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:
: 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. :
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BRIEF OF AMICUS CURIAE NEW JERSEY STATE BAR ASSOCIATION

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PRELIMINARY STATEMENT

The Petition for Review in this matter should be denied because the Advisory Committee on Professional Ethics, Committee on Attorney Advertising and Unauthorized Practice of Law Committee (the "Committees") applied the plain meaning of RPCs 5.4, 7.2 and 7.3, as a Court does when construing statutory language, to conclude in Joint Opinion 732/44/54 ("Joint Opinion") that the legal service plans Avvo offered through its website require attorneys to participate in an impermissible fee sharing arrangement and to pay an impermissible referral fee to a non-lawyer. The Committees followed well-established principles and relied upon Supreme Court case law in reaching its conclusion. The Joint Opinion is clear and straightforward. It requires no further review. If the Petition for Review is granted, however, the Joint Opinion should be affirmed.

The Joint Opinion emanates from an inquiry the New Jersey State Bar Association (NJSBA) submitted, questioning whether it is ethical for lawyers to participate in certain online, non-lawyer, corporately owned entities that offer legal services to the public. While the inquiry specifically noted three such companies as examples, Avvo, Inc., LegalZoom, Inc. and Rocket Lawyer, Inc., the focus of the Petition for Review is the services offered by Avvo, Inc. Likewise, in this submission, the NJSBA will focus on the

relevant Avvo offerings and the information presented by Avvo to the Committees.

Following up on the NJSBA's inquiry, the Committees gave Avvo an opportunity to provide information about the services the company offers and, in particular, the payment structure that applies to participating New Jersey lawyers. RA12.

From the materials submitted to the Committees, and from a review of its website, Avvo offers a variety of services to consumers online. Two of its products offer direct legal services to the public: Avvo Advisor and Avvo Legal Services. Avvo Advisor offers 15-minute consultations with attorneys for a flat fee of \$39. Avvo Legal Services offers certain specific services for a fixed fee. Those services include, e.g., a "simple document review" for \$149, an "uncontested divorce" for \$995 and a "green card application" for \$2995. RA15-17; <https://www.avvo.com> (last checked Feb. 14, 2018).

To participate in either service, attorneys must meet Avvo's criteria, which include a minimum Avvo rating, minimum client review score and a licensing record clean of disciplinary sanctions. RA15.

Consumers choose a service to buy and pay Avvo directly. They are then provided with a list of attorneys to choose from who match their needs, or are matched with the first available attorney who matches their needs. Avvo provides the lawyer with the consumer's

name and pertinent information, and the lawyer is expected to call the consumer using a tracking phone number provided by Avvo. Once Avvo confirms that the lawyer contacted the client via the tracking phone number and remained on the call for at least eight minutes, the consumer's credit card is charged. RA17-18.

At the beginning of each month, Avvo deposits all of the legal fees a participating attorney has generated into their bank accounts. Once a month, Avvo also withdraws a "marketing fee" from the bank accounts of participating attorneys commensurate with the nature of the legal services provided and the fee charged (e.g., \$40 for review of a prenuptial agreement; \$400 for a green card application). RA18; <https://www.avvo.com> (last visited Feb. 14, 2018).

After reviewing all of the submitted information, and performing its own due diligence search of the Avvo website, the Committees rightfully concluded that Avvo is connecting its users to lawyers who have signed up with the company to provide legal services, and the company is impermissibly sharing in the legal fee charged for those services under the guise of "marketing fees."

This clearly violates the prohibition of RPCs 5.4, 7.2 and 7.3, and requires no further review from the Supreme Court.

Accordingly, the Petition for Review should be denied outright. If the Court is inclined to grant the Petition, however, the NJSBA urges that the Joint Opinion be affirmed.

