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May 5, 2017

Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219
Attn: Karen A. Gould

Re: Comments in Opposition to Proposed Legal Ethics Opinion 1885

Dear Ms. Gould:

Thank you for the opportunity to comment on proposed Virginia State Bar Legal Ethics Opinion 1885. These comments are submitted on behalf of Avvo, Inc. Avvo is an online resource for consumers of legal services. Since its launch in 2007, Avvo has become the web's largest and most heavily-trafficked legal resource, with over 8 million visits per month. Avvo offers a comprehensive directory of attorneys (including every public-facing licensed attorney in Virginia), lawyer reviews, a question-and-answer forum, and thousands of legal guides and other legal resources. Avvo has recently started offering Avvo Legal Services: fixed-price, limited-scope legal services, fulfilled by local attorneys. We believe Avvo Legal Services is the so-called "Attorney Client Matching Service" described in proposed LEO 1885.

1. Access to Justice and the Unmet Need for Legal Services.

Virginia, in creating its Access to Justice Commission, has recognized the vast problems facing its citizens – particularly those with low incomes – when trying to obtain legal help. This problem has only grown worse since the Commission was created in 2013, and further challenges lie ahead with threatened cuts to (or even elimination of) Legal Services Corporation funding.

Avvo Legal Services is an attempt to help address this issue. Instead of making the only option traditional, full-scope representation, Avvo offers a marketplace where consumers can buy fixed-price, limited-scope legal services from local attorneys. Many of these services involve targeted, direct help with matters that people are otherwise handling on their own: brief consultations, coaching sessions, document review and advice calls. For those of modest means, these limited-scope services may be the only way to get legal help.

A primary goal of the Virginia Access to Justice Commission is to “identify barriers to obtaining needed legal services, and develop solutions.” One such barrier is the traditional model of full-scope legal services, which for most consumers is unacceptably expensive, uncertain, and opaque. That’s a barrier that Avvo seeks to address with Avvo Legal Services. But another barrier – related, in this case, to the first – is overly-broad interpretations of the Rules of Professional Conduct. While the Bar must interpret and enforce the Rules to protect the public, it also must ensure that its positions don’t frustrate this purpose by keeping attorneys from offering innovative legal services to the public.

Unfortunately, proposed LEO 1885 does precisely this. It does not take into account the vast consumer need, nor does it consider any input from consumers on what they are looking for in legal services – or whether consumers are asking for or need this type of regulation. For this reason, and for the legal reasons discussed in more detail below, we urge the Committee to reconsider its position and either withdraw proposed LEO 1885 or revise it to allow attorney participation in such services.

2. Ethics Opinions Regarding the Rules of Professional Conduct Must Take Into Account Actual Concern for Consumer and Client Protection.

a. The Rules of Professional Conduct Relating to Attorney Advertising Must be Interpreted Consistently with the First Amendment.

Virginia’s Rules of Professional Conduct with respect to attorney advertising are fundamentally rules of consumer and client protection. 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 touch on speech rights, required by law. Starting in 1977 and continuing through a string of subsequent decisions, the United States Supreme Court has 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

For Virginia’s attorney advertising rules, the important governmental interest is the protection of the public from false and deceptive practices in the selling of legal services. In order to meet the *Central Hudson* “intermediate scrutiny” requirements, such regulation must be interpreted with this purpose in mind, must be supported by evidence that the harm is real and the application of the rule actually works, and must not be more extensive than necessary to achieve the goal.

¹ See, e.g., Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Shapiro v. Kentucky Bar Association, 486 U.S. 466 (1988); Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995).

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. 552 (2011); Retail Digital Network v. Appelsmith, 810 F.3d 638 (9th Cir., 2016).

b. Ethics Opinions Relating to Attorney Advertising Should Reflect this Narrowness of Interpretation

While specific issues will be discussed below, there is a general thematic weakness with proposed LEO 1885: it does not engage with or reflect on the constitutional constraints binding the Rules of Professional Conduct. This is problematic not only because so doing fails to comply with the law, but also because expansive, cautionary ethics opinions on matters relating to speech have a chilling effect on the availability to the public of legal information and access to legal services.

