

Avvo Legal Services and The Rules of Professional Conduct

Avvo Legal Services are designed to solve a simple yet vexing problem: how to make it easier for consumers and small businesses to get access to legal services.

How it Works:

- A variety of fixed-price, unbundled legal services are offered through Avvo.
- Any attorneys who meet Avvo’s criteria may participate in offering these services.
 - At present the criteria include a minimum Avvo Rating and clean disciplinary history.
- A potential client may access the available services in a variety of ways:
 - From the profile of a participating lawyer, choosing that lawyer to provide the service.
 - From a “marketplace” page for a particular practice area (e.g., “Business,” or “Immigration”), featuring all available services and the participating attorneys offering them within the user’s geographic area.
 - By having Avvo connect them with a lawyer.
 - In this case, Avvo sends a notification to all participating attorneys who are licensed in the user’s state and have indicated they provide the Avvo Legal Service chosen by the potential client, and that person is connected to the first attorney to respond.
- To purchase the service, the potential client enters some basic details of their legal issue and their credit card information.
- The lawyer connects with the potential client via Avvo’s telephone system.
- Once the call is completed, the user’s credit card is charged.
 - Avvo’s telephone system tracks call completion (but not call content).
 - Clients may request a 100% refund within 48 hours of call completion if not satisfied or if the legal services could not be delivered.
- At the beginning of each month, Avvo pays all of the legal fees generated from Avvo Legal Services in the previous month.
- Avvo charges attorneys a separate marketing fee for each completed service.
 - No marketing fee is charged for legal services calls resulting in refunds.

Avvo Legal Services is quite different than how legal services have traditionally been purchased, and with that comes questions about how the program “fits” with the Rules of Professional Conduct under which attorneys do their work. However, we have built Avvo Legal Services with both consumers and these rules in mind. The program complies with the rules and also helps meet the Bar’s aspirational goals of expanding access to legal services.

What follows is a more in-depth look at the Rules, and the primary questions asked by attorney participants:

Structural Issues

1. **How to Think About the Ethics Rules.** State Rules of Professional Responsibility relating to attorney advertising are consumer/client protection rules. They are intended to lead to outcomes where consumers are not deceived and clients are not harmed.

This purpose is both intuitive and, to the extent the ethics rules affect speech rights, required by law. Starting in 1977 and continuing through a string of subsequent decisions, the United States Supreme Court found that the First Amendment protects the right of attorneys to inform the public about legal service offerings.¹ For state regulation of advertising to survive constitutional review, such regulation must meet either the “intermediate scrutiny” standard (for regulation of misleading advertising)² or a developing form of even-more-rigorous scrutiny (for restrictions on non-misleading advertising).³ Under these tests state attorney regulators have the burden of showing, with empirical evidence, that a particular regulation is necessary to meet an important government interest, and that it does so in a narrowly-tailored way.

For the advertising rules, the important governmental interest is the protection of the public from false and deceptive practices in the selling of legal services. Any application of advertising regulation to a particular practice must have this purpose in mind, must be supported by evidence that the harm is real and the application actually works, and must not be any more extensive than necessary to achieve the goal.

In other words, the advertising rules aren’t amenable to broad readings or mechanical application. This principle - that empirically-based, narrowly-tailored consumer protection regulation defines the scope of the attorney advertising rules - will inform the rest of this discussion.

2. **Limited Scope Representation.** Avvo Legal Services is a form of “limited scope representation,” which is sometimes also referred to as “unbundled legal services.” Traditionally, legal services are purchased by hiring a lawyer to handle the entirety of a matter from start to finish. Limited scope representation is simply breaking the legal matter into component parts, some of which may be handled by the client on a DIY basis and others handled by the lawyer.

¹ See [Bates v. State Bar of Arizona](#), 433 U.S. 350 (1977), and [later Supreme Court cases dealing with attorney advertising](#).

² [Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York](#), 447 U.S. 557 (1980)

³ This test has been described as occupying a middle ground between “intermediate” and “strict” scrutiny. See [Sorrell v. IMS Health](#), 564 U.S. ____ (2011); [Retail Digital Network v. Appelsmith](#), ____ F.3d ____ (9th Cir., 2016).

[ABA Model Rule 1.2\(c\)](#) speaks to unbundling, providing that “a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Nearly all states have adopted this rule or something similar.

As the purpose of this rule is consumer and client protection, the important part is ensuring that the limited representation is reasonable and that the client clearly understands what is - and is not - included.

Taking the latter point first: someone taking a compliance-minded approach to the Rules might conclude that that using a disclaimer or burying the terms in a fee agreement is adequate for informed consent. However, it’s much better for potential clients - and helps avoid problems down the road - to simply be crystal-clear about what’s in the package at the outset. That’s why consumers buying Avvo Legal Services are shown, up front and in plain English, what’s included and what’s not included in the package they are considering buying.