LEGAL ARGUMENT

I. The Petition Should be Denied Because Petitioners are not Aggrieved by the Opinion and Therefore Lack Necessary Standing to Request Review

The Rules of Professional Conduct (RPCs) allow for certain individuals or entities to petition the Court to review advisory opinions issued by the Advisory Committee on Professional Ethics (ACPE), Committee on Attorney Advertising (CAA) and Unauthorized Practice of Law Committee (UPL Committee) (collectively, "the Committees"). R. 1:19-8; R. 1:19A-3(d); R. 1:22-3A. Pursuant to the RPCs, requests for the review of CAA opinions are limited to members of the bar (R. 1:19A-3(d)); requests for review of ACPE opinions can be submitted by aggrieved members of the bar, bar associations or ethics committees (R. 1:19-8(a)); and requests for review of UPL Committee opinions can be requested by any aggrieved member of the bar, bar association, person or entity (R. 1:22-3A(a)). Taken together, the RPCs allow only an aggrieved person, entity or members of a group who will be adversely affected by a joint advisory opinion issued by the Committees to petition for its review.

The Petitioner in this matter is not an aggrieved entity seeking review of an opinion that will cause it or its members harm. Rather, in its petition, Consumers for a Responsive Legal System describes itself as "a national nonprofit organization

working to make the civil legal system more affordable, accessible and accountable to its consumers." It is a nonprofit advocacy group headquartered in Washington, D.C. that, according to its website "represents the interests of individuals in the legal system." <https://www.responsivelaw.org> (last visited Feb. 15, 2018). The group seeks review of the Joint Opinion because it claims that, as a result of the opinion, New Jersey consumers are cut off from certain legal services. Petitioner fails to provide, however, any information specific to New Jersey consumers using the Avvo services who they claim are cut off. Petitioner also fails to account for the availability of other legal service providers that are operating within the ethical boundaries to assist New Jersey residents. In sum, Petitioner fails to demonstrate in any way how or why it is an aggrieved entity entitled to petition the Court for review.

While New Jersey courts have liberally applied standing to allow cases to proceed on their merits, organizations do not have standing where their representational interest is too ethereal to justify judicial recognition and acknowledgement. N.J. Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402 (App. Div. 1997), appeal dismissed as moot, 152 N.J. 361 (1998). That is the case here. The Petitioner is an out-of-state organization that broadly represents the "consumer's voice in the legal system." It makes no claim to represent an aggrieved user or group of users of

legal services in New Jersey. Petitioner's arguments are based on national studies and national statistics to support claims of a lack of access to legal representation that it asserts will be worsened in New Jersey by the Joint Opinion. Petitioner cannot point to any New Jersey-specific information or harm. Its interests in this matter are tenuous at best.

Since Petitioner has not shown that it is aggrieved by the Joint Opinion, its Petition should be denied.

II. The Joint Opinion's Decision is Based on the Plain Reading of the Rules of Professional Conduct and Requires No Substantive Review; The Joint Opinion Should be Affirmed

After analyzing all of the available information about how the Avvo system operates, the Committees reached the reasonable, rational conclusion that attorneys participating in the program would be violating RPCs 5.4, 7.2. and 7.3 by engaging in improper fee sharing and by paying impermissible referral fees. This was the only appropriate conclusion based on the information presented.

The applicable RPCs are straightforward, clearly worded and easy to apply. RPC 5.4 prohibits a lawyer from sharing fees with a non-lawyer. Similarly, RPCs 7.2 and 7.3 prohibit the giving of anything of value for recommending a lawyer's services or securing a lawyer's employment. There are two exceptions: (1) payment for

the reasonable cost of advertising, and (2) participating in a lawyer referral service operated by a not-for profit agency or a bar association.

In applying these RPCs in a disciplinary matter, the Court acknowledged that, "the prohibition of the Disciplinary Rule is clear. It simply forbids the splitting or sharing of a legal fee by an attorney with a lay person, particularly when the division of the fee is intended to compensate such a person for recommending or obtaining a client for the attorney." In re Weinroth, 100 N.J. 343, 349 (1985). More precisely, the fee split is only permissible with licensed attorneys under specified requirements. See R. 1:39-6(d).