For many rules (such as those dealing with competence, diligence, and client confidences), ethics advice enjoys a “one-way ratchet:” there’s no detriment to clients if attorneys are overly-protective. After all, what client wouldn’t want their attorney to be extra-careful when it comes to their confidences? But this is not the case when it comes to legal information and new ways for attorneys to provide legal services. Applying the same level of caution to marketing is actually bad for the public, as it deprives them of both information and access to new ways of engaging with lawyers.

As the U.S. Supreme Court noted in *Bates v. Arizona*:

“[T]he consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.”⁴

A major way that consumers find information about legal services is via communications from lawyers. If conscientious lawyers – the kind who ask for, read, and pay attention to ethics opinions – pull back because a Bar ethics opinion took an overly-conservative interpretation of the rules, then consumers have access to less information and fewer innovative service offerings. That’s a bad thing for consumers and lawyers alike.

This fundamental mismatch between ethics opinions and free speech was recently visited by the U.S. Supreme Court in addressing a very similar system – that used by the Federal Election Commission:

“Because the FEC’s “business is to censor, there inheres the danger that [it] may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression.” [Freedman v. Maryland, 380 U.S. 51, 57-58, 85 S.Ct. 734, 13 L.Ed.2d](#)

⁴ [Bates v. Arizona](#), 433 U.S. at 364 (internal citations removed.)

[649 \(1965\)](#). When the FEC issues advisory opinions that prohibit speech, “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.” [citations omitted]. Consequently, “the censor’s determination may in practice be final.” [Freedman, supra, at 58, 85 S.Ct. 734](#).⁵

Proposed LEO 1885 doesn’t take the First Amendment into consideration. While we can assume the Rules involved serve an important government interest (the protection of the public), the proposed opinion does not reflect any evidence or findings that its interpretation of the Rules is necessary and appropriately narrow in scope. As such, LEO 1885 exacerbates the censor’s veto, hurting consumers and lawyers alike.

3. Avvo Legal Services Does Not Violate the Virginia Rules of Professional Conduct.

a. Reasonableness of Fees

While this section of LEO 1885 does not directly address Avvo Legal Services, its suggestion that attorney fees cannot be “reasonable” unless they are customized to every combination of attorney and client implicates a duty of diligence far beyond the permissible scope of the Rules. We urge the Committee to consider whether such a rigid understanding of the “reasonableness” of fees is serving the public interest concerns animating the Rules.

Now more than ever, potential clients have a wealth of information available to them with which to determine whether a fee – particularly a fee for a well-defined, relatively low-cost, fixed-price service – is reasonable. The public is not protected by an ethics opinion that forces conscientious attorneys to second-guess whether such fixed-fee services are reasonably priced. Rather, they are ill-served, as many such attorneys will simply opt to not provide such services – thus frustrating efforts to address the access-to-justice gap – rather than risk running afoul of the Bar’s interpretation of this Rule.

Evaluating the “reasonableness” of a fee should be a much more involved endeavor when floating a \$100,000 fee than when pricing a \$200 fixed-fee service. For such lower cost services, it isn’t worth the candle to agonize long over how such fees fit with Rule 1.5(a) – the stakes are low, and the market will provide an answer quickly enough. The Bar should adopt a more expansive reading of Rule 1.5(a), one in which attorneys have the freedom to experiment with a wide range of low-price, fixed-fee services, so long as the legal fees charged are not clearly excessive.⁶

⁵ [Citizens United v. Federal Election Commission](#), 558 U.S. 310 (2010)

⁶ The Committee should consider the extent to which a close focus on the “reasonableness” of fees may be found to be anticompetitive, exposing the Bar and members of the Committee to antitrust liability. See [North Carolina Board of Dental Examiners v. FTC](#), 574 U.S. ____ (2015) and [Goldfarb v. Virginia State Bar](#), 421 U.S. 773 (1975).

b. Avvo Legal Services Does Not Involve Advance Legal Fees.

Consumers purchasing Avvo Legal Services do so using credit cards. However, a client's card is not charged until after that client has had a substantive telephone call with the lawyer. In the vast majority of cases, the services are provided during that telephone call. These services – the 15-minute consult and various 30-minute coaching and document review sessions – are completed, in their entirety, before a credit card is charged. And the small percentage of services that require post-call work by the attorney are structured such that attorneys can treat the fee as fully-earned after this initial call.

