

Ethics Opinions Related to Avvo Legal Services

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Introduction

Avvo was launched in 2007 as an online directory of lawyers to provide consumers with access to lawyers' profiles. In 2014, it expanded its services from merely providing a directory of lawyers to providing a way to connect prospective clients with lawyers through a website called Avvo Advisor. Some time later, Avvo expanded its services again into what it now calls Avvo Legal Services,² which it describes as "an online legal services marketplace."³ This new program offers access to limited-scope legal services through a network of attorneys.

Should attorneys be concerned about participating in Avvo Legal Services? Because no jurisdiction has actually decided one way or another, the answer to this question is not straightforward. Avvo has tried to assure lawyers that participating in the program does not raise any ethical concerns.⁴ Yet, given recent ethics opinions in a number of states based on principles

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² The website for Avvo Legal Services can be found at https://www.avvo.com/legal-services?avvo_campaign=legal_services&avvo_medium=giganav_s_ubnav&avvo_source=avvo.

³ The program started as a pilot program in only five cities but then expanded to 18 states on February 9, 2016. Robert Ambrogi, *Avvo Officially Launches its Fixed-Fee Legal Services in 18 States*, Law Sites, February 9, 2016, <http://www.lawsitesblog.com/2016/02/avvo-officially-launches-its-fixed-fee-legal-services-in-18-states.html>; Robert Ambrogi, *Avvo readies rollout of fixed-fee legal services*, ABA Journal.com, January 12, 2016, http://www.abajournal.com/mobile/article/avvo_readies_roll_out_of_fixed_fee_legal_services/.

⁴ See, http://www.avvo.com/support/avvo_legal_services_attorney_faq#ethics.

that apply in almost every jurisdiction, it is fair to say that participation in Avvo Legal Services as it is currently constituted does raise a number of concerns for the lawyers involved.

What is “Avvo Legal Services”?

Avvo Legal Services is an online platform designed to connect potential clients with lawyers who are available to provide limited-scope legal services. The way the system works is relatively simple. Potential clients go to the Avvo website and provide some information about their legal needs. Based on that information and the potential client’s location, Avvo generates a list of attorneys from which the potential client can choose the attorney they want to work with. Once the client chooses an attorney, the client pays the full price to purchase the legal services. The price for the legal services to be provided is set by Avvo, not by the lawyer who will provide the services. Avvo collects the payment before the services are rendered, and keeps it until the attorney chosen by the client completes the service for the client. After that happens, Avvo sends the attorney the amount paid by the client and, in a separate transaction, directly withdraws what Avvo calls a “marketing fee” from the attorney’s operating account. The amount of the marketing fee the attorney pays Avvo varies depending on the price of the legal service that is provided by the attorney. The more expensive the services are, the higher the marketing fee is. Avvo and the lawyer then go through the same process every time a new client chooses the lawyer again.⁵

Given how it works, Avvo Legal Services is neither a law firm nor a pre-paid or group

⁵ Avvo’s own description of its service is available here: <https://advisor.avvo.com/providers/welcome>. See also, http://www.avvo.com/support/avvo_legal_services_attorney_faq.

legal service plan.⁶ Moreover, it would likely not be considered a referral service because it does not exercise discretion in order to determine which attorneys to recommend to the clients.⁷ Instead, Avvo Legal Services is more likely to be considered a “lead generator,” a concept that is now recognized in the ABA Model Rules of Professional Conduct.

In 2012, the ABA amended the Comment to Model Rule 7.2 to “help guide the growing industry of lead generation services (and the lawyers who use those services).”⁸ The new language recognizes the differences between ads, referrals and leads which is critical to understand how the conduct of attorneys involved with Avvo is likely to be regulated because, although lawyers have a constitutionally protected right to advertise,⁹ they are generally banned from giving anything of value to a person for recommending the lawyer’s services.¹⁰

⁶ According to the Comment to ABA Model Rule of Professional Conduct 7.2, a legal service plan is “a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation.” MODEL RULES OF PROF’L CONDUCT R. 7.2, cmt. [6]. See also, ABA Standing Committee on Ethics and Professional Responsibility, Formal Op. 87-355 (1987), p. 3 (typically, for-profit prepaid legal service plans provide for plan members to pay a monthly fee, part of which is kept by the plan sponsor).

