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March 19, 2018

Mark Neary, Clerk of the Supreme Court
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, 8th Floor, North Wing
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Trenton, NJ 08625

Re: 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
September 2017 Term, No. 079852

Dear Mr. Neary:

Enclosed please find for filing an original plus ten (10) copies of Reply Brief of Petitioner Consumers for a Responsive Legal System, along with the certificate of service. Please return one time-stamped copy to my attention using the attached return envelope.

Sincerely,

JEREMY E. MEYER
Enclosures
cc: Steven Flanzman, Esquire
Thomas Gordon, Esquire

IN THE SUPREME COURT OF NEW JERSEY
DOCKET NO. 079852

In the Matter of THE JOINT OPINION OF THE ATTORNEY COMMITTEE ON PROFESSIONAL ETHICS OPINION 732, COMMITTEE ON ATTORNEY ADVERTISING OPINION 44, AND UNAUTHORIZED PRACTICE OF LAW OPINION 54.	On Petition for Review of the final order of the Attorney Committee on Professional Ethics, the Committee on Attorney Advertising, and the Unauthorized Practice of Law

REPLY BRIEF OF PETITIONER CONSUMERS FOR A RESPONSIVE LEGAL SYSTEM

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REPLY BRIEF OF PETITIONER
CONSUMERS FOR A RESPONSIVE LEGAL SYSTEM

I. This Court Can and Should Address the Joint Opinion's Policy Effects.

A. The Attorney General's brief in opposition urges the Court to accept the committees' interpretation of the Rules of Professional Conduct without considering its anticompetitive impact, arguing that the committees' opinions are immune from antitrust liability. *See* Opp. at 16. As the petition explained, however, the committees are overwhelmingly made up of lawyers. Where, as here, a state has delegated its regulatory power to market participants, "established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern." *N. Carolina State Bd. of Dental Examiners v. F.T.C.,* 135 S. Ct. 1101, 1111 (2015). For that reason, "active market participants cannot be allowed to regulate their own markets free from antitrust accountability." *Id.*

Under *Dental Examiners*, the fact that this Court established the committees is not enough to shield the decisions of those committees from antitrust liability. *Id.* at 1114. Rather, the committees enjoy antitrust immunity only if they "satisf[y] two requirements: first that the challenged restraint be one clearly articulated and affirmatively expressed as state policy, and second that the policy be actively supervised by the State." *Id.* at 1110 (internal quotation marks and alterations omitted). Far from permitting this Court to ignore the anticompetitive ef-

fects of the committees' decision, *Dental Examiners* requires the Court to actively review the committees' decision on policy grounds, and to "foresee[] and implicitly endorse[] the anticompetitive effects as consistent with its policy goals." *Id.* at 1112. Similarly, *Bates v. State Bar of Arizona*, which the Attorney General cites approvingly as granting immunity to the Arizona bar (at 17), was decided in part because the bar's decisions were "subject to pointed re-examination by the policymaker the Arizona Supreme Court." 433 U.S. 350, 362 (1977) (cited in *Dental Examiners*, 135 S. Ct. at 1114).

Despite the adversary posture of this case, this Court's role in reviewing the committees' decision under *Dental Examiners* is thus more legislative than judicial. *Dental Examiners* grants state-action antitrust immunity to the Committees and their members only when those decisions are actively supervised by the courts. It thus requires the Court to review the decision on policy grounds, not merely for facial compliance with the relevant rules.

B. The Attorney General also urges that the Court avoid considering other questions about the risks and benefits of its interpretation of the Rules of Professional Conduct. Opp. at 19-20. This Court, however, can and should consider such policy questions in reviewing the joint opinion. Indeed, consideration of the risks and benefits of restricting lawyers' participation

in Avvo's fixed-fee services is a necessary step in determining the proper application of the rules to Avvo's services.

