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Working Party No. 2 on Competition and Regulation

DISRUPTIVE INNOVATIONS IN LEGAL SERVICES

--United States--

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More documents related to this discussion can be found at www.oecd.org/daf/competition/disruptive-innovations-in-legal-services.htm

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--UNITED-STATES--

1. Introduction

1. The United States has a federal system of government in which “the practice of law” is largely regulated at the state level, by state courts, legislatures, and bar associations. There is no national license to practice law. Rather, the fifty states, the District of Columbia, and U.S. territories have each adopted different standards for licensing attorneys to practice law.¹ Certain aspects of what constitutes the provision of legal services, however, are governed by federal policy.²

2. Once admitted to practice law, attorneys are required to pay annual dues to maintain their licenses and, in some states, to complete continuing legal education, which typically means attendance at a legal seminar or completion of an online course. 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, without having to satisfy all of the requirements for a newly admitted attorney.³

3. In addition to setting licensing standards, state bar associations, in conjunction with the highest court of their respective states, have developed and implemented ethics rules to govern the practice of law by licensed professionals. Among other things, these rules restrict the performance of certain tasks to licensed attorneys and regulate attorney advertising.

4. Licensed attorneys have traditionally performed many legal services on behalf of clients. However, non-lawyers have also historically performed many legal-related services that have not been deemed subject to regulation as the practice of law.⁴ The fact that both lawyers and non-lawyers provide

1 Every state determines the qualifications necessary to become a member of its legal bar, which typically includes completing an accredited law school program, taking a state bar examination, meeting the state’s requirements for character and fitness, and swearing an oath before the highest court of that state. The American Bar Association administers the accreditation process for law schools, applying criteria that it has established. Persons who have studied law in a foreign jurisdiction may have to satisfy certain requirements, such as the completion of additional education, to be admitted to a state’s bar.

2 See, e.g., *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 400–01 (1963) (holding that state power to regulate the bar was subordinate under the Supremacy Clause to federal law allowing lay representation in the U.S. federal patent office).

3 This type of qualification may involve, for instance, 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 and other requirements, and payment of an admission fee.

4 See generally Herbert M. Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work* 11 (1998) (“[B]y one count, as of 1994, nonlawyers can appear as advocates before thirty-eight federal agencies.”). Non-lawyers have practiced before the U.S. Patent and Trademark Office from its inception, with the express approval of the Office and with the knowledge of Congress. *Sperry*, 373 U.S. at 384-88. Accountants and other tax specialists may practice in tax matters before the Treasury Department. *Grace v. Allen*, 407 S.W.2d 321 (Tex. Civ. App. 1966) (accountants admitted to practice before Treasury Department in

legal-related services has naturally raised questions about the scope of legal practice, and defining the practice of law has been a difficult question for the legal profession for many years. The boundaries of the practice of law are frequently unclear and have varied significantly over time and from jurisdiction to jurisdiction.

5. A number of recent innovations have raised issues about the boundaries of the practice of law. Self-help resources such as legal self-help books and standardized paper legal forms for completion by a consumer have historically been available in a number of states.⁵ More recently, in response to consumer demands for less expensive ways to address their legal needs, software companies, entrepreneurs, and law firms have developed inexpensive interactive software for generating legal documents. These programs allow users to create wills, trusts, articles of incorporation, and other legal documents, based on answers to questions presented by the software. Individuals may complete many of these forms themselves, or with the assistance of a legal services provider, such as an attorney. Such programs have included physical software products (e.g., CD-ROMs), as well as web-based Internet applications and non-web-based Internet applications (e.g., smartphone-type “native” applications). A number of state and federal courts⁶ and agencies⁷ also now provide online legal forms for use in their respective jurisdictions.

6. Beyond the development of low-cost software for creating legal forms, the United States legal services marketplace has experienced a number of additional changes in recent years. These trends include: client demands for more cost-effective and efficient services; unbundling of services and disaggregation of legal matters across multiple service providers; development of new billing models and law firm models; geographic expansion of law firms and other legal services providers; provision by non-

preparation and presentation of client’s protest of federal income tax assessment may perform some legal research and provide assistance to tax lawyers). Accredited non-attorney representatives may represent persons in immigration proceedings before immigration judges and the Board of Immigration Appeals. *Al Roumy v. Mukasey*, 290 F. App’x 856, 861 n.2 (6th Cir. 2008).