And although we believe that the fully-earned nature of the fee prior to it being charged the client fully addresses this concern raised in LEO 1885, there are several other points in favor of the Bar wielding a light regulatory touch when it comes to alternative methods of payment:

- (i) Avvo's collecting of fees on behalf of attorneys is strongly beneficial to consumers and attorneys alike. Attorneys are freed from worrying about collections, and consumers have a familiar interface and a neutral party to address should there be concerns about payment.
- (ii) Traditional concerns about protecting client funds are not present when fees are paid using credit cards. This is true regardless of whether an intermediary like Avvo is involved. There are protections – including chargeback and anti-fraud measures – available to credit card users that are far greater than those the Bar can provide through its Rules.
- (iii) Intermediaries are always involved when funds are paid. Unless a fee is paid in cash, it runs through intermediaries – banks, credit card processors, etc. – before it reaches the attorney's account.

Due to these factors, the Bar's focus here should not be on rigidly prohibiting intermediaries – or “non-financial” intermediaries, as the LEO seems to imply – but rather on ensuring that attorneys perform some level of diligence on the intermediaries they work with. Public protection concerns are greatly lessened when clients pay using credit cards. The Bar should not let the rigidity of an old rule keep its members from engaging with new services. Absent some indicia that an intermediary lacks financial stability, attorneys should be free to work with them.

c. Avvo Legal Services Does Not Involve Fee-Sharing or Interference with the Independent Professional Judgment of Lawyers.

Draft LEO 1885 goes to great lengths to find that Avvo's payment mechanism violates 5.4(a), despite the fact that Avvo Legal Services involves no splitting of legal fees: 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 from how attorneys pay for advertising today.

Rather than seeing this as a belt-and-suspenders approach designed to help conservative attorneys feel more comfortable with the program, the LEO treats this as “a technical nicety which does not change the substance of the transaction.” But the “substance” of the rule is not preventing fee splits; it is the protection of clients by ensuring that a lawyer’s independent professional judgment is not compromised by a non-lawyer third party having an interest in the lawyer’s fee.

As ABA Opinion 465 (which along with those states⁷ making a similar finding was not cited in the draft LEO) noted, in finding that deal-of-the-day websites don't violate Rule 5.4:

The fact that the marketing organizations deduct payment upfront rather than bill the lawyer at a later time for providing the advertising services does not convert the nature of the relationship between the lawyer and the marketing organization from an advertising arrangement into a fee sharing arrangement that violates the Model Rules.

Thus, Opinion 465 stands for the unsurprising conclusion 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.

Like the deal-of-the-day websites (or credit card processors, which also technically split fees with their attorney customers, and which state ethics opinions have similarly found do not violate the substance of Rule 5.4⁸), Avvo Legal Services has no control, interference, or interest in how the lawyer exercises independent professional judgment in service of the client.

The interpretation of Rule 5.4 in draft LEO 1885 implicates the availability of forms of attorney advertising, and thus must meet the requirements of the commercial speech doctrine. This it cannot do. The interpretation is technical, rigid, and wholly unsupported by argument or evidence that it is necessary to protect the public. We urge the Bar to adopt language on this point, following the lead of the ABA, Nebraska, and North Carolina, that would permit lawyers to engage in such methods of payment as long as there is no interference with the lawyer’s independent professional judgement.

d. Avvo Legal Services Does Not Involve “Recommending” Lawyers

As an initial matter, this portion of the draft LEO 1885 is now moot, as Rule 7.3 has been modified, effective July 1, 2017. While the operative language upon which this portion of

⁷ See, e.g., ABA Formal Opinion 465 - Lawyers’ Use of Deal-of-the-Day Marketing Programs (2013); Nebraska Ethics Advisory Opinion for Lawyers No. 12-03 (2012); North Carolina Formal Ethics Opinion 10: Lawyer Advertising on Deal of the Day or Group Coupon Website (2011); South Carolina Ethics Opinion 11-05 (2011).

⁸ See, e.g., Arizona Ethics Opinion 89-10 (1989); Colorado Formal Opinion 99 - Use of Credit Cards to Pay for Legal Services (1997).

the draft LEO turns remains, it has been clarified and narrowed to only apply to solicitation – not general advertising.