⁷ See, North Carolina State Bar Ethics Committee Proposed Formal Ethics Opinion 6 (July 27, 2017) (“If [Avvo Legal Services] is a lawyer referral service, North Carolina lawyers may not participate. . . . As long as [Avvo Legal Services] does not exercise discretion to match prospective clients with participating lawyers, the requirements of Rule 7.2(d) are not implicated.”) For more information on referral services, see the ABA Model Supreme Court Rules Governing Lawyer Referral & Information Service, available at https://www.americanbar.org/groups/lawyer_referral/policy.html.

⁸ Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 65 (2015).

⁹ MODEL RULES OF PROF’L CONDUCT R. 7.2(a).

¹⁰ MODEL RULES OF PROF’L CONDUCT R. 7.2(b); RONALD ROTUNDA, JOHN DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY, A STUDENT’S GUIDE 1192 (2012-13) (a lawyer cannot pay a non-lawyer a fee for each referral that results in a client representation or a

Based on these distinctions, according to the Comment to Model Rule 7.2 a lawyer may pay a non-lawyer lead generator only if the lead generator does not recommend the lawyer, and the payment to the lead generator is “consistent with” the rule that bans splitting fees with non-lawyers and with the rule that regulates a lawyer’s right to advertise.¹¹ For this reason, whether Avvo’s business model is consistent with these rules of professional conduct is precisely the issue that jurisdictions have been trying to address.

What are some of the concerns?

The most common concern raised in ethics opinions about Avvo Legal Services relates to whether paying Avvo a fee based on the legal fee paid by the client constitutes a violation of the ban on sharing fees with non-lawyers.¹² Obviously, this is an important question for the lawyers involved, so Avvo has tried to reassure lawyers¹³ that they should not worry about this issue because (1) lawyers pay Avvo’s fee in a separate transaction, (2) Avvo’s fee is a “marketing fee” as opposed to a legal fee, (3) fee sharing is not inherently unethical, and (4) attempts to regulate

percentage of the legal fees generated by the referrals).

¹¹ MODEL RULES OF PROF’L CONDUCT R. 7.2, cmt. [5].

¹² See, S.C. Bar Ethics Advisory Comm., Advisory Op. 16-06 (2016); Sup. Ct. of Ohio Bd. of Prof’l Conduct, Op. 2016-3 (2016); Pennsylvania Bar Association, Legal Ethics and Professional Responsibility Committee, Formal Opinion 2016-200 (2016); New York State Bar Association Committee on Professional Ethics, Opinion 1132 (2017); ACPE Joint Opinion 732, CAA Joint Opinion 44, UPL Joint Opinion 54 (2017); Utah State Bar Ethics Advisory Op. 17-05 (2017); Virginia State Bar Association Proposed Legal Ethics Opinion 1885 (2017); Indiana Supreme Court Disciplinary Commission, Op. #1-18 (2018).

¹³ See, http://www.avvo.com/support/avvo_legal_services_attorney_fa#ethics.

the conduct of the lawyer paying the fee would be unconstitutional.¹⁴

As of now, however, these issues are not as clear cut as Avvo suggests. Model Rule 5.4(a), which has been adopted in almost all jurisdictions, states that it is unethical to share a fee with a non-lawyer except under four enumerated circumstances, none of which apply to the business arrangement with Avvo. Clearly, part of the policy behind the rule is to protect the attorney's independent professional judgment but that does not mean that the interference needs to be shown in order for the rule to apply.¹⁵ The rule does not say that sharing a fee with a non-lawyer is unethical only if it interferes with the attorney's independent professional judgment; it says it is unethical to share a fee *because* it is too much of a threat to an attorney's independent professional judgment.¹⁶

The joint opinion of several bar committees in New Jersey illustrates this position. Addressing Avvo's contention that fee sharing with non-lawyers is not inherently unethical, the opinion explains that the rule "does not restrict the prohibition to situations where there is a clear connection between the fee sharing and the lawyer's professional judgment. . . . Sharing fees

¹⁴ For a more detailed discussion of some of Avvo's arguments see, Alberto Bernabe, *Avvo Joins the Legal Market: Should Attorneys Be Concerned?*, 104 GEO L.J. ONLINE 184 (2016).

