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### Avvo Joins the Legal Market; Should Attorneys Be Concerned?, 104 Geo. L.J. Online 184 (2016)

Alberto Bernabe

*John Marshall Law School*, [abernabe@uic.edu](mailto:abernabe@uic.edu)

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# Avvo Joins the Legal Market; Should Attorneys Be Concerned?

ALBERTO BERNABE\*

## INTRODUCTION

There is ample evidence that the vast majority of civil legal needs in the United States are addressed without attorneys, in part because of lack of access to affordable legal services.<sup>1</sup> This reality has created a demand for programs that provide access to solutions to legal issues, which in turn has resulted in calls for more “innovation” in the way legal services are provided.<sup>2</sup> As a result, companies like LegalZoom and Rocket Lawyer began to provide access to legal forms and do-it-yourself options. However, as could be expected, the challenge to the current boundaries of the marketplace did not stop there. Soon, LegalZoom, Rocket Lawyer, Avvo,

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\* Professor of Law, The John Marshall Law School. The author would like to thank Mary K. Foster, Jett Hanna, Dennis Rendleman, and Roy D. Simon, Jr., for their help and support. The author’s Professional Responsibility blog is available at <http://bernabepr.blogspot.com/>.

1. See Selina Thomas, *Rethinking Unauthorized Practice of Law in Light of the Access to Justice Crisis*, 23 PROF. LAW., no. 3, 2016, at 17, 17; Robert Ambrogi, *Unauthorized Practice*, 101 A.B.A. J. 72, 74 (2015) (“[M]ultiple state and federal studies show[] that 80 to 90 percent of low- and moderate-income Americans with legal problems are unable to obtain or afford legal representation.”); Thea Jennings, *An Access to Justice First: Washington State’s Limited Licensing Program for Nonlawyers*, @LAW, Fall 2014, at 28, 29 (discussing a study by the Supreme Court of Washington); Milan Markovic, *Juking Access to Justice to Deregulate the Legal Market*, 29 GEO. J. LEGAL ETHICS 63, 65 (2016).

2. Nick Robinson, *When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1, 3–4, 11 (2016). For a great example of this debate and the issues it raises, see *Video Highlights: Summit on Innovation in Legal Services*, ABA (May 2–4, 2015) (on file with The Georgetown Law Journal), <http://stream.americanbar.org/services/player/bcpid2088329878001?bckey=AQ~~,AAA Bsp7SiCE~,aEBLYbQyvvdftlAC2wSmNncgPJCgafWv&bctid=4250333728001>. See also Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 51–52 (2015). Although it is impossible to point to a specific moment when the debate regarding innovation began, much of the discussion can be traced back to the adoption of the 2007 Legal Services Act in the United Kingdom. See Laurel S. Terry, *Why Your Jurisdiction Should Consider Jumping on the Regulatory Objectives Bandwagon*, 22 PROF. LAW., no. 1, 2013, at 28, 28–29.

and even the American Bar Association (ABA)<sup>3</sup> began to offer access to legal services through networks of lawyers who agree to be available to clients.

Allowing lawyers to work with nonlawyers to provide access to legal services is certainly innovative, but the legal profession should not rush to try to be innovative at the risk of creating more problems.<sup>4</sup> Likewise, individual lawyers should not rush to adopt innovative initiatives at the risk of violating the current regulations in their jurisdictions.

With these concerns in mind, this article (1) looks at Avvo's newest incursion into the legal services marketplace, a platform to provide access to limited-scope legal representation, and (2) discusses Avvo's various responses to the issues. The article outlines some concerns about whether participating in Avvo's new Legal Services program would constitute a violation of rules of professional conduct adopted in most states and concludes that many of Avvo's arguments in support of its program are questionable.

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3. In October of 2015, the ABA and Rocket Lawyer announced the launching of ABA Law Connect, an online platform that would allow small businesses in Illinois, Pennsylvania, and California to connect with lawyers for a \$4.95 fee. As stated in a press release by the ABA, "[t]he goal of ABA Law Connect is to provide small businesses with affordable legal services through innovative solutions while expanding professional opportunities for ABA members." *ABA, Rocket Lawyer Launch Test of Legal Services for Small Businesses in 3 States*, ABA (Oct. 1, 2015), [https://www.americanbar.org/news/abanews/aba-news-archives/2015/10/aba\\_rocket\\_lawyerl.html](https://www.americanbar.org/news/abanews/aba-news-archives/2015/10/aba_rocket_lawyerl.html) [<https://perma.cc/ST6F-K64A>].

