

SUPREME COURT OF NEW JERSEY
DOCKET NO. 079852

IN THE MATTER OF THE ADVISORY
COMMITTEE ON PROFESSIONAL ETHICS
JOINT OPINION 732, THE COMMITTEE
ON ATTORNEY ADVERTISING JOINT
OPINION 44, AND THE COMMITTEE ON
THE UNAUTHORIZED PRACTICE OF
LAW JOINT OPINION 54.

BRIEF AND APPENDIX IN OPPOSITION
TO PETITION FOR REVIEW

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Letter from Carol Johnston, Secretary for Advisory Committee on Professional Ethics, to Josh King, Esq., Vice President, Business Development and General Counsel, Avvo Inc., dated March 22, 2017 Ra12-Ra13

Letter and attachment from Josh King, Chief Legal Officer, Avvo, Inc. to Supreme Court Committee on Professional Ethics, dated May 12, 2017 Ra23

Letter from Elizabeth Bosshard-Blackey, Sr. Corporate Counsel, Legalzoom to Carol Johnston, Esq., dated May 9, 2017 1:22 Ra24-Ra25

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PRELIMINARY STATEMENT

The Rules of Professional Conduct (RPC) forbid lawyers from splitting legal fees with or paying referral fees to non-lawyers, regardless of whether the payment would compromise the independent judgment of the lawyer. At their core, those rules advance the Supreme Court's fundamental interest in promoting public confidence in New Jersey's judiciary and legal system.

Three Supreme Court Committees - the Advisory Committee on Professional Ethics (ACPE), the Committee on Attorney Advertising (CAA) and the Committee on the Unauthorized Practice of Law (CUPL) - issued a Joint Opinion (collectively, "JO 732"). After reviewing the "Avvo Advisor Plan" (AAP) and the "Avvo Legal Service Plan" (ALSP) marketed on Avvo's website, the Committees jointly concluded that lawyers participating in either plan were splitting professional fees with Avvo (a non-attorney) or making payments to Avvo for the referral of legal business, in violation of RPC 5.4(a), 7.2(c), and 7.3(d).

Petitioner Consumers for a Responsive Legal System (CRLS) claims that enforcement of JO 732 will leave New Jersey residents in need of legal services fewer ways to obtain legal help. CRLS argues that JO 732 is "anticompetitive" and contrary to federal antitrust laws. CRLS also argues that ethics rules should not be interpreted to prohibit lawyers for paying "advertising fees" that are calculated solely upon the actual

dollar amounts of new business generated by an advertisement. All of these arguments lack merit.

First, CLRS's dire predictions regarding JO 732's impact on New Jersey's marketplace for legal services are speculative and overstated. JO 732 is narrowly drawn and does not ban all so-called "lawyer-matching services." Moreover, JO 732 provides "countervailing benefits" for consumers of legal services. Prohibitions against fee splitting and referral fees advance the judiciary's bedrock interest in promoting public confidence, which substantially benefits consumers.

Second, actions of the Supreme Court and its Committees are immune from federal antitrust laws under the doctrine of "state action" immunity. Thus, even assuming *arguendo* that prohibiting Avvo from operating in New Jersey might have some "anticompetitive" effects, federal antitrust laws do not apply.

Third, and most fundamentally, CLRS's claim that the "marketing" fees Avvo collects from participating attorneys are merely reasonable "advertising" expenditures ignores the essence of Avvo's relationship with participating attorneys. JO 732 properly looks past the labels Avvo places on electronic banking transactions, and correctly concludes that Avvo retains a percentage - approximately 15 to 35% - of every legal fee a participating lawyer is paid. Avvo steers consumers to lawyers participating in Avvo's plans due to Avvo's direct financial

interest in maximizing the aggregate amounts of fees collected. Avvo's financial interest exists even if a referral is not in the consumer's best interest. Avvo does precisely what the RPC prohibit - partner with participating attorneys to share legal fees or receive referral fees for all business generated. Thus, the Committees correctly concluded in JO 732 that lawyers participating in Avvo's plans are in violation of the RPC.

