SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CHAD CONLEY, Plaintiff, vs. DAVE JONES in his capacity as Commissioner of the California Department of Insurance, Defendant.	Case No.: BC630383 STATEMENT OF DECISION AFTER COURT TRIAL Judge Elizabeth R. Feffer Department 39 Trial Date: November 30, 2017 Submitted Date: Action Filed: August 11, 2016

The above-captioned matter was tried before the Honorable Elizabeth R. Feffer, Judge Presiding, on November 30, 2017 in Department 39 of the above-entitled court. John M. Rorabaugh, Esq. appeared on behalf of Plaintiff Chad Conley. Laura E. Robbins, Deputy Attorney General, appeared on behalf of Defendant Dave Jones, in his capacity as Commissioner of the California Department of Insurance.

Oral and documentary evidence was introduced on behalf of the parties. The cause was subsequently argued via closing briefs, and taken under submission on December 19, 2017. On January 17, 2018, the court, having considered all the evidence and arguments of counsel, issued its tentative statement of decision in accordance with Code of Civil Procedure § 632 and Rule 3.1590 of the California Rules of Court. Only defendant filed a timely response thereto. The court hereby issues its final statement of decision:

This case presents a challenge by Chad Conley, a licensed bail agent, to the California Insurance Commissioner's regulations barring bail agents from referring attorneys to arrestees. (Cal. Code Regs., tit. 10, section 2071.) Conley contends the regulation is outside of the scope of the authority granted to the Commissioner by the Legislature. He also contends the regulation violates bail agents' right to freedom of speech. (U.S. Const., Amend. 1.)

FACTUAL AND PROCEDURAL BACKGROUND

I. PROCEDURAL HISTORY

On December 1, 1941, the Insurance Commissioner of the State of California (hereinafter "Commissioner") adopted a regulation prohibiting bail agents from making attorney referrals as Regulation 23 in Ruling 21.[1] Regulation 23 read, "No bail agent, bail permittee, or bail solicitor shall in any manner directly or indirectly suggest to any person the name of, or recommend, any attorney or attorneys at law. Nothing contained in this rule shall prevent a bail licensee from following any procedure prescribed by the local Bar Association or the State Bar of California." (Rulemaking File, at p. 000003.)[2] On November 27, 1953, Ruling 76 repealed Regulation 23 and other regulations. It replaced Regulation 23 with Section 2071, which stated, "No bail licensee shall in any manner, directly or indirectly, suggest the name of or recommend any attorney to any person. Nothing contained in this section, however, shall prevent a bail licensee from following any lawful procedure prescribed by a local bar association of the State Bar of California." (Rulemaking File, at p. 000016.)

On December 30, 1975 the Commissioner issued a Notice of Proposed Changes in the Regulations of the Commissioner that stated in relevant part that Section 2071 would be "Amended to clarify the prohibition against recommending an attorney to arrestees and their representatives." (Rulemaking File, at p. 000061.) It proposed that the revised regulation state, "Suggesting or Recommending Attorney; Prohibited. No bail licensee shall in any manner,

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[1] From May 1, 1936 through September 21, 1994 the Insurance Commissioner adopted proposed regulations by means of rulings, signed by the commissioner.

[2] All references to the Rulemaking File refer to Exhibit A to the Declaration of Laura E. Robbins, which was filed in support of the Commissioner's Request for Judicial Notice. The court granted the Request for Judicial Notice and took judicial notice of the Rulemaking File during trial on November 30, 2017.

directly or indirectly, suggest the name of or recommend any attorney to any arrestee or person purporting to act for or represent an arrestee." (*Ibid.*) Before adopting a revised Section 2071, public hearings were held in both San Francisco and Los Angeles. (Rulemaking File, at pp. 000076-000170.) The Advisory Board stated in relevant part that Section 2071 was being amended "to clarify the prohibition against recommending an attorney" and that it did not object. (Rulemaking File, at p. 000053.) On August 17, 1977, Ruling 219, File No. RH-182, revised Section 2071 to state, "Suggesting or Recommending Attorney; Prohibited. No bail licensee shall in any manner, directly or indirectly, suggest the name of or recommend any attorney to any arrestee or person purporting to act for or represent an arrestee." (Rulemaking File, at p. 000188.)

Section 2071 currently states: "Suggesting or Recommending Attorney; Prohibited No bail licensee shall in any manner, directly or indirectly, suggest the name of or recommend any attorney to any arrestee or person purporting to act for or represent an arrestee." California Code of Regulations, title 10, section 2054.5 defines arrestee as "any person actually detained or subject to detention in custody whose release may lawfully be effected by bail."

II. FINDINGS OF FACT

At trial, the Commissioner presented one witness by declaration, Eric Hubner. Hubner also attended the trial and was available to testify. Conley did not object to Hubner's testimony, and did not present any testimony or other evidence in support of his position. Hubner is a Captain with the California Department of Insurance's Enforcement Division, and has 27 years of law enforcement experience. Much of Hubner's testimony was corroborated at trial by concessions from Conley's counsel, as well as by the applicable statutory authorities.

Based upon the record, the evidence presented, the law governing the rights and duties of bail agents, and the arguments at trial, the court finds: Bail agents have per se conflicts of interest with arrestees. Bail agents' role in the administration of justice is limited. Bail agents may solicit for bail business, that is, they offer (on behalf of a surety) to post bail on an arrestee's behalf, in exchange for a premium (from which they receive a commission) and/or collateral to guarantee payment of the premium and the arrestee's appearance in court. (Ins. Code §§ 1802, 1802.5, 1803.)

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Bail agents owe no fiduciary duty to an arrestee except with respect to any collateral the arrestee may have tendered to the bail agent as a condition of the transaction. (Cal. Code Regs., tit 10, § 2088.) As Conley concedes: "Bail agents, unlike attorneys, don't have a ... general duty of loyalty to the ... people they bail out. It's a business transaction." (Trial Transcript at p. 33, lines 19-21.)

The conflicts of interest between bail agents and arrestees may manifest in many ways. For instance, a bail agent may surrender an arrestee back into custody at any time after the agent has arranged for the arrestee's release from custody. (Penal Code § 1300.) Additionally, in the event the arrestee does not attend his or her scheduled court appearance, the bail agent is authorized to "apprehend, detain, or arrest" the arrestee (now a "bail fugitive") by virtue of the bail agent's licensure by the Department of Insurance. (Penal Code §§ 1299.01 and 1299.02. See also Trial Transcript at p. 6, lines 3-6.)

A bail agent may for any or no reason remand the arrestee back to custody and thereby avoid liability for forfeiture of bail. (Trial Transcript at p. 34, lines 18-23.) Bail agents possess exceptional power and control over arrestees. Bail agents lack any knowledge, training, or experience, by virtue of their status as bail agents, about the competence of defense attorneys to handle an arrestee's case (Hubner Declaration ¶ 7), and bail agents have no legal interest in whether an arrestee is convicted or acquitted — as long as the arrestee appears in court, bail is exonerated. "It's a client-customer basis. Bail agents, essentially, are just insurance agents." (Trial Transcript at p. 36, lines 6-8.) At the same time, despite the lack of training and these inherent conflicts of interest, arrestees and families place excessive and unjustified confidence in bail agents. (Hubner Declaration ¶ 7; Trial Transcript at p. 6, lines 19-21.)

Referral arrangements between bail agents and attorneys undermine the fair administration of justice because they are likely to compromise the attorney-client relationship. For instance, as stated in the Declaration of Eric Hubner, arrestees are entitled to a hearing for bail reduction, pursuant to Penal Code § 1270.1, or for release on their own recognizance, pursuant to Penal Code § 1270. Attorneys who are routinely referred by bail agents are less likely to inform the client of these rights, which are contrary to the financial interests of the referring bail agent. As

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Captain Hubner testified, "[w]e see very few of these hearings being requested." (Hubner Declaration ¶ 10.)

