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); letters from the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al*. (Jun. 30, 2003 and Mar. 28, 2003); letter from the Justice Department and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Ass'n (Dec. 20, 2002); letter from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives, *et al*. (Mar. 29, 2002); letter from the Justice Department and the FTC to President of the North Carolina State Bar (July 11, 2002); letter from the Justice Department and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); letter from the Justice Department to Board of Governors of the Kentucky Bar Ass'n (Jun. 10, 1999 and Sept. 10, 1997); letter from the Justice Department and the FTC to Supreme Court of Virginia (Jan. 3, 1997); letter from the Justice Department and the FTC to Virginia State Bar (Sept. 20, 1996). Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Servs. Co. of W. Va.*, No. 31706 (filed May 25, 2004), available at http://www.usdoj.gov/atr/cases/f203700/203790.htmhttp://www.ftc.gov/be/V040017.pdf; 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.ftc.gov/os/2003/07/georgiabrief.pdf and http://www.usdoj.gov/atr/cases/f201100/201197.htm; Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass'n *et al.* in *Ky. Land Title Ass'n v. Ky. Bar Ass'n*, No. 2000-SC-000207-KB (Ky., filed Feb. 29, 2000), available at http://www.usdoj.gov/atr/cases/f4400/4491.htm. Advocacy letters are available at http://www.usdoj.gov/atr/public/comments/comments.htm and http://www.ftc.gov/be/advofileother.htm.

8 In *United States v. Allen County Bar Ass'n,* the Justice Department sued and obtained a judgment against a bar association that had restrained title insurance companies from competing in the business of certifying title. The bar association had adopted a resolution requiring lawyer examinations of title abstracts and had induced banks and others to require lawyer examinations of their real estate transactions. Civ. No. F-79-0042 (N.D. Ind. 1980). In *United States v. N.Y. County Lawyers Ass'n*, the Justice Department obtained a court order prohibiting a county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with lawyers. No. 80 Civ. 6129 (S.D.N.Y. 1981). *See also United States v. Coffee County Bar Ass'n*, No. 80-112-S (M.D. Ala. 1980).

consumers who prefer to hire an attorney pay for closing services. At the same time, the Agencies are not aware of any evidence of widespread consumer harm due to non-attorneys performing tasks related to real estate closings. Thus, the harm from restricting competition in the provision of closing services is not offset with any benefits that consumers value.

3. Analysis of Attorney Advertising Restrictions

7. Advertising is an indispensable component of any free enterprise system because it helps consumers compare prices and quality offered by competing suppliers.[9] When it is difficult for consumers to find such information, firms have less incentive to compete. Theory and empirical evidence have shown that when consumers face large costs to discover market prices, firms charge higher prices and enjoy larger margins.[10] Likewise, empirical research has found that restrictions on attorney advertising and on other professional advertising lead to higher prices and have either a negative or no effect on quality.[11]

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9 *Bates*, 433 U.S. at 364; *See also In the Matter of Felmeister & Isaacs,* 104 N.J. 515, 523-24 (1986) *citing* Report of the Staff of the Federal Trade Commission, *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* (1984) (FTC Report).

10 *See, e.g.,* G. Stigler, *The Economics of Information*, 64 J. Pol. Econ. 213, 220 (1961). In addition, 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), *available at* http://www.ftc.gov/be/workpapers/ wp283.pdf. This comports will theories that restrictions limiting truthful attorney advertising reduce the incentive for attorneys to compete. H. Beales, *et al., The Efficient Regulation of Consumer Information*, 24 J.L. & Econ. 492 (1981); *see also* R. Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising,* 90 Harv. L. Rev. 661, 670 (1977).