With respect to the reasonableness of the representation: while all of the Avvo Legal Services are appropriate as unbundled legal services for *most* clients, they won’t be appropriate for *all* clients. We expect that our being clear about what’s in and what’s out at the outset will screen out most consumers with more complex legal needs. However, it won’t get them all, and that’s where we are counting on the skill and experience of our Attorney participants to determine where a client’s needs dictate a different level of legal service. We have built Avvo Legal Services in a way that makes it easy and client-friendly for lawyers to have this discussion, and to move to full-scope services where necessary.

3. **Lawyer Referral Service.** [ABA Model Rule 7.2\(b\)\(2\)](#) refers to “qualified lawyer referral services,” and many states have limitations on the conditions under which lawyers can participate in such services. However, Avvo Legal Services does not fall under this provision. It is not a “lawyer referral service,” “lawyer intermediary organization,” “cooperative advertising scheme,” or the like.

Why not? It can be tempting to lump all sorts of forms of advertising under the rubric of “lawyer referral service,” as the term is ill-defined under most state’s Rules of Professional Conduct. But to be deserving of special regulation - and to have such special regulation meet constitutional requirements - a “lawyer referral service” (“LRS”) must be something more than advertising and marketing. While states may use different definitions, the fundamental nature of an LRS is best described in the [ABA Overview of LRS Regulation](#):

“This debate reveals that the defining characteristic of a lawyer referral service is generally understood, if not explicitly described in court rules, as the use of an intermediary to connect a potential client to a lawyer based on an exercise of discretion within stated guidelines.”

In other words, “lawyer referral services” are marketing programs that purport to match a potential client with the right lawyer for their specific legal problem, while actually referring that person to whichever lawyer has bought the right to that “lead” (often through geographic exclusivity). Many states have concluded, and probably not without reason, that special regulation is required due to the strong potential for consumer deception inherent in such programs.

Avvo Legal Services does not involve such a referral. Consumers are free to choose from any participating lawyer - or to go to Avvo’s directory (which features nearly every lawyer in the country) and contact an attorney to purchase legal services directly. And even for those consumers who choose speed and have Avvo connect them with a lawyer, that connection is made to the first available lawyer in the client’s practice area - not on the basis of Avvo’s discretion, or to a lawyer who has bought marketing exclusivity.

Resources:

[Overview of Total Attorneys litigation](#)

New Jersey: (Opinion 13; 132 N.J.L.J. 267 - 1992)

“The key to the regulatory activity in this area is to discern the dividing line between acceptable advertising (“public communication”) and a prohibited referral service. To do so, it is necessary to consider the factors which distinguish referral activity, namely: 1. Limited access to information . . . 2. Directive conduct . . . 3. [lack of] Public purpose. . . [a referral service] cuts sharply against a public purpose of providing the greatest possible amount of information about the largest possible number of lawyers.”

New York State Bar Association: (Opinion #799 - 09/29/2006)

“We begin with the observation that a traditional advertising directory in paper form, such as the “yellow pages,” is not recommending or obtaining employment within the meaning of DR 2-103(B). The question is at what point an online “directory” website becomes a referral service for purposes of DR 2-103(B). For example, an online yellow pages that provides tools by which a potential client can filter a list of attorneys by geography and/or practice area (e.g., to create a list of attorneys in “Albany” who do “personal injury” work) does not violate the rule.

We find that the line is crossed, however, when a website purports to recommend a particular lawyer or lawyers for the prospective client’s problem, based on an analysis of that problem. For example, if a potential client describes a slip-and-fall incident on an intake form and the website determines that the problem calls for a personal injury

lawyer and then recommends one or more attorneys in that area, the website is "recommending" those lawyers."

Florida State Bar: (Rule 4-7.23(a))

Defines "lawyer directories" as listings "in which all the participating lawyers and their advertisements are provided and the viewer is not directed to a particular lawyer or lawyers." This is distinguished from "lawyer referral service," defined in 4-7.22(c) as groups directing referrals to a limited group of lawyers."

Kentucky State Bar: (Ethics Opinion E-429 (2008))

"Whether a particular arrangement falls in one category or the other will depend on a careful analysis of the facts." [Directories are not referrals - there is no analysis of the client's needs or the qualifications of the participating lawyers.] "Once the advertising organization becomes actively involved in screening cases and matching prospective clients to specific lawyers, the arrangement functions as a lawyer referral service."

4. **Fee-Splitting.** Under [ABA Model Rule 5.4\(a\)](#), attorneys may not, under most circumstances, split legal fees with non-lawyers. As Avvo collects the fee for Avvo Legal Services from the client, passes it through to the attorney, and then charges the attorney a marketing fee, some attorneys ask whether this constitutes impermissible fee-splitting.

