ILLINOIS STATE
BAR ASSOCIATION

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April 3, 2020

Jerry Larkin
Administrator
Illinois Attorney Registration and Disciplinary Commission

(information@iardc.org)

Dear Administrator Larkin:

Thank you for the opportunity to provide both general and specific comments on the February 3, 2020, ARDC Intermediary Connecting Services Proposal ("Proposal"). The Illinois State Bar Association's comments are set out below. In general, the ISBA supports the proposal.

I. <u>General Comments</u>

The ISBA acknowledges and appreciates the ARDC's willingness to meet with ISBA leaders on several occasions during the last 18 months to discuss the draft Proposal. As you know, the ISBA for many years has been diligent in providing the practicing bar's response to the changing legal environment, not only by raising the level of understanding of these changes within the bar, but also by proposing relevant regulatory reforms to the Illinois Supreme Court. These issues continue to be of paramount importance to the ISBA.

The ISBA also acknowledges that the Proposal is a significant advancement from the earlier (2018) ARDC Matching Services Study. As you know, on August 31, 2018, the ISBA leadership expressed a number of concerns about that Study in written comments to the ARDC. It appears that the Proposal addresses a number of those concerns. In addition, it appears that the Proposal incorporates some of the concepts contained in the ISBA's February 21, 2018 "lead generation" proposal. The ISBA believes that these material changes are a positive development.

The ISBA is pleased to note that the Proposal does not appear to negatively impact any aspect of Illinois Rule of Professional Conduct 5.4, including that Rule's prohibition on fee-sharing with non-lawyers. As you know, issues related to fee-sharing have been a major concern of the ISBA (and bar associations in many other jurisdictions as well). The ISBA continues to believe that IRPC 5.4's purpose of preserving a lawyer's professional independence of judgment and other client centric protections represents a necessary core value of the profession. The Proposal's preservation of the prohibition on fee-sharing also appears consistent with the Court's longstanding precedent that fee-sharing is against public policy. *O'Hara v. Ahlgren*, 127 Ill.2d 333 (1989).

It is important that the Proposal also includes safeguards for the public. The Proposal's rigorous registration requirements would appear to be sufficient to ensure that "fly-by-night" operations are eliminated. The various disclosures concerning business operations, lawyer participation, selection criteria, fees, and others are reasonable efforts to ensure transparency so that legal consumers and lawyers can make reasoned decisions about working with an ICS.

Also, as described in its accompanying narrative, the Proposal seems well positioned to address one significant aspect of "market inefficiency" that may be negatively impacting the public's access to justice: consumer education and the perception that a life issue is not a legal one or that a lawyer may not be able to provide meaningful services. The Proposal's focus on facilitating more connections between lawyers and those in need of legal services through greater, more accessible, and more technologically advanced advertising opportunities, particularly online, is appropriate.

In addition, the Proposal has the potential to benefit lawyers. With the facilitation of more connections between lawyers and those in need of legal services, it is reasonable to presume more lawyer-client relationships will be formed resulting in an economic benefit to lawyers.

Finally, it is important to recognize what the Proposal does not do. The Proposal does not, appropriately in the ISBA's view, put the ARDC or the Court on a path of fundamental change in the legal profession and legal services industry. As the ARDC knows, a few states (Arizona, Utah, and Washington) have begun to experiment with expanding the role of non-alawyers (individuals and entities) in providing legal services to the public (while other states studying these issues, such as California and New Mexico, seem to be taking a "go slow" approach). This "re-regulation" of the legal services industry is primarily designed to lower the cost of legal services in order to encourage and facilitate more consumers accessing the justice system and otherwise addressing their legal needs. This is a valid and important goal that the ISBA supports. However, and no matter how well intended, many of these re-regulation efforts do not appear to be supported by any empirical data that demonstrates they will have a positive impact on access to justice or the legal system, or are even targeted at consumers most in need. The ISBA believes the Proposal appropriately seeks to find a well-reasoned means to help the public access legal services while maintaining a robust, competent, and effective legal profession in service to the its clients and the public.

II. Specific Comments

In addition to the above general commentary, the ISBA has several comments, questions, and concerns about specific sections of the Proposal. For ease of reference they are numbered and listed below. Depending on how these items are addressed by the ARDC, additional comments may be forthcoming. In any event, the ISBA looks forward to continuing its dialogue with the ARDC on its Proposal.

