

Proposed Amendments to Rule 5.4

Approved by the Subcommittee on Avvo Legal Services

[Henriques, Coward, Poisson, Rawls, Willardson, Stell (advisory)]

July 26, 2017

Purpose: To create an exception to the fee-splitting prohibition in Rule 5.4 to allow paying a reasonable portion of a legal fee to a credit card processor, group advertising provider, or online platform for hiring a lawyer if the business relationship will not interfere with the lawyer's professional judgment on behalf of a client.

Rule 5.4 Professional Independence of Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, principal, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer or a disbarred lawyer may pay to the estate of the deceased lawyer or to the disbarred lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer or the disbarred lawyer;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter; and

(6) a lawyer or law firm may pay a portion of a legal fee to a credit card processor, group advertising provider or online platform for identifying and hiring a lawyer if the amount paid is a reasonable charge for payment processing or for administrative or marketing services, and there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, engages, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] 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 pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment. See Rule 1.8(f).

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

[3] Although a nonlawyer may serve as a director or officer of a professional corporation organized to practice law if permitted by law, such a nonlawyer director or officer may not have the authority to direct or control the conduct of the lawyers who practice with the firm.

Proposed Amendments to Rule 1.15 Comment

Approved by the Subcommittee on Avvo Legal Services [Henriques, Coward, Poisson, Rawls, Willardson, Stell (advisory)]

July 26, 2017

Purpose: To explain the due diligence required if a lawyer uses an intermediary (such as a bank, credit card processor, or litigation funding entity) to collect a fee.

Rule 1.15, Safekeeping Property

Comments to Rule 1.15 and All Subparts

[1]

Prepaid Legal Fees

[12]

[13] Client or third-party funds on occasion pass through, or are originated by, intermediaries before deposit to a trust or fiduciary account. Such intermediaries include banks, credit card processors, litigation funding entities, and online legal service platforms. A lawyer may use an intermediary to collect a fee. However, the lawyer may not participate in or facilitate the collection of a fee by an intermediary that is unreliable or untrustworthy. Therefore, the lawyer has an obligation to make a reasonable investigation into the reliability, stability, and viability of an intermediary to determine whether reasonable measures are being taken to segregate and safeguard client funds against loss or theft and, should such funds be lost, that the intermediary has the resources to compensate the client. Absent other indicia of fraud (such as the use of non-industry standard methods for collection of credit card information), a lawyer's diligence obligation is satisfied if the intermediary collects client funds using a credit or debit card. Unearned fees, if collected by an intermediary, must be transferred to the lawyer's designated trust or fiduciary account within a reasonable period of time so as to minimize the risk of loss while the funds are in the possession of another and to enable the collection of interest on the funds for the IOLTA program or the client as appropriate. See 27 N.C.A.C. 1B, Sect. .1300.

Abandoned Property

[13] **[14]**....

[Renumbering remaining paragraphs.]

Inquiry on Participation in Avvo
Tentatively Approved by the Subcommittee on Avvo Legal Services (June 9, 2017)
[Henriques, Coward, Poisson, Rawls, Willardson, Stell (advisory)]
July 26, 2017

Caption: Participation in Online Platform for Finding and Employing a Lawyer

Headnote: Proposed opinion rules that a lawyer may participate in an online platform for finding and employing lawyers subject to certain conditions.

Research:

Rule Involved: 1.2, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.15-2, 5.4, 5.5, 7.1, 7.2, 8.4

Prior State Bar Ethics Opinion: 2004 FEO 1, 2008 FEO 10,
2010 FEO 4, 2011 FEO 10

ABA Formal or Informal Opinion:

Other Bar Opinions:

Judicial Decisions:

Statutory Law: N.C. Gen. Stat. §84-5

Other:

Inquiry on Participation in Avvo
Tentatively Approved by the Subcommittee on Avvo Legal Services (June 9, 2017)
July 26, 2017

Introduction:

Avvo.com is a company that provides an online platform for accessing legal services. Its website includes a directory of United States lawyers derived from public records and the membership lists of licensing agencies. Lawyers listed in the directory are rated by Avvo using a rating system developed by the company. Lawyers do not pay to be included in the directory and consumers do not pay to obtain access to the directory.

Avvo also offers “fixed fee legal services from local lawyers” on its website. Known as Avvo Legal Services (ALS), this service allows consumers to select and employ a lawyer to perform an “unbundled” or discrete legal service. Lawyers in private practice agree to participate in the program and to comply with Avvo’s terms of service. Avvo determines the legal services that will be offered and the fee that will be charged for each service. It charges participating lawyers a percentage of the legal fee earned by the lawyer for each service. This charge to the lawyer is called a “marketing fee.” The marketing fees vary depending upon the legal service.

