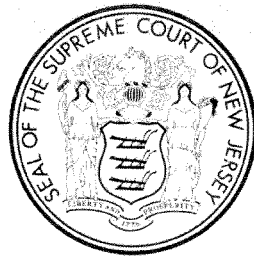


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**ADVISORY COMMITTEE ON PROFESSIONAL ETHICS
COMMITTEE ON ATTORNEY ADVERTISING
COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW**

Appointed by the Supreme Court of New Jersey

**ACPE JOINT OPINION 732
CAA JOINT OPINION 44
UPL JOINT OPINION 54**

**Lawyers Participating in Impermissible Lawyer
Referral Services and Providing Legal Services for
Unregistered Legal Service Plans – Avvo, LegalZoom,
Rocket Lawyer, and Similar Companies**

The Advisory Committee on Professional Ethics received an inquiry from a bar association requesting a formal opinion on “whether it is ethical for lawyers to participate in certain online, non-lawyer, corporately owned services that offer legal services to the public.” Inquirer stated that three companies (Avvo, LegalZoom, and Rocket Lawyer) are soliciting New Jersey lawyers to provide legal services to customers of the companies. The inquiry was jointly considered by the Advisory Committee on Professional Ethics, Committee on Attorney Advertising, and Committee on the Unauthorized Practice of Law. The Committees find that New Jersey lawyers may not participate in the Avvo legal service programs because the programs improperly require the lawyer to share a legal fee with a nonlawyer in violation of *Rule of Professional Conduct* 5.4(a), and pay an impermissible referral fee in violation of *Rule of Professional Conduct* 7.2(c) and 7.3(d). The Committees further find that LegalZoom and Rocket Lawyer appear to operate legal service plans through their websites but New Jersey lawyers may not participate in these plans because they are not registered with the Administrative Office of the Courts in accordance with *Rule of Professional Conduct* 7.3(e)(4)(vii).

Inquirer asked four specific questions:

1. Does a lawyer's participation in these services constitute impermissible fee sharing with nonlawyers in violation of *Rule of Professional Conduct 5.4(a)*?
2. Does participation in these services interfere with a lawyer's independent professional judgment in violation of *Rule of Professional Conduct 5.4(c)*?
3. Are Avvo, LegalZoom, and Rocket Lawyer impermissible attorney referral services in violation of *Rule of Professional Conduct 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 and/or by allowing a nonlawyer company to have direct access to a lawyer's trust or bank accounts?

The Committees reviewed the websites and public information posted on the internet by Avvo, LegalZoom, and Rocket Lawyer, and considered written responses provided by the companies setting forth their positions on the ethical issues. Avvo offers, on its website, two legal services products: Avvo Advisor and Avvo Legal Services. Through Avvo Advisor, users may purchase a 15-minute telephone conversation with a lawyer for a flat fee. The user pays the fee to Avvo, Avvo contacts participating lawyers, and the first lawyer who responds to Avvo gets the job. Users can also select a lawyer from the Avvo profiles of participating lawyers. After the telephone conversation is completed, Avvo electronically deposits the flat fee into the lawyer's bank account and then withdraws a "marketing fee" (currently \$10, about 25% of the \$39.95 flat fee for the legal consultation). Avvo suggests that the deposit be made into the lawyer's trust account, and the withdrawal be taken from the lawyer's operating account.

Through Avvo Legal Services, users may purchase various legal services for fixed fees paid to Avvo, such as an uncontested divorce or a green card application. Participating lawyers provide these services to the user. When the services are completed, Avvo deposits the fees into the lawyer's bank account and then withdraws a "marketing fee" in set amounts that vary according to the fee charged for the specific legal service.