Non-attorney practice has also been allowed before a number of state administrative agencies. *E.g.*, *Cleveland Bar Ass’n v. CompManagement, Inc.*, 104 Ohio St. 3d 168 (2004) (non-lawyers who appear and practice in a representative capacity before the Ohio Industrial Commission and the Bureau of Workers’ Compensation are not engaged in the unauthorized practice of law when they act in conformance with Industrial Commission standards of conduct); *Petition of Burson*, 909 S.W.2d 768, 777 (Tenn. 1995) (statute permitting non-attorney agents to represent taxpayers before boards of equalization did not sanction unauthorized practice of law).

5 *See, e.g.*, *N.Y. County Lawyers’ Ass’n v. Dacey*, 28 A.D.2d 161, 171 (N.Y. App. Div. 1st Dept. 1967) (Stevens, J., dissenting), *rev’d*, 21 N.Y.2d 694 (1967) (adopting dissenting opinion of Appellate Division, holding that incorporating legal forms into self-help book entitled “How to Avoid Probate!” was not the unauthorized practice of law).

6 *E.g.*, CALIFORNIA COURTS, FORMS & RULES, <http://www.courts.ca.gov/forms.htm>; DELAWARE COURTS, FORMS, <http://courts.delaware.gov/forms/>; NORTH CAROLINA COURT SYSTEM, JUDICIAL FORMS, <http://www.nccourts.org/Forms/FormSearch.asp>; IDAHO JUDICIAL BRANCH COURT ASSISTANCE OFFICE, FORMS: INDIVIDUAL FORMS AND INSTRUCTIONS, <http://www.courtsselfhelp.idaho.gov/individual-forms-instructions>; IOWA JUDICIAL BRANCH, COURT RULES AND FORMS, http://www.iowacourts.gov/Court_Rules_Forms/Overview/; MASS. COURT SYSTEM, COURT FORMS, <http://www.mass.gov/courts/forms/>; UNITED STATES COURTS, FORMS, <http://www.uscourts.gov/services-forms/forms>.

7 *E.g.*, CALIFORNIA SECRETARY OF STATE, FORMS, SAMPLES AND FEES, BUSINESS ENTITIES, <http://www.sos.ca.gov/business-programs/business-entities/forms>; UNITED STATES COPYRIGHT OFFICE, FORMS, <http://copyright.gov/forms/>; UNITED STATES PATENT AND TRADEMARK OFFICE, PATENT FORMS, <http://www.uspto.gov/patent/patents-forms> and TRADEMARK ELECTRONIC APPLICATION SYSTEM, <http://www.uspto.gov/trademarks-application-process/filing-online>.

law firms of certain services previously obtained exclusively from law firms; increased use of automation technologies; online matching, reviewing, and ranking of lawyers; and use of Internet, World Wide Web, and related computer technologies to deliver legal services. In particular, it appears the increased use of computer, software, and online technologies have enabled non-lawyers to provide many services that historically were provided exclusively by traditional law firms.

7. Notwithstanding these changes, there remains a well-known crisis in access to legal services for millions of American consumers, especially for low- and middle-income persons. There are a variety of government- and privately-funded legal assistance programs at the federal, state, and local levels to help lower-income Americans with their legal situations.⁸ Many attorneys and law firms also provide *pro bono publico* (free) legal services to low-income persons. Despite the existence of such programs, however, surveys have repeatedly shown that many low- and middle-income Americans cannot afford to retain the services of a licensed attorney, even though the number of lawyers in the United States has generally continued to increase.⁹ This seeming paradox of unmet legal needs and an abundance of lawyers continues to persist.¹⁰

2. Department of Justice and FTC Activities to Promote Competition in Legal Services

8. Because of the importance of legal services to consumers and the economy, the regulation of the practice of law has long been an area of interest for the U.S. Department of Justice Antitrust Division (“DOJ” or the “Justice Department”) and U.S. Federal Trade Commission (the “FTC” or the “Commission”) (together, the “Agencies”).¹¹ The U.S. Supreme Court has made it clear that, notwithstanding state regulation, U.S. federal antitrust law generally applies to the legal profession.¹²

9. In the 1980s, DOJ obtained injunctions prohibiting bar associations from unreasonably restraining competition from non-attorneys in violation of the antitrust laws.¹³ DOJ also sued the

8 For example, Legal Services Corporation (“LSC”) is an independent non-profit entity established by the United States Congress to provide financial support for civil legal aid to low-income Americans. LSC provides funding to 134 independent non-profit legal aid programs in every state, the District of Columbia, and U.S. territories. See Legal Services Corp., <http://www.lsc.gov/>. Criminal defendants may also be entitled under the Sixth Amendment to the United States Constitution to the assistance of counsel provided by the government, if they can demonstrate indigent status.