However, to the extent the Committee interprets the prohibition on paying for recommendations as still extending more broadly to advertising: Avvo Legal Services does not involve a “recommendation.” Consumers using Avvo may choose from any participating lawyer - or use Avvo’s directory (which features every consumer-facing attorney in Virginia) and contact an attorney to purchase legal services directly.

In a similar vein, we take issue with the draft LEO finding that attorneys cannot pay for advertising “a sum tethered directly to her receipt, and the amount, of a legal fee paid by a client.” As discussed below, such a finding is not supported by evidence or the law.

i. Advertising Fees Tethered to Receipt of Legal Fees

The public protection concerns that provide the substance to restrictions on paying directly for business originate in the use of “cappers” - characters who would hang around hospitals or courthouses and get paid for every client they could hustle back to a lawyer. But the problem with “cappers” wasn’t the mechanics of payment, but the consumer deception that went along with the “capper” methodology.⁹ That’s not remotely what Avvo Legal Services is about. Avvo is not soliciting clients or trying to convince people with legal issues that a particular attorney is the right one for their needs. Avvo is simply creating the marketplace, and consumers are free to choose from any attorney participating in that marketplace.

ii. Advertising Fees Tethered to the Size of Legal Fees

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. While it is not a set percentage applied to all Legal Services, the size of the marketing fee does roughly scale upward with the price of a Service.

The draft LEO cites with approval a number of other ethics opinions that seem baffled that different legal services may require different levels of advertising spend. This belies a lack of familiarity with how modern advertising – and particularly online advertising – works.

It is certainly true that for most legacy forms of advertising – like the Yellow Pages, TV, or radio – the cost of a given marketing “impression” is often the same, regardless of the underlying value of the good or service. However, this is not the case online, where so much more data is available, and where targeted advertising allows advertisers to pay

⁹ See, e.g., the comments to Virginia RPC 7.3, which note the consumer protection concerns at work here: “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.”

only for interested, or even committed, customers (of course advertisers pay more – much more – for an interested purchaser or actual sale than they would for a generic “impression” on TV or in print). What’s more, different markets have different competitive dynamics. Some legal practice areas and types of legal services are more lucrative to lawyers than others. Costs of acquisition, retention, and servicing can vary widely. But none of this is remotely controversial or problematic in any way to clients, and the variability and targeting involved allows advertisers to spend their ad dollars more efficiently.

Avvo Legal Services involves even more factors that tie our costs to the value of the services being offered:

- Avvo buys ads promoting Avvo Legal Services elsewhere online; the cost of those ads – as any attorney buying online advertising knows – varies widely depending on the value of the underlying service.
- Avvo pays the credit card processing fees, which are a direct percentage of the legal fee spent by the client.
- Avvo takes all of the payment processing risk, which also scales directly with the cost of the service purchased:
 - Unfulfilled services (voided transaction risk).
 - Client dissatisfaction, despite the attorney completing the work (refund risk).
 - Client demanding charges be reversed via their credit card provider (chargeback risk).
- Avvo also provides U.S.-based, end-to-end customer service, via telephone, chat, and email, to all purchasers of Avvo Legal Services. Purchasers of more expensive services typically have more questions and concerns.

For these reasons, it should come as little surprise that the size of the marketing fee is strongly correlated to the value of the underlying service. And this correlation has absolutely no negative impact on consumers. As the First Amendment demands that there must be real potential for consumer deception before an advertising method can be prohibited by law, there’s no basis to find Avvo Legal Services in violation simply because of the payment mechanism it employs.

Conclusion

Ultimately, the Bar’s proposed LEO 1885 is fatally flawed by its failure to consider the desires and needs of Virginia citizens. Both the law and the common sense of regulation dictate that regulators consider the impact of regulations before taking action. Imagine if sugar regulators required that every Virginia ham be covered with an extra layer of glaze – without first taking into account those in the public who may prefer their hams boiled, or with less added sugar. The Committee is effectively making the same move here: adopting a level of regulation unmoored from any evidence that such regulation is

necessary, desired, or advisable. We urge the Committee to either amend proposed LEO 1885 as discussed above, or withdraw it. Should the Committee wish to discuss further Avvo Legal Services or any of the matters described in this letter, we would welcome the dialogue. Best,

A handwritten signature in blue ink, appearing to read 'Josh King', with a stylized flourish at the end.

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