11 *See* Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17,* 8 Sup. Ct. Econ. Rev. 265, 293-304 (2000) (discussing the empirical literature on the effect of advertising restrictions in the professions and citing, among others: James H Love and Jack H. Stephen, *Advertising, Price and Quality in Self-regulating Professions: A Survey*, 3 Intl. J. Econ. Bus. 227 (1996); J. Howard Beales & Timothy J. Muris, *State and Federal Regulation of National* Advertising 8-9 (1993); R.S. Bond, J.J. Kwoka, J.J. Phelan, and I.T. Witten, *Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry* (1980); J.F. Cady, *Restricted Advertising and Competition: The Case of Retail Drugs* (Washington, D.C.: American Enterprise Institute, 1976); J.F. Cady, *An Estimate of the Price Effects on Restrictions on Drug Price Advertising*, 14 Econ Inq 490, 504 (1976); James H. Love, et al, *Spatial Aspects of Competition in the Market for Legal Services*, 26 Reg Stud 137 (1992); Frank H. Stephen, *Advertising, Consumer Search Costs, and Prices in a Professional Service Market,* 26 Applied Econ 1177 (1994)); In *the Matter of Polygram Holdings, Inc., et al.*; FTC Docket No. 9298, at 38 n.52 (F.T.C. 2003), *aff'd* 416 F.3d. 29 (D.C. Cir 2005)(same). *See also* Timothy J. Muris & Fred S. McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1 American Bar Found. Res. J. 179, 184 (1979) (discussing that attorney advertising results in the phenomena of increased consumer requests for legal services coupled with lower prices and higher quality of services, particularly in specialized areas of the law); *see* Frank H. Stephen & James H. Love,

8. Recognizing the value of advertising in promoting competition and consumer choice, the FTC has a long history of advising regulators not to adopt overly broad attorney advertising restrictions. The FTC staff believes that although deceptive advertising by lawyers should be prohibited, restrictions on advertising and solicitation should be specifically tailored to prevent deceptive claims and should not unnecessarily restrict the dissemination of truthful and non-misleading information.[12]

9. The FTC's analysis is consistent with the U.S. Supreme Court's treatment of advertising restrictions under the First Amendment, which encourages the free flow of truthful and non-misleading information to consumers.[13] The U.S. Constitution does not protect deceptive and misleading advertising, but truthful advertising is protected and any restrictions limiting such advertising must advance a significant state interest and be carefully tailored to advance the state interest.[14] Following this principle, the Supreme Court has struck down prohibitions on attorney advertising that did not have sufficient evidence to support the state interest or that were not narrowly tailored to prevent the specific consumer harm.[15]

Regulation of the Legal Professions, 5860 Encyclopedia of L. & Econ. 987, 997 (1999), *available at* http://encyclo.findlaw.com/5860book.pdf (empirical studies demonstrate that restrictions on attorney advertising have the effect of raising fees).

12 *See, e.g.*, Letter from FTC Staff to the Florida Bar (Mar. 23, 2007), *available at http://www.ftc.gov/be/V070002.pdf;* Letter from FTC Staff to Louisiana State Bar Association (Mar. 16, 2007), *available at http://www.ftc.gov/be/V070001.pdf;* Letter from FTC Staff to Office of Court Administration of the New York Unified Court System (Sept. 14, 2006), *available at http://www.ftc.gov/os/2006/09/V060020-image.pdf;* Letter from FTC Staff to Committee on Attorney Advertising, the Supreme Court of New Jersey (Mar. 1, 2006), *available at* http://www.ftc.gov/be/V060009.pdf; *see also, e.g.,* Letter from FTC Staff to Robert G. Esdale, Clerk of the Alabama Supreme Court (Sept. 30, 2002), *available at* http://www.ftc.gov/be/v020023.pdf. In addition, the staff has provided its comments on such proposals to, among other entities, the Supreme Court of Mississippi (Jan. 14, 1994); the State Bar of Arizona (Apr. 17, 1990); the Ohio State Bar Association (Nov. 3, 1989); the Florida Bar Board of Governors (July 17, 1989);New Jersey Supreme Court's Committee on Attorney Advertising (November 9, 1987), and the State Bar of Georgia (Mar. 31, 1987). *See also* Submission of the Staff of the Federal Trade Commission to the American Bar Association Commission on Advertising (June 24, 1994) (available online as attachment to Sept. 30, 2002, Letter to Alabama Supreme Court, *supra*).