Similarly, arrestees who have been surrendered into custody by the bail agent are entitled to a hearing on the return of their bail premium, pursuant to Insurance Code § 1300(b). Again, according to Captain Hubner, "attorneys who are routinely referred by bail agents are less likely to inform the client of this right, because it conflicts with the financial interests of the referring bail agent. We see very few of these hearings being requested." (Hubner Declaration ¶ 11.) Conley conceded at trial that bail agents are in competition with attorneys for the defendant's money, and that bail agents are better off if the defendant's assets can be used for bail instead of legal defense. (Trial Transcript at p. 10, lines 9-12; p. 32, line 13 - p. 33, line 19.) Thus a low-cost rather than a competent defense is in the best interest of the bail agent. Conley also concedes that there is market pressure upon bail agents to secure the contract with arrestees, and that referral arrangements support the business interests of the bail agent. (Trial Transcript at p. 33, lines 21-23; p. 17, lines 6-16.)

"[C]ontrol over the arrestee's liberty is exploited to steer the arrestee towards an attorney with which the agent has a prior relationship." (Hubner Decl. ¶ 4.) Bail agents control the collateral posted by arrestees or their representatives. Collateral may include the title to homes and cars. (*Id.* at ¶ 5.)

Referral transactions between bail agents and attorneys may be complex and consideration for referrals "can take the form of reciprocal referral schemes, food and beverage, entertainment, tickets to concerts or sporting events, no-interest loans, and other valuable non-cash consideration." (Hubner Decl. ¶ 21.) As a result, "a prohibition against referral fees is insufficient by itself to protect the arrestee from self-dealing by the bail agent and attorney." (*Id.* at ¶ 22.)

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DISCUSSION

I. SECTION 2071 DOES NOT EXCEED THE COMMISSIONER'S AUTHORITY

A. Standard of Review

Regulations "come[] to the court with a presumption of validity." (*Association of California Insurance Companies v. Jones* (2017) 2 Cal.5th 376, 389 ["*ACIC*"].) The burden of demonstrating invalidity is squarely on the challenger. (*Credit Ins. General Agents Assn. v. Payne* (1976) 16 Cal.3d 651, 657.)

Conley mounts challenges to Section 2071, pursuant to Government Code section 11350. Section 11350 provides, in relevant part, "Any interested person may obtain a judicial declaration as to the validity of any regulation or order of repeal by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure." (Gov. Code, § 11350, subd. (a).) The regulation may be declared invalid for multiple grounds including "[t]he agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence." (Gov. Code, § 11350, subd. (b)(1).)

The standard of review is laid out in Government Code § 11342.2, which states, "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." Applying this standard, "courts recognize that the Legislature must be permitted to rely on the peculiar ability of an administrative agency to achieve continuous, flexible, and expert regulation ...." (*Ralph's Grocery v. Reimel* (1968) 69 Cal.2d 172, 176.) A contrary view—where agencies are prevented from exercising their discretion and expertise to address emerging problems—would "suggest that the Legislature had little need for agencies in the first place." (*ACIC*, *supra*, 2 Cal.5th at p. 398, citing *Ralph's Grocery*, *supra*, 69 Cal.2d at p. 172.)

The nature of a regulation may affect how a court undertakes its review. Here, Conley concedes that Section 2071 is a quasi-legislative rule. (Plaintiff's Brief, at p. 13.) "Quasi-

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legislative rules represent 'an authentic form of substantive lawmaking' in which the Legislature has delegated to the agency a portion of its lawmaking power." (*ACIC, supra*, 2 Cal.5th at p. 396, quoting *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10.) "Because [quasi-legislative] rules 'have the dignity of statutes,' a court's review of their validity is narrow: 'If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end.'" (*ACIC, supra*, 2 Cal.5th at p. 397, quoting *Yamaha, supra*, 19 Cal.4th at pp. 10–11.)

"In reviewing the propriety of administrative regulations allegedly promulgated pursuant to a grant of power by the Legislature, this Court undertakes a two-pronged inquiry. (*Ralphs Grocery, supra,* 69 Cal.2d at pp. 174-175.) "Under the first prong of this standard, the judiciary independently reviews the administrative regulation for consistency with controlling law. ... In short, the question is whether the regulation is within the scope of the authority conferred; if it is not, it is void. This is a question particularly suited for the judiciary as the final arbiter of the law, and does not invade the technical expertise of the agency." (*California Chamber of Commerce v. State Air Resources Bd.* (2017) 10 Cal.App.5th 604, 619.) "By contrast, the second prong of this standard, reasonable necessity, generally does implicate the agency's expertise; therefore, it receives a much more deferential standard of review. The question is whether the agency's action was arbitrary, capricious, or without reasonable or rational basis." (*Ibid.*, internal quotation marks and citation omitted.)

"A reviewing court does not superimpose its own policy judgment upon a quasi-legislative agency in the absence of an arbitrary decision." (*Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 594.) "[T]he burden is on the party challenging a regulation to show its invalidity." (*California School Bds. Assn. v. State Bd. of Education* (2010) 191 Cal.App.4th 530, 544, internal quotation marks and citation omitted.)

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B. Section 2071 Is Within the Scope of the Authority Conferred Upon the Commissioner to Regulate the Conduct of Bail Agents

Insurance Code Division 1, Part 2, Chapter 7 (sections 1800 through 1823) (hereinafter, "Chapter 7") governs bail licensees in California. Chapter 7 is a Legislative delegation of broad authority to the Insurance Commissioner to license bail agents, to specify qualifications and conduct of bail agents, to establish educational requirements relating to laws and regulations governing giving of bail, bail undertakings, rights of the accused, apprehension of bail fugitives, and ethics. (See e.g., Ins. Code, §§ 1804, 1806-07, 1810.5 - 1810.7.) Additionally, the Legislature delegated to the Commissioner broad, open-ended rule-making authority:

> The commissioner may make reasonable rules necessary, advisable, or convenient for the administration and enforcement of the provisions of this chapter.

(Ins. Code, § 1812.) "Where, as here, the Legislature uses open-ended language that implicates policy choices of the sort the agency is empowered to make, a court may find the Legislature delegated the task of interpreting or elaborating on the statutory text to the administrative agency." *ACIC*, *supra*, 2 Cal. 5th at p. 393 [broadly interpreting the term administer].) Further, the underlying statutory scheme set forth in Chapter 7 is itself open-ended, expressly leaving many of the particulars of bail license issuance and revocation, and the conduct of bail licensees, to the commissioner's discretion. (See, e.g., Ins. Code §§ 1805, subds. (d) and (h); 1806; and 1807.)

It has long been established that this statutory scheme provides broad authority for the Commissioner to adopt regulations governing the conduct of bail agents:

> The bail bond licensing provisions were adopted to meet a well-known condition which obviously called for some real regulation of the business of furnishing such bail bonds. Such regulation was placed in the hands of the insurance commissioner, and while some statutory regulation was provided he was given a further rule-making power similar to that given to many other administrative agencies, and for similar reasons. While rules so established must be reasonable, it seems inconceivable that it could have been intended to leave the question of their reasonableness exclusively to the criminal courts.

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> Chapter 7 of the Insurance Code provides for the licensing of persons engaged in this business. Section 1805 provides eight grounds for refusing to issue a bail license. Section 1807 provides that such a license may be suspended or revoked for the same reasons. Section 1806 also provides that such a license may be suspended or revoked whenever it is made to appear to the commissioner that the holder of the license is not a fit or proper person to be permitted to hold it. Section 1812 authorizes the commissioner to make reasonable rules for the administration and enforcement of all of the provisions of this chapter. Section 1813 provides that the commissioner may suspend or revoke such a license whenever he finds that the holder has violated any provision of the chapter. By necessary implication the violation of the rules adopted is forbidden by these provisions. Section 1814 then makes the violation of any of the foregoing provisions, or of any such rule, punishable as a criminal offense. This is another provision making the violation of such rules an act forbidden by this code.