Legal services available on the ALS platform include advice sessions, document reviews, document drafting, and, in some practice areas, a “start to finish” service such as a simple divorce. The legal fee for each service is displayed on the website together with a description of the legal service that identifies “what’s included” and “what’s not included.” After a consumer selects a legal service, the consumer clicks on the “choose a lawyer” button and is prompted to provide a zip code. The profiles of participating lawyers in or near the provided zip code appear. The consumer can then “select” one of the lawyers from the list to perform the legal service. After a lawyer is selected, the charge for the service is displayed. The page also displays the following “important information:”

- **Additional legal services**—If you want additional legal services beyond the purchased service, you can make arrangements directly with the attorney.
- **Attorney-client relationship**—Once your phone call begins, everything you discuss is protected by attorney-client privilege, meaning what you share is confidential; this relationship does not exist until your call takes place.
- **Representation**—The attorney-client relationship may not be formed if the attorney is unable to help you. This can happen if the lawyer feels they [sic] are not qualified to answer your questions or if there's a conflict of interest.
- **Representation agreement**—For some legal services, the attorney could require that you sign a representation agreement before proceeding with the service.
- **Attorney advertising**—Attorneys participating in Avvo Legal Services pay Avvo a marketing fee for each legal service provided.

The consumer then provides the information necessary to pay online by credit card. Once the credit card information is confirmed by Avvo, the consumer is advised that the selected lawyer will call the consumer within a specified period of time. Avvo provides the potential client’s

identifying information and a description of the legal matter to the chosen lawyer. The lawyer is also given a tracking phone number to use to call the consumer. When the lawyer places the phone call over this designated line, Avvo tracks the call to confirm that the call was completed and its length. Avvo states that it does not monitor the content of the phone call and has no ability to do so. Upon confirmation that the phone call has occurred for a designated length of time, the consumer's credit card is charged the full amount for the legal service purchased. Avvo represents that it will refund the fee paid by a consumer if the legal services are not delivered or the consumer is not satisfied with the service.

The credit card funds are deposited in an Avvo bank account. On a monthly basis, Avvo pays the participating lawyer for all ALS legal fees generated by the lawyer in the preceding month. The lawyer designates the bank account (trust or operating account) into which the fees will be deposited. Also on a monthly basis, Avvo collects its marketing fees for the legal services provided by the lawyer in the preceding month by debiting the operating account designated by the lawyer.

Inquiry:

May a lawyer participate in ALS or other similar online platforms for consumers to identify, select and employ a lawyer?

Opinion:

Yes, subject to certain conditions which are addressed below. Although this opinion references Avvo or ALS throughout, it is applicable to any other similar online platform for marketing legal services.

Unauthorized Practice of Law

N.C. Gen. Stat. § 84-5 makes it unlawful for a corporation to practice law or to "hold itself out to the public or advertise as being entitled to practice law." Rule 5.5(f) prohibits a lawyer from assisting in the unauthorized practice of law by another. Therefore, a lawyer participating in ALS must determine that Avvo is not engaged in the practice of law and not holding itself out as able to do so. To this end, Avvo's advertising and website must make abundantly clear that Avvo does not provide legal services to others and that its only role is as a marketing agent or platform for the purchase of legal services from independent lawyers. In addition, there may be no limitations placed on the consumer's right to engage a participating lawyer to provide different or additional legal services outside of the ALS platform.

Lawyer Referral Service

Rule 7.2(d) prohibits a lawyer from participating in a lawyer referral service that is operated for a profit or that collects any sums from clients or potential clients for use of the service. If ALS, which is operated for a profit, is a lawyer referral service, North Carolina lawyers may not participate. A lawyer referral service is defined in 2010 FEO 4 as "a service that purports to screen the lawyers who participate and to match prospective clients with suitable participating

lawyers” (citing 2004 FEO 1). The opinion holds that a for-profit barter exchange is not a lawyer referral service and North Carolina lawyers may participate where the barter service “provides a complete, impartial list of all participating lawyers, does not purport to recommend or select a lawyer for an exchange member seeking legal services, and does not restrict the number of participating lawyers.” Similarly, ALS is not a lawyer referral service if, after indicating the type of service desired, the consumer has the ability to select a lawyer from the list of all participating lawyers in a particular geographic area who are willing to provide the selected service. As long as ALS does not exercise discretion to match prospective clients with participating lawyers, the requirements of Rule 7.2(d) are not implicated.

Independent Professional Judgment and Non-interference in the Professional Relationship

The exercise of independent professional judgment by a lawyer is an essential feature of the client-lawyer relationship. *See e.g.*, Rule 1.8(f) and Rule 5.4(c). If a third party interferes in the lawyer’s professional judgment, the lawyer is not fulfilling his duty to the client to provide competent, independent legal advice, free of conflicts of interest, and the third party may be engaged in the unauthorized practice of law. Comment [11] to Rule 1.8, which addresses third party payment for a lawyer’s services, is instructive:

Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer’s independent professional judgment and there is informed consent from the client. *See also* Rule 5.4(c) (prohibiting interference with a lawyer’s professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

Rule 1.8(f), cmt. [11].