¹⁵ Some ethics opinions related to referral services also support this view. See, Helen Gunnarsson, *Staying on the Right Side of the Blurry Ban Against Paying for Referrals*, 30 Law. Man. Prof. Conduct 541 (2014), discussing, among others, North Carolina Ethics Op. 2004-1 (lawyer may participate in for-profit online service that is hybrid of lawyer referral service and legal directory, provided there is no fee-sharing with service); Ohio Supreme Court Ethics Op. 2001-2 (2001) (company operates as impermissible referral service when company requires lawyers to pay a percentage of the fee obtained for rendering legal services); Oregon Ethics Op. 2007-180 (2007) (lawyer may not pay internet referral if fee is based on number of referrals, retained clients or revenue generated by listing).

¹⁶ See, Rotunda and Dzienkowski, *supra* note 10.

with a non-lawyer is prohibited, without qualification.”¹⁷

Moreover, according to the Comment to Model Rule 7.2, if the fee paid to a non-lawyer for a client lead is contingent on a person’s use of the lawyer’s service, paying the fee would constitute an impermissible sharing of fees with non-lawyers.¹⁸ Since a lawyer does not have to pay a fee to Avvo unless a client chooses a lawyer suggested by Avvo, it can be argued that the fee is “contingent on a person’s use of the lawyer’s service.”

For either of these reasons, or both, in opinions issued separately since 2016, South Carolina’s Ethics Advisory Committee, the Ohio Board of Professional Conduct, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, the New York State Bar Association’s Committee on Professional Ethics, the Utah State Bar, three committees of the Supreme Court of New Jersey¹⁹ and the Virginia State Bar Association found that participating in arrangements as those used by Avvo Legal Services either violates the prohibition of sharing fees with a non-lawyer or creates the risk of such a violation, whether under a rule like Model Rule 5.4 or like Model Rule 7.2.²⁰

Avvo’s arguments that there is no violation of the rules because Avvo is paid a marketing fee rather than a legal fee, and the argument that the payment is done in a separate transaction have also been rejected by ethics opinions. For example, one opinion concluded that a model

¹⁷ ACPE Joint Opinion 732, *supra* note 12, at 6-7.

¹⁸ American Bar Association Commission 20/20, Report to the House of Delegates on Resolution 105B, p. 5.

¹⁹ The Advisory Committee on Professional Ethics, the Committee on Attorney Advertising, and the Committee on the Unauthorized Practice of Law.

²⁰ See *supra* note 12.

similar to what Avvo claims is a marketing or advertising fee does “not correspond to any traditional model of compensation for advertising,”²¹ while another found that the fee does not appear to be a fee for the reasonable costs of advertising.²²

Likewise, the joint opinion of the committees in New Jersey concludes that the fact that Avvo refers to its fee as a “marketing fee” does not determine the purpose of the fee or negate the fact that paying it constitutes sharing a fee with a non-lawyer.²³ It also concludes that the fact that the fee the lawyer pays Avvo changes depending on the value of the legal fee creates the impression that the lawyer is paying Avvo a percentage of the legal fee, which is precisely what the ban on sharing fees with a non-lawyer prohibits.²⁴ The most recent opinion on this question (at the time this article was finished), issued on April 9, 2018 by the Indiana Supreme Court Disciplinary Commission, agrees with this analysis. It concludes that the so-called marketing fee

²¹ Pennsylvania Bar Association, Legal Ethics and Professional Responsibility Committee, Formal Opinion 2016-200, p. 6 (September 2016).

²² Utah State Bar Ethics Advisory Op. 17-05 (September 27, 2017).

²³ ACPE Joint Opinion 732, *supra* note 12, at 5-8. For Avvo’s response to the opinion, see, Josh King, *Why New Jersey Gets It Wrong on Avvo Legal Services*, Socially Awkward, July 20, 2017, at <http://sociallyawkwardlaw.com/why-new-jersey-gets-it-wrong-on-avvo-legal-services/>.