9 See generally LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA, THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2009), <http://www.lsc.gov/lsc-updates-october-1-2009>; ABA, LEGAL NEEDS AND CIVIL JUSTICE, A SURVEY OF AMERICANS (1994), <http://www.americanbar.org/content/dam/aba/migrated/legal-services/downloads/sclaid/legalneedstudy.auth.checkdam.pdf>.

10 See generally J.D. Smeallie, From BBA President, Connecting Supply with Demand to Fill the Justice Gap, BOSTON BAR ASS’N (July 17, 2013), <http://www.bostonbar.org/public-policy/public-policy-archive/2013/07/22/from-bba-president-connecting-supply-with-demand-to-fill-the-justice-gap>.

11 See generally Submission of the United States, Roundtable on Bringing Competition into Regulated Sectors: The Legal Profession (Feb. 10, 2005), <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/2005-Roundtable%20on%20Bringing%20Competition.pdf> (summarizing DOJ–FTC activities); Submission of the United States, Competitive Restrictions in Legal Professions (May 18, 2007), <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/Competitive%20Restrictions%20in%20Legal%20Professions%20-%20US.pdf> (same).

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

13 In *United States v. Allen County Bar Ass’n*, Civ. No. F-79-0042 (N.D. Ind. 1980), the Justice Department sued and obtained a judgment against a bar association that had restrained title insurance companies from

American Bar Association (“ABA”) in 1995, 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.¹⁴ DOJ secured a consent decree prohibiting the ABA from misusing its powers as the law school-accrediting agency to restrain competition, which a district court subsequently enforced in 2006 after the ABA violated it.¹⁵ In 1990, the Supreme Court upheld an FTC challenge of anticompetitive boycott activity by private lawyers acting as court-appointed criminal defense counsel for low-income criminal defendants.¹⁶

10. In addition to its shared jurisdiction over the antitrust laws, the FTC also has expertise in various aspects of consumer protection that are relevant to the provision of legal services.¹⁷ The FTC promotes truthful and non-deceptive information in the marketplace, including in the professions,¹⁸ and has extensive expertise in the advertising and marketing of products and services, including disclosure issues.¹⁹ The FTC has significant consumer protection expertise combatting fraud, as well as in identifying data security, privacy, and identity theft issues that websites and other software applications relating to the provision of legal services may raise.²⁰

11. Beyond law enforcement actions, the Agencies have policy tools to promote a competitive legal marketplace. In particular, the Agencies engage in advocacy, which can be particularly helpful when certain actions by state bar associations, legislatures, and courts may be beyond the reach of the federal antitrust laws.²¹ 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. Accordingly, the Agencies have engaged in competition advocacy to urge policymakers not to adopt anticompetitive restrictions on the practice of law and advertising. The Agencies have also urged that if certain policies are warranted to guard against a legitimate risk of consumer harm, they should be narrowly tailored to minimize any restrictions on competition.

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. In *United States v. N.Y. County Lawyers Ass’n*, No. 80 Civ. 6129 (S.D.N.Y. 1981), 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. See also *United States v. Coffee County Bar Ass’n*, No. 80-112-S (M.D. Ala. 1980).

14 See Department of Justice, *U.S. v. American Bar Association*, <https://www.justice.gov/atr/case/us-v-american-bar-association> (collecting materials).

15 *United States v. American Bar Ass’n*, 2006-1 Trade Cases (CCH) ¶ 75,295 (D.D.C. 2006).

16 *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990).

17 The comments in this submission regarding deception, disclosure, and other consumer protection issues are based on the FTC’s consumer protection experience.

18 See generally FTC Policy Statement on Unfairness (Dec. 17, 1980), *appended to Int’l Harvester Co.*, 104 F.T.C. 949, 1070 (1984), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness> (see 15 U.S.C. § 45(n)); FTC Policy Statement on Deception (Oct. 14, 1983), *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984), <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

19 FTC STAFF, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (2013), <http://ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>.

20 See FTC STAFF, MOBILE PRIVACY DISCLOSURES: BUILDING TRUST THROUGH TRANSPARENCY (2013), <http://www.ftc.gov/os/2013/02/130201mobileprivacyreport.pdf>.