(*Smith v. Downey* (1952) 109 Cal.App.2d 745, 748 [bail licensee's suspension affirmed for making gifts to law-enforcement employees for the purpose of inducing bail referrals]. See also, *People v. Dolezal* (2013) 221 Cal. App.4th 167 [regulation prohibiting unsolicited contacts between bail agent and arrestee is constitutional.])

Section 2071 is well within the scope of authority conferred in Chapter 7. According to *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, the degree to which regulations are quasi-legislative, on the one hand, or merely interpretive, on the other, affects the deference they receive. As discussed above, quasi-legislative rules, like Section 2071, "have the dignity of statutes," and thus judicial review of such rules is limited. (*Id.* at pp. 10-11.) Interpretive rules, on the other hand, are accorded less deference: "Because an interpretation is an agency's *legal opinion*, however 'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference [citation omitted]." (*Id.* at p. 11.) "[T]he terms [quasi-legislative and interpretive] designate opposite ends of an administrative continuum, depending on the breadth of the authority delegated by the Legislature." (*Id.* at p. 7, fn. 3.) The *Yamaha* court set forth a "complex of factors," often referred to as the "*Yamaha* factors," that courts must consider when determining the degree of deference to accord to agency regulations. (*Id.* at p. 12.) Applying the applicable *Yamaha* factors to the regulations challenged in this case places the regulations squarely at the quasi-legislative end of the administrative continuum.

Adoption of regulations in accordance with the provisions of the Administrative Procedure Act, Government Code § 11340 *et seq.* (the "APA") is a factor that weighs in favor of judicial

deference. (*Id.* at p. 13.) The current iteration of Section 2071 was adopted pursuant to the APA in 1977. (Rulemaking File, at p. 000202.)

Similarly, the Rulemaking File also contains "indications of careful consideration by senior agency officials," another of the *Yamaha* factors that militates in favor of judicial deference. (*Yamaha, supra*, 19 Cal.4th at p. 13.) Each time the challenged regulations were adopted, the then-sitting Insurance Commissioner of the State of California, who leads the agency, personally signed the ruling. (Rulemaking File, at pp. 000007, 000009, & 000179.)

Another of the *Yamaha* factors which, if present, weighs in favor of deference is "evidence that the agency 'has consistently maintained the interpretation in question, especially if [it] is longstanding.'" (*Yamaha, supra*, 19 Cal.4th at p. 13, citation omitted.)[3] In the instant case, the Insurance Commissioner has consistently maintained the rule barring bail licensees from suggesting or recommending attorneys since December 1, 1941, when Ruling No. 21 was signed. (Rulemaking File Ruling No. 21, at p. 000003 [Rule 23]; Ruling No. 76, at p. 000016 [Section 2071]; and Ruling No. 219, at p. 000188 [Section 2071].) Thus, it is longstanding.

Here, the Legislature twice has affirmatively ratified the regulation by amending Insurance Code section 1814, which since the statute was first enacted in 1937 has always specified penalties for violating the Commissioner's rules, including what is now Section 2071. (Stats. 1937, ch. 654, § 3, p. 1804; Stats. 1976, ch. 1139, § 92, p. 5088; Stats. 2011, ch. 15, § 211.)

"[I]ndications that the agency's interpretation was contemporaneous with the legislative enactment" comprise yet another of the *Yamaha* factors militating in favor of judicial deference. (*Yamaha, supra*, 19 Cal.4th at p.13.) Here, the legislative enactment creating each of the relevant statutory provisions underlying the challenged regulations (Insurance Code sections 1800, 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1812, 1813 and 1814) was signed by the Governor on June 30, 1937. (Stats. 1937, ch. 654, § 3, p. 1800.) Less than five years later, on December 1, 1941, the Insurance Commissioner signed Ruling No. 21, effectuating Rule 23, the first iteration

[3] One of the logical bases for this factor is "a presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it." (*Id.* at pp. 21-22, quoting *Moore v. California State Bd. of Accountancy* (1992) 2 Cal. 4th 999, 1017-1018 (conc. opn. of Mosk, J.).)

of the challenged regulation prohibiting bail licensees from suggesting or recommending attorneys. (Ruling No. 21, pp. 3 and 7.)

One final category of *Yamaha* factors weighing in favor of judicial deference "assume[s] the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion." (*Yamaha, supra*, 19 Cal.4th at p. 12.) Here, the underlying statutory text is open-ended, expressly providing discretion to the Insurance Commissioner, including broad quasi-legislative rulemaking authority to codify this discretion. (Ins. Code, § 1812.) Insurance Code § 1812 provides the Commissioner with express authority to promulgate substantive rules governing the behavior of bail licensees in the performance of their official duties. Insurance Code § 1805(d) ("Section 1805(d)") gives the Commissioner discretion to decline to issue a bail license until he is satisfied that certain conditions are met, including "[t]hat the applicant has not participated in or been connected with any business transaction which, in the opinion of the commissioner tends to show unfitness to act in a fiduciary capacity or to maintain the standards of fairness and honesty required of a trustee or other fiduciary." Insurance Code § 1804(h) states another, even more broadly worded condition: The Commissioner may decline to issue a bail license until he is satisfied that "the applicant is a fit and proper person to hold the license applied for." Insurance Code § 1806 singles out this particular condition as one of the main bases for suspension or revocation of bail licenses, as well as for refusing to issue them: "The commissioner may suspend, revoke or refuse to issue any license under this chapter whenever it is made to appear to him that the holder of such permit is not a fit or proper person to be permitted to continue to hold or receive such license." The Commissioner may, however, in fact "suspend or revoke any bail license for any cause for which he could deny such license." (Ins. Code, § 1807.) Insurance Code § 1814 further states, "The violation of any foregoing provision of this chapter, or of any rule of the commissioner made pursuant thereto, is a public offense, punishable by fine not exceeding ten thousand dollars ($10,000), or by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code, or in the county jail not exceeding one year, or by both that fine and imprisonment." Just as that authority includes barring gifts that might be

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inducements to law enforcement, and includes prohibiting direct solicitation of custodial defendants, it likewise includes rules barring referrals bail agents may make to attorneys.

The Legislature entrusted the Commissioner to fill out the details of the statutory scheme to address specific problems. (*ACIC*, *supra*, 2 Cal.5th at p. 398.) "To conclude that these statutory schemes require the Legislature to define in advance every problem it expects an agency to address is to suggest that the Legislature had little need for agencies in the first place." (*Ibid.*)

Thus, the express delegation of rulemaking authority encompasses the other professionals to whom bail agents may refer their clients. The Commissioner is regulating bail agents rather than attorneys. Section 1805(d) provides that the Commissioner may determine what is fitness to act in a fiduciary relationship with the arrestee's property, and, more generally, to hold a bail license at all.

This provides the Commissioner with authority to prevent bail agents from referring arrestees to attorneys in order to reduce the likelihood of overreaching and undue influence, as well as conflicts of interest that will interfere with the relationship between the bail agent and the arrestee and, potentially, between the arrestee and the attorney for whom the bail agent has procured the arrestee's business.

Just as attorney referrals by bail licensees are not specifically addressed in the underlying statutes, the bail statutes also contain no mention of record keeping requirements, for instance, but the court nonetheless upheld provisions of the challenged bail regulations specifying detailed record-keeping requirements. The court upheld these (and all of the other challenged) provisions: "The provisions for giving proper receipts and keeping proper and complete records, showing exactly what was done, are certainly reasonable and are absolutely essential to any proper regulation of this business." (*Id.* at p. 749)

At trial Conley conceded that the Legislature had indeed granted the Commissioner authority to promulgate record-keeping requirements even though there was no mention of record keeping requirements in the underlying statutes. (Trial Transcript at p. 12, lines 23-26.) Conley reasoned that because, in his view, such requirements were necessary, the Commissioner had the requisite rulemaking authority. (Trial Transcript at p. 12, line 26- p. 13, line 4.) The court agrees

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but cannot credit the corollary reasoning urged by Conley, that because in Conley's view Section 2071 is unnecessary the Commissioner lacked the requisite rulemaking authority.