²⁴ ACPE Joint Opinion 732, *supra* note 12, at 5-8. See also, Rotunda, *supra* note 10, at 1013 (a lawyer cannot pay a non-lawyer on a contingent basis because this would constitute the sharing of a fee.) In addition, although ethics opinions on “deal of the day” marketing programs are divided on whether paying the website that markets the deal constitutes sharing a fee with a non-lawyer, the analysis in most of them suggests that paying a fee that is dependent on the amount of the legal fees would constitute sharing fees with a non-lawyer. See, Alabama State Bar, Formal Op. 2012-01 (2012); Indiana State Bar Ass’n Legal Ethics Comm., Advisory Op. 1, (2012); Pennsylvania Bar Ass’n, Advisory Op. 2011-27 (2011); ABA Standing Committee on Ethics and Professional Responsibility, Formal Op. 465 (2013); North Carolina State Bar, Formal Op. 10 (2011). But see, Maryland State Bar Ass’n Comm. on Ethics, Op. 2012-07 (2012); South Carolina Bar Ethics Advisory Comm., Advisory Op. 11-05 (2011).

is not really a fee for marketing services because it “is typically tied to the cost of the legal services provided and is not tied to the actual cost of advertising the individual lawyer’s legal services,” making the fee “more akin to fee splitting or a referral fee, [than to] payment for advertising.”²⁵

In addition, even if the fee paid to Avvo is for marketing, the comment to the model rule that recognizes the right to advertise states that lawyers are banned from paying a lead generator “if the lead generator states, implies, or creates a reasonable impression that it is recommending the lawyer.”²⁶ For this reason, lawyers paying Avvo should consider whether a state disciplinary authority might argue that by providing Avvo’s own “ratings,” as opposed to client ratings, Avvo creates the impression that Avvo is recommending some lawyers more than others. After all, part of Avvo’s original goal was to have consumers trust Avvo to provide guidance on how to choose the best attorney for their needs.²⁷

This was one of the concerns expressed in the opinion of the New York State Bar Association’s Committee on Professional Ethics.²⁸ In fact, the Committee concluded that Avvo does seem to be recommending lawyers and, thus, lawyers who pay Avvo’s fee would be in violation of the rule. This is so, according to the opinion, because Avvo does more than merely

²⁵ Indiana Supreme Court Disciplinary Commission, Op. #1-18 (2018), at 2-3.

²⁶ MODEL RULES OF PROF’L CONDUCT R. 7.2, cmt. [5].

²⁷ See, Robert Ambrogi, *Following Avvo’s Acquisition, Founder Britton is Leaving the Company*, LAW SITES, April 2, 2018, available at <https://www.lawsitesblog.com/2018/04/following-avvos-acquisition-founder-britton-leaving-company.html> (citing Mark Britton, Avvo’s founder, stating that “our focus in this product — was in serving the consumer and on getting them the help that they need.”).

²⁸ New York State Bar Association Committee on Professional Ethics Op. 1132.

list lawyers, their profiles, and their contact information. According to the committee, Avvo also gives each lawyer a rating in a way that suggests mathematical precision, and claims that the rating enables a potential client to find the right lawyer for their needs. Based on this, the committee found that Avvo is giving potential clients the impression that a lawyer with a higher rating is a better lawyer than a lawyer with a lower rating and is, therefore, more highly recommended.²⁹

Avvo has suggested that these concerns are unwarranted because if challenged, courts would decide that the application of rules of professional conduct to attorneys' transactions with Avvo would be declared unconstitutional. However, it is also possible that a state could articulate a substantial state interest that would be directly advanced by the application of a ban on sharing fees with non-lawyer lead generators. After all, as the comment to Model Rule 5.4 states, the rule expresses what is a "traditional limitation" on the practice of law, which means the policy upon which it is based is deeply entrenched and respected. As stated above, Avvo feels confident in its view, but, given the recent ethics opinions on the subject what lawyers ought to be asking themselves is how confident *they* would feel risking discipline.

Finally, one last issue of concern regarding Avvo Legal Services relates to the ethical duty to hold a client's money in a trust account. Avvo's position is that "[b]ecause Avvo does not transfer the fee paid by the consumer until after legal services have been provided and the fee earned, participating attorneys need not worry about trust account issues."³⁰ Thus, Avvo seems

²⁹ Id.