4. The ABA–Rocket Lawyer partnership mentioned in note 3, *supra*, is a great example of this. Having launched the online platform to much fanfare in October of 2015, the ABA quietly abandoned the project just four months later amidst criticism that the program "disregard[ed] well-established bar association law referral programs, which . . . are already serving the public," Annie Hunt, *Opposition Forms Against the ABA's Pilot Program for Small Businesses*, COOK COUNTY. REC. (Feb. 6, 2016), <http://cookcountyrecord.com/stories/510658854-opposition-forms-against-the-aba-s-pilot-program-for-small-businesses> [<https://perma.cc/33EA-5MT5>], and that it probably did not "measure up to the ABA's own Model Supreme Court Rules Governing Lawyer Referral Services." Sam Glover, *ABA Abandons Rocket Lawyer Partnership*, LAWYERIST (Feb. 19, 2016), <https://lawyerist.com/102328/aba-abandons-rocket-lawyer/> [<https://perma.cc/8SGA-QPX7>].

## I. AVVO AND ITS LEGAL SERVICES PROGRAM

Avvo was launched in 2006 as an online directory of lawyers that provides consumers with access to lawyers' profiles.<sup>5</sup> However, Avvo's profiles were different from those offered by other directories because they included a controversial rating calculated using Avvo's own formula.<sup>6</sup> The company was criticized and sued for its ratings system, after which it made some changes, but it continues to apply and post ratings.<sup>7</sup>

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5. See Tricia Duryee, *Hiring a Lawyer? Avvo Can Help You*, SEATTLE TIMES (June 5, 2007), [http://old.seattletimes.com/html/business/technology/2003734582\\_avvo05.html](http://old.seattletimes.com/html/business/technology/2003734582_avvo05.html) [https://perma.cc/DQ5N-UL2Y].

6. See *id.* (describing Avvo's rating system).

7. Shortly after Avvo was launched in 2006 as a website that rated lawyers, its ratings system and business practices were criticized as inaccurate, inconsistent, and deceptive. See John Cook, *Respected Lawyer Wants Rating Site Avvo Closed*, SEATTLE POST-INTELLIGENCER (June 11, 2007), <http://www.seattlepi.com/business/article/Respected-lawyer-wants-rating-site-Avvo-closed-1240273.php> [https://perma.cc/8S5L-QZHC]; Robert Ambrogi, *Bravo for Avvo? Not so Quick*, LAW SITES (June 5, 2007), <http://www.lawsitesblog.com/2007/06/bravo-for-avvo-not-so-quick.html> [https://perma.cc/D2V6-84SA] (citing Declan McCullagh, who, after testing Avvo, found it "riddled with . . . errors" and "inexplicable scores"); Susan Cartier Liebel, *Lawyer Rating System Endorsed by WSJ - Does This Make You Feel Better?*, BUILD SOLO PRAC. (Dec. 24, 2007), [http://susancartierliebel.typepad.com/build\\_a\\_solo\\_practice/2007/12/lawyer-rating-s.html](http://susancartierliebel.typepad.com/build_a_solo_practice/2007/12/lawyer-rating-s.html) [https://perma.cc/R2Z9-JGUP]. For a reply to this comment, see Carolyn Elefant, *This Solo Has No Problem with Avvo*, MY SHINGLE (Dec. 25, 2007), <http://myshingle.com/2007/12/articles/marketing-making-money/this-solo-has-no-problem-with-avvo/> [https://perma.cc/D3D8-9PVD]. Two lawyers eventually sued Avvo arguing its practices were unfair and deceptive. See Peter Lattman, *Seattle Lawyers Sue New Lawyer-Rating Web Site*, WALL ST. J.L. BLOG (June 15, 2007), <http://blogs.wsj.com/law/2007/06/15/seattle-lawyers-sue-new-lawYer-rating-web-site/> [https://perma.cc/46HR-ZUV3]. The lawsuit was eventually dismissed, but Avvo did make changes to its rating system. See John Cook, *Avvo Drops Ratings on Some Attorneys*, SEATTLE POST-INTELLIGENCER (June 26, 2007), <http://blog.seattlepi.com/venture/2007/06/26/avvo-drops-ratings-on-some-attorneys/?source=rss> [https://perma.cc/MGJ5-7KGT]; see also Debra Cassens Weiss, *Another Lawyer Sues Avvo Rating Site, Claims Its Practices are 'Beyond Unfair'*, A.B.A. J. (Sept. 2, 2010), [http://www.abajournal.com/news/article/another\\_lawyer\\_sues\\_avvo\\_rating\\_site\\_claims\\_its\\_practices\\_are\\_beyond\\_unfair/](http://www.abajournal.com/news/article/another_lawyer_sues_avvo_rating_site_claims_its_practices_are_beyond_unfair/) [https://perma.cc/F66Y-9P2X]. More recently, a Chicago attorney sued Avvo, contending that the company's online lawyer directory violated a state statute by using professional information on the site without permission. Martha Neil, *Lawyer Sues Avvo, Says Unauthorized Use of Professional Info Violates Right of Publicity*, A.B.A. J. (Feb. 8, 2016), [http://www.abajournal.com/news/article/lawyer\\_sues\\_avvo\\_says\\_unauthorized\\_use\\_of\\_professional\\_info\\_violates\\_right/?utm\\_so](http://www.abajournal.com/news/article/lawyer_sues_avvo_says_unauthorized_use_of_professional_info_violates_right/?utm_so)