LegalZoom offers what appear to be legal service plans to users through its website. For Business Advantage Pro, users pay a monthly flat fee subscription and receive legal advice on limited business matters. For Legal Advantage Plus, users pay a monthly flat fee and receive legal advice on various matters such as estate planning, family law, and tax. Under both plans, users receive "unlimited" 30-minute consultations with lawyers. Users may make appointments with participating lawyers or request to receive a phone call from the "first available" lawyer. Users may receive additional services directly from participating lawyers at a discounted fee rate. The "Join Our Attorney Network" page of the LegalZoom website states that lawyers do not pay LegalZoom to participate; the monthly subscription fees are retained by LegalZoom.

Rocket Lawyer offers what appear to be legal service plans to users for a monthly flat fee; subscribing users receive limited legal advice on document-related matters, such as

enforcing a legal document (called “document defense”). Users also receive a “free” 30-minute consultation with a lawyer, and can use the “ask a lawyer” section of its website for legal advice. Participating lawyers do not pay Rocket Lawyer but agree to offer a discounted fee for additional services; Rocket Lawyer retains the monthly subscription fees.

The Committees find that the LegalZoom and Rocket Lawyer websites appear to offer legal service plans to paying subscribers, rather than an attorney referral service. *Rule of Professional Conduct 7.3(e)(4)* governs legal service plans. That *Rule* permits a “bona fide organization” to “recommend[], furnish[], or pay[]” for legal services to its “members or beneficiaries” under certain conditions. If the organization is for profit, the legal services cannot be rendered by lawyers “employed, directed, supervised or selected by it” *RPC 7.3(e)(4)(i)*. The participating lawyers must be separate and apart from the bona fide organization and cannot be affiliated or associated with it. *RPC 7.3(e)(4)(ii)* and *(iii)*. The member or beneficiary must be recognized as the client of the lawyer, not of the organization. *RPC 7.3(e)(4)(iv)*. The member or beneficiary must be entitled to select counsel other than that furnished, selected, or approved by the organization for the matter (though the switch in counsel may be at the member’s or beneficiary’s own expense). *RPC 7.3(e)(4)(v)*. Participating lawyers must not have any cause to know that the organization is in violation of applicable laws, rules, or legal requirements. *RPC 7.4(e)(4)(vi)*. Lastly, the organization must register its plan with the Supreme Court (Administrative Office of the Courts, Professional Services). *RPC 7.4(e)(4)(vii)*.

LegalZoom submitted a response that stressed that its employees do not provide legal advice or assistance; it merely offers prepaid legal service plans. It stated that it contracts with a New Jersey law firm to provide legal consultations for its members and pays this law firm a monthly capitated fee per plan member in New Jersey.

Rocket Lawyer submitted a response, including its Service Provider Agreement. It stated that it offers prepaid legal service plans through independent lawyers who are not employees of the company. The Service Provider Services Appendix A states that participating lawyers are paid an undisclosed sum by Rocket Lawyer for participation in the “Q&A Service.”

The LegalZoom and Rocket Lawyer offerings appear to be legal service plans, as they “furnish” and “pay for” limited legal services through outside participating lawyers to “members” who pay a monthly subscription (“membership”) fee. Members select lawyers from the respective websites; participating lawyers are not officially affiliated with LegalZoom or Rocket Lawyer; and members become clients of the participating lawyer. As of the date of this Joint Opinion, however, neither organization has registered a legal service plan with the Administrative Office of the Courts. Therefore, New Jersey lawyers may not provide legal services to members of these unregistered legal service plans.

The Avvo plans do not meet the definition for legal service plans; they are pay-for-service plans. There are no “members or beneficiaries” to whom legal services are “furnished” and “paid for” through a legal service plan.