³⁰ King, *Avvo Legal Services and the Rules of Professional Conduct*, at 9-10, available at <http://sociallyawkwardlaw.com/wp-content/uploads/Avvo-Legal-Services-and-the-RPC-with-supporting-details-2016-2-11.pdf>.

to take the position that the fact that the fee is paid to Avvo in advance of the provision of legal services exempts a lawyer from having to place the money in a trust account. In fact, the generally accepted rule is exactly the opposite. Model Rule 1.15(c) states that a lawyer has a duty to deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.³¹

This concern has already been expressed by the ABA Standing Committee on Ethics and Professional Responsibility in a different context. In an ethics opinion on prepaid marketing deals, the Committee held that it is doubtful that prepaid marketing deals can be structured to comply with the duty to deposit unearned fees in a trust account because prepaid deals involve non-lawyers collecting in advance the money to which the lawyer will be entitled for legal services yet to be performed.³²

If this analysis supports concerns over prepaid marketing deals, it is likely to support arguments against allowing participation in Avvo Legal Services. As expressed in the Utah State Bar's opinion on Avvo, it is difficult to see how a lawyer can protect client funds "with the care required of a professional fiduciary" if the lawyer has no control over the trust fund.³³ Likewise, in a proposed ethics opinion, the Virginia State Bar concluded that a lawyer who participates in a service like Avvo Legal Services violates Virginia Rules of Professional Conduct because in doing so, the attorney cedes control of her client's or prospective client's advanced legal fees to a

³¹ MODEL RULES OF PROF'L CONDUCT R. 1.15(c).

³² ABA Standing Committee on Ethics and Professional Responsibility, Formal Op. 465 (2013) at 6.

³³ Utah State Bar Ethics Advisory Op. 17-05, p. 3 (September 27, 2017).

lay entity, thus relinquishing control of the lawyer's obligation to refund any unearned fees to a client at the termination of representation.³⁴

The only way the duty to safeguard the client's money in a trust account does not apply is if the fee is deemed earned by the lawyer upon payment to Avvo.³⁵ Yet, Avvo's own language defeats this argument since it admits that it keeps the money until after legal services have been provided and the fee is earned. If the fee is not earned until the services have been provided, by definition, the money paid to Avvo still belongs to the client until the lawyer provides the services and, therefore, the lawyer has an obligation to place the money in a trust account.

For all these reasons, as discussed in almost all the ethics opinions issued to date, it is not far fetched to conclude that a disciplinary agency might find that a lawyer involved in Avvo Legal Services would violate rules of professional conduct. And that is something lawyers should be concerned about.

The North Carolina Bar Ethics Committee's proposed opinion

In contrast with the conclusion expressed in the ethics opinions already published, a

³⁴ Virginia State Bar Association Proposed Legal Ethics Opinion 1885 (2017). The opinion also concludes that participating in the services violates the rules related to sharing legal fees with a non-lawyer and paying another for recommending the lawyer's services.

³⁵ A proposed opinion by the North Carolina State Bar Ethics Committee suggests this alternative, which is addressed below. See, North Carolina State Bar Ethics Committee Proposed Formal Ethics Opinion 6 (July 27, 2017). For a comment on the problems created by "deeming" that fees are earned before they are, in fact, earned, see, Alberto Bernabe, *Flat Fees: Earned, Unearned or Both*, Ohio Lawyer, Vol. 30, No. 4, page 14 (July/August 2016); Alberto Bernabe, *Ethical Issues Related to Flat Fees*, @Law, p. 36 (Spring 2017).

proposed opinion in North Carolina takes a different view.³⁶ In it, the North Carolina Bar Ethics Committee concludes that lawyers can participate in Avvo Legal Services as long as certain conditions are met. Most of these conditions are reasonable and understandable. For example, Avvo must not exercise discretion in choosing lawyers for prospective clients (because this would mean Avvo operates as a referral service in violation of Rule 7.2), Avvo must not make recommendations to the lawyer relative to the representation of the client (because this would interfere with the lawyer's independent professional judgment), Avvo must not have a policy of threatening to remove or of removing lawyers from the list of participating lawyers due to their exercise of independent professional judgment (for the same reason) and participating lawyers must evaluate the fees charged by Avvo and decline to offer legal services if the fee is excessive (because otherwise the lawyer would violate the duty not to charge unreasonable fees).