In 2014, following the trend of expansion into the legal market by nonlawyer companies, Avvo 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.<sup>8</sup> A year later, seeking to penetrate the legal market even further, Avvo's CEO participated in a number of events, including an ABA conference on innovation and a meeting of the ABA's House of Delegates. During these events, he called for the opening of the legal market to nonlawyers and for the elimination of bans on the unauthorized practice of law in order to open the way for Avvo itself to join the market.<sup>9</sup> Not waiting for this to happen, however, Avvo recently expanded its services again into what it now calls Avvo Legal

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urce=maestro&utm\_medium=email&utm\_campaign=daily\_email [https://perma.cc/KE3L-M9FD]. This lawsuit was recently dismissed. See Stephanie Francis Ward, *Avvo Has First Amendment Right to Publish Lawyer Listings*, *Chicago Federal Court Rules*, A.B.A. J. (Sept. 14, 2016), [http://www.abajournal.com/news/article/avvo\\_has\\_first\\_amendment\\_right\\_to\\_publish\\_lawyer\\_listings\\_chicago\\_federal\\_c](http://www.abajournal.com/news/article/avvo_has_first_amendment_right_to_publish_lawyer_listings_chicago_federal_c) [https://perma.cc/JCN5-E9WJ]. For more recent criticism of Avvo, see Eric Turkewitz, *Avvo Rating System: Thanks, but I'll Pass*, N.Y. PERS. INJ. L. BLOG (Mar. 2, 2008), <http://www.newyorkpersonalinjuryattorneyblog.com/2008/03/avvo-rating-system-thanks-but-ill-pass.html> [https://perma.cc/W547-K3VC]; Scott Greenfield, *The Train to Nowhere*, SIMPLE JUST. (Aug. 15, 2015), <http://blog.simplejustice.us/2015/08/15/the-train-to-nowhere/> [https://perma.cc/56G8-SXWQ]; Mark C. Palmer, *How Reliable Are Those Online Attorney Rating Review Services Anyway?*, CHI. DAILY L. BULLETIN (Feb. 25, 2016), <http://www.chicagolawbulletin.com/Articles/2016/02/25/Mark-Palmer-forum-2-25-16.aspx> [https://perma.cc/2WXX-RWVY].

8. Through Avvo Advisor, a potential client can connect with a lawyer for a 15 minute phone consultation for a flat fee of \$39. Victor Li, *Avvo Launches Service Providing On-Demand Legal Advice for a Fixed Fee*, A.B.A. J. (Oct. 27, 2014), [http://www.abajournal.com/news/article/avvo\\_launches\\_on\\_demand\\_legal\\_advice\\_for\\_a\\_fixed\\_fee](http://www.abajournal.com/news/article/avvo_launches_on_demand_legal_advice_for_a_fixed_fee) [https://perma.cc/RMY4-GW7L]; Robert Ambrogi, *More Info on Avvo's On-Demand, Fixed Fee Legal Advice Service*, LAW SITES (Oct. 31, 2014), <http://www.lawsitesblog.com/2014/10/info-avvos-demand-fixed-fee-legal-advice-service.html> [https://perma.cc/SSN4-XR3X].

9. In May of 2015, Avvo's CEO participated in the ABA's National Summit on Innovation in Legal Services at Stanford University. See *Video Highlights*, *supra* note 2. In August of 2015, he spoke at the ABA's House of Delegates meeting where he argued that the legal profession should get rid of the regulation on the unauthorized practice of law. Lorelei Laird, *Avvo Founder Tells Lawyers to 'Get Rid of UPL' if They Want Innovation and Access to Justice*, A.B.A. J. (Aug. 3, 2015), [http://www.abajournal.com/news/article/avvo\\_founder\\_tells\\_lawyers\\_to\\_get\\_rid\\_of\\_upl\\_if\\_they\\_want\\_innovation\\_and\\_to](http://www.abajournal.com/news/article/avvo_founder_tells_lawyers_to_get_rid_of_upl_if_they_want_innovation_and_to) [https://perma.cc/T8AB-DELG].

Services, which it describes as an online legal services “marketplace.”<sup>10</sup> This new program offers access to limited-scope legal services through a network of attorneys in at least 18 states.<sup>11</sup>

Under current regulations in almost every jurisdiction, participation in Avvo Legal Services as currently constituted raises a number of concerns regarding the regulation of advertising, sharing of fees with nonlawyers, and safekeeping of clients’ property. Avvo has tried to assure lawyers that participating in the program does not raise ethical concerns, yet the basis for its position is questionable.