13 *See, e.g., Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976) (holding that the free flow of commercial information is indispensable to preserve a predominantly free enterprise economy); *see also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561-62 (1980) (advertising not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information).

14 *See Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566 (1980)*; see also Florida Bar v. Went for It,* 515 U.S. 618, 632 (1995) (restrictions on commercial speech must be reasonable and narrowly tailored to achieve the state's desired objective).

15 *See, e.g., Zauderer v. Office of Disciplinary Counsel Of the Supreme Court of Ohio*, 471 U.S. 628, 638 (1985) (restrictions rooted on bald assertions without evidence of deception were struck down), *see also Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91, 106 (1990) (rejecting for lack of evidence of deception an argument that a form of advertising was misleading) s*ee also Bates*, 433 U.S. at 372-74 (same); *Mason v. Florida Bar*, 208 F.3d 952, 956 (11th Cir. 2000) (explaining that the state must demonstrate that the harms it recites are real and that its restrictions will alleviate the identified harm).

4. Recent Federal Trade Commission Staff Guidance on Attorney Advertising

10. In 2006 and 2007, the FTC staff offered several state attorney regulators guidance on proposed attorney advertising policies that risk harming consumers. Below is an analysis of specific restrictions found in these proposals.

a. Comments and Amicus Curiae submitted to New York, Louisiana, New Jersey, and Florida Regarding Proposed Rules Governing Attorney Advertising

11. In June 2006, the New York Unified Court System promulgated draft rules to impose significant restrictions to attorney advertising, and, in October, 2006, the Louisiana State Bar, following the model of the rules proposed in New York, circulated similar proposed restrictions. The New Jersey Supreme Court's Committee on Attorney Advertising proposed a rule that would restrict the use of testimonials, and the Florida Bar proposed a rule that would require, among other things, regulatory screening of certain forms of advertising. Subsequently, the New Jersey Supreme Court's Committee adopted an attorney advertising ethics opinion enforcing a prohibition against comparative advertising. In these cases, the FTC and the FTC staff were concerned that several provisions in the proposals were overly broad, would restrict truthful advertising, and may adversely affect prices paid and services received by consumers. The FTC staff submitted comments to the policymaking body in each jurisdiction, and the FTC filed a Brief Amicus Curiae in New Jersey, recommending significant changes to the proposed rules.[16]

12. The FTC filings identified four main areas of concern in the proposed rules. First, in New York and Louisiana, many of the proposed rules related to the style and content of media advertising but did not necessarily target deception. Specifically, the rules sought to prohibit voice-overs or images of non-attorney spokespersons recognizable to the public, depictions of courtrooms or courthouses, portrayals of judges and lawyers by non-lawyers, portrayals of clients by non-clients, re-enactments of events or scenes or persons that are not actual, and Internet pop-up advertisements. Such techniques can be useful to consumers in identifying suitable providers of legal services, however, and are effective ways to reach consumers. The FTC staff comments advised that the proposed constraints would prevent the use of common advertising methods that were unlikely to hoodwink unsuspecting consumers, who are usually familiar with them. Concerns that, for example, actors may be more poised or otherwise more appealing than actual clients could be addressed by requiring clear and prominent disclosures that the advertising used actors in lieu of a prophylactic ban on such techniques.