21 See *Hoover v. Ronwin*, 466 U.S. 558, 568–70 (1984).

12. Under their advocacy programs, the Agencies and their staff have provided comments to policymakers and stakeholders on the scope of the practice of law, the unauthorized practice of law, attorney advertising, and other aspects of the regulation of legal services.²² They have also submitted *amicus curiae* briefs to courts regarding the application of competition principles to the provision of legal services.²³

13. DOJ and the FTC have urged that the definition of the practice of law be limited to activities where: (1) specialized legal skills are required such that there is an implicit representation of authority or competence to practice law, and (2) a relationship of trust or reliance exists.²⁴ The Agencies have recognized District of Columbia Court of Appeals Rule 49 Commentary as being instructive.²⁵

14. In advocating that legislatures, courts, and state bars avoid undue restrictions on the performance of legal-related services, the Agencies of course recognize the important role of state legislatures, courts, and bar associations in protecting consumers of legal services from legitimate and substantiated harm. The Agencies have noted, however, that unnecessarily broad definitions of the practice of law or the unauthorized practice of law (“UPL”) can impose significant competitive costs on consumers of legal services, restrict access to legal services, and inhibit the development of innovative ways to deliver legal services to consumers.²⁶

22 The Agencies’ joint letters regarding the practice of law are available at FTC, Advocacy Filings, <https://www.ftc.gov/policy/advocacy/advocacy-filings> (Topic Filter: Attorneys).

23 See, e.g., Brief Amici Curiae of the FTC and United States of America, *McMahon v. Advanced Title Servs. Co. of W. Va.*, 216 W.Va. 413 (2004), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2004/05/ftc-amicus-curiae-brief-lorrie-mcmahon-et-al-v> (real estate settlement services); Brief of FTC as Amicus Curiae Supporting Neither Party, *Cleveland Bar Ass’n v. CompManagement, Inc.*, 104 Ohio St. 3d 168 (2004), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2004/07/ftc-amicus-curiae-brief-cleveland-bar-association> (representation in workers’ compensation matters); Brief of the FTC as Amicus Curiae Supporting Arguments to Vacate Opinion 39 of the Committee on Attorney Advertising Appointed by the Supreme Court of New Jersey, *In re Opinion 39 of Committee on Attorney Advertising*, 197 N.J. 66 (2008), <https://www.ftc.gov/news-events/press-releases/2007/05/ftc-approves-filing-amicus-brief-new-jersey-supreme-court> (comparative attorney advertising).

24 E.g., DOJ-FTC Comments Before the Supreme Court of Hawaii on Revised Proposed Rule Concerning Unauthorized Practice of Law (Apr. 20, 2009), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2009/04/ftc-and-department-justice-comment-supreme-court>.

25 E.g., *id.* at 2; see also D.C. Court of Appeals Commentary to Rule 49(b)(2) (Mar. 1, 2016), http://www.dccourts.gov/internet/documents/DCCA_Rules_02-04-2016.pdf (“[There are] two essential elements of the practice of law: The provision of legal advice or services, and a client relationship of trust or reliance. Where one provides such advice or services within such a relationship, there is an implicit representation that the provider is authorized or competent to provide them; just as one who provides any services requiring special skill gives an implied warranty that they are provided in a good and workmanlike manner. . . . The presumption that one’s engagement in [an activity] is the ‘practice of law’ may be rebutted by showing that there is no client relationship of trust or reliance, or that there is no explicit or implicit representation of authority or competence to practice law, or that both are absent.”) (internal citations omitted).

26 Enforcement authorities, such as state bar officials, typically seek to enjoin non-attorneys from engaging in certain activities that are considered to be “the practice of law” or “the unauthorized practice of law,” among other possible sanctions. State unauthorized practice of law committees may also issue ethics opinions interpreting UPL policies to limit certain activities only to attorneys. These types of actions may effectively prohibit non-attorneys from performing such tasks, unless the definition or opinion in question

15. For example, among the early subjects of FTC advocacy efforts were state restrictions on attorney advertising, which had long existed in a number of states. Recognizing the value of advertising in promoting competition and consumer choice, the FTC has repeatedly advised regulators not to adopt overly broad attorney advertising restrictions. The FTC staff believes that although deceptive advertising by lawyers should be prohibited, any restrictions on advertising and solicitation should be specifically tailored to prevent unfair or deceptive claims and should not unnecessarily restrict the dissemination of truthful and non-misleading information.²⁷ Such restrictions on attorney advertising are also subject to First Amendment (freedom of speech) scrutiny under the U.S. Constitution.²⁸

16. The FTC's approach 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.²⁹ 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.³⁰ Applying 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.³¹

3. Principles for Evolving Industries and Application to Legal Services

17. In any evolving industry, certain principles should be applied to promote competition and appropriately protect consumers. Regulatory frameworks, when needed, should be flexible enough to allow new and innovative forms of competition (i.e., "disruptive" innovations). Consumers benefit from competition between traditional and new products and services, and new methods of delivering them. A forward-looking regulatory framework should allow new and innovative forms of competition to enter the marketplace unless regulation is necessary to achieve some countervailing pro-competitive or other benefit, such as protecting the public from significant harm. Ideally, regulatory frameworks should be reviewed and revised periodically to facilitate and encourage the emergence of new forms of competition. These are

is subsequently modified. *See, e.g., infra* notes 41-43 and related text, discussing *UPL Committee v. Parsons Tech., Inc.*, 179 F.3d 956 (5th Cir. 1999).