In the Weinroth matter, an attorney was retained by a business entity upon the recommendation of a non-lawyer third-party. Upon the successful conclusion of the representation, all agreed that the third party should be compensated for bringing the lawyer and business entity together; however, the lawyer was mindful of the prohibition against fee sharing and referral fees. The attorney agreed, therefore, to refund a portion of the legal fee paid by the business entity to be used to compensate the third party for the referral. In finding an ethical violation, the Court noted, "For these policies to succeed, both indirect as well as direct fee-sharing must be banned so as fully to preserve the integrity of attorney-client relations." Id. at 350.

Here, the Committees construed the Court-approved RPCs and correctly applied the plain language therein to conclude that the non-negotiable "marketing fee" lawyers are required to pay Avvo is not reasonably related to the cost of advertising. The Committees properly held this scheme is an impermissible referral fee being paid to a non-lawyer.

Under both the Avvo Advisor and the Avvo Legal Services plans, consumers pay a flat legal fee to Avvo. Upon completion of the legal service, as monitored by Avvo, Avvo pays that fee to the attorney and then withdraws its payment from the lawyer's bank account where the fee was deposited. The amount of the withdrawal depends on the service provided and is determined - solely and unilaterally by Avvo. If a lawyer does not receive a referral, no fee is ever paid. RA18; <https://www.avvo.com> (last visited Feb. 14, 2018).

Petitioners claim this is no different than paying for the number of clicks an advertisement receives online. That analogy is misplaced because there exists a direct connection between the advertising and the number of people the advertisement reaches. Here, regardless of how many people view the advertisement, payment is only triggered when a client is successfully referred and a lawyer successfully employed.

Petitioners make an additional false comparison in saying that Avvo's marketing fee is akin to the transaction fees a credit

card company charges. Here, again, a logical fallacy exists as the fee paid to Avvo is directly tied to the particular legal service provided. A credit card fee is a transaction fee related to the banking services the credit card company provides, not the legal services provided by the lawyer. It is based on the lawyer's financial interaction with the credit card company, not the lawyer's provision of legal services to a client.

In sum, there is no avoiding the plain fact that the Avvo fee arrangement is in direct violation of the RPCs. Avvo's fee is a payment a lawyer makes to a non-lawyer, consisting of a portion of fees the lawyer charges for legal services rendered to a paying client that the non-lawyer referred to them. The Joint Opinion simply and properly applied the plain language of the RPCs to the facts presented. No further review is necessary; however, if the Court is inclined to review the matter, the NJSBA urges that the Joint Opinion be affirmed.

III. The Committee's Opinion is Not Anti-Competitive; It Promotes Access to Justice within Ethical Boundaries

The Rules of Professional Conduct, including RPC 5.4 prohibiting fee sharing, are designed to protect the public and to uphold the fundamental standards required to uphold the integrity of our legal system. Baxt v. Liloia, 155 N.J. 190, 196 (1998). The interests the RPCs seek to vindicate are the interests of society

in assuring a legal system based on integrity and honesty, not private interests. Id.

In issuing advisory opinions, the focus of the Committees is on applying the RPCs to a situation presented to ensure that lawyers act within ethical boundaries for the benefit and protection of their clients and the public.

In this instance, the stated purpose of the ethical rules in question is to "ensure that any recommendation made by a non-attorney to a potential client to seek the services of a particular lawyer is made in the client's interest, and not to serve the business impulses of either the lawyer or the person making the referral; it also eliminates any monetary incentive for transfer of control over the handling of legal matters from the attorney to the lay person who is responsible for referring in the client." In re Weinroth, supra, 100 N.J. at 350.

The ethical rules also discourage "overzealous or unprofessional solicitation by denying compensation to a lay person who engages in such solicitation on behalf of a lawyer, or even as to another lawyer unless the latter has also rendered legal services for the client and the fee that is shared reflects a fair division of those services." Id.

In evaluating the actions of Avvo in operating its legal services website, the Committees applied the RPCs in a reasonable way to fortify the principle that consumers can be confident when

they purchase legal services, their best interests are the main focus of those services.