## II. WHAT IS “AVVO LEGAL SERVICES” AND HOW DOES IT WORK?

The idea behind Avvo Legal Services is relatively simple. Avvo sets the price for the services, but the services are provided by attorneys who sign up with Avvo.<sup>12</sup> Potential clients go to the Avvo website, enter some information about their legal needs, pay to purchase legal services, choose the attorney they want to work with, and pay the full price of the service up front.<sup>13</sup> Avvo collects that payment and keeps it until the chosen attorney

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10. JOSH KING, AVVO LEGAL SERVICES AND THE RULES OF PROFESSIONAL CONDUCT 8 (2016), <http://sociallyawkwardlaw.com/wp-content/uploads/Avvo-Legal-Services-and-the-RPC-with-supporting-details-2016-2-11.pdf> [https://perma.cc/848N-GY9M], attached to Josh King, *Avvo Launches Legal Services*, SOCIALLY AWKWARD (Feb. 14, 2016), <http://sociallyawkwardlaw.com/avvo-launches-legal-services/> [https://perma.cc/U83G-R7QY]. The program started as a pilot program in only five cities but then expanded to 18 states on February 9, 2016. See Robert Ambrogi, *Avvo Officially Launches its Fixed-Fee Legal Services in 18 States*, LAW SITES (Feb. 9, 2016) [hereinafter Ambrogi, *Avvo Officially Launches*], <http://www.lawsitesblog.com/2016/02/avvo-officially-launches-its-fixed-fee-legal-services-in-18-states.html> [https://perma.cc/R4Y4T-2Z4K]; Robert Ambrogi, *Avvo Readies Rollout of Fixed-Fee Legal Services*, A.B.A. J. (Jan. 12, 2016), [http://www.abajournal.com/news/article/avvo\\_readies\\_roll\\_out\\_of\\_fixed\\_fee\\_legal\\_services](http://www.abajournal.com/news/article/avvo_readies_roll_out_of_fixed_fee_legal_services) [https://perma.cc/7LTU-NP55].

11. The 18 states are Arizona, California, Colorado, Florida, Georgia, Illinois, Massachusetts, Maryland, Michigan, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Texas, Virginia, Washington, and Wisconsin. Ambrogi, *Avvo Officially Launches*, *supra* note 10.

12. See *Attorney FAQ for Avvo Legal Services*, AVVO [hereinafter *Avvo Legal Services FAQ*], [https://www.avvo.com/support/avvo\\_legal\\_services\\_attorney\\_faq](https://www.avvo.com/support/avvo_legal_services_attorney_faq) [https://perma.cc/5REX-FLSW] (describing Avvo Legal Services).

13. See *id.*

completes the service for the client.<sup>14</sup> After that happens, Avvo sends the attorney the amount paid by the client.<sup>15</sup> In a separate transaction, Avvo directly withdraws what Avvo calls a “per-service marketing fee” from the chosen attorney’s operating account, to which the attorney has given Avvo direct access.<sup>16</sup> The amount of the marketing fee the attorney pays Avvo varies depending on the price of the legal service provided by the attorney.<sup>17</sup> Avvo and the lawyer would then go through the same process every time a new client chooses the lawyer again.<sup>18</sup>

Given this structure, Avvo Legal Services is clearly not a law firm. It does not provide legal services nor does it employ the lawyers who do. It merely provides an online platform designed to connect potential clients with lawyers who are available to provide limited-scope legal services in exchange for a fee paid by the lawyers.<sup>19</sup>

Also, even though Avvo connects potential clients with lawyers who are available to represent them, because the system does not charge clients a set fee for membership, it is not likely to be considered a “pre-paid or group legal service plan.”<sup>20</sup> Finally, Avvo is also not likely to be considered a “referral service,” because Avvo seems to use an automated computer system, rather than human discretion, to choose the attorney to whom the client will be referred.<sup>21</sup> Using Avvo Legal Services, potential clients can

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14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. 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 PROFESSIONAL CONDUCT r. 7.2 cmt. 6; *see also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-355, 3 (1987) (“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.”).

21. The consensus on whether online matching services constitute “lawyer referral services” turns on whether such services utilize an intermediary exercising discretion, such as an intake worker answering a telephone, when determining which attorneys to recommend to which clients based upon some stated criteria. *See, e.g.*, ABA STANDING COMM. ON LAWYER REFERRAL AND INFO. SERV., THE REGULATION OF LAWYER REFERRAL SERVICES 5, [http://www.floridabar.org/cmdocs/cd001.nsf/c5aca7f8c251a58d85257236004a107f/c0654058804c0045852578b7006a6e60/\\$FILE/National%20Review%20of%20LRS%20Regulation.pdf](http://www.floridabar.org/cmdocs/cd001.nsf/c5aca7f8c251a58d85257236004a107f/c0654058804c0045852578b7006a6e60/$FILE/National%20Review%20of%20LRS%20Regulation.pdf) [<https://perma.cc/V2T6-JSV7>].

choose which attorney they want to hire from all the attorneys available, and even if Avvo connects a potential client with a lawyer directly, the connection is made with the first available lawyer in the client's geographical area—not on the basis of Avvo's discretion.<sup>22</sup>