The rule barring bail agents from referring arrestees to attorneys is reasonably necessary to the administration of justice. It protects arrestees from overreaching and undue influence by bail agents whom the arrestees may not readily know have a bona fide conflict of interest with them. After all, as Conley conceded at trial, bail agents do not have a duty of loyalty to arrestees. (Trial Transcript at p. 33, lines 19-21.) It inhibits professional relationships that tend to undermine an attorney's undivided duty of loyalty to his or her client, in favor of obtaining more referrals from bail agents whose interests conflict with those of the arrestee. In short, it ensures that the unique access and control bail agents have over arrestees, and the trust placed in them by arrestees, not be used in any way other than to perform the bail agent's exclusive statutory role in the administration of justice: Securing bail for arrestees from sureties upon conditions that will induce the arrestee to appear and face charges as required by the order of the court.

Conley makes much of Insurance Code § 1814, which authorizes criminal penalties for violation of the bail bond regulations. That statute, however, does not affect the court's analysis here for a number of reasons. First, only if a criminal prosecutor can prove criminal intent can a violation of Section 2071 be prosecuted as a crime, so Conley's concerns about "innocent violations" are not persuasive. "It is an established principle that every true crime (as distinguished from 'regulatory' or 'public welfare' offenses) ordinarily requires a general criminal intent or 'mens rea.' This principle is expressed in [Penal Code section] 20: 'In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence'." (1 Witkin, Cal. Crim. Law 4th Elements § 1 (2012).) "In *People v. Vogel* (1956) 46 C.2d 798..., the court observed: 'So basic is this requirement that it is an invariable element of every crime unless excluded expressly or by necessary implication.' (46 C.2d 801.)" (*Id.*)

Second, the fact that the Legislature views bail agents' obedience to the laws and regulations governing their licensure seriously enough to impose criminal sanctions for their violation only underscores the Legislature's intent that bail agents respect their limited role, and not interfere in the administration of justice beyond the role they are licensed to perform.

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Nevertheless, whatever concerns Conley may have with the Legislature enacting section 1814 to compel compliance with the bail regulations, he has not presented authority that section 1814 requires a different analysis of the Commissioner's authority under section 1812.

Finally, the question before the court is not whether Insurance Code section 1814 is constitutional as applied to Section 2071. Indeed, Conley's Complaint does not even lodge a cause of action challenging Section 1814. Rather, the question is whether the statutory charge to the Insurance Commissioner to regulate the conduct of bail agents as licensees, and the authority to "make reasonable rules necessary, advisable, or convenient for the administration and enforcement of the provisions of this chapter" (Ins. Code, § 1812) includes the power to prohibit attorney referrals to arrestees, and is reasonably necessary to implement the purpose of the statute. As set forth above, it does, and as set forth below, it is.

C. The Commissioner Was Not Arbitrary, Capricious, or Without Reasonable or Rational Basis in Enacting Section 2071

The Commissioner was not arbitrary, capricious or without reasonable or rational basis in enacting Section 2071. Section 2071 prevents the bail licensee from overreaching and exerting undue influence with respect to the bail arrestee's choice of counsel. Attorney referrals by the licensee have the potential to violate this standard.

Even in non-monetary transactions, as Hubner explained, there is a potential for self-dealing when bail licensees refer an attorney. Reciprocal referral streams from licensee to attorney, and vice versa, which often are in non-cash compensation, can potentially represent a valuable asset. In any event, as above-stated, it is not only the consideration that creates the mischief, but the undue influence, potential for overreach, and lack of unity of interest between them that interferes with the administration of justice. Bail agents possess excessive power and control over arrestees. Bail agents lack any knowledge, training, or experience, by virtue of their status as bail agents, about the competence of defense attorneys to handle an arrestee's case, and bail agents have no legal interest in whether an arrestee is convicted or acquitted — as long as the arrestee appears in court, bail is exonerated. At the same time, despite the lack of training and

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these inherent conflicts of interest, arrestees and families place excessive and unjustified confidence in bail agents. (Hubner Declaration ¶ 7.)

As a result, the Commissioner was not arbitrary, capricious, or without reasonable or rational basis in enacting Section 2071.

Posing hypothetical situations where the Insurance Commissioner might devote resources to seeking to discipline a bail agent solely for referring an arrested family member to an attorney, does not amount to a showing that the challenged regulation is arbitrary, capricious or without rational basis.[4] Conley of course does not actually face this prospect; his is a facial challenge. "A facial challenge is 'the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid.'" (*Association of California Ins. Cos. v. Poizner* (2009) 180 Cal.App.4th 1029, 1054, citing *T.H. v. San Diego Unified School Dist.* (2004) 122 Cal.App.4th 1267.)[5]

II. SECTION 2071 DOES NOT VIOLATE FREE SPEECH PRINCIPLES UNDER EITHER THE UNITED STATES OR THE CALIFORNIA CONSTITUTION

Section 2071 does not violate the First Amendment free speech rights of bail agents. The United States Supreme Court has explained that "[s]peech regulation is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." (*Reed v. Town of Gilbert, Ariz.* (2015) 576 U.S. __ [135 S.Ct. 2218, 2227], citations omitted.) Rather than restricting attorney referrals for "the idea or message expressed," Section 2071 prohibits bail agents from referring their clients to attorneys. Section 2071 prevents bail agents from using their unique access to, and power over, arrestees to overreach and exert undue

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[4] Nor does the proffered hypothetical identify any appreciable burden imposed on the licensee by the challenged provision, since in this case nothing in the regulations would bar the licensee himself from engaging an attorney to represent his family member.

[5] (See also *ACIC, supra,* 2 Cal.5th at p. 401 ["Because the Association has advanced only a facial challenge to the Regulation, its burden was to show, at the least, that a noncompliant estimate would not be misleading in the generality or vast majority of cases."]; *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 39 [facial challenge to constitutionality of regulation cannot succeed based on "some future hypothetical situation"]; *Sanchez v. State* (2009) 179 Cal.App.4th 467, 487 [regulations valid where plaintiff fails to demonstrate that they "inevitably pose a present total and fatal conflict with applicable constitutional provisions"].)

influence on arrestees' decisions with respect to legal representation, by means of "direct, personalized communication in a coercive setting." (*Tennessee Secondary Sch. Athletic Assn. v. Brentwood Acad.* (2007) 551 U.S. 291, 296 [holding that an athletic association did not violate a private school's free speech rights by sanctioning the school because a coach sent letters to recruits in violation of the athletic association's rules].) Thus, any burden on speech survives review.