The Attorney General's interpretation of the relevant rules depends on a posited "bright-line" prohibition on fees that are tied to formation of the lawyer-client relationship. Opp. at 13. But although Rule 5.4(a) prohibits lawyers from "shar[ing] fees with a nonlawyer," that prohibition has never been read to flatly prohibit payments for services that are based on a percentage of the lawyer's fee. Otherwise, the rule would prevent a lawyer from accepting payment by credit card, since credit-card fees are calculated as a percentage of the total payment. Rather, states interpreting Rule 5.4(a)'s prohibition "have looked to the public policies that underlie Rule 5.4 and have determined that the arrangements are permissible if they comply with" those policies. D.C. Ethics Op. 329 (2005). In particular, states have focused on two policy considerations: "1) whether a proposed arrangement would interfere with a lawyer's independent judgment; and 2) whether refusing to permit the arrangement would result in fewer legal resources being available for those in need of them." *Id.*

Several states and the American Bar Association have thus held that lawyers may participate in coupon services that calculate their fees as a percentage of the consumer's cost for the service. Although these services take a percentage of the lawyer's fees, they nevertheless do not conflict "with the purpose

behind Rule 5.4, the protection of lawyers' independent professional judgment." ABA Formal Op. 465 (2013), at 2. For that reason, the ABA concluded that such payments are "nothing more than payment for advertising and processing services rendered to the lawyers who are marketing their legal services." *Id.* at 3; *see id.* at 2 n.7 (citing state ethics opinions).

A proposed ethics opinion of the North Carolina State Bar relies on similar reasoning in approving lawyers' participation in Avvo's fixed-rate services. As long as the lawyer can ensure independence of professional judgment and non-interference by Avvo in the lawyer-client relationship, the proposed opinion concludes, Avvo's marketing fee is a permissible fee for advertising legal services. *See* Martá P. Brown, *Ethical Marketing in Today's Technological Marketplace*, Jan. 24, 2018, *available at* http://ncada.org/featured-articles/5703861 (citing proposed 2017 Formal Ethics Opinion 6).[1]

In applying the Rules of Professional Conduct to Avvo's services, this Court thus must consider whether banning lawyers from participating in Avvo would serve any consumer-protection

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[1] The Attorney General identifies a series of opinions from other jurisdictions that have concluded that a lawyer's use of Avvo constitutes impermissible fee splitting or improper payment for referral of business. *See* Opp. at 11 & n.7. Those copycat decisions, however, mostly fail to consider whether prohibiting lawyers from participating in Avvo's fixed-fee service offerings furthers the purposes of those states' ethics rules and are wrong for the same reasons as the committees' decision here.

function or whether it "would result in fewer legal resources being available for those in need of them." D.C. Ethics Op. 329.

II. The Joint Opinion Restricts Access to Justice with No Countervailing Benefit.

As the petition explained (at 6), lawyer-client matching services like Avvo help address the gap in access to justice by allowing consumers to conveniently compare and retain the services of a broad range of lawyers at fixed rates. Restricting access to these popular services will deny consumers those benefits and artificially restrict competition for legal services in New Jersey. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-48 (1985) (noting that legal advertising "tend[s] to acquaint persons with their legal rights who might otherwise be shut off from effective access to the legal system").

The Attorney General discounts the impact of the committees' decision, arguing that the harms are "wholly speculative and unsupported." Opp. at 18. That is inevitably the case where the decision under review reflects a recent policy change that has not yet had the opportunity to make its effects felt. But the lack of quantifiable effects does not give the committees free rein to restrict access to legal services. At the very least, the committees' opinion will necessarily cause New Jersey lawyers to stop participating in Avvo's fixed-fee services. Where a decision restricts access to a popular marketplace for

legal services, it is incumbent on the state to show that the benefits of the decision outweigh the harms.