STATEMENT OF THE CASE¹

a. Inquiry from New Jersey State Bar Association - On September 3, 2016, the New Jersey State Bar Association (NJSBA) requested the ACPE publish a formal advisory opinion addressing whether it was "ethical for lawyers to participate in certain online, non-lawyer, corporately owned services that offer legal services to the public." (Ra1-7). The request identified Avvo, LegalZoom, and Rocket Lawyer, and posited four questions:

1. Does a lawyer's participation in these services constitute impermissible fee sharing with nonlawyers in violation of RPC 5.4(a)?
2. Does participation in these services interfere with a lawyer's independent professional judgment in violation of RPC 5.4(c)?
3. Are Avvo, Legal Zoom and Rocket Lawyer impermissible attorney referral services in violation of RPC 7.2?
4. Do the services violate Rule 1:28A-2, which requires lawyers to establish an IOLTA account in which to hold client funds until they are earned, by having a nonlawyer company hold such funds instead

¹The procedural and factual histories are combined to avoid duplication and for the Court's convenience.

and/or by allowing a nonlawyer company to have direct access to a lawyer's trust or bank accounts?

[(Ra2).]

NJSBA described the three entities' operations and offered its analysis of the four questions (consistent with R. 1:19-3). NJSBA later provided screen shots from Avvo.com, Legalzoom.com, and Rocketlawyer.com, with additional detail regarding the services marketed by the companies. (Ra38-67). CPE requested and received submissions from Avvo, Rocket Lawyer, and LegalZoom responding to NJSBA's questions.² (Ra8-13; Ra14-40).

b. Avvo's Business Model - Avvo offers two plans for consumers seeking legal representation. The AAP allows a consumer to purchase a fixed-fee, fifteen or thirty-minute phone consultation with an attorney. (Ra52-53; Ra59-60). Consumers select a "legal topic" from a dropdown menu. (Ra52). Avvo contacts participating lawyers, and the first to respond gets the job. (Ra17). Consumers also may select a specific lawyer from a list of participating attorneys, in which case that attorney contacts the consumer.

²JO 732 distinguishes Rocket Lawyer and LegalZoom as "legal services plans" that allow a consumer to prepay for access to legal services that may be required later. The Committee found these plans are permissible, but must be registered with the Court. As for Avvo, JO 732 focuses only on Avvo's AAP and ALPS. Thus, the facts and argument herein focus solely on those plans.

Through the ALSP, Avvo offers fixed-fee legal services. Consumers can purchase specific services in nine practice areas, such as representation in uncontested divorces or preparation of green card applications. (Ra54-55).³ Participating lawyers provide the services. (Ra58). As described by Avvo's web site:

Avvo Legal Services is a range of fixed-fee, limited-scope legal services determined by Avvo and fulfilled by local attorneys. Avvo defines the services and prices. Attorneys choose which services they would like to offer in their geographical area. Local clients purchase legal services, choose the attorney they want to work with, and pay the full price of the service up front. The chosen attorney then completes the service for the client and is paid the full legal fee. As a separate transaction, the chosen attorney pays a per-service marketing fee for the completed, paid services. Attorney participation is governed by the Avvo Legal Services Terms.

[(Ra58).]

Upon completion of a service, Avvo electronically deposits by ACH transfer the full fee it collects from the consumer into a participating attorney's trust or operating account (payments are made at the beginning of a month for services completed the prior month). (Ra18). Then, in a second transaction, Avvo withdraws by ACH transfer a "marketing fee" from the attorney's operating account. Ibid. Avvo's "Legal Services Terms" concede that a participating lawyer nets less than the entire legal fee collected: "a service might have a standard consumer price of

³See also <https://www.avvo.com/legal-services?avvo-campaign-legal?services&avvo-medium-gignav-subnav&avvo-source-avvo> (last accessed 1/9/18).

\$200 with a marketing fee of \$50, which means you'll net \$150 each time you fulfill one of these services." (Ra23).

Avvo unilaterally sets the fees for all services offered through its website; participating attorneys must provide services for those fees. (Ra23; Ra69). Fees range from \$39 to \$2995, depending on the service. (Ra67). For the AAP, Avvo charges consumers \$39 for a fifteen-minute "advice session" or \$69 for a thirty-minute "advice session." (Ra60). After depositing those sums electronically in a lawyer's account, Avvo withdraws \$10 and \$25, respectively, as its "per-service marketing fee." (Ra60). Thus, for a fifteen-minute consultation, a participating lawyer nets \$29 and Avvo nets \$10 - a 74.4%/25.6% split; for a thirty minute consultation, the lawyer nets \$44 and Avvo nets \$25 - a 63.8%/36.2% fee split.