A. Section 2071 Concerns Commercial Speech

Historically, courts have afforded a lesser degree of constitutional protection to commercial speech than many other forms of expression. Indeed, the California Supreme Court has recognized that the United States Supreme Court has held that "[T]he [federal] Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 952, quoting *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 64-64.) "Commercial speech," at its core, is speech that does "no more than propose a commercial transaction" and, more broadly, is speech that goes beyond proposing such a transaction but yet "relate[s] solely to the economic interests of the speaker and its audience." (*Cincinnati v. Discovery Network, Inc.* (1993) 507 U.S. 410, 420-423, citations omitted.) "Speech is commercial in its content if it is likely to influence consumers in their commercial decisions." (*Kasky v. Nike, Inc., supra,* 27 Cal.4th at 969.) "[E]conomic motivation is relevant but not conclusive and perhaps not even necessary." (*Ibid.*)

The speech impacted here, a bail agent's recommendation of an attorney to a client, is commercial speech because it proposes a commercial transaction between the arrestee and the suggested attorney. Conley's reply brief at page 14, lines 10-17, seeks to rely on *Cincinnati v. Discovery Network* (1993) 507 U.S. 410 in support of his suggestion that Section 2071 restricts other than commercial speech, for the reason that attorney referrals by bail agents to arrestees, "do not go to the 'economic advantage of the speaker.'" In support of this proposition, Conley misquotes *Cincinnati v. Discovery Network* (1993) 507 U.S. 410. The phrase "economic advantage" does not appear in that case. The page range indicated in the citation to *Cincinnati* at page 14, line 14 of Conley's brief does, however, include another iteration of the actual test for

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commercial speech: "In *Fox*, we described the category [commercial speech] even more narrowly, by characterizing the proposal of a commercial transaction as '*the* test for identifying commercial speech.' 492 U.S. At 473-474 (emphasis added [by the *Cincinnati* court])." The reference to *Superior Court of San Diego County v. Kevin J. Kinsella* (2016) 1 Cal.App.5th 984, 994, in Conley's opening brief addresses the other flaw in his argument: "Commercial speech usually involves a speaker who is likely to be someone engaged in commerce — that is, generally, the production, distribution, or sale of goods or services — ***or someone acting on behalf of a person so engaged.***" (Plaintiff's Opening Trial Brief, p. 19, lines11-14 [emphasis modified].) Thus, the fact that the commercial transaction was proposed not for "the speaker" but for an attorney the speaker is acting on behalf of does not affect the commercial character of the speech. Accordingly, the court is not persuaded that Section 2071 regulates noncommercial speech.

It has long been established that there is a "'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." (*Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980) 447 U.S. 557, 562, quoting *Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 455-456.) The United States Supreme Court has noted that the First Amendment "therefore applies lesser protection to commercial speech than to other constitutionally guaranteed expression." (*Id.* at pp. 562-563.)

B. Section 2071 Does Not Violate Free Speech Rights Under the U.S. or California Constitutions

The United States Supreme Court has regularly adopted the test announced in *Central Hudson* to resolve commercial speech First Amendment challenges, which are reviewed under intermediate scrutiny. (*Greater New Orleans Broad. Assn. v. United States* (1999) 527 U.S. 173, 183.)

Regulation of commercial speech is reviewed according to the four-prong, intermediate-scrutiny test announced in *Central Hudson*. (*Retail Digital Network, LLC v. Appelsmith* (9th Cir. 2017) 861 F.3d 839, *en banc*.) The first prong asks whether the commercial speech at issue

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concerns a lawful activity and is not misleading. (*Central Hudson, supra*, 447 U.S. at p. 566.) If so, then the second prong asks whether the government asserts a substantial interest; the third prong asks whether the government's regulation directly advances the asserted interest; and the fourth prong asks whether the regulation is no more restrictive than necessary to serve that interest. (*Ibid.*)

In the commercial speech context, the Commissioner is free to regulate "based solely on history, consensus, and simple common sense." (*Fla. Bar v. Went For It* (1995) 515 U.S. 618, 628, quotation marks omitted [holding that a state bar rule that placed a 30 day restriction on mail to accident victims did not violate free speech rights].) Regulators "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." (*City of Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 52; citation and quotation marks omitted.) They may do so based on evidence "reasonably believed to be relevant to the problem . . . ." (*Id.* at p. 51.) Empirical data does not need to support every restriction on commercial speech; common sense is enough. (*See, e.g., City of Los Angeles v. Alameda Books, Inc.* (2002) 535 U.S. 425, 439, plurality opinion [explaining that a city did not need empirical data to support its conclusion that its adult-bookstore ordinance would lower crime]; *Ctr. for Fair Pub. Policy v. Maricopa County* (9th Cir. 2003) 336 F.3d 1153, 1168 [rejecting an argument that local government needed empirical data to support its ordinance restricting the hours of sexually oriented businesses]; see also *Williams-Yulee v. Fla. Bar* (2015) 135 S. Ct. 1656, 1666 [accepting as "intuitive" the connection between Florida's judicial canon preventing judges from personally soliciting campaign funds and the state's interest in protecting the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary].)

When determining whether a law satisfies the narrow-tailoring test, courts look for a fit between the government's ends and the means chosen to accomplish those ends that is reasonable, "that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." (*Bd. of Trustees v. Fox* (1989) 492 U.S. 469, 480, quotation marks omitted.) So long as a statute falls within those bounds, courts "leave it to governmental decisionmakers to judge what manner of regulation may best be employed." (*Ibid.*) Even in the

context of strict scrutiny, the United States Supreme Court has cautioned against requiring that speech-related statutes be perfectly tailored to meet lawmakers' goals. (*See Williams-Yulee*, *supra*, 135 S. Ct. at p. 1671.)

1. The Commercial Speech Prohibited by Section 2071 Is Inherently Misleading So Rational Basis Review Applies and Section 2071 is Rationally Related to a Legitimate State Interest

a. The Speech Restricted By Section 2071 Is Inherently Misleading Because Within the Referral Is an Implied False Representation That the Bail Agent's Interests Are Aligned With the Arrestee's, Rather Than In Conflict

Under the United States Supreme Court's decision in *Central Hudson*, the threshold inquiry for assessing commercial speech restrictions is whether the speech at issue is misleading or concerns unlawful activity. (*Central Hudson*, *supra*, 447 U.S. at p. 566.) "Inherently misleading" speech is speech that "inevitably will be misleading" to consumers. (*Bates v. State Bar of Ariz.* (1977) 433 U.S. 350, 372.) The "inherently misleading" character of speech may be inferred from the "particular content or method of the advertising" as well as from "experience [that] has proved that in fact such advertising is subject to abuse." (*In re R.M.J.* (1982) 455 U.S. 191, 203.) "Misleading advertising may be prohibited entirely." (*Ibid.*) Requirements of this type are subject to rational basis review and are constitutional so long as they bear "'some rational relationship to a conceivable legitimate state purpose.'" (*Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329. 364, quoting *California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 209; see also *Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 651.)

Here, the Commissioner presented convincing argument that attorney referrals by bail agents to arrestees are inherently misleading. The nature of the referral of an attorney implies a necessarily false representation that the bail agent shares the arrestee's interest in retaining competent counsel. But, as explained above, the bail agent has no such interest, and in fact effective assistance of counsel to the arrestee is in many circumstances adverse to the financial interests of the bail agent. Contrary to Conley's argument, therefore, the inherently misleading nature of the communication is not whether the attorney that would be referred is competent. Given the context of the interaction between bail agent and arrestee, *any* suggestion made by the

bail agent to the arrestee is likely to be understood by the arrestee as carrying much greater weight than suggestions made by others. The bail agent is, after all, licensed by the State to perform a limited official function having to do with the administration of justice and, more significantly, has the power to secure the arrestee's freedom or to surrender him back into custody, for any or no reason, or as Conley admits, "because of a bad dream." (Trial Transcript at p. 34, lines 22-23.)

Additionally, when a bail agent recommends an attorney to an arrestee, the statement is likely to mislead the arrestee to believe, mistakenly, that one or more of the following is true:

(1) The arrestee needs to engage an attorney, and must do so immediately;

(2) The attorney being recommended is the best or at least a competent attorney that can successfully represent the arrestee;

(3) Engaging the attorney recommended by the bail agent is a condition to the arrestee's being released from custody, or to the arrestee's remaining out of jail;

(4) Engaging the recommending bail agent is the only way the arrestee can secure the services of the recommended attorney;

(5) The bail agent's status as a State licensee gives him special expertise to direct the arrestee's legal defense or has unique insight into attorneys' competence to handle the arrestee's defense; and

(6) The attorney is secondary to the bail agent in protecting the arrestee's interests.