13. Second, the FTC filings expressed concern about limitations on comparative advertisements. In 2006, the New Jersey Supreme Court Committee on Attorney Advertising, applying a rule that bans all comparative advertisements, issued an ethics opinion banning attorneys from disclosing their ranking by certain attorney rating programs. Comparative advertising, including certain attorney ranking programs,[17]

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16 *See* Letter from FTC Staff to Office of Court Administration of the New York Unified Court System (Sept. 14, 2006), *available at http://www.ftc.gov/os/2006/09/V060020-image.pdf;* Letter from FTC Staff to Louisiana State Bar Association (Mar. 16, 2007), *available at http://www.ftc.gov/be/V070001.pdf;* Letter from FTC Staff to the Florida Bar (Mar. 23, 2007), *available at http://www.ftc.gov/be/ V070002.pdf;* and Letter from FTC Staff to Committee on Attorney Advertising, the Supreme Court of New Jersey (Mar. 1, 2006), *available at* http://www.ftc.gov/be/V060009.pdf; *See also* Brief of the Federal Trade Commission as *Amicus Curiae* Supporting Arguments to Vacate Opinion 39 of the Committee on Attorney Advertising Appointed by the Supreme Court of New Jersey, *available at http://www.ftc.gov/opa/2007/05/fyi07244.shtm.*

17 *See* Brief of the Federal Trade Commission as *Amicus Curiae* Supporting Arguments to Vacate Opinion 39 of the Committee on Attorney Advertising Appointed by the Supreme Court of New Jersey, *supra* note 13,

can be a source of useful information to consumers and thus assist them in making rational purchase decisions, encourage competition, spur innovation, and lead to lower prices in the marketplace. Similarly, the proposed rules in New York, Louisiana and Florida sought to prohibit comparative advertising unless such claims can be objectively verified. The FTC filings advocate that although requiring that material claims be substantiated can serve consumers by helping to ensure that claims are not misleading, if substantiation is demanded for representations that, though not misleading, concern subjective qualities that are not easy to measure (i.e. the "friendly law firm") and for which substantiation may not normally be expected, then messages that consumers find useful may be unnecessarily barred.

14. Third, the proposed rules in New York and New Jersey would prohibit paid endorsements and testimonials and would place significant restrictions on testimonials and endorsements from existing clients. Testimonials and endorsements can convey valuable information to consumers and spur competition and thus should not be prohibited outright unless they are deceptive. There can be risk of deception when, as explained in the FTC's Endorsement Guides, there is a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement.[18] In such cases, however, the Commission suggests that requiring disclosure rather than prohibiting such endorsements protects consumers while encouraging the truthful flow of information to consumers.

15. Lastly, the proposed rules in New York, Louisiana, and Florida required that copies of all or some advertisements and solicitations be placed on file with the bar or court, and in Louisiana and Florida, the proposals sought to require that attorneys receive prior or concurrent approval before promulgating the advertisements. The FTC staff expressed concern that, as with other regulations on attorney advertising, these types of requirements likely raise the cost of doing business for attorneys and thus likely raise prices for consumers without providing countervailing benefits to consumers.

16. Also, as expressed in the Louisiana and Florida comments, competitive concerns arise when state bars, composed of competing attorneys, regulate and screen attorney advertising. Legitimate and fair industry self-regulation, when implemented properly, can provide efficiencies and other benefits to consumers.[19] However, there are risks to competition when one group of competitors is charged with regulating another. Attorneys on the advertising committee may have the incentive, and would have the ability, to limit advertising by competitors to soften competition rather than to protect consumers. The FTC staff comments recommended that state bar associations forego the filing and screening rules in favor of enforcing the general prohibition against deceptive and misleading claims through sanctions for violations.

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at 3-4, 12-14 (ratings programs serve a demand of consumers seeking to compare lawyers on price and quality).

18 *See* Federal Trade Commission Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255.5.

19 *See* Deborah Platt Majoras, "Self Regulatory Organizations and the FTC," Address to the Council of Better Business Bureaus (April 11, 2005), available at http://www.ftc.gov/speeches/majoras/050411selfregorgs. pdf.