Services provided through the ALSP are more expensive. For example, consumers purchasing "document review services" are charged fees ranging from \$149 to \$595. (Ra60). Lawyers providing those services are in turn assessed "per service marketing fees" ranging from \$40 to \$150.⁴ Ibid. Consumers may also purchase what Avvo describes as "start to finish" services. Ibid. Again, depending on the service, consumers are charged

⁴If the lowest "marketing" fee (\$40) applies to the lowest legal fee (\$149), the lawyer would net \$109 and Avvo would retain \$40 - a 73.2%/26.8% split. If the \$150 "marketing" fee applies to the \$595 service, the percentage split is 74.8%/25.2%.

amounts ranging from \$295 to \$2995, with "marketing fees" ranging from \$40 to \$400.⁵ (Ra61). The "marketing fees" are the only fees participating attorneys pay Avvo. (Ra64).

Avvo concedes its marketing fee is "strongly correlated to the value of the underlying service." (Ra22). Avvo's FAQs include a quotation from "ethics expert" Josh King stating that "fee splits are not inherently unethical," and that "service fees, if deducted like credit card fees, would involve the sort of technical fee split that would not create a potential for compromise." (Ra68). Despite that admission, Avvo claimed in its submission to the Committees that "Avvo Legal Services does not involve the splitting of legal fees: the entire fee for legal services is passed through to the attorney, and the attorney pays a marketing fee to Avvo separately. Mechanically, that's no different than how attorneys pay for advertising today." (Ra20).

c. JO 732 - Because the questions in the NJSBA's inquiry fell within the jurisdictional domains of all three Committees, they jointly considered the issue. JO 732 is not a referendum on all lawyer matching services; nor does it cut off access to all such services. JO 732 applies only to Avvo's business model.

The Committees found that New Jersey lawyers could not participate in Avvo's AAP and the ALSP because the programs

⁵A \$400 fee for a \$2995 service results in an 86.7%/15.3% split.

require the lawyer to share a legal fee with a non-lawyer in violation of RPC 5.4(a) or pay a referral fee in violation of RPC 7.2(c) and 7.3(d).⁶ The Committees rejected Avvo's claim that attorneys' payments to Avvo are permissible advertising fees under RPC 7.2(c) and 7.3(d). The Committees also rejected Avvo's assertion that the RPC's prohibitions should only apply if fee-splitting would compromise the lawyer's independent judgment because the prohibitions against fee-splitting and referral fees are absolute. Thereafter, CRLS petitioned for review of JO 732.

LEGAL ARGUMENT

POINT ONE

LAWYERS PARTICIPATING IN AVVO'S ALSP OR AAP PLANS SPLIT LEGAL FEES WITH OR PAY REFERRAL FEES TO AVVO.

CRLS does not challenge the Committees' determination that the sums Avvo deducts from a participating lawyer's account are fees for "recommending the lawyer's services" and/or for

⁶RPC 5.4(a) states that "a lawyer or law firm shall not share legal fees with a nonlawyer" RPC 7.2(c) states that "a lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communications permitted by this Rule;" RPC 7.3(d) states that "a lawyer shall not compensate or give anything of value to a person or organization to recommend or secure lawyer's employment by a client; or as a reward for having made a recommendation resulting in the lawyer's employment by a client except that the lawyer may pay for public communications permitted by RPC 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association."

"recommend[ing] or secur[ing] the lawyer's employment by a client" under the RPC. Instead, CLRS contends the fee Avvo debits from a participating attorney's bank account - after the entire legal fee collected by Avvo is first electronically deposited into that same attorney's account - is a permissible "advertising" fee subject to the exemption for the "reasonable cost of advertising" in RPC 7.2(c). The characterization of the attorneys' payments to AVVO as "reasonable advertising" fees is spurious. The fees bear no relationship to "reasonable" advertising costs, but instead are tied to, and calculated upon, the aggregate legal fees generated.