As noted above, Inquirer asked four questions. The first question asks whether lawyers who participate in these programs are engaged in impermissible fee sharing in violation of *Rule of Professional Conduct 5.4(a)* (“[a] lawyer shall not share legal fees with a nonlawyer”). The

Committees find that the Avvo business model violates *Rule of Professional Conduct 5.4(a)*. The participating lawyer receives the set price for the legal service provided, then pays a portion of that amount to Avvo. The label Avvo assigns to this payment (“marketing fee”) does not determine the purpose of the fee. *In re Weinroth*, 100 N.J. 343, 349-50 (1985) (referral fee was disguised as a credit for future legal services to client; law firm was aware that client intended to forward that amount to the nonlawyer who referred the firm the case); *In re Maran*, 80 N.J. 160 (1979) (improper referral fee to a doctor took the form of an inflated medical bill). Here, lawyers pay a portion of the legal fee earned to a nonlawyer; this is impermissible fee sharing, prohibited under *Rule of Professional Conduct 5.4(a)*. See also *In re Bregg*, 61 N.J. 476 (1972); Joint ACPE Opinion 716/UPL Opinion 45 (June 2009).

The Committees further find that the monthly subscription fees paid by consumers to LegalZoom and Rocket Lawyer for the “free” consultations with lawyers do not violate this *Rule*. Those monthly subscription fees are not paid to the lawyers providing the service; the lawyers have not shared their legal fees. In legal service plans, members pay membership fees to the plan and, in return, get access to limited legal services by participating lawyers. Participating lawyers usually are paid a lump per-capita amount by the plan for providing the limited-scope legal services to plan members who select them.

The second question presented by Inquirer asks whether these services unduly interfere with the lawyer’s professional judgment in violation of *Rule of Professional Conduct 5.4(c)*. This *Rule* provides that “[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.” Inquirer suggested that Avvo directs or regulates the lawyer’s professional judgment because it “defines the scope of the legal services offered, receives payment from clients, sets the fee and pays lawyers only when legal tasks are completed.” The Committees disagree. Avvo does not insert itself into the legal consultation in a manner that would interfere with the lawyer’s professional judgment.

As for LegalZoom and Rocket Lawyer, Inquirer suggested that lawyers may be constricted in the service they provide for clients in the limited phone consultations. Again, however, this is the nature of legal service plans. Members get a limited consultation with participating lawyers and if the member needs more, they can retain the lawyer separately (usually at a discounted rate).

The third question presented by Inquirer asks whether the companies offer impermissible attorney referral services. *Rule of Professional Conduct 7.2(c)* provides in relevant part:

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 communication permitted by this Rule; . . . and (3) a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

Rule of Professional Conduct 7.3(d) provides:

A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by the 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.

Accordingly, the *Rules* prohibit a lawyer from giving anything of value to a person for recommending the lawyer's services, or compensating or giving anything of value to a person or organization to secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client. *RPC 7.2(c)*; *RPC 7.3(d)*. Both of these *Rules* provide that lawyers may, however, "pay the reasonable cost of advertising" or "public communication."

The Committees find that the "marketing fee" that lawyers pay Avvo after providing legal services to clients is not for the "reasonable cost of advertising" but, instead, is an impermissible referral fee. The fee "bears no relationship to advertising." ACPE Opinion 481 (May 1981); Joint ACPE Opinion 716 / UPL Opinion 45 (June 2009). Rather, it is a fee that varies with the cost of the legal service provided by the lawyer, and is paid only after the lawyer has completed rendering legal services to a client who was referred to the lawyer by Avvo.

Lawyers may "advertise" by placing an ad on the Avvo website or participating in other parts of the website without paying this "marketing fee." Lawyers may pay a set, flat amount for *potential* client inquiries or "leads" that may or may not result in retention of a client for a specific matter, but they may not pay a fee in exchange for referral or retention of a client for a specific case. CAA Opinion 43 (June 2011). This service offered by Avvo is a lawyer referral program that does not conform to the requirements of *Rule of Professional Conduct 7.2(c)* and *Rule of Professional Conduct 7.3(d)*. Accordingly, New Jersey lawyers may not participate in the program.

The Committee on Attorney Advertising has issued several opinions on the distinction between "advertising" and an impermissible referral service. *See, e.g.*, CAA Opinion 13 (October 1992); CAA Opinion 43 (June 2011). Because the companies at issue in those opinions did not charge a fee for each case a lawyer received (as opposed to inquiries or "leads"), the opinions focused on whether the companies were making improper statements or restricting information about the participating lawyers. When the lawyers pay a fee to the company based on the retention of the lawyer by the client or the establishment of an attorney-client relationship, the answer to the inquiry is simple: the company operates an impermissible referral service.