A. Proposed Revisions to the Illinois Rules of Professional Conduct

1. *Proposed IRPC 7.2(b)(1)*. Many ISBA members expressed concern with the potential disciplinary consequences for lawyers unknowingly participating in a disciplined or unregistered ICS. Particularly problematic was a concern that an ICS may be registered when a lawyer begins a relationship with it but that the ICS's status subsequently may change without any kind of notice to the participating lawyer. The ISBA suggests that the ARDC consider some other type of potential lawyer disciplinary trigger such as eliminating the "reasonably should know" language.

2. *Proposed IRPC 7.2(c)(2)*. The deletion of "legal services plan" seems unrelated to the focus of the proposal. Because it appears that "legal services plans" are not defined as an ICS (and in fact are potentially very different), its deletion appears unnecessary. We believe the legal service plan issues is

best reserved for another study that focuses on those plans as means to improve access to justice on its own merits.

3. *Proposed IRPC 7.2(c)(3)*. The Proposal appears to allow an ICS fee structure *only* where the ICS results in a potential client hiring a lawyer (as opposed to paying a fee just a "connection" or "lead" that may or may not result in the formation of a lawyer-client relationship). This raises fee-sharing concerns but also appears too restrictive. Consistent with IRPC 7.2, Comment [5], and other professional responsibility authority, an ICS should be allowed to develop a fee structure that allows a participating lawyer to pay for its services regardless of whether the lawyer is ultimately hired by a prospective client. The ISBA believes that a true fee for lead generation is payable upon generation of a LEAD. That fee should be payable for that service and not based upon an engagement.

4. The Proposal appears to allow an ICS to set (and then advertise) fees for specific types of legal services offered by participating lawyers (e.g. $500 for a will). As you know, the ISBA raised this as an issue, but has taken no formal position on it. The ISBA's concern is whether an ICS setting a fee for a particular legal service would artificially drive the cost of legal services down in a "price war" environment among lawyers, with perhaps the public suffering the consequences of insufficient or incomplete representations by lawyers motivated by retaining clients by volume rather than individualized (bespoke) services. The ISBA believes additional clarification on this point may be warranted.

5. *Proposed IRPC 7.2(c)(3)*. This paragraph uses the term "connecting fee." It also uses the term "usual charges" in relation to what a participating lawyer or user must pay to use the ICS's services. Other provisions of the proposed rule merely reference "fees" (730 II.(5)(vi) and 730 II.(6)(vi)). The ISBA believes consistency, if applicable, could be beneficial for the overall interpretation of the rule.

6. *Proposed IRPC 7.2, Comment [6]*. The proposed last sentence of Comment [6] uses the term "fee splitting." It appears the term used in the IRPC is "fee-sharing."

B. Proposed New Supreme Court Rule 730

7. *Proposed 730 II. (i)(6)(i)*. In addition to prohibiting an ICS from interfering with the attorney-client relationship and a participating lawyer's independent professional judgment, an ICS should be prohibited from impeding a participating lawyer's compliance with all other professional restrictions. This is of critical importance. The ISBA would suggest language similar to: the ICS shall not "(i) interfere with or attempt to interfere with the attorney-client relationship between participating lawyers and their clients, the independent professional judgment of its participating lawyers regarding their clients legal matters, *or the participating lawyers compliance with the Illinois Rules of Professional Conduct*."

8. *Proposed 730 I.(b)(3)*. The use of the term bar association "operated" and legal aid organization "operated" may be ambiguous and too restrictive. Such language could be interpreted as prohibiting bar associations or legal aid organizations from employing, hosting, or partnering with third-party technology vendors that have developed, and may own, maintain, and to some degree "operate" directories or referral platforms. Following the existing pattern of the IRPC, perhaps "operated" could be deleted.

9. *Proposed 730 II.(a)(1)*. The ISBA believes that as a matter of consumer transparency, an additional subparagraph should be added (or otherwise the rule be clarified) that requires an ICS to disclose its method of calculating the usual charges (or connecting fees) it requires a participating lawyer or user to pay. This would merely compliment the obligation (at least to the participating lawyer) in proposed IRPC 7.2(c)(3)(iv).