Similarly, Avvo has business interests that differ from the interests of the consumers who use its website. Therefore, once a consumer selects a lawyer using the ALS platform, there can be no interference by Avvo in the lawyer’s professional judgment or with the professional relationship between the consumer (now client) and the lawyer. For example, Avvo may not limit a participating lawyer’s freedom to advise a consumer that the legal service selected on the ALS platform is not appropriate given the consumer’s stated legal problem. Similarly, Avvo may not limit the lawyer’s authority to recommend different or additional legal services not offered on the ALS platform. In addition, Avvo may not make recommendations to the lawyer relative to the legal representation of the client, including the nature and extent of the legal services that the lawyer determines are appropriate, and may not have a policy or practice of threatening to remove or removing a lawyer from the list of participating lawyers for the exercise of independent professional judgment as described above.

Non-interference is particularly important with regard to confidential communications between the lawyer and the client, including the transmission via Avvo’s website of documents by the consumer to the lawyer and the use of the tracking phone line. Rule 1.6(a) requires a lawyer to

maintain the confidentiality of any information learned during the professional relationship. To preserve confidentiality, Avvo may not be a party to client-lawyer communications about the substance of the representation.

It is recommended that Avvo's non-interference in a participating lawyer's professional judgment or with client-lawyer relationship be confirmed in writing.

Determination of the Amount of the Legal Fee and Resolution of Fee Disputes

Rule 1.5(a) requires a lawyer to charge and collect only legal fees that are not illegal or "clearly excessive." The rule lists non-exclusive factors to be considered when determining whether a fee is clearly excessive. Thus, a lawyer must exercise professional judgment when establishing an hourly rate or setting a fee for a particular legal service.

Although Avvo establishes the fees for all of the legal services offered on the ALS platform, to comply with Rule 1.5, a participating lawyer is still obliged to evaluate the fee that will be charged for any legal service that the lawyer agrees to provide via ALS. If a participating lawyer determines that a fee charged by Avvo for a particular legal service is clearly excessive, the lawyer must decline to offer that legal service until Avvo reduces the fee to an amount that complies with the lawyer's duty under Rule 1.5(a). Similarly, if a participating lawyer determines that there are statutory limitations on a particular legal fee or prior approval of a tribunal is required, the lawyer must decline to offer the legal service unless the statutory limitations are satisfied or payment of the fee is deferred until the approval of the tribunal is obtained.

Rule 1.5(f) requires a lawyer having a dispute with a client regarding a fee for legal services to advise his client of the North Carolina State Bar's program of fee dispute resolution and to participate in good faith in the resolution process if the client submits a proper request. Avvo may not participate in a fee dispute between the lawyer and the client. However, Avvo's response to complaints about its process for enabling consumers to identify and hire a lawyer do not implicate this prohibition. Moreover, if Avvo provides a "money-back guarantee" of its service, a refund by Avvo of the fee paid by a consumer may resolve the dispute with the lawyer and is permissible.

Collection and Disbursement of the Legal Fee

The ALS model calls for the consumer's credit card to be charged for the full amount of the fee for a chosen legal service as soon as the tracked phone call between the participating lawyer and the consumer (now client) is complete. The money remains in Avvo's bank account until the following month when the legal fee is transferred by Avvo to an account designated by the lawyer.

Rule 1.15-2(a) requires an unearned legal fee to be deposited to a lawyer's trust account and withdrawn from the trust account once the fee is earned. To comply with Rule 1.15-2(a), a trust account must be the 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. In the alternative, the ALS website must fully disclose that the fee is a flat fee for legal services that is earned by the lawyer immediately (and in advance of the full provision of legal services). *See* 2008 FEO 10.

Nothing in the Rules of Professional Conduct requires a lawyer to collect a fee directly from a client or prohibits the use of an intermediary to collect a fee. Nevertheless, a lawyer may not participate in or facilitate the collection of fees by an intermediary that is unreliable or untrustworthy. *See* Rule 8.4(g). Therefore, before participating in ALS, or a similar online platform that collects legal fees from consumers and holds them for a period of time, the lawyer must make a reasonable investigation into the reliability, stability, and viability of Avvo, the operating company, to determine whether reasonable measures are being taken to segregate and safeguard consumer funds against loss or theft and, should consumer funds be lost inadvertently, that the company has the resources to compensate the consumer. Further, the funds, once collected, must be transferred by Avvo to the lawyer's designated account within a reasonable period of time so as to minimize the risk of loss while the funds are in the possession of another and to enable the collection of interest on the funds for the IOLTA program or the client as appropriate. *See* 27 N.C.A.C. 1B, Sect. 1300. If the lawyer cannot, in good faith, conclude that payments for legal services will not be at risk, the lawyer may not participate in the online platform.