For these reasons, Avvo Legal Services is more likely to be considered a relatively new form of “client development tool” that is sometimes referred to as a “lead generation service.”<sup>23</sup> Fortunately, the ABA has tried to keep up with the changes in the online legal services marketplace and has provided guidance on how the conduct of lawyers interacting with lead generators may be regulated.<sup>24</sup>

In 2012, the ABA amended the Comment to Model Rule of Professional Conduct 7.2 to “help guide the growing industry of lead generation services (and the lawyers who use those services).”<sup>25</sup> The new language recognizes the differences between referrals and “leads.”<sup>26</sup> This distinction is critical to understanding how the conduct of attorneys involved with Avvo is likely to be regulated because, even though lawyers have a right to advertise,<sup>27</sup> they are generally banned from “giv[ing] anything of value to a person for recommending the lawyer's services.”<sup>28</sup>

According to recently approved changes to the Model Rules of Professional Conduct, a lawyer may pay a nonlawyer lead generator only as long as the lead generator does not recommend the lawyer, and the payment

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22. See *Avvo Legal Services FAQ*, *supra* note 12; King, *supra* note 10, at 4.

23. Perlman, *supra* note 2, at 63–64.

24. In 2009, the ABA created a Commission (named the Commission on Ethics 20/20) to “perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments.” *ABA Commission on Ethics 20/20*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html) [<https://perma.cc/9RSR-L6E8>].

25. Perlman, *supra* note 2, at 65 & n.83.

26. MODEL RULES OF PROF'L CONDUCT r. 7.2 cmt. 5.

27. See MODEL RULES OF PROF'L CONDUCT r. 7.2(a).

28. MODEL RULES OF PROF'L CONDUCT r. 7.2(b); see also RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE* 1192 (2012–13 ed.) (“[A] lawyer could not pay” a nonlawyer a “fee for each referral that results in a client representation or a percentage of the legal fees generated by the referrals.”). Note that Rule 7.2 is based on the notion that payments for referrals are inherently unethical because they create too much of a risk to the lawyer's independence. See ROTUNDA & DZIENKOWSKI, *supra*, at 1191.

to the lead generator is “consistent with” the rule that bans splitting fees with nonlawyers and the rule that regulates a lawyer’s right to advertise.<sup>29</sup> Given this language, lawyers need to be concerned about a few issues. In particular, lawyers ought to be concerned about whether paying Avvo’s fees could be construed as sharing fees with nonlawyers, whether the fees would be considered to be a form of advertisement, and whether agreeing to Avvo’s terms satisfies a lawyer’s duty to safeguard clients’ property.

### III. DOES PAYING AVVO’S FEE CONSTITUTE FEE SHARING?

Avvo’s launch of Avvo Legal Services quickly raised concerns<sup>30</sup> about whether the fact that an attorney would be paying Avvo a fee based on the legal fee paid by the client constitutes a violation of the ban on sharing fees with nonlawyers.<sup>31</sup> Obviously, this is an important concern for both the lawyers involved and for Avvo, so, in its website, Avvo reassures lawyers that they should not worry about this issue:

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29. The Comment to Model Rule 7.2 states that “[e]xcept as permitted” under the exceptions listed in the rule, “lawyers are not permitted to pay others for recommending the lawyer’s services . . . . A communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities . . . . [A] lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.1, 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.” MODEL RULES OF PROF’L CONDUCT r. 7.2 cmt. 5.

30. See, e.g., Susan Cartier Liebel, *Is Avvo’s New ‘Marketing Fee’ Really a ‘Referral Fee’ in Sheep’s Clothing?*, SOLO PRACT. UNIV. (Jan. 12, 2016) <http://solopracticeuniversity.com/2016/01/12/is-avvos-new-marketing-fee-really-a-referral-fee-in-sheeps-clothing/> [<https://perma.cc/8WBK-E44F>]; Martha Neil, *Avvo Offers Fixed-Fee Legal Services Through an Attorney Network in 18 States*, A.B.A. J. (Feb. 9, 2016), [http://www.abajournal.com/news/article/avvo\\_offers\\_fixed\\_fee\\_legal\\_services\\_through\\_attorney\\_network\\_in\\_18\\_states/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=daily\\_email](http://www.abajournal.com/news/article/avvo_offers_fixed_fee_legal_services_through_attorney_network_in_18_states/?utm_source=maestro&utm_medium=email&utm_campaign=daily_email) [<https://perma.cc/8YQD-AM6P>]; Ambrogi, *Avvo Officially Launches*, *supra* note 10.

31. See MODEL RULES OF PROF’L CONDUCT r. 5.4(a). For a discussion of the history and scope of the rules that ban fee sharing with nonlawyers, see Roy D. Simon, Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L.J. 1069, 1076–90 (1989).

Should I be concerned about fee-splitting?