Petitioner presents a field of statistics to show that there is a widening justice gap in the United States in which the legal needs of low- to moderate-income Americans are not being met. The New Jersey State Bar Association agrees that access to legal services is a paramount concern; however, there is no need to sacrifice ethical compliance for that access. For that reason, the NJSBA commissioned a Blue Ribbon Task Force to examine how the unmet legal needs of low- to moderate-income New Jerseyans are being met and ways they can be addressed going forward. The Task Force's Report details a number of programs, operating within ethical boundaries, that provide services to that segment of the population at no fee or reduced fees. See Report of the Blue Ribbon Commission on Unmet Legal Needs, June 3, 2016, <https://tcms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/Reports%20&%20Comments/060316Report.PDF> (last visited Feb. 15, 2018).

Thus, the Joint Opinion does not "restrict new entrants and new means of delivery to the legal services industry" as Petitioner claims; rather it serves as a reminder to attorneys seeking to participate in reduced-fee programs to ensure their participation keeps the consumers' best interests as paramount. As such, there is no need for further Supreme Court review, and the Petition for

Review should be denied. If review is granted, however, the NJSBA urges that the Joint Opinion be affirmed.

IV. The Committees' Action Does Not Require Supreme Court Review Under the Sherman Antitrust Act as the Joint Opinion is Advisory Only and Ultimate Enforcement is Vested in the Supreme Court

Petitioner asserts it requires Supreme Court review under the Supreme Court's recent decision in North Carolina Board of Dental Examiners v. Federal Trade Commission to protect the members of the Court Committees from antitrust liability. In that case, the U.S. Supreme Court held that where a state board consists of decision makers who are active participants in the occupation the board regulates, the board's action must be actively supervised by the State to be able to invoke state action antitrust immunity. North Carolina Board of Dental Examiners v. Federal Trade Commission, 135 S. Ct. 1101 (2015). The role of the Committees that issued the Joint Opinion in this case, though, is vastly different from the role of the Board of Dental Examiners in the North Carolina case.

The North Carolina Board of Dental Examiners is comprised mostly of licensed dentists engaged in the active practice of dentistry. The state is charged with the regulation of the practice of dentistry. It has broad authority over licensees, including authority to promulgate rules and regulations governing the

practice of dentistry within the state. Id. At issue in the case was the Board's action in interpreting a statute and actively seeking to enforce it against market participants by sending out cease and desist letters.

This is not even remotely the situation at hand. Unlike the Board of Dental Examiners, in this case, the Committees do not have the necessary authority to "regulate" attorneys. Rather, they provide only advisory opinions, which are subject to review by the Supreme Court. R. 1:19-8; R. 1:19A-3(d); R. 1:22-3A. Further, the Committees are not empowered with promulgating new rules or regulations, nor are they empowered to impose discipline based on their opinions interpreting the policy set by the Supreme Court. Id. Both of those functions remain squarely within the purview of the Court itself, further distinguishing this question from the North Carolina matter.

The action of the Committees can also be distinguished from the Virginia State Bar's actions in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), which were found to be outside the scope of state action immunity. In that case, a county bar published an advisory fee schedule that attorneys in the county followed, and the State Bar acted as the enforcement mechanism against attorneys who did not follow the schedule. There, the Supreme Court was authorized to regulate the practice of law, and, while the Court had delegated some authority to the State Bar, it had no role in

the establishment of the fee schedule at issue or in its enforcement. That is not the case here.

The action of the Committees in this matter is similar to the action of the Arizona State Bar in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), where attorneys were charged with violating disciplinary rules relating to advertising that were established by the Arizona Supreme Court. The Court had imposed the disciplinary rule, and a State Bar Committee interpreted it to recommend discipline against the attorneys. That discipline was subject to review by the Supreme Court. In holding that the action of the State Bar was not subject to the Sherman Antitrust Act, the Court noted, "The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. In re Wilson, 106 Ariz. 34, 470 P.2d 441 (1970). Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision." Bates v. State Bar of Arizona, supra, 433 U.S. at 361.