Sharing a Legal Fee with Nonlawyer

Rule 5.4(a) sets forth the "traditional limitations" on sharing legal fees with a nonlawyer which limitations are "to protect the lawyer's professional independence of judgment." Rule 5.4, cmt. [1]. Although Avvo has taken care to separate the transfer of the intact legal fee for a particular legal service to the lawyer from the payment of the marketing fee to Avvo from the lawyer's operating account, the fact that the marketing fee is a percentage of the legal fee implicates the fee-sharing prohibition. Nevertheless, similar arrangements have been approved when the nonlawyer exercised no influence over the professional judgment of the lawyer and the fee was a reasonable charge for marketing or advertising services.

In 2010 FEO 4, the fee structure of a barter exchange was found not to constitute fee-sharing in the following passage:

The manager of the barter exchange charges a cash transaction fee of 10% on the gross value of each purchase from a member through the exchange. The transaction fee is paid by the recipient of the services; the lawyer is not required to give 10% of his fee to the exchange manager....The use of credit cards to pay for legal services has long been allowed, although credit card banks routinely charge a "discount fee" that is a percentage of the legal fee charged to the credit card. *See* CPR 129 (lawyers may accept payment of legal fees by credit card). Paying a percentage fee to a barter exchange manager is no different than paying a discount fee to a credit card bank. The fee is a surcharge on the transaction and is not fee sharing with a nonlawyer.

In 2011 FEO 10, participation in an online group coupon website was permitted although the website company retained a portion of the fee paid by a purchaser for an anticipated legal service. The opinion holds that the fee retained by the website company was the cost of advertising on the website and did not violate Rule 5.4(a). Stating that “the purpose for the fee-splitting prohibition [protection of independent professional judgment] is not confounded by this arrangement,” the opinion explains:

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. Rule 7.2(b)(1) allows a lawyer to pay the reasonable cost of advertisements. As long as the percentage charged against the revenues generated is reasonable compensation for the advertising service, a lawyer may participate.

Similarly, if there is no interference by Avvo in the independent professional judgment of a participating lawyer and the percentage marketing fees paid by the lawyer to Avvo are reasonable costs of advertising as allowed by Rule 7.2(b)(1), the lawyer is not prohibited from participating in ALS on the basis of the fee-sharing prohibition.

Truthful and Non-Misleading Communications

Rule 7.1 prohibits a lawyer from making a false or misleading communication about the lawyer or the lawyer’s services. If a lawyer participating in ALS provides information to Avvo for inclusion in the lawyer’s profile or the lawyer exercises any control over the content of the lawyer’s profile or of the website, the lawyer is professionally responsible for that content. The lawyer may not submit untruthful or misleading information to the website. A participating lawyer is responsible for monitoring information on the Avvo website about the lawyer and his services. If Avvo posts information about the lawyer or the lawyer’s services that the lawyer knows is false or misleading, the lawyer must demand its removal or, if given the opportunity, post a disclaimer or corrective information. If neither is possible, the lawyer must cease to participate in ALS.

Similarly, if Avvo posts false or misleading generic statements about all participating lawyers, such as “consult specialists” or “all participating lawyers are top-rated,” the lawyer must demand that the statement be clarified, corrected or removed as appropriate to render the statement truthful and not misleading. If Avvo is unwilling to do so, the lawyer may not participate in ALS.

With regard to user-generated content (i.e., online reviews), a lawyer may not solicit or submit false or “fake” reviews for inclusion in his profile.

“Satisfaction guaranteed” is prominently displayed on the website landing page for ALS. Because it is impossible to guarantee the outcome of a legal matter, an outcome guarantee by a lawyer is prohibited under Rule 7.1(a) as a misleading communication. However, it appears that Avvo guarantees consumer “satisfaction” with its process for identifying and hiring a lawyer; Avvo does not guarantee a particular outcome or resolution of the consumer’s legal matter. If

Avvo abides by its representation and, without dispute, refunds a consumer's fee payment upon receiving a complaint of dissatisfaction with the service, the guarantee does not constitute a false representation by an agent of the lawyer about the lawyer's services.

Conflicts of Interest and Other Professional Duties

The fact that a client-lawyer relationship is initiated via ALS does not relieve the lawyer of the responsibility for complying with all of the lawyer's duties to a client including, but not limited to the following: (1) ensuring the limited scope of the representation is reasonable under the circumstances (Rule 1.2(c)); (2) checking for conflicts of interest upon initial contact with a prospective client (Rules 1.7, 1.8, and 1.9); (3) keeping the client reasonably informed about the status of the matter (Rule 1.4); and (4) protecting confidential client information from unauthorized disclosure (Rule 1.6).