No. Avvo always sends you 100% of the client's payment. . . . As a completely separate transaction, you will pay a per-service marketing fee.

We know this issue is extremely important to participating attorneys. Here's what ethics expert and Avvo General Counsel Josh King says on the matter:

"Fee splits are not inherently unethical. They only become a problem if the split creates a situation that may compromise a lawyer's professional independence of judgment. We believe that Avvo Legal Services fees, if deducted like credit card fees, would involve the sort of technical fee split that would not create such a potential for compromise. Nonetheless, we have tried to keep things simple and clear by making the per-service marketing fee a separate charge."<sup>32</sup>

Thus, according to Avvo's explanation, attorneys should not worry about the ban on sharing fees with nonlawyers for the following reasons: (1) paying a fee to Avvo does not constitute sharing a legal fee with a nonlawyer because the fee is paid in a separate transaction, (2) paying a fee to Avvo does not constitute sharing a legal fee with a nonlawyer because it is a "marketing fee" as opposed to a legal fee, and (3) even if paying a fee to Avvo constitutes sharing a fee with a nonlawyer, sharing a fee in this case would not be considered unethical because fee sharing is not "inherently unethical."<sup>33</sup> As shall be discussed below, Avvo has also emphasized a fourth argument: since the fee paid to Avvo is for "marketing," an attempt to regulate the conduct of the lawyer paying it would be unconstitutional.<sup>34</sup>

Avvo may eventually be proven right about these claims, but as of now, the answers are not as clear-cut as it suggests. Model Rule 5.4(a), which has been adopted in almost all jurisdictions, states clearly that sharing a fee with a nonlawyer is unethical except under four enumerated circumstances, none

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32. *Avvo Legal Services FAQ*, *supra* note 12.

33. *Id.*

34. King, *supra* note 10, at 2.

of which apply to the business arrangement with Avvo.<sup>35</sup> Thus, at least as far as the text of the Model Rule is concerned, unless allowed by one of the specific exceptions, splitting fees with a nonlawyer *is* inherently unethical. The rule does not say that sharing a fee with a nonlawyer is unethical only if it interferes with the attorney's independent professional judgment; it says sharing a fee is unethical *because* it is a threat to an attorney's independent professional judgment.<sup>36</sup> 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.<sup>37</sup>

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35. "[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, partner, 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 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 (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter." MODEL RULES OF PROF'L CONDUCT r. 5.4(a).

36. Although there are two ethics opinions holding that payments to nonlawyers do not constitute fee sharing under certain circumstances, the opinions do not support the general interpretation that Avvo suggests. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 88-356 (1988), for example, concludes that it is ethically permissible for a law firm to pay a temporary lawyer placement organization a percentage of the compensation the firm pays the temporary lawyer. However, the opinion makes clear that one important reason is that the payment to the temporary placement agency was not being calculated out of legal fees paid by the client, but out of the compensation paid by the firm to the attorney. *Id.* at 7. In ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-374 (1993), the Committee held that it was not unethical to share legal fees with a nonlawyer because, under the specific circumstances discussed in the opinion, the nonlawyer was a nonprofit organization and the fees were court-awarded fees as opposed to fees paid by the client. This view is now specifically reflected in MODEL RULES OF PROF'L CONDUCT r. 5.4(a)(4).

37. 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. MANUAL ON PROF CONDUCT 541 (2014) (discussing, among others, Ethics Comm. of the N.C. State Bar, Formal Op. 2004-1 (2004) ("lawyer may participate in" a for-profit "online service . . . that has aspects of a referral service and a legal directory, provided there is no fee-sharing with the company"); Bd. of Comm'rs on Grievances & Discipline of the Ohio Sup. Ct., Op. 2001-2 (2001) (charging lawyers "a percentage of the fee obtained for rendering legal services . . . is considered payment for a referral"); Legal Ethics Comm. of the Or. State Bar, Formal Op. 2007-180, at 4 & n.2 (2007) (lawyer may not pay internet

Thus, the rule is based on the notion that the distorting influence of a nonlawyer's motivations, especially the motivation to make a profit, poses an undue risk of clouding a lawyer's independent professional judgment or of creating a conflict of interest. As explained by two leading commentators:

The purpose of the general prohibition against lawyer payments for obtaining recommendations or client referrals is based upon the concept that lawyers must be independent from third persons. Rule 5.4(a) prohibits lawyers from sharing legal fees with nonlawyers. Rule 5.4(b) and (d) prohibit lawyers from practicing law in an organization in which a nonlawyer has an ownership interest . . . .