17. Following the FTC advocacy, the New York Unified Court system promulgated revised rules incorporating nearly all of the FTC staff's recommendations.[20] The rules proposed in New Jersey, Louisiana and Florida are still pending before the respective policymaking bodies in those jurisdictions.

b. Advocacy to the Texas Bar Regarding Restrictions on On-Line Attorney Referrals

18. In May 2006, the FTC staff filed comments with the Professional Ethics Committee of the State Bar of Texas as it considered whether rules prohibiting attorneys from paying for referrals precluded participation in on-line legal matching services.[21] Presently, many states require attorneys who wish to obtain legal referrals to do so only through certain approved programs, typically those operated by the local or regional bar associations, thus giving the bar association a near monopoly in providing referrals. Several businesses have begun to provide Internet-based attorney/client matching platforms as a competitive alternative to such approved referral services.[22]

19. Typically, these services recruit licensed attorneys who pay a 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 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 usually completes a short on-line 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 service sends the questionnaire to attorneys in the designated practice area, and interested attorneys may send a response, which typically contains 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 client's application may invite an attorney to contact a client directly.

20. Compared to many bar-operated referral programs, the on-line legal matching format allows consumers to compare more easily the price and quality among several competing attorneys. By lowering consumers' costs of obtaining information about price and quality of legal services, online legal matching services are likely to allow consumers 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.[23]

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20 The revised Rules of the Unified Court System of New York (with red-lined changes comparing the initial draft) are available at http://www.nycourts.gov/rules/attorney_ads_amendments.shtml.

21 *See* Letter from the Federal Trade Commission to the Professional Ethics Committee of the Texas State Bar, May 2006; http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf

22 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).

23 A pair of studies find that consumers who use an on-line 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

21. Following the FTC staff advocacy, the Texas State Bar adopted an opinion that allows attorneys to participate in on-line legal matching services.[24]

5. DOJ Lawsuit Against Anticompetitive American Bar Association Law School Accreditation System

22. In June 1995, the DOJ sued the American Bar Association ("ABA"), alleging that the ABA, in its accreditation of law schools, restrained competition among professional personnel at ABA-approved law schools, by fixing their compensation levels and working conditions. The complaint also alleged that the ABA allowed its law school accreditation process to be captured by those with a direct interest in its outcome. Consequently, rather than setting minimum standards for law school quality and thus providing valuable information to consumers, which are legitimate purposes of accreditation, the ABA at times acted as a guild that protected the interests of professional law school personnel. ABA approval was a valuable asset to law schools, as over 40 states required graduation from an ABA-approved school to qualify to take the state bar exam, and the ABA is the only agency the US Department of Education recognizes as a law school-accrediting agency. In 1996, the US District Court entered a modified consent decree, which prohibits the ABA from misusing its powers as the law school-accrediting agency to restrain competition among professional personnel at ABA-approved law schools. The decree bars the ABA from fixing faculty salaries, refusing to accredit schools simply because they are for-profit, and refusing to allow ABA-approved law schools to accept credits from schools that are state-accredited but not ABA-approved.

23. In June 2006 the court found that the ABA had violated multiple provisions of the 1996 consent decree, following a petition filed with the court by DOJ requesting that the ABA be held in civil contempt. The ABA acknowledged the violation of provisions that required it to:

- annually certify that it had complied with the terms of the final judgment;
- provide proposed changes to accreditation standards to the DOJ for review;
- provide briefings to certain ABA staff concerning the decree's requirements;
- obtain annual certifications from certain ABA staff that they agree to abide by the decree and are not aware of any violations;
- ensure that no more than half of the membership of the ABA's Standards Review Committee be comprised of law school faculty; and
- include on the on-site law school evaluation teams, to the extent reasonably feasible, a university administrator who is not a law school dean or faculty member.

24. The district court ordered the ABA to comply with the 1996 judgment until its expiration and ordered the ABA to compensate the DOJ for attorneys' fees and costs related to the investigation of the violations. *U.S. v. American Bar Ass'n*, 2006-1 Trade Cases ¶ 75,295, D.D.C., June 26, 2006.

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.

[24] *See* Tex. St. Bar Eth. Op., No. 573, *available at* http://www.texasbar.com/Template.cfm?Section=texas_bar_journal1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=15929