LegalZoom and Rocket Lawyer offer what appear to be legal service plans through a different business model. Participating lawyers do not pay referral fees to those companies.

The fourth question raised by Inquirer asks whether payment of the legal fee by the user to Avvo violates *Rule 1:28A-2*, which requires lawyers to maintain a trust account registered with the IOLTA program. Avvo holds the legal fee until the services are performed and then electronically transfers the monies to the law firm bank account.

In New Jersey, lawyers are not required to hold advance payment of fees in their trust account absent an agreement with the client; while that is the better practice, they may deposit such monies in their operating account. *In re Stern*, 92 N.J. 611 (1983); Michels, K., *New Jersey Attorney Ethics*, § 8:4-3a, p. 126-27 (Gann 2017). The arrangement by Avvo does not violate Rule 1:28A-2.

The Committees notified Avvo, LegalZoom, and Rocket Lawyer that they were considering whether New Jersey lawyers may, consistent with the rules governing attorney ethics and advertising, participate in their programs, and requested written responses setting forth their position. In its response, Avvo claimed to be serving a public purpose of improving access to legal services. The Committees acknowledge that improving access to legal services is commendable, but participating lawyers must still adhere to ethical standards.

Avvo stated that it is not recommending or referring lawyers to potential clients. The Committees disagree; Avvo is connecting its users to the lawyers who have signed up with Avvo to provide those specific services. Avvo asserted, in essence, that all lawyers licensed in a jurisdiction are listed on its pages and, conceivably, a user could select any lawyer, even those who do not participate in this service, by merely finding that lawyer's contact information on its site and reaching out directly to that lawyer for representation. Avvo is conflating its two services – the attorney-referral service and the attorney-directory service. Only those lawyers participating in the “Avvo Legal Services” plan can provide users with the requested legal services. It is irrelevant that other lawyers can be found on the general lawyer directory.

Avvo claimed that the “marketing fee” is not a referral fee but an advertising cost, and because the “marketing fee” is a separate transaction, there is no improper fee sharing. The label and timing of the fee does not transform it into an advertising cost. This fee varies depending on the cost of the legal service provided, which is inconsistent with the essential elements of an advertising cost. Avvo defended the varying amounts of its “marketing fees” by stating that in the online market, bigger-ticket services should have bigger-ticket fees. It stated that it spends more to advertise the range of services and takes a bigger payment processing risk for more expensive services. The Committees are not convinced that the sliding scale of fees for legal services rendered bear any relation to marketing.

Avvo asserted that its marketing scheme is commercial speech that must be tested against the intermediate scrutiny standard applied to First Amendment commercial speech. The Committees are not restricting Avvo's marketing; the focus of this Joint Opinion is on the for-profit lawyer referral program and sharing of a legal fee with a nonlawyer. The First Amendment does not protect lawyers who seek to participate in prohibited attorney referral programs or engage in impermissible fee sharing.

Avvo further asserted that fee sharing is only unethical if it compromises the lawyer's professional judgment. The Committees acknowledge that concerns about independent professional judgment undergird the prohibition on sharing legal fees with nonlawyers. But the precedent in New Jersey, in case law, opinions, and the language of the *Rule of Professional Conduct* itself, do not restrict the prohibition to situations where there is a clear connection between the fee sharing and the lawyer's professional judgment. *See, e.g., In re Weinroth*, 100

N.J. 343, 349-50 (1985) (“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”). Sharing fees with a nonlawyer is prohibited, without qualification.

Avvo acknowledged that what it calls its “pay-per-action” model may look like a referral fee. It asserted that its model is permitted because the user chooses the lawyer, no “runners” are involved, and there is no element of deception in the Avvo website. The prohibition on for-profit referral fees or sharing legal fees with a nonlawyer does not depend on whether deception is involved; as noted above, it is unqualified.