The same reasoning applies here. While the Committees have issued an advisory opinion applying the rules the Supreme Court established, any enforcement of that opinion will ultimately fall to the Court itself. Thus, like the Arizona Supreme Court, the New Jersey Supreme Court adopted the rules, and it is the ultimate

trier of fact and law in the enforcement process. Committee members act as the Court's agent and remain under its continuous supervision. Accordingly, Supreme Court review of the Joint Opinion is not required to preserve state action immunity, and the Petition for Review should be denied. If the Court is inclined to grant the Petition, however, the NJSBA urges that the Joint Opinion be affirmed.

V. The Joint Opinion is Consistent with Decisions in Other States and Does Not Raise Any Issue that Requires Supreme Court Review; The Joint Opinion Should be Affirmed

There has been a rising tide of similar cases around the country, and ethics boards have almost systematically reached the same decision issued here. The Joint Opinion is consistent with what other state's ethics committees have concluded after examining the Avvo fee arrangement: that it amounts to improper fee sharing and the unethical payment of referral fees.

The Ohio Board of Professional Conduct found that a lawyer's participation in an online, non-lawyer-owned legal referral service, where the lawyer is required to pay a "marketing fee" to a non-lawyer for each service completed for a client, is unethical. Specifically, the Committee held that, "This business model presents multiple, potential ethics issues for lawyers. These include fee-splitting with non-lawyers, advertising and marketing,

a lawyer's responsibility for the actions of non-lawyer assistants, interference with the lawyer's professional judgment, and facilitating the unauthorized practice of law." Supreme Court of Ohio, Board of Professional Conduct, Opinion 2016-3 (June 3, 2016).

Similarly, the South Carolina Ethics Advisory Committee found that the Avvo model violates the prohibition against fee sharing with a non-lawyer and paying for a referral. The Committee could not find any exception under which the arrangement would be allowable. "The fact that there is a separate transaction in which the service is paid does not mean that the arrangement is not fee splitting as described in the Rules of Professional Conduct." South Carolina Ethics Advisory Opinion 16-06 (July 14, 2016).

In New York, the Committee on Professional Ethics noted that Avvo's mode of operation raises many questions under the Rules in addition to the marketing fee issue. The Committee ultimately concluded that, "A lawyer paying Avvo's current marketing fee for Avvo Legal Services is making an improper payment for a recommendation in violation of R. 7.2(a)." New York State Bar Association Committee on Professional Ethics Opinion 1132 (Aug. 8, 2017).

The Virginia State Bar also issued a proposed legal ethics advisory opinion finding the Avvo fee arrangement problematic. It noted, "Calling the online service's entitlement a 'marketing fee'

does not alter the fact that a lawyer is sharing her legal fee with a lay business. . . The fact that the ACMS executes a separate electronic debit from the lawyer's bank account for its 'marketing fee' following the firm's electronic deposit of the full legal fee to the lawyer's bank account does not change the ethically impermissible fee-sharing character of the transaction." Virginia State Bar Association Legal Ethics Opinion 1885 (proposed) (Nov. 17, 2017).

The Pennsylvania Bar Association's Legal Ethics and Responsibility Committee likewise concluded, "The manner in which the amount of the 'marketing fee' is established, taken in conjunction with what the lawyer is supposedly paying for, leads to the conclusion that the lawyer's payment of such 'marketing fees' constitutes impermissible fee sharing with a non-lawyer." Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee Formal Opinion 2016-200 (Sept. 2016).

The fact that numerous other state's ethics entities have come to the same conclusion about the Avvo fee-sharing arrangement fortifies the soundness of the Committees' conclusion in the Joint Opinion. As such, there is no issue that requires further review by the Supreme Court, and the Petition for Review should be denied. If the Court is inclined to grant the Petition, however, the NJSBA urges that the Joint Opinion be affirmed.

CONCLUSION

For all of the above reasons, the New Jersey State Bar Association urges the Supreme Court to deny the Petition for Review. If granted, the NJSBA urges the Court to affirm the Joint Opinion to stand as conclusive guidance to New Jersey's attorneys.

Respectfully submitted,
New Jersey State Bar Association

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