On the other hand, on the issues most commonly addressed by the other available opinions, the suggestions of the North Carolina Bar Ethics Committee raise some questions. For example, to address the possible violation of the rules requiring clients' funds to be kept in a trust account, the opinion states that the fee paid by the customer to Avvo must be deposited in a lawyer trust account, rather than kept by Avvo as required by Avvo's terms. Will Avvo agree to change its current practice and tell the customer to send the payment directly to lawyers instead of collecting the payment and keeping it until the work is done? Unless Avvo does, the opinion suggests North Carolina lawyers would not be allowed to participate in Avvo Legal Services.

The opinion mentions a possible exception, but it is not clear when this exception will be

³⁶ See, North Carolina State Bar Ethics Committee Proposed Formal Ethics Opinion 6 (July 27, 2017).

available. The opinion states that “a trust account must be designated repository for a legal fee collected and forwarded to a participating lawyer by Avvo unless the lawyer is confident that the legal services will be complete and the fee earned by the time that the fee is transferred by Avvo to the lawyer’s account.”³⁷ Will the lawyer be in a position to start to work for the client, let alone, finish the work, before Avvo collects and transfers the money? According to Avvo’s own terms, isn’t the lawyer supposed to wait until the customer pays Avvo before beginning to provide the services?

As an alternative, the Committee seems to suggest that Avvo itself must establish a trust account in which it would deposit the attorneys’ clients’ funds. Assuming Avvo would agree to do that, the Committee suggests that lawyers would have a duty to investigate whether Avvo (or any other designated entity that would hold the funds in trust) has reliability, stability and viability. Lawyers would also have to determine if Avvo (or another designated entity) has taken reasonable efforts to segregate and safeguard the clients’ funds.³⁸ In addition, the Committee states that once collected, the funds must be transferred to the lawyer’s designated trust account to, among other things, enable the collection of interest for the IOLTA program or for the client.³⁹ Again, it is unclear whether this means that Avvo would have to create a trust account, and connect it to the state’s IOLTA program, or whether it means that Avvo would have to eliminate its requirement that the fee be kept in Avvo’s possession until it is earned. Given Avvo’s original description of its program, it seems the Committee’s suggestion is that Avvo must give

³⁷ Id.

³⁸ Id.

³⁹ Id.

the money to the lawyer promptly after it is paid by the customer to Avvo so the lawyer can place it in the lawyer's trust account, which is not how Avvo Legal Services works currently. Will Avvo agree to this substantial change in its business practice? If not, it does not sound like North Carolina lawyers would be able to participate in Avvo Legal Services.

As yet another alternative, the Committee suggests that the Avvo website could fully disclose that the fee "is a flat fee for legal services that is earned by the lawyer immediately and in advance of the provision of legal services."⁴⁰ As stated above, in theory, this would solve the problem since, once the fee is earned, the money belongs to the lawyer; but in reality, it may raise more problems.

The notion that a fee can be deemed earned when the services for which it is paid have not been provided is troubling because, as mentioned in the opinion on Avvo by the Virginia State Bar, lawyers have an obligation to refund any unearned fees to a client at the termination of representation.⁴¹ In response to this concern, it could be required that, in addition to the suggested language, the website also state clearly that a client might have a right to seek a refund if the services paid for in advance are not performed (or completed). However, doing so would expose the fact that the money still belongs to the client and, therefore, that the lawyer has violated the obligation to keep the amount paid in a trust account until the fee is actually

⁴⁰ Id.

⁴¹ Virginia State Bar Association Proposed Legal Ethics Opinion 1885 (2017). The opinion also concludes that participating in the services violates the rules related to sharing legal fees with a non-lawyer and paying another for recommending the lawyer's services.

earned.⁴²

If a fee is truly earned, the money belongs to the lawyer and the lawyer can do with it as the lawyer pleases *except* leaving it in the trust account because leaving it in the trust account would result in commingling of funds. If, on the other hand, the money is “deemed” earned when in fact it must be refundable, by placing the money in the lawyer’s general account, the lawyer would be depositing in the general account an amount of money the lawyer can’t touch since it is possible it would have to be refunded to the client. At that point, the account would contain client money (the unearned amount to be refunded) and attorney money at the same time. In other words, by allowing a lawyer to consider a fee paid in advance to be earned even though it really hasn’t been earned, in order to avoid commingling funds within the trust account, the lawyer is forced to commingle funds within the lawyer’s operating account.