10. *Proposed 730 II.(a)(1)*. The ISBA believes that as a matter of consumer transparency, an additional subparagraph should be added (or otherwise the rule be clarified) that requires an ICS to disclose its dispute resolution process.

11. *Proposed 730 II.(c)(2)*. As a purely legal matter, the ISBA has concerns about the authority of the Court or the ARDC to compel the remittal of 0.25% of an ICS's previous year's total revenue as part of a registration fee. The ISBA does not question the motives behind the registration fee or its intended use for access to justice projects. However, the ISBA is concerned that this might establish a precedent applicable to lawyer registration fees. In this context, the ISBA would be wholly opposed to such a registration fee based on revenue. (Relevant to this point, it should not go unnoticed that in 2018 Illinois lawyers reported 2 million hours of pro bono work and $18 million in contributions to legal aid organizations.)

12. Related to the issue of requiring an ICS to be open to all Illinois licensed lawyers in 730 II.(i)(5)(i), has the ARDC considered whether an ICS can be restricted to certain users? For example, can B.I.G. Corp. establish an ICS open only to its paid members or subscribers?

13. *Proposed 730 II.(i)(5)(v)*. Because not all ICSs may provide a "rating criteria," this paragraph should be prefaced with "if applicable…."

14. *Proposed 730 II.(i)(5)(vii)*. This provision appears somewhat ambiguous. An ICS does not "permit" a lawyer to disclose the basis or rate of the lawyer's fee. That disclosure is required under IRPC 1.5(b). Nevertheless, the ISBA believes the apparent intent behind, and need for, the fee and expense disclosure, is important. Perhaps the obligations could be bifurcated such that: an ICS shall disclose the basis or rate of the lawyer's fee if set by the ICS; and the ICS shall not restrict a participating lawyer's disclosure of the basis or rate of the lawyer's fees and expenses?

15. *Proposed 730 IV*. Under the Proposal, an ICS can be "disciplined" the same as any lawyer. The proposed rule references S. Ct. Rule 770, which includes such sanctions as disbarment, suspensions, and censures. Nevertheless, reference to lawyer disciplinary sanctions seems misplaced as applied to an ICS business entity. More relevant for disciplinary purposes may be S. Ct. Rule 779 allowing contempt proceedings and injunctive relief for matters involving UPL.

C. Proposed Rule 220

16. The ISBA concurs in the proposed protections afforded communications between an ICS and its users. In addition, however, it may be appropriate for the ARDC to consider adding language to protect consumer information and data from being sold, or used, by an ICS for purposes unrelated to the legal connection. An example of such language is:
"220(c). Potential Client Information. A lawyer-client connecting service must not sell, transfer, or disclose personal information about potential clients to third parties for purposes unrelated to: (1) seeking or obtaining a connection with a lawyer participating in the service for the rendition of legal services; or (2) facilitating the rendition of legal services by a participating lawyer in the lawyer-client connecting service.

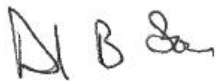
III. Conclusion

Today, it is unquestionably an understatement to say that the legal profession and the administration of justice are being subjected to profound economic, technologic, and attitudinal pressures unheard of even twenty years ago. As acknowledged by Chief Justice Lloyd Karmeier in the preface of the 2019-2022 Illinois Judicial Branch Strategic Agenda, "growing economic disparities threaten the stability

of many of our communities and have placed meaningful access to the court system beyond the reach of a growing number of poor and middle-class families." The pressures on the legal system are complex and multifaceted with no single cause or solution. The ISBA believes the Proposal, while capable of improvement, is nevertheless a reasonable and good faith effort to make legal services more widely known, transparent, and accessible to those who may need such services. As such, it advances the Court's first Strategic Agenda goal of ensuring accessible justice and equal protection under the law. (The current public health crisis should not go unmentioned. In this context, the availability of appropriately regulated intermediary connecting services might prove to be an important on-line and easily accessible resource for consumers in need of legal services.) The Proposal also has the important benefit of fitting within existing norms of professional conduct and preserving fundamental principles of lawyer regulation: professional independence and protecting the interests of the public and clients.

In closing, the ISBA appreciates the opportunity to provide the above comments. In keeping with the February 3, 2020 direction of the Court, the ISBA looks forward to additional opportunities to discuss and collaborate with the ARDC on this proposal. If you have any questions concerning these comments or related matters, please do not hesitate to contact me.

Very truly yours,



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