27 *See, e.g.,* FTC Staff Comments Before the Tennessee Supreme Court Concerning Attorney Advertising (Jan. 24, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/ftc-staff-tennessee-supreme-court-should-decline-adopt-proposals>.

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

29 *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).

30 *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980); *see also Florida Bar v. Went for It*, 515 U.S. 618, 625, 632 (1995) (stating that restrictions on commercial speech must be reasonable and narrowly tailored to achieve a substantial state interest).

31 *See, e.g., Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 628, 639-49 (1985) (striking down state restrictions based on bald assertions of deception without evidence); *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); *Bates*, 433 U.S. at 372-74 (same); *Mason v. Florida Bar*, 208 F.3d 952, 956-58 (11th Cir. 2000) (explaining that the state must demonstrate that the harms it recites are real and its restrictions will alleviate the identified harm).

general principles that are applicable in a variety of contexts to incorporate new ways of providing products and services to consumers.³²

18. Competition in legal services takes place on a variety of dimensions, including price, quality, availability, matter type, timeliness, convenience, payment mechanism, and the provision of related services. The ongoing changes in the legal service marketplace may raise novel questions about the regulation of legal services, especially given the variety of dimensions on which competition occurs. A regulatory framework should generally enable these various kinds of competition to flourish and not unnecessarily restrict, either directly or indirectly, the introduction of new ways for consumers to address their legal situations. Regulation should not in purpose or effect favor one type of similarly situated competitor over others.

19. The Agencies believe that consumers generally benefit from competition between lawyers and non-lawyers in the provision of certain legal-related services. Consumers should have that choice, unless it is clear that specialized legal training is required. The Agencies recognize that licensing requirements and scope-of-practice policies can have valid consumer protection justifications, and that there are circumstances and tasks requiring the knowledge and skill of a person trained in the law. Regulation of legal services should focus primarily on protecting consumers from harm they cannot reasonably avoid themselves.

20. Regulation of new products and services relating to legal services should therefore focus primarily on deterring unfair or deceptive advertising and marketing practices relating to the products' or services' content, validity, terms of liability, other terms of use, price, and any related fees. Regulation may also address other consumer protection issues, such as privacy, data security, and the prevention of identity theft.

21. New products and services should provide truthful, non-deceptive information about their characteristics.³³ Providers of new products and services should not falsely represent, either expressly or impliedly, that their offerings are a substitute for the specialized legal skills of a licensed attorney, or that they are affiliated with or endorsed by a government entity.³⁴ Providers also should not falsely represent, either expressly or impliedly, the scope or cost of the product or service, including whether the provider will initiate a legal submission to a government entity. Providers should not expressly or impliedly represent that a legal submission will be made to a government entity if, in fact, additional payment to the provider or to a government entity, or some other further action, is needed to execute a completed filing on behalf of a consumer. Providers should provide truthful, non-deceptive information about what functions their products and services actually perform.

22. New methods of reviewing and ranking legal services providers, like endorsements and testimonials generally, should be based on the reviewers' honest opinions, findings, beliefs, or experiences. If a provider has sponsored a particular review, that review should not convey any express or implied

32 See generally Note by the United States, OECD, Hearing on Disruptive Innovation (June 19, 2015) (DOJ–FTC submission), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/1507disruptive_innovation_us.pdf.

33 See FTC Policy Statement on Unfairness and FTC Policy Statement on Deception, *supra* note 18.

34 See generally FTC, Enforcement Policy Statement on Deceptively Formatted Advertisements n.17 (2015), <https://www.ftc.gov/news-events/press-releases/2015/12/ftc-issues-enforcement-policy-statement-addressing-native> (discussing commercial communications misrepresenting they are from the government and other examples of deceptively formatted advertisements).

representation that would be deceptive if made directly by the provider, and should clearly and conspicuously disclose the connections between the provider and the reviewer that might materially affect the weight or credibility of the review (“material connections”). Likewise, the service should clearly and conspicuously disclose any material connections it may have with providers. Further, the service should not mislead consumers about the process or system that it uses to assign aggregate rankings or scores to the providers.³⁵

23. Restrictions on innovative legal products and services should be adopted only if there is credible evidence of actual or likely consumer harm. This determination should examine whether any harm from these products is or would be materially greater than any same or similar harms posed by traditional attorney-client relationships or government provision of legal services or information, like forms or other information available at the website of a government court or agency. As noted above, a pro-competitive regulatory framework should not favor one type of competitor over others in addressing any such harms.