There are two things to keep in mind here: First, even if Rule 5.4(a) is applied mechanically, there is no fee-split - the entire fee for legal services is passed through to the attorney, and the attorney pays a marketing fee to Avvo separately. Mechanically, that's no different than how attorneys pay for advertising today.

Secondly, and more important, is the purpose of the prohibition against fee splitting: the protection of clients by ensuring that a lawyer's independent judgment is not compromised. As the Comment to ABA Model Rule 5.4 notes:

"The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client . . . recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client."

It's not hard to imagine a situation where an attorney has agreed to split a legal fee with a non-lawyer friend, and for that friend to put pressure on the lawyer to churn higher fees, settle a case quickly, or take some other action driven by a desire for money rather than the client's needs. But it's also the case that fee splits are not *inherently* unethical. They only become a problem if the fee is split with a party that may pressure the attorney's decision-making in a given case.

Indeed, even out-and-out fee splits are widely accepted when they present no risk to the lawyer's independent professional judgment: consider the fee split involved in taking legal fees by credit card (a portion of which goes directly to the credit card processor), or in using a "deal of the day" website like Groupon. Avvo Legal Services, much like credit card fees, would at most involve only the sort of "technical" fee split that poses no risk to an attorney's independence. Nonetheless, Avvo has kept things simple and clear by making Avvo's marketing fee a separate charge.

Resources:

[ABA Formal Opinion 465 \(Deal-of-the-day Websites\)](#)

[Arizona Ethics Opinion 89-10 \(1989\)](#)

Under a standard credit card financing plan, the card-issuing lender would have no voice in the selection of the attorney by the client, nor would it have any interest in or control over the litigation. The loyalty of the attorney would remain fully with the client, as the relationship with the lender would be merely financial. Consent of the client is apparent from the use of the credit card for payment.

[Colorado Formal Opinion 99 - Use of Credit Cards to Pay for Legal Services \(1997\)](#)

The limitations on sharing of legal fees with nonlawyers set forth in Rule 5.4 are designed to protect the lawyer's professional independence of judgment on behalf of the client. Because no partnership involving the practice of law has been formed with the issuing institution, the lawyer may comply with Rule 5.4(b) so long as the card issuer is not permitted to direct or regulate the lawyer's professional judgment in rendering legal services to the client.

[Nebraska Ethics Advisory Opinion for Lawyers No. 12-03 \(2012\)](#)

Rule 5.4(a) prohibits, generally, the sharing of legal fees with non-lawyers. It is this Committee's opinion that the principle underlying this fee-splitting prohibition is the risk of undue influence upon the attorney. Although the payment to Groupon is based upon a percentage of total sales, we do not believe that this constitutes an impermissible sharing of legal fees with a non-lawyer under Rule 5.4 because there is little risk that the attorney's representation of the 2868 client will be influenced by Groupon.

[North Carolina Formal Ethics Opinion 10: Lawyer Advertising on Deal of the Day or Group Coupon Website \(2011\)](#)

The purpose for the fee-splitting prohibition is not confounded by this arrangement. As noted in Comment [1] to the rule, the traditional limitations on sharing fees prevent interference in the independent professional judgment of a lawyer by a nonlawyer. There is no interaction between the website company and the lawyer relative to the legal representation of purchasers at any time after the fee is paid on-line other than the transfer of the proceeds of the “daily deal” to the lawyer.

[South Carolina Ethics Opinion 11-05 \(2011\)](#)

The sharing of fees with a non-lawyer may be permitted where the circumstances do not suggest any encroachment on the lawyer’s independent judgment. Even where a website retains a portion of each fee paid for services to be subsequently rendered by an attorney, the use of such websites as a marketing tool does not violate Rule 5.4(a), provided the website does not have the ability to exercise any control over the services which are to be subsequently rendered by the attorney.

5. Reasonable Cost of Advertising.

The marketing fee charged by Avvo will differ depending on a variety of factors, including the type of service purchased, the overall cost of the service, promotional considerations, competition, market testing, and a variety of other factors. It is also only charged when a Legal Service has been successfully provided.

Some attorneys question whether the fluctuating nature of the marketing fee, and the performance-based way in which it is charged, runs afoul of ethics rules: specifically [ABA Model Rule 7.2\(b\)](#), which states:

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

This rule stands for the proposition that attorneys cannot pay others to “channel” work. The comments to Rule 7.2 note the consumer protection concerns at work here (which are animated by the same concerns related to “lawyer referral services”):

“a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral.”