New Jersey courts reject labels self-interested attorneys place on payments to non-lawyers, and instead focus on the underlying reason for the payments. For example, in In re Weinroth, 100 N.J. 343 (1985), this Court concluded that an attorney violated disciplinary rules prohibiting payment of referral fees and fee splitting by providing a client a \$5,000 "credit" towards future legal fees with the knowledge that the client would use the "credit" to pay a referral fee to a State Senator that had recommended the attorney to the client. Id. at 350. The Court reached its conclusion even though the attorney did not pay the \$5000 referral fee directly to the Senator and cloaked the payment as a "credit" for future legal services. Id. at 348. See also In re Maran, 80 N.J. 160 (1979) (rejecting

attorney's claim that the payments to a doctor who referred patients to the attorney's law firm were not referral fees but "advance payments for prospective medical reports").

The Committees scrutinized Avvo's business model, and properly focused on the substance of the underlying transactions between participating attorneys and Avvo. The equitable maxim "substance controls over form" applies to Avvo's business model. See Conley v. Guerrero, 443 N.J. Super. 62, 67 (App. Div. 2015). Avvo structures transactions with participating attorneys in two parts. This structure shrouds the true nature of the transaction between Avvo and a participating attorney.

Avvo's "marketing fees" are nothing other than payments for the referral of business, or payments splitting legal fees. The "marketing" fees bear none of the hallmarks of advertising fees: 1) the fees are assessed only after an attorney-client relationship is established; 2) the fees are not tied to traditional pricing criteria for advertisements, such as the projected or actual audience of an advertisement, and an "advertising" attorney assumes no economic risk; and 3) the fees for an advertisement are not tied to Avvo's costs to market the "advertised" service, but to the cost of the legal service. None of Avvo's machinations alter the essence of the transaction: Avvo receives payments from participating attorneys as a fee for recommending the attorney to the client.

Five sister states - Pennsylvania, Ohio, South Carolina, New York, and Virginia - have also concluded that attorneys participating in the AAP and the ALPS (or seemingly indetical "hypothetical" business models) violate those states' prohibitions against fee splitting and/or payment or referral fees.⁷ Neither CRLS in its Petition nor Avvo in its submission to the Committee identified any contrary opinion.

A. The RPC Prohibit Lawyers from Paying Advertising Fees Based on the Establishment of an Attorney-client Relationship.

Lawyers may pay for internet advertisements, but the charges cannot be correlated to the formation of a lawyer-client relationship. See CAA Opinion 43 (July 4, 2011) (opining that attorneys could pay "per click" or "per lead" advertising fees, because "the [payments are] based only on the contact, not on the retention of the attorney by the client or the establishment of an attorney-client relationship"). The rationale for prohibiting referral fees, but allowing advertising fees, is grounded in the distinction between paying someone for a referral resulting in an attorney-client relationship, and

⁷Pennsylvania's, Ohio's, and South Carolina's opinions were discussed at length in JO 732. Subsequent to JO 732, the New York State Bar Association and the Virginia State Bar concluded that participation with Avvo violate those states' respective ethical rules. See New York State Bar Association Committee on Professional Ethics Opinion 1132 (August 8, 2017); Proposed VA Legal Eth. Op 1885 (Virginia Legal Ethics Opinions), on petition for review and approval by Virginia Supreme Court, available at http://www.vbs.org/docs/LEO1885_SCV_petition111717.pdf.

paying for an advertisement where the expense must be incurred regardless of whether or not an attorney-client relationship is ever established. Referral fees are prohibited:

Because of the moral hazard that a recommendation will be based only upon the financial benefit to the recommender, rather than on the attorney's suitability for the legal problem, and the concern that the referral agents will distort a consumer's legal needs to match the practices of the lawyers who will pay for a referral. Advertising, in contrast, does not present any such moral hazard, because the money paid by the lawyer to the advertiser is not based upon whether the lawyer contracts with the client or ever receives a fee from the client. The payment is based on the advertising service itself. There is no danger of corrupt influence when the payment for advertising and the consummation of an attorney-client relationship are not coupled. Advertisers are not being compensated for endorsing a particular attorney over others; they are compensated for providing advertising services.

[Smolla, Law of Lawyer Advertising, § 7:24.50 (September 2017 Update).]