Here, the Attorney General fails to show that restricting use of Avvo accomplishes *any* legitimate purpose. The purpose of Rule 5.4(a) is "to protect the lawyer's professional independence of judgment." ABA Model Rule of Prof'l Conduct 5.4, cmt. There is no such risk here because, after matching a lawyer with a potential client, Avvo plays no further role in the lawyer-client relationship. Indeed, the committees concluded that "Avvo does not insert itself into the legal consultation in a manner that would interfere with the lawyer's professional judgment." App. 7a.

The Attorney General nevertheless argues that the rules should be read to forbid Avvo's services "*regardless* of whether the payment would compromise the independent judgment of the lawyer." Opp. at 1 (emphasis added). The Attorney General contends that "[a]ny suspension of such enforcement, even if it might have an anticompetitive effect, would erode the public's confidence in the legal system." Opp. at 19. That argument, however, is circular. The argument *assumes* that using Avvo violates the Rules of Professional Conduct and that permitting such use would thus undermine enforcement of the rules. But the question here is whether the rules *should* be read to prohibit using Avvo, and that question cannot be answered without also asking whether the prohibition would serve the purposes of the rules.

If anything, denying New Jersey consumers access to fixed-fee legal services on Avvo is likely to *damage* the image of the legal system. The public's image of the profession is improved by advertising that promotes price competition and increases access to legal services. Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States?*, 27 J. Legal Stud. 503, 508, 512 (1998). Restricting such advertising has the reverse effect.

The committees' opinion thus makes access to justice harder for consumers without any countervailing consumer-protection benefit. For those reasons, the opinion should be reversed.

III. Petitioner Has Standing to Challenge the Committees' Decision.

Although the Attorney General does not challenge Responsive Law's standing to petition for review of the committees' decision, the New Jersey State Bar Association does raise such a challenge. The NJSBA argues that Responsive Law is not "aggrieved" by the decision because it does not identify "information specific to New Jersey consumers using the Avvo services who … are cut off" by the decision. NJSBA Br. at 5.

Again, Responsive Law cannot be expected to present empirical evidence of the impact of a decision that has just been decided. Nor is Responsive Law required to present such evidence to show that it is "aggrieved." The joint decision necessarily prohibits New Jersey lawyers from participating in a large and

popular marketplace for legal services, thus creating a new barrier to the public's access to justice. Since its founding in 2010, Responsive Law has testified about access-to-justice issues to state legislatures, supreme courts, and bars in 18 states and has testified to the American Bar Association on multiple occasions. *See* https://www.responsivelaw.org/legislative-testimony.html. The joint decision falls within Responsive Law's core mission of increasing access to legal services both in New Jersey and nationwide. Nothing more is required to show that it is "aggrieved" by the decision.

In exercising its rulemaking authority, this Court should welcome comments from parties other than lawyers with a financial stake in the rules under review. If the Court were to act only in response to filings by members of the bar, it would give the bar veto authority over policy—no policy could arise or be adopted that had not been approved by the bar. To act as the true seat of policymaking authority, this Court has to be able to consider viewpoints from outside the bar, and to generate and adopt rules that the bar opposes (or never proposes). For that reason, it would make little sense to strictly interpret the rules to shut out a voice seeking only to assert the interests of the public.

CONCLUSION

The Court should reverse the joint opinion of the committees and permit New Jersey lawyers to participate in lawyer-client matching services.

Respectfully submitted,

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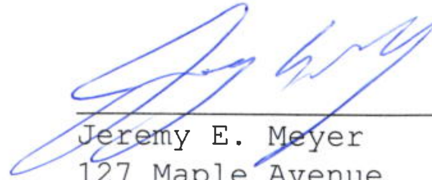
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing petition was furnished by express mail to the clerk of the Supreme Court of New Jersey at Richard J. Hughes Justice Complex, Supreme Court Clerk's Office P.O. Box 970 Trenton, NJ 08625, and to Steven Flanzman at the Office of the Attorney General, Richard J. Hughes Justice Complex, 25 Market Street, Box 080 Trenton, NJ 08625, on March 19, 2018.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



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