24. The Agencies recommend that any restriction should be narrowly crafted. For example, requiring narrowly tailored disclosures may be an efficient method of promoting truthful, non-deceptive information about new types of products and services.³⁶ Any disclosure requirements should be no more extensive than is necessary. The existence of a disclosure, however, should not become a safe harbor for making false express or implied claims.

4. Examples

25. The Agencies have engaged in a variety of law enforcement and advocacy activities to promote competition in legal services, as noted above. Certain of these activities particularly illustrate how authorities can play a role in promoting regulatory systems that reflect current market realities and ensure market access for innovators, while protecting consumers from harm.

4.1. *Unbundling of Services*

26. The Agencies have submitted several joint letters to policymakers regarding non-attorney participation in real estate closings. For example, in March 2002, the Agencies sent a joint letter to the Rhode Island House of Representatives, urging it not to alter its definition of the practice of law to require the use of lawyers in real estate closings.³⁷ The Agencies noted that prohibiting most lay real estate closing services would likely increase closing costs for consumers. The Agencies urged the Rhode Island House not to eliminate lay closing services unless the House found, at a minimum, that (1) there was “strong factual evidence” that lay closing services harmed Rhode Islanders and (2) this harm was “not outweighed

35 See FTC, Guides Concerning the Use of Endorsements and Testimonials in Advertising; Final Rule, 16 C.F.R. 255 (2009), <https://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials>; see also FTC, THE FTC’S ENDORSEMENT GUIDES, WHAT PEOPLE ARE ASKING 14 (2015), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> (discussing online review programs).

36 See FTC STAFF, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING, *supra* note 19. This staff guidance, among other things, emphasizes that advertisers should ensure that disclosures are clear and conspicuous on all devices and platforms consumers may use.

37 FTC–DOJ Comments Before the Rhode Island House of Representatives on Proposed Bill H. 7462, Restricting Competition From Non-Attorneys In Real Estate Closing Activities (Mar. 29, 2002), <https://www.justice.gov/atr/advocacy-letter-about-rhode-island-legislation-about-non-lawyer-competition-real-estate-closings>.

by the harm to consumers of foreclosing competition.”³⁸ The Agencies pointed out that, even if lay real estate closing services could cause some harm, the House could protect Rhode Island consumers through less restrictive means, such as by requiring written notice to consumers about the risks of closing a real estate transaction without a lawyer. The letter observed that the assistance of a licensed lawyer at closing may be desirable in some situations, but recommended that the choice of hiring a lawyer or non-lawyer should rest with the consumer.³⁹ The proposed bill was not adopted.

27. Letting consumers hire non-lawyers for real estate closing services may promote the unbundling of legal services relating to such transactions. Consumers performing routine real estate transactions may be able to forgo hiring a lawyer altogether. Consumers who determine that they require legal assistance for certain discrete elements of a real estate transaction can choose to retain a lawyer to advise them on those elements, rather than for the entire transaction.

4.2. *Interactive Software*

28. In December 2002, the Agencies sent a joint letter to the American Bar Association’s Task Force on the Model Definition of Unauthorized Practice of Law, which had drafted a definition of unauthorized practice of law for consideration by state legislators and regulators.⁴⁰ The letter suggested that the proposed definition was unnecessarily broad, citing FTC and Justice Department experience with uses of UPL to foreclose competition in various arenas. The letter explained that an overly broad definition of UPL could prevent a wide variety of non-lawyer advocates from competing with lawyers to provide legal information and resolve problems for consumers.

29. Specifically, the letter noted that an overly broad definition of UPL could prevent consumers from using popular software programs for writing wills and preparing other legal documents, since these programs could be considered rendering legal advice if they provide suggestions in response to information inputted by the consumer.

30. The letter cited the case of *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.* and subsequent legislative developments in Texas as instructive.⁴¹ Parsons Technology, doing business as Quicken Family Lawyer, published a popular legal software program for generating legal forms relating to common family-law situations. The Texas Unauthorized Practice of Law Committee succeeded in having a federal district court enjoin the sale and distribution of the software as the unauthorized practice of law. The State of Texas subsequently enacted legislation to exclude such software and similar products from the statutory definition of the practice of law, while requiring such products to state clearly and conspicuously they are not a substitute for attorney advice.⁴² Based on the enactment of this legislation, a federal appeals court vacated the injunction against the software.⁴³

38 *Id.* at 9.