Avvo's "marketing fees" are not fixed unless and until an attorney-client relationship is established. Avvo thus has a direct financial interest in referring consumers to participating attorneys; Avvo's revenue is tied to the volume of legal business performed by participating attorneys. That direct interest is what the RPC seek to guard against. See Annotated Model Rules of Professional Conduct, Center for Professional Responsibility, American Bar Association, Eighth Edition (2015), comments to Model Rule 7.2(b), p. 604-05 (collecting cases). Thus, the Committees properly recognized that Avvo's business

model crosses the absolute bright-line distinction between permissible advertising fees and impermissible referral fees.

B. Avvo's Marketing Fees Are Not Permissible Advertising Costs.

Advertising costs are typically dependent on factors relating to the size of the expected audience that an advertisement will reach. See, e.g., Harvard Business Review, March 2013, "Advertising Analytics 2.0." Regardless of the medium, an advertisement's cost is typically based on metrics unrelated to the dollar volume of new business that the advertisement actually generates, but instead correlated to the number of times an advertisement is likely to be or actually is viewed. An advertisement placed in the New York Times will cost an advertiser more than if placed in a local newspaper because the New York Times' circulation is far greater.

Internet pricing is also related to the number of times that an advertisement is viewed. See Smolla, Law of Lawyer Advertising, § 7:24:50 (September 2017 Update). The CAA has concluded that attorneys may pay advertising costs based on calculations of how often an advertisement is viewed, such as "pay-per-click" and "pay-per-lead," but distinguished prohibited payments that are based on the actual establishment of business. CAA Opinion 43 (July 4, 2011). See also Smolla, Law of Lawyer Advertising, § 7:24:50 (September 2017 Update) (pay-per-click

advertising fees should be permissible "as long as those fee charges are not based on whether an attorney-client relationship is ever formed or legal fees are ever generated"); Hazard, Hodes and Jarvis, The Law of Lawyering, 4th Edition, §60.05 (pay-per-click payments should be permissible "if not linked to the actual establishment of client-lawyer relationships" and that "an agreement to pay a percentage of the fees earned by the advertising or listing lawyer would surely be impermissible fee sharing with a non-lawyer under Rule 5.4(a)").

JO 732 properly distinguishes Avvo's "marketing" fees from advertising costs because the fees Avvo charges a participating lawyer are not based on how often Avvo's web pages are viewed by consumers. The fee is based solely on the amount of fee revenue the attorney derives from performing legal services for clients steered to him by Avvo. The attorney pays Avvo nothing for the "advertisement" itself, but pays only for the referral of actual legal business. If the attorney is willing to perform legal services consistent with Avvo's fee schedule, that attorney need not consider what the expected "return on investment" will be for "advertising" with Avvo. The attorney will pay nothing to Avvo unless business is generated and fees collected.

Nor is there any relationship between the amount of Avvo's "marketing fees" and Avvo's true advertising costs. Avvo's "marketing fees" instead increase in lockstep with the cost of

"advertised" services. As the Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee stated when analyzing Avvo's business model,

The cost of advertising does not vary depending upon whether the advertising succeeded in bringing in business, or on the amount of revenue generated by a matter. One FFLS program charges participating lawyer's 'marketing fees' ranging from \$10 for a \$39 'Advice Session' to \$400 for a 'Green Card Application,' which generates \$2,995 in legal fees. Clearly, there cannot be a 4000% variance in the operator's advertising and administrative costs for these two services, particularly since the operator does not, and cannot, have any role in the actual delivery of legal services. The variation in the amount of the marketing fees based upon the amount of the fees earned by the lawyer establishes that the non-lawyer business is participating directly in, and sharing in, the fee income derived by the lawyer. This is impermissible fee sharing under RPC 5.4(a).

[Formal Opinion 2016-200, "Ethical Considerations Relating to Participation in Fixed Fee Limited Scope Legal Services Referral Programs," (September 2016).]

Finally, Avvo's "marketing fees" are not comparable to fees charged by credit card processing companies as CRLS claims. Credit card processing companies have no involvement in "matching" the consumer with the business that accepts the credit card. Further, nothing in the record suggests that the economic risks Avvo assumes when it accepts payments for higher-priced legal transactions are on par with economic risks that a credit card processing company assumes when it processes larger dollar value transactions. Therefore, CRLS's claim that Avvo's fees are akin to advertising costs is meritless.