These provisions seek to minimize the third party influences that could affect a representation of a client. Formal arrangements in which lawyers give money or other things of value to third persons for recommending the lawyer's services implicate similar concerns. In addition, the rules reflect a fear that if third persons could receive funds for funneling cases to lawyers, those individuals could be tempted to violate the advertising rules and those violations could be difficult to police.<sup>38</sup>

Moreover, according to the drafters of the Comment to Model Rule 7.2, a fee paid to a nonlawyer for a client lead should "not be contingent on a person's use of the lawyer's service" because "[s]uch a fee would constitute an impermissible sharing of fees with nonlawyers under Model Rule 5.4(a)."<sup>39</sup> Since a lawyer does not have to pay a fee to Avvo unless a client

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referral if fee is "based on number of referrals, retained clients, or revenue generated from the advertisements").

38. ROTUNDA & DZIENKOWSKI, *supra* note 28, at 1191.

39. ABA COMM'N ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES ON RESOLUTION 105B, at 5 (May 7, 2012), [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/2012\\_hod\\_annual\\_meeting\\_105b\\_filed\\_may\\_2012.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b_filed_may_2012.authcheckdam.pdf) [<https://perma.cc/5M5S-KTC2>]. The Commission filed its report with the ABA House of Delegates on May 7, 2012, for consideration at the Chicago Annual Meeting in August of 2012. See *ABA Commission on Ethics 20/20*, *supra* note 24. The resolution was adopted on August 6, 2012. See *id.*

chooses the lawyer, the fee seems to be “contingent on a person’s use of the lawyer’s service.”<sup>40</sup> Thus, paying the fee to Avvo arguably constitutes a violation of the ban on fee sharing and, as a consequence, of Model Rule 7.2.

However, Avvo’s website assures attorneys they do not have to worry about violating the ban on fee sharing because the attorney is paid the legal fee and Avvo is paid its fee in separate transactions.<sup>41</sup> Again, perhaps someday this argument will prove to be sufficient to satisfy the authorities in some states, but as of now it is just as likely to be considered a distinction without a difference.

As described above, Avvo sets the price for the legal services to be rendered by the attorney, and the client pays that amount in advance. The fee the attorney will eventually pay to Avvo is also predetermined by Avvo, and it is based on the price for the legal services. The more expensive the legal services, the higher Avvo’s fee will be. For this reason, the fact the fee is paid as a separate transaction does not matter. It is the fact that Avvo’s fee varies depending on the value of the legal fee that 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 nonlawyer prohibits.<sup>42</sup> Ethics opinions on deal-of-the-day marketing programs do not help clarify the issue because they are divided on whether paying the website that markets the deal constitutes sharing a fee with a nonlawyer. If anything, most of those opinions suggest that Avvo’s fee does constitute fee sharing (as opposed to a separate fee for advertising), because it is dependent on the earning of, and valued based on the amount of, legal fees.<sup>43</sup>

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40. ABA COMM’N ON ETHICS 20/20, *supra* note 39, at 5.

41. *See Avvo Legal Services FAQ*, *supra* note 12.

42. ROTUNDA & DZIENKOWSKI, *supra* note 28, at 1013 (A lawyer “cannot pay [a] nonlawyer on a contingent basis because this would constitute the sharing of a fee.”); *see also* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 87-355, *supra* note 20, at 3 (1987) (citing ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 85-1510 (1985)) (“lawyer may participate . . . in a for-profit lawyer referral service so long as the lawyer does not pay a fee to or share the lawyer’s fees with the referral service”).

43. *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 465, at 2 n.7 (2013), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/formal\\_opinion\\_465.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_465.authcheckdam.pdf) [<https://perma.cc/2F2F-6Q5H>]; *see also, e.g.*, Ala. State Bar Office of Gen. Counsel, Ethics Op. 2012-01, at 2 (2012) (“The percentage taken by the site is not tied in any manner to ‘reasonable cost’ of the

To illustrate the point, assume a group of lawyers hires a nonlawyer to find prospective clients off the street and to bring them to meet with the lawyers, and, as a reward, the lawyers agree to pay the nonlawyer a percentage of the legal fee the client pays the lawyers once the work is done. The nonlawyer does not decide which lawyer would be better for the job; he or she just lets the client choose from a list of who is available. There should be little doubt that this agreement would be found to violate the ban on sharing fees with nonlawyers. The fact that the lawyer would pay the nonlawyer's commission as a separate transaction after the lawyer gets paid by the client would not change anything. It would also not matter that the commission was agreed upon before the services are rendered or that the services of the nonlawyer were provided before the legal services were rendered.

With all this in mind, is it farfetched to think that a state regulatory agency could conclude that the transactions involved in Avvo Legal Services are the equivalent of a lawyer paying a nonlawyer a commission for finding a client based on the legal fee paid by the client to the lawyer? *That* is the question lawyers ought to be asking in order to determine whether they should be concerned.