Many state ethics opinions - and the [ABA's own opinion on deal-of-the-day services like Groupon](#) - have dealt with this issue and concluded that there is no issue with respect to the "reasonable cost of advertising" (and they've paid little heed to any "channeling" considerations, likely realizing that there is no such concern when it is simply a case of advertising payment being moved closer to actual performance). As [ABA Formal Opinion 465](#) notes, in addition to finding that such programs aren't impermissible fee-splits:

"If the portion of the price retained by the marketing organization is reasonable given the cost of alternate types of advertising, the fee likely would be deemed to be reasonable. Similarly, if additional services are being provided (e.g., where the marketing organization is being compensated for publishing the lawyer's advertising message to a large group of subscribers that has been developed by the marketing organization, and/or the organization processes payments from the buyers), the fee, even if a significant portion of the purchase price, likely would be considered to be reasonable."

In many ways, the insertion of the word "reasonable" in ABA Model Rule 7.2 is superfluous; advertising will be sold for what the market will bear, and "unreasonable" fees for advertising aren't going to be around for long. Ultimately, it comes back to consumer protection: does the advertising practice in question harm consumers and clients?

Remember - to meet First Amendment requirements, regulations of this sort *must* be animated by real consumer protection concerns.

And indeed, this provision of the Model Rules is driven by such concerns - at least to the extent it applies to advertising and referral programs that deceive consumers by leading them to believe that the attorney they have been referred to is the best for their individualized situation, when in fact the attorney is paying for that message to be delivered. But such regulation can't be applied broadly to any form of advertising that happens to be novel or more innovative than traditional forms of advertising. The First Amendment demands that there must be consumer deception before the advertising practice can be prohibited by law. And that's simply not the case here: Avvo Legal Services may be offered by any participating attorney, without geographic exclusivity. Potential clients can choose whichever attorney they want, or go outside of the Avvo Legal Services marketplace and contact an attorney from our directory.

Marketing fees that differ based on a variety of factors are completely neutral to consumers. They simply reflect the differing cost of alternate types of advertising, and higher-value services typically drive commensurately higher marketing costs. The marketing fees charged by Avvo reflect this. They also reflect access to the millions of users who visit Avvo every month, as well as the fact that Avvo facilitates the Legal Services transaction by providing the telecommunications and document sharing platform, processing the payment, and taking the risk that a purchase of Avvo Legal Services is not successfully completed.

Process Issues

1. **Competence & Conflicts.** [ABA Model Rule 1.1](#) imposes on attorneys an obligation of competent representation, and [ABA Model Rule 1.7](#) prohibits representing clients with conflicting interests. Every state has adopted these rules or something substantively similar.

An attorney's first interaction with a potential client who has purchased an Avvo Legal Service is no different than the first interaction that attorney would have with a potential client who calls or visits the attorney's office. As with those initial inquiries, at the beginning of the call, the attorney must ensure that there are no conflicts and that the attorney is capable of competently providing the legal services requested. The fee paid by the client is not paid to the attorney until legal services have been rendered. Thus, if any issue prevents the attorney from being able to provide the services, the call can be concluded and the consumer can choose another attorney or obtain a full refund from Avvo.

2. **Attorney-Client Relationship.** The form that potential clients complete on Avvo indicates the fact that the legal services provided are limited in scope, and specifies what is included in a package, and what is not. We also encourage attorneys to clearly explain the parameters of the services being provided, and to provide any additional information that may help clarify the scope of the attorney-client relationship. This is the statement users see prior to completing the Avvo Legal Services sign-up form:

Important information

- Until your advice session actually takes place, no attorney-client relationship exists between you and the attorney you have chosen.
- An attorney-client relationship may never be formed if the attorney:
 - determines there is a conflict of interest;
 - is unable to provide the desired representation; or
 - declines representation for some other reason.
- The attorney may require that you complete a representation agreement in order to proceed.
- If the attorney is unable to fulfill your advice session for any reason, you will receive a full refund.
- Should you require additional legal services beyond the purchased advice session, you will need to make such arrangements directly with the attorney.

The key thing here is consumer awareness - making sure the potential client knows that the representation is limited in scope. Avvo Legal Services provides this information in a variety of ways, including clearly listing as part of the purchase path what's included and not included. Attorneys should not hesitate to provide more information in order to make sure that the services being purchased are appropriate.

3. **Trust Accounts.** Because 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. In the event Avvo offers a marketplace for more complex, longer-running legal services, attorneys will want to ensure that fees, once received from Avvo, are

immediately deposited into the proper trust or IOLTA account (Avvo would most likely offer a multiple account option in that case as well, so that legal fees could be deposited into an attorney's trust or IOLTA account and marketing fees withdrawn from the operating account).

4. **Refunds.** Avvo will refund the fee paid by a consumer if the services paid for are not delivered, or if the consumer is not satisfied for any reason. In the latter case, Avvo will make such a refund proactively, without waiting to collect the fee back from the attorney. This eliminates ethical concerns that may arise relating to reasonableness of fees, etc. (note as well that Avvo will not charge a marketing fee for a consultation where fees are refunded).

More Questions? Contact:

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