Conley alleges the bail agent is motivated to make the referral by a purely philanthropic urge to serve her fellow human being because he or she shares a common client base with criminal defense attorneys. The record, however, contains no evidence to support the notion that bail agents generally act philanthropically on behalf of arrestees. Indeed, their role is decidedly not to do so. A bail agent's limited role in the administration of justice is set forth below. Just as a judge's or prosecutor's role does not include referral of a lawyer to a defendant, neither does the role of a bail agent.

Conley also alleges that the bail agent can provide sufficient explanations and disclaimers to ensure that the arrestee is not misled in any of the ways mentioned above, but the supposition

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begs the question of the purpose of the intended referrals in the face of disclaimers that would necessarily need to confess conflicts of interest and disclaim competency to recommend an attorney. Even so, the implication that the bail agent is the arrestee's trusted friend and ally would still be unavoidable. The bail agent's interests are not aligned with the arrestee's interests. The bail agent's interests are contrary to the arrestee's because if, for instance, the arrestee is bailed out, the bail agent may at any time surrender the arrestee back into custody. If the bail agent is able to show that for any reason the risk that the arrestee will fail to appear is materially increased, the bail agent may also keep the arrestee's premium. (Cal. Code Regs., tit. 10, § 2090.) Similarly, if the arrestee fails to appear, the bail agent may seize any collateral posted by the arrestee. Even if the only effect of the referral is that the bail agent gains the arrestee's confidence, that result is itself misleading and may encourage the arrestee into confiding in the bail agent when doing so would not be in the arrestee's interest.

As explained in more detail below, Section 2071 easily passes this level of review as it is rationally related to a legitimate state interest. (*Pickup v. Brown* (9th Cir. 2014) 740 F.3d 1208, 1231.)

b. Section 2071 Advances Legitimate State Interests

Section 2071 advances legitimate state interests. First, "bail agents are licensed professionals who are an integral part of the criminal justice system" and the "state has an interest in regulating their work to make sure that they operate in a fair, honest and professional manner." (*People v. Dolezal* (2013) 221 Cal.App.4th 167, 174.) The Commissioner has a substantial interest in regulating and licensing the professions. (*Fla. Bar v. Went For It*, *supra*, 515 U.S. at p. 624; *see also Edenfield v. Fane* (1993) 507 U.S. 761, 770 ["We have given consistent recognition to the State's important interests in maintaining standards of ethical conduct in the licensed professions."].)

Second, bail agents have unique and often private access to arrestees, and hold State-licensed authority to grant or deprive them of their liberty. "Most people find being in jail to be a very stressful situation. For many arrestees, a bail agent is the only person who can secure their release. But an arrestee may also lack information about his or her court schedule or custody

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status..." (*People v. Dolezal*, *supra*, 221 Cal.App.4th at p. 175.) At trial, Conley conceded that bail agents typically engage arrestees during "some of the most difficult parts of their lives." (Trial Transcript at p. 6, lines 19-20.) Section 2071 prevents the bail licensee from overreaching and exerting undue influence in his dealings with this vulnerable population. Even in non-monetary transactions, there is a potential for self-dealing when bail licensees refer an attorney. Reciprocal referral streams from licensee to attorney, and vice versa, can potentially represent a valuable asset. (*See*, Commissioner's trial brief p. 20 l. 13, providing citation to "Bail bondsman sentenced in referral scheme," Vik Jolly, *Orange County Register*, January 27, 2011 (http://www.ocregister.com/2011/01/27/bail-bondsman-sentenced-in-referral-scheme/; see also "Family questions attorney's ties to bail bonding company," Nancy Amons, WSMV-TV.com – Nashville, May 2, 2017 (http://www.wsmv.com/story/35321398/family-questions-attorneys-ties-to-bail-bonding-company)); and to Declaration of Eric Hubner.) Solicitation by those acting as "agents or runners" for attorneys "present[s] similar problems" to solicitation by attorneys themselves. (*Ohralik v. Ohio State Bar Assn.*, *supra*, 436 U.S. at p. 466, fn. 22 [holding that a ban on in person solicitation of accident victims did not violate free speech rights].)

Many of the coercive conditions attendant upon in-person solicitation by an attorney that are identified in *Ohralik* may also be present when a bail agent suggests or recommends a particular attorney to an arrestee: The communication "may exert pressure and ... demand[] an immediate response without providing an opportunity for comparison or reflection; it may "provide a one-sided presentation and ... encourage speedy and perhaps uninformed decisionmaking"; and "there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close" to the arrestee. (*Id.* at p. 457.) This kind of communication by a bail agent to an arrestee can readily entail the same kind of overreaching and undue influence as can be present when the bail agent solicits on his own behalf: "Direct solicitation of an arrestee by a bail agent poses the same 'dangers of undue influence and overreaching that exist when a lawyer chases an ambulance.'" (*Dolezal*, *supra*, 221 Cal.App.4th at p. 178, quoting *Tennessee Secondary Sch. Athletic Assn. v. Brentwood Acad.* (2007) 551 U.S. 291, 298.) But worse than ambulance-chasing attorneys, referrals by bail agents bear the

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additional mischief injecting the bail agent's own conflict of interest into the proposed attorney-client relationship.

Third, protecting clients from "harassment, intimidation, overreaching, annoyance or invasions of privacy by bail agents" trying to profit from attorney referrals is a legitimate state interest. (*People v. Dolezal, supra,* 221 Cal.App.4th at p. 174.) Protecting the privacy of potential clients is a legitimate state interest. (*Fla. Bar v. Went for It, supra*, 515 U.S. at p. 625.) Moreover, protection from solicitation is a substantive state interest. (*Edenfield v. Fane, supra,* 507 U.S. at pp. 768-769.)

Fourth, there is a legitimate state interest "in protecting the orderly administration of justice." (*People v. Dolezal, supra,* 221 Cal.App.4th at p. 174.) Conley concedes this is a compelling state interest, a much higher threshold. (Plaintiff's Reply Brief, at p. 11.)

c. Section 2071 Is Rationally Related to a Legitimate State Interest

The regulation prohibits attorney referrals by bail licensees to or for arrestees and their representatives but not for non-arrestees. The regulation also protects against undue influence by bail agents to arrestees, which may occur regardless of whether there is a referral fee. The undue influence aspect is especially important because of a conflict of interest between the bail agent and the arrestee. Unlike the attorney-client relationship, the bail agent is not obligated to act in the best interest of the arrestee except with regard to collateral. (See Cal. Code Regs., tit. 10 § 2088.) The regulation also does not prohibit bail licensees from soliciting clients, nor does it prohibit or impair bail licensees from practicing their profession. As a result, Section 2071 is rationally related to a legitimate state interest.

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2. Section 2071 Passes Intermediate Scrutiny Under *Central Hudson*

Having found that implied communications in a bail agent's referral are inherently misleading, the court need go no further. Nevertheless, the restriction easily passes muster under the balance of the *Central Hudson* factors.

a. Section 2071 Advances Substantial State Interests

Section 2071 advances substantial state interests. First, "bail agents are licensed professionals who are an integral part of the criminal justice system" and the "state has an interest in regulating their work to make sure that they operate in a fair, honest and professional manner." (*People v. Dolezal* (2013) 221 Cal.App.4th 167, 174.) The Commissioner has a substantial interest in regulating and licensing the professions. (*Fla. Bar v. Went For It*, *supra*, 515 U.S. at p. 624; *see also Edenfield v. Fane* (1993) 507 U.S. 761, 770 ["We have given consistent recognition to the State's important interests in maintaining standards of ethical conduct in the licensed professions."].)