Finally, as to the notion of sharing fees with a non-lawyer, the North Carolina Bar proposed opinion admits that “the fact that the marketing fee is a percentage of the legal fee

⁴² One would think that agreeing that the fee is “earned upon receipt” means that the fee is earned and that the money belongs to the attorney. Yet, in those jurisdictions that recognize the possibility of an agreement to consider a flat fee as “earned upon receipt,” a fee that is earned upon receipt is actually not really earned and, although the attorney can place it in the attorney’s own bank account as if the money belonged to the attorney, the attorney can’t touch that money since it is possible the attorney may have to refund it. In effect, in those jurisdictions, a flat fee can be earned and unearned at the same time. This makes little sense. Alec Rothrock, *The Forgotten Flat Fee: Whose Money is it and Where Should it be Deposited?*, 1 Fla. Coastal L.J. 293, 347 (1999) (“It simply makes no sense to permit lawyers to enter into fee agreements with clients stating that an advance payment such as a flat fee is earned upon receipt, when such payments are subject to being refunded to the extent unearned.”).

To be fair, North Carolina is not alone in suggesting that unearned fees can be “deemed” earned. See for example Ohio Prof. Cond. R. 1.5(d)(3). See also, Rothrock, *supra* at 305-313, citing ethics opinions by the State Bar of Arizona, The Florida Bar Ethics Committee, the Georgia Supreme Court, the Disciplinary Board of the Hawaii Supreme Court, the State Bar of North Carolina and an Oregon Bar Ethics Committee.

implicates the fee sharing prohibition.”⁴³ Yet, because a similar concern can be raised in circumstances that have been found acceptable in the past, such as accepting credit card payments and participating in group coupon services, the Committee concludes that as long as there is no interference with a lawyer’s independent professional judgement, there would be no violation of the rule. The Committee is careful to point out, however, that this conclusion also depends on whether the fee charged by Avvo is for the reasonable cost of advertising, a claim that was rejected by some of the other published opinions.

A different approach?

Aside from the proposed opinion in North Carolina, and given the current regulation in most states, Avvo’s position that participating in its services does not constitute a violation of the rules does not seem to have found much support. For that reason, maybe what it should be doing is arguing that the rules should be changed to allow lawyers to participate in Avvo Legal Services.

This approach, which would likely yield better results for Avvo, has not been addressed by ethics opinions so far, but seems to be under way in North Carolina. There, in addition to finding the support of the Ethics Committee, Avvo apparently has been working with the state regulators to change the rules. As a result, North Carolina may become the first state to change the regulatory approach in order to formally make it acceptable for lawyers to participate in services like Avvo Legal Services.

⁴³ North Carolina State Bar Ethics Committee Proposed Formal Ethics Opinion 6 (July 27, 2017).

To this end, in 2017, a committee of the North Carolina State Bar Association drafted a proposal to amend several rules of professional conduct to address concerns about splitting fees with non-lawyers and improper payment of referral fees, which are the two main issues raised by the ethics opinions on Avvo. Also, to address the concern regarding the fact that Avvo retains the consumer's payment until the lawyer finishes providing the legal services, Avvo has suggested an amendment to the comment of the rule on safeguarding property, but it is not clear that the Ethics Committee of the North Carolina State Bar has adopted it.

Conclusion

Avvo Legal Services is the kind of innovation that lawyers and non-lawyers alike have argued is needed to provide new solutions to issues facing the provision of legal services in the United States. However, given the current regulatory scheme in almost all jurisdictions, all but one of the ethics opinions available to date have held that participating in Avvo Legal Services would raise serious ethical concerns for lawyers.

Given that these issues have not been addressed directly by courts or regulatory agencies, lawyers should be careful and should seek guidance from their local authorities before taking unnecessary risks, particularly as it relates to advertising, sharing legal fees with non-lawyers and safeguarding clients' property.