39 *Id.* at 10.

40 DOJ–FTC Comments on the American Bar Association’s Proposed Model Definition of the Practice of Law (Dec. 20, 2002), <https://www.justice.gov/atr/comments-american-bar-associations-proposed-model-definition-practice-law>.

41 *See UPL Committee v. Parsons Tech., Inc.*, 179 F.3d 956 (5th Cir. 1999) (vacating and remanding district court injunction in favor of plaintiff-appellee, because of passage of legislative amendment excluding computer software or similar products from the definition of the practice of law, if they clearly and conspicuously state they are not a substitute for attorney advice).

42 TEX. GOV’T CODE ANN. § 81.101(c) (1999) (“[T]he ‘practice of law’ does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the

31. Interactive software programs for generating legal documents appear to be responsive to consumer demands for more cost-effective and efficient ways to address their legal issues. They may expand consumer access to legal services, facilitate the unbundling of legal services, promote a more efficient allocation of resources (e.g., among licensed attorneys, non-attorney providers, and self-help efforts), reduce transaction costs, increase convenience, and help some consumers more effectively to address their legal situations. For example, a consumer who cannot afford to retain a licensed attorney both to draft and review a legal document may be able to use interactive software to generate a draft document, and pay an attorney only to review the document, if desired. At the same time, however, such programs may raise consumer protection issues regarding consumers' understanding of the available forms, and when the decision to seek the services of an attorney may be desirable. Software programs that require consumers to input information in order to generate legal forms may also raise data security, privacy, and identity theft issues.

4.3. *Legal Matching Services*

32. 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.⁴⁴ Many states required 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 associations a near-monopoly in providing referrals. Around this time, several businesses had begun to provide Internet-based attorney/client matching platforms as a competitive alternative to state-approved referral services.

33. Typically, these services recruited licensed attorneys who paid a fee to participate. In their applications, member attorneys might disclose their areas of practice, years of experience at the bar, affiliations, and any other pertinent information. The client could examine the service's website to learn how attorneys become members of the service and how the service could help the client identify an attorney to satisfy his or her legal needs. If the client wished to seek legal assistance from a member attorney, the client would usually complete 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 would then send the questionnaire to attorneys in the designated practice area, and interested attorneys could send a response, which typically contained information such as fees, experience, and other qualifications. With this information, the client would determine which attorneys, if any, to contact, and initiate contact. In some instances, the client's application might invite an attorney to contact a client directly.

34. The FTC staff comments observed that, compared to many bar-operated referral programs, the online 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 facilitate consumers paying lower prices and/or obtaining higher quality legal services than they would have if they had used their next-best

products clearly and conspicuously state that the products are not a substitute for the advice of an attorney.”).

43 *Parsons*, 179 F.3d at 956.

44 FTC Staff Comments Before State Bar of Texas Professional Ethics Committee Regarding Online Attorney Matching Programs (May 26, 2006), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-professional-ethics-committee-state-bar-texas-concerning-online-attorney-matching/v060017commentsonarequestforanethicsopinionimage.pdf.

alternative means of identifying a legal service provider (e.g., doing an independent search or seeking a recommendation from a family member or friend).

35. The comments recommended that, if the Professional Ethics Committee had concerns that consumers may be misled with respect to the pool of attorneys to which their requests were sent, there are less restrictive alternatives than barring attorney participation in these services. For example, online legal matching services could be required to disclose the number of attorneys and firms that participate in their program, and that requests are not sent to all Texas-licensed attorneys, but only to member attorneys. Further, online legal matching services could be required to explain explicitly whether and, if so, how they limit attorney participation.

36. Following the FTC staff advocacy, the Texas State Bar adopted an opinion that allows attorneys to participate in online legal matching services.⁴⁵

4.4. Attorney Review and Rating

37. In May 2007, the FTC filed an amicus brief with the New Jersey Supreme Court advocating that the Court vacate an ethics opinion that was issued in 2006 by the Court's appointed Committee on Attorney Advertising. That ethics opinion prohibited attorneys from disclosing their ranking by certain attorney-rating programs like the "Best Lawyers" and "Super Lawyers" lists.⁴⁶

38. The FTC expressed its support for the argument that the ethics opinion should be vacated, and also recommended that the Court revise New Jersey Supreme Court Rule of Professional Conduct 7.1 to prohibit only false and misleading attorney advertising. In addition to citing First Amendment legal concerns, the brief observed there are a growing number and wide variety of legal-rating and scoring programs in the United States, both in print and on web pages, including methods by which consumers may provide their opinions of lawyers. The brief noted these ratings programs address a consumer demand, and argued that their merit, quality, and validity are best determined in the marketplace.