Second, bail agents have unique and often private access to arrestees, and hold State-licensed authority to grant or deprive them of their liberty. "Most people find being in jail to be a very stressful situation. For many arrestees, a bail agent is the only person who can secure their release. But an arrestee may also lack information about his or her court schedule or custody status..." (*People v. Dolezal*, *supra*, 221 Cal.App.4th at p. 175.) At trial, Conley conceded that bail agents typically engage arrestees during "some of the most difficult parts of their lives." (Trial Transcript at p. 6, lines 19-20.) Section 2071 prevents the bail licensee from overreaching and exerting undue influence in his dealings with this vulnerable population. As previously noted, even in non-monetary transactions, there is a potential for self-dealing when bail licensees refer an attorney. Reciprocal referral streams from licensee to attorney, and vice versa, can potentially represent a valuable asset. Solicitation by those acting as "agents or runners" for attorneys "present[s] similar problems" to solicitation by attorneys themselves. (*Ohralik v. Ohio State Bar Assn.*, *supra*, 436 U.S. at p. 466, fn. 22.)

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Many of the coercive conditions attendant upon in-person solicitation by an attorney that are identified in *Ohralik* may also be present when a bail agent suggests or recommends a particular attorney to an arrestee: The communication "may exert pressure and ... demand[] an immediate response without providing an opportunity for comparison or reflection; it may "provide a one-sided presentation and ... encourage speedy and perhaps uninformed decisionmaking"; and "there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close" to the arrestee. (*Id.* at p. 457.) This kind of communication by a bail agent to an arrestee can readily entail the same kind of overreaching and undue influence as can be present when the bail agent solicits on his own behalf: "Direct solicitation of an arrestee by a bail agent poses the same 'dangers of undue influence and overreaching that exist when a lawyer chases an ambulance.'" (*Dolezal, supra*, 221 Cal.App.4th at p. 178, quoting *Tennessee Secondary Sch. Athletic Assn. v. Brentwood Acad.* (2007) 551 U.S. 291, 298.)

Third, protecting clients from "harassment, intimidation, overreaching, annoyance or invasions of privacy by bail agents" trying to profit from attorney referrals is a substantial state interest. (*People v. Dolezal, supra,* 221 Cal.App.4th at p. 174.) Protecting the privacy of potential clients is a substantial state interest. (*Fla. Bar v. Went for It, supra*, 515 U.S. at p. 625.) Moreover, protection from solicitation is a substantive state interest. (*Edenfield v. Fane, supra,* 507 U.S. at pp. 768-769.)

Fourth, there is a substantial state interest "in protecting the orderly administration of justice." (*People v. Dolezal, supra,* 221 Cal.App.4th at p. 174.) Conley concedes this is a substantial state interest. (Plaintiff's Reply Brief, at p. 11.)

Just one substantial interest is sufficient for purposes of the *Central Hudson* analysis. (*Fla. Bar v. Went For It, Inc., supra*, 515 U.S. at p. 625, fn. 1.) As a result, there is a substantial state interest here.

b. Section 2071 Directly Advances the Government's Interest

Section 2071 directly advances the government's interest in making sure that bail agents operate in a fair and professional manner because it prohibits bail agents from referring their

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clients to attorneys to ensure that bail agents will not overreach or exert undue influence in their State-authorized contacts with arrestees. It protects arrestees from the overreaching and exertion of undue influence by bail agents. It also protects the privacy of arrestees against unwanted solicitations at a time when arrestees are vulnerable. It further protects the orderly administration of justice by preventing bail agents from exerting undue influence with regard to arrestees.

c. Section 2071 Is No More Restrictive Than Necessary

Section 2071 does not violate the First Amendment freedom of speech as it is no more restrictive than necessary. Here, Section 2071 only prohibits attorney referrals by bail agents to arrestees. Bail agents are free to solicit arrestees. They also remain free to practice their profession unencumbered and to refer non-arrestees to attorneys. All that is restricted is attorney referrals to arrestees and their representatives. The Commissioner did not need to commission studies but was free to rely upon history, consensus, and common sense, as he has done here. (*Fla. Bar v. Went For It*, *supra*, 515 U.S. at p. 628.)

When determining whether a law satisfies the narrow-tailoring test, courts look for a fit between the government's ends and the means chosen to accomplish those ends that is reasonable, "that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." (*Bd. of Trustees v. Fox*, *supra*, 492 U.S. at p. 480, quotation marks omitted.) Here, the scope of Section 2071 is in proportion to the interest served. It prohibits attorney referrals by bail licensees to or for arrestees and their representatives but not for non-arrestees. It protects against undue influence by bail agents to arrestees, which may occur regardless of whether there is a referral fee. The undue influence is especially important because of a conflict of interest between the bail agent and the arrestee. Unlike the attorney-client relationship, the bail agent is not obligated to act in the best interest of the arrestee except with regard to collateral. (See Cal. Code Regs., tit. 10, §2088.) It also does not prohibit bail licensees from soliciting clients. Nor does it prohibit or impair bail licensees from practicing their profession. As a result of this fit between the government's end goal and the means of accomplishing it, Section 2071 is not more restrictive than necessary.

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In *People v. Dolezal*, *supra*, 221 Cal.App.4th 167, Todd Russell Dolezal, a bail bondsman, appealed his conviction of unlawful contact for bail solicitation in violation of Insurance Code section 1814 and California Code of Regulations, title 10, section 2079.1. Dolezal argued that a regulation criminalizing the solicitation of bail violated the First Amendment freedom of speech. (*People v. Dolezal*, *supra*, 221 Cal.App.4th at p. 170.) The Court of Appeal, using intermediate scrutiny, concluded that "the regulation is narrowly tailored and serve the state's substantial interests in protecting the orderly administration of jail facilities and in protecting arrestees from harassment, intimidation, fraud, or other forms of overreaching common in direct solicitation of bail." (*Ibid.*) Similarly, here, like the regulation in *Dolezal*, the scope of Section 2071 is "in proportion to the interest served." (*Bd. of Trustees v. Fox*, *supra*, 492 U.S. at p. 480, quotation marks omitted.)

3. Under Strict Scrutiny, Section 2071 Does Not Violate Free Speech Protections

Even assuming the court found the regulation to implicate non-commercial speech, Section 2071 withstands strict scrutiny. Under strict scrutiny, a regulation must be "justified by a compelling government interest and . . . narrowly drawn to serve that interest." (*People v. Dolezal*, *supra*, 221 Cal.App.4th at p. 173, fn. 3, citations and quotation marks omitted.)

a. Section 2071 is Justified By a Compelling Government Interest

First, "bail agents are licensed professionals who are an integral part of the criminal justice system" and the "state has an interest in regulating their work to make sure that they operate in a fair, honest and professional manner." (*People v. Dolezal* (2013) 221 Cal.App.4th 167, 174.) The Commissioner has a compelling interest in regulating and licensing the professions. (*Fla. Bar v. Went For It*, *supra*, 515 U.S. at p. 624; *see also Edenfield v. Fane* (1993) 507 U.S. 761, 770 ["We have given consistent recognition to the State's important interests in maintaining standards of ethical conduct in the licensed professions."].)

Second, bail agents have unique and often private access to arrestees and their representatives, and hold State-licensed authority to grant or deprive them of their liberty. "Most people find being in jail to be a very stressful situation. For many arrestees, a bail agent is the

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only person who can secure their release. But an arrestee may also lack information about his or her court schedule or custody status..." (*People v. Dolezal*, *supra*, 221 Cal.App.4th at p. 175.) As previously noted, at trial, Conley conceded that bail agents typically engage arrestees during "some of the most difficult parts of their lives." (Trial Transcript at p. 6, lines 19-20.) Section 2071 prevents the bail licensee from overreaching and exerting undue influence in his dealings with this vulnerable population. Even in non-monetary transactions, there is a potential for self-dealing when bail licensees refer an attorney. Reciprocal referral streams from licensee to attorney, and vice versa, can potentially represent a valuable asset. Solicitation by those acting as "agents or runners" for attorneys "present[s] similar problems" to solicitation by attorneys themselves. (*Ohralik v. Ohio State Bar Assn.*, *supra*, 436 U.S. at p. 466, fn. 22.)