One need not parse the Avvo website to determine if the language used improperly restricts choice or directs users to a particular lawyer. Avvo charges a pay-per-legal-service fee, which is a hallmark of an attorney referral service.

The Committees reviewed advisory opinions about Avvo-type companies issued by other states. Ohio found that the “marketing fee” was not payment for advertising but, rather, a referral fee because the amount is based on a percentage of the fee for rendering legal services. Supreme Court of Ohio, Board of Professional Conduct, Opinion 2016-3 (June 3, 2016).

Even where a business model states that it does not engage in impermissible fee splitting because the fees are separated into two different transactions or are called a “marketing fee” or similar term, fee splitting with a nonlawyer likely occurs. Such fees are not traditional advertising fees, as outlined in Adv. Op. 2001-2. Unlike advertising fees that are fixed amounts and paid for a fixed period of time, these “marketing fees” are a percentage of the fee generated on each legal service completed by the lawyer. Therefore, a fee-splitting arrangement that is dependent on the number of clients obtained or the legal fee earned does not comport with the Rules of Professional Conduct.

South Carolina found that the arrangement violates *Rule of Professional Conduct 5.4(a)*, improper fee-sharing, and *Rule of Professional Conduct 7.2(c)*, improper referral fee. South Carolina Ethics Advisory Opinion 16-06 (July 14, 2016). As for fee-sharing, South Carolina stated:

In the situation described above, the service collects the entire fee and transmits it to the attorney at the conclusion of the case. In a separate transaction, the service receives a fee for its efforts, which is apparently directly related to the amount of the fee earned in the case. 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.

A lawyer cannot do indirectly what would be prohibited if done directly. Allowing the service to indirectly take a portion of the attorney’s fee by disguising it in two separate transactions does not negate the fact that the service is claiming a certain portion of the fee earned by the lawyer as its “per service marketing fee.”

South Carolina further found that the payment by the lawyer to the company is not payment for the cost of advertisement but, rather, a referral fee. It stated:

The service, however, purports to charge the lawyer a fee based on the type of service the lawyer has performed rather than a fixed fee for the advertisement, or a fee per inquiry or “click.” In essence, the service’s charges amount to a contingency advertising fee arrangement rather than a cost that can be assessed for reasonableness by looking at market rate or comparable services.

Presumably, it does not cost the service any more to advertise online for a family law matter than for the preparation of corporate documents. There does not seem to be any rational basis for charging the attorney more for the advertising services of one type of case versus another. For example, a newspaper or radio ad would cost the same whether a lawyer was advertising his services as a criminal defense lawyer or a family law attorney. The cost of the ad may vary from publication to publication, but the ad cost would not be dependent on the type of legal service offered.

Pennsylvania also found impermissible fee-sharing. Pennsylvania Bar Association, Legal Ethics and Professional Responsibility Committee Formal Opinion 2016-200 (September 2016). It stated:

The manner in which the payments are structured is not dispositive of whether the lawyer’s payment to the Business constitutes fee sharing. Rather, 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 further found that the “marketing fee” was not the “usual cost of advertising” within the meaning of *Rule of Professional Conduct 7.2(c)*. It stated: “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.”

In sum, the Committees find that the Avvo website offers an impermissible referral service, in violation of *Rules of Professional Conduct 7.2(c)* and *7.3(d)*, as well as improper fee sharing with a nonlawyer in violation of *Rule of Professional Conduct 5.4(a)*. LegalZoom and Rocket Lawyer avoid those problems but appear to be offering legal service plans that have not been registered pursuant to *Rule of Professional Conduct 7.3(e)(4)(vii)*. New Jersey lawyers may not participate in the Avvo legal service programs. In addition, New Jersey lawyers may not participate in the LegalZoom or Rocket Lawyer legal service plans because they are not registered with the New Jersey Supreme Court (Administrative Office of the Courts).