39. The brief argued that overly broad restrictions on truthful and non-deceptive information are likely to harm consumers of legal services, by denying them useful information and impeding competition among attorneys. Thus, the FTC recommended that the Court adopt a policy embraced by the overwhelming majority of states, by revising Rule 7.1 to allow comparative advertisements as long as they are not false or misleading. The brief further recommended that if the New Jersey Supreme Court were concerned about the types of advertising considered in the ethics opinion, it should adopt a less restrictive remedy such as requiring disclosures.

40. The Supreme Court of New Jersey ruled that First Amendment constitutional concerns mandated vacating the ethics opinion, and ordered an administrative review and modification of Rule 7.1.⁴⁷ A revised version of Rule 7.1 allows comparisons with other lawyers, but requires certain disclosures.⁴⁸

45 Tex. St. Bar Ethics Op., No. 573 (July 2006), <https://www.legaethicstexas.com/Ethics-Resources/Opinions/Opinion-573.aspx>.

46 See Press Release, FTC, FTC Approves Filing of Amicus Brief with New Jersey Supreme Court (May 9, 2007), <https://www.ftc.gov/news-events/press-releases/2007/05/ftc-approves-filing-amicus-brief-new-jersey-supreme-court>.

47 *In re Opinion 39 of Committee on Attorney Advertising*, 197 N.J. 66 (2008).

48 New Jersey Rules of Professional Conduct Rule 7.1(a)(3) (Sept. 1, 2015), http://www.judiciary.state.nj.us/rules/RPC_09-01-2015.pdf (comparative advertising) ("A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which

4.5. *Online Advertising and Marketing*

41. In January 2012, the FTC secured settlements resolving charges against Immigration Center, a private immigration services business, and its principals. The FTC's complaint alleged that defendants falsely claimed they were authorized to provide immigration and naturalization services, they were affiliated with the U.S. government, and fees paid by consumers would cover all the costs associated with submitting immigration documents to the United States Citizen and Immigration Services ("USCIS"), the government agency that oversees lawful immigration to the United States.⁴⁹

42. The FTC's complaint alleged, among other things, that Immigration Center used Internet website addresses resembling U.S. government websites in a deceptive manner, and through these websites, misrepresented the nature of the services provided. These website addresses included phrases like "uscis-ins.us," "usgovernmenthelpline," and "uscis-helpline." The complaint also alleged that defendants' statements on their websites that they were not affiliated with the U.S. government were inadequate and ineffective because they were written in small, hard-to-read print, and were not easily seen on the web pages consumers viewed. Rather, in numerous instances, consumers needed to scroll down to the bottom of defendants' web page to find the disclaimer. The complaint further alleged that defendants' agents failed to explain to consumers that their fees covered only their own services, and not USCIS processing fees.

43. The settlements, among other things, ban defendants from providing immigration services and prohibit them from making any misrepresentations about any goods or services, including federal government affiliation, the terms of any refund or cancellation policy, and their qualification to provide legal advice or services.⁵⁰

5. **Conclusion**

44. The Agencies believe that consumers generally benefit from competition among lawyers, and between lawyers and non-lawyers, in the provision of certain legal-related services. The Agencies have recommended that consumers should be able to choose among lawyers and non-lawyers, unless it is clear that specialized legal training is required. The Agencies recognize, however, that licensing requirements and scope-of-practice policies can have valid consumer protection justifications.

45. The Agencies have generally recommended that regulatory frameworks for legal services allow new and innovative forms of competition to enter the marketplace unless regulation is necessary to achieve some countervailing pro-competitive or pro-consumer benefit, such as protecting the public from significant harm.

the lawyer has or seeks a professional involvement. A communication is false or misleading if it . . . compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernable manner: 'No aspect of this advertisement has been approved by the Supreme Court of New Jersey.'").

49 See Press Release, FTC, FTC Action Bans Defendants from Providing Immigration Services (Jan. 24, 2012), <https://www.ftc.gov/news-events/press-releases/2012/01/ftc-action-bans-defendants-providing-immigration-services>.

50 The consent orders are for settlement purposes only and do not constitute an admission by the defendants that the law has been violated. Consent orders have the force of law when approved and signed by a district court judge.

46. Regulation of new products and services relating to legal services should therefore focus primarily on deterring unfair or deceptive advertising and marketing practices, and addressing other consumer protection issues such as privacy, data security, or identity theft. The Agencies have generally recommended that any restrictions be narrowly drawn so that consumers may still receive the benefits of “disruptive” innovations in the legal services marketplace.