Many of the coercive conditions attendant upon in-person solicitation by an attorney that are identified in *Ohralik* may also be present when a bail agent suggests or recommends a particular attorney to an arrestee: The communication "may exert pressure and ... demand[] an immediate response without providing an opportunity for comparison or reflection; it may "provide a one-sided presentation and ... encourage speedy and perhaps uninformed decisionmaking"; and "there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close" to the arrestee. (*Id.* at p. 457.) This kind of communication by a bail agent to an arrestee can readily entail the same kind of overreaching and undue influence as can be present when the bail agent solicits on his own behalf: "Direct solicitation of an arrestee by a bail agent poses the same 'dangers of undue influence and overreaching that exist when a lawyer chases an ambulance.'" (*Dolezal*, *supra*, 221 Cal.App.4th at p. 178, quoting *Tennessee Secondary Sch. Athletic Assn. v. Brentwood Acad.* (2007) 551 U.S. 291, 298.)

Third, protecting arrestees and their representatives from "harassment, intimidation, overreaching, annoyance or invasions of privacy by bail agents" bent on making an attorney referral is a compelling state interest. (*People v. Dolezal, supra,* 221 Cal.App.4th at p. 174.) Protecting the privacy of potential clients is a compelling state interest. (*Fla. Bar v. Went for It*,

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supra, 515 U.S. at p. 625.) Moreover, protection from solicitation is a compelling state interest. (*Edenfield v. Fane, supra,* 507 U.S. at pp. 768-769.)

Fourth, there is a compelling state interest "in protecting the orderly administration of justice." (*People v. Dolezal, supra,* 221 Cal.App.4th at p. 174.) Conley concedes this is a compelling state interest. (Plaintiff's Reply Brief, at p. 11.)

b. Section 2071 Is Narrowly Drawn to Serve That Interest

Further, Section 2071 is narrowly drawn to further the government's interests because it prevents only bail licensees from referring attorneys, and only to arrestees or their representatives, in order to prevent bail licensees from overreaching and exerting undue influence on the arrestee's or her representative's choices with respect to legal representation. (See *Burson v. Freeman* (1992) 504 U.S. 191 [upholding a Tennessee statute that prohibited solicitation of votes or display of campaign materials within 100 feet of the entrance to polling places by determining that it was narrowly tailored to serve a compelling state interest].) It prohibits attorney referrals by bail licensees to or for arrestees and their representatives but not for non-arrestees.

Despite the various misreadings of Section 2071 urged by Plaintiff at trial and in his papers, Plaintiff has failed to show that the challenged regulation is not narrowly tailored to serve these compelling interests. The text of 10 CCR 2071 is as follows: "No bail licensee shall in any manner, directly or indirectly, suggest the name of or recommend any attorney to any arrestee or person purporting to act for or represent an arrestee." "Arrestee" is defined as follows, in 10 CCR 2054.5: "any person actually detained or subject to detention in custody whose release may lawfully be effected by bail."

Giving their ordinary meanings to the words used in the regulation, Section 2071 must be read as prohibiting only the volitional act of suggesting the name of or recommending a specific attorney to an arrestee or his representative. Further, the only act that can possibly be prohibited by Section 2071 is suggesting the name of or recommending a specific attorney, because there is but one possible object of the compound verb "suggest the name of or recommend": *any attorney*; while it is certainly possible to recommend an attorney without actually suggesting the name of the attorney, Section 2071 unambiguously prohibits only recommendations of specific attorneys,

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because only a specific attorney can reasonably be understood to have a name that could be suggested.

Accordingly, the proffered example of rating an attorney highly on social media, where (presumably) an arrestee later happens to see that posting, is not a violation of the regulation. If, however, the bail licensee refers or otherwise directs an arrestee to that social media posting (at a time when that person is an arrestee), there may be a violation of the regulation. This would be one of many conceivable forms of "indirectly" suggesting the name of or recommending the attorney, via the intermediary device of the social media posting, though the intermediary could of course be a human being, perhaps an inmate acting as the bail agent's toady, for example, or enforcer, inside the jail. On the other hand, a person not in custody, or not subject to detention in custody (e.g., for whom no arrest warrant has been issued), is not an arrestee as defined. Accordingly, there has been no violation if such a person happens to see the bail agent's social media post and then is later arrested (or later becomes subject to detention in custody).

Conley repeatedly urges the court to construe the challenged regulation to mean that, because everyone is theoretically subject to being placed into custody, that Section 2071 applies to recommendations made to a wider audience than is actually the case. However, it would be a patently absurd reading of California Code of Regulations, Title 10, Section 2054.5 to suggest that it is at all susceptible to the interpretation that everyone is an arrestee. Were an enforcement action predicated upon such a position, no doubt it would justify an as-applied challenge, which of course, is not here before the court.

Further, in order to come under the ambit of the regulation, the recommendation must be made to an arrestee or anyone "purporting to act for or represent an arrestee," which typically includes the arrestee's family or friends, whose interaction with the bail agent is for the purpose of "representing" the arrestee. This group of people is vulnerable to similar coercive pressures to those which bail agents are able to exert on arrestees themselves. (Hubner Declaration ¶¶ 5-7, 18.) Indeed, the bail agent can conceivably exact the equivalent of ransom from these representatives in the form of attorney retainers, and it is often these representatives who put up the collateral, which the bail agent can then use as further leverage.

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Conley has not carried his burden of showing that Section 2071 is not narrowly tailored to achieve a compelling government interest, at any rate. Precedent requires that "[i]n determining whether a law is facially invalid, [courts] must be careful not to go beyond [a] statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." (*Washington State Grange v. Washington State Republican Party* (2008) 552 US 442, 449-450, quoting *US v. Raines* (1960) 362 US 17, 22.)

Section 2071 protects against undue influence by bail agents on arrestees and their representatives, which may occur regardless of whether there is a referral fee. The very real threat of undue influence is especially grave in these circumstances because of the conflict of interest between the bail agent and the arrestee. Unlike the attorney-client relationship, the bail agent is not obligated to act in the best interest of the arrestee except with regard to collateral. (See Cal. Code Regs., tit. 10, § 2088.) Section 2071 also does not prohibit bail licensees from soliciting clients. It does not, as Conley alleges, prohibit referrals to the State Bar or Public Defender's office. (Trial Transcript at p. 10, lines 1-16; p. 18, line 19 - p. 22, line 15.) Nor does it prohibit or impair bail licensees from practicing their profession.

While Conley alleges the regulation is not the least restrictive alternative, he offers no suggestions for how it could be more narrowly crafted to do so, and still further the state's compelling interests. Furthermore, the fact that it does not prohibit disparaging attorneys does not render it under-inclusive as Conley alleges. (Trial Transcript at p. 11, lines 9-23.) Rather, prohibiting disparaging comments against attorneys would not serve the compelling interests this regulation was designed to address. As a result of this fit between the government's end goal and the means of accomplishing it, Section 2071 is not more restrictive than necessary. As a result, it survives strict scrutiny.

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CONCLUSION

For the reasons set forth herein, Section 2071 does not exceed the Commissioner's authority and does not violate free speech principles.

This court finds in favor of Defendant Dave Jones, in his capacity as Commissioner of the California Department of Insurance. The court orders that judgment be entered in favor of Defendant Dave Jones, in his capacity as Commissioner of the California Department of Insurance, and against Plaintiff Chad Conley.

The court's Statement of Decision after Court Trial is served upon all parties by regular United States mail.

Date: February 9, 2018

ELIZABETH R. FEFFER
JUDGE OF THE SUPERIOR COURT

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