Notably, as this article was getting ready to go to press, Ethics Committees in several states began to provide some guidance. For example, the South Carolina Bar Association recently issued an advisory ethics opinion in which it concludes that participating in a program like Avvo's

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advertisement," thus, "use of such sites to sell legal services is a violation of Rule 5.4 because legal fees are shared with a non-lawyer."); Ind. State Bar Ass'n Legal Ethics Comm., Advisory Op. 1, at 23 (2012) ("[O]nline providers . . . are being paid to channel buyers of legal work to the specific lawyer, in violation of the advertising and fee-sharing rules."); Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., Advisory Op. 2011-27 (2011) (using deal-of-the-day website is impermissible fee splitting with a nonlawyer). *But see, e.g.*, Md. State Bar Ass'n Comm. on Ethics, Op. 2012-07 (2012) (paying deal-of-the-day website upfront fee to use service is cost of advertising and not legal fee-splitting); Ethics Comm. of the N.C. State Bar, Formal Op. 10 (2011) (treating fee retained by website as a mere advertising cost because "it is paid regardless of whether the purchaser actually claims the discounted service and the lawyer earns the fee"); S.C. Bar Ethics Advisory Comm., Advisory Op. 11-05 (2011) ("The fee charged by a company for use of its service (i.e., a percentage of the money paid by the customer for the discounted coupon) constitutes the payment of 'the reasonable cost of advertisements' . . . and not the sharing of a legal fee with a non-lawyer. . . .").

would be unethical because it would violate the ban on sharing fees with nonlawyers.<sup>44</sup>

In the situation described . . . , the service collects the entire fee and transmits it to the attorney at the conclusion of the case. In a separate transaction, the service receives a fee for its efforts, which is apparently directly related to the amount of the fee earned in the case. The fact that there is a separate transaction in which the service is paid does not mean that the arrangement is not fee splitting as described in the Rules of Professional Conduct.

A lawyer cannot do indirectly what would be prohibited if done directly. Allowing the service to indirectly take a portion of the attorney's fee by disguising it in two separate transactions does not negate the fact that the service is claiming a certain portion of the fee earned by the lawyer as its "per service marketing fee."<sup>45</sup>

Interestingly, even after the publication of the opinion in South Carolina, and of similar opinions in Ohio and Pennsylvania, Avvo continued to advise lawyers not to worry,<sup>46</sup> since according to Avvo's

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44. See S.C. Bar Ethics Advisory Comm., Advisory Op. 16-06 (2016), <http://www.sbar.org/Bar-Members/Ethics-Advisory-Opinions/Opinion-View/ArticleId/2455/Ethics-Advisory-Opinion-16-06> [<https://perma.cc/97N4-TV78>].

45. *Id.* Similar opinions have been published in Ohio and Pennsylvania. See Alberto Bernabe, *Attention Ohio Lawyers: PR Board Finds Participating in Programs Like Avvo Legal Services Is Likely Unethical*, PROF. RESP. BLOG (June 19, 2016), <http://bernabepr.blogspot.com/2016/06/attention-ohio-lawyers-pr-board-finds.html> [<https://perma.cc/G92T-YGW5>] (commenting on Sup. Ct. of Ohio Bd. of Prof'l Conduct, Op. 2016-3 (2016), [http://www.supremecourt.ohio.gov/Boards/BOC/Advisory\\_Opinions/2016/Op\\_16-003.pdf](http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2016/Op_16-003.pdf) [<https://perma.cc/6PR8-7V28>]); Alberto Bernabe, *Pennsylvania Opinion Finds Participating in Program Like Avvo Legal Services to Be Unethical*, PROF. RESP. BLOG (Oct. 10, 2016), <http://bernabepr.blogspot.com/2016/10/pennsylvania-opinion-finds.html> [<https://perma.cc/88H7-8RD3>] (commenting on Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., Formal Op. 2016-200 (2016), <https://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/F2016-200.pdf#search=%222016-200%22> [<https://perma.cc/CA7G-QGRW>]).

46. Regardless of the advisory opinion, Avvo continued to seek to sign up lawyers in South Carolina because, as Avvo's chief legal officer stated: "We've looked at the rules. We have our own interpretation of the rules." Debra Cassens Weiss, *Ethics Opinion on Fee-Sharing Is Bad News for Avvo Legal Services*, A.B.A. J. (Aug. 11, 2016),

argument, paying a fee to Avvo does not constitute sharing a legal fee with a nonlawyer because the fee is a marketing fee as opposed to a legal fee. Granted, unlike the previous argument, this one can make a meaningful difference. Yet, again, lawyers might be concerned that Avvo's argument may not be entirely accurate.

First, as mentioned above, a number of the available ethics opinions on deal-of-the-day marketing programs do not seem to support Avvo's conclusion. Second, even if Avvo's fee is for marketing or, more appropriately, advertising, the comment to the 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."<sup>47</sup> For this reason, lawyers paying Avvo should consider whether their state disciplinary authority might conclude that by providing Avvo's own ratings, as opposed to client ratings, Avvo creates the impression that Avvo recommends some lawyers more than others.<sup>48</sup>

Rather than addressing this question, Avvo's argument seems to be limited to saying that Avvo merely provides a space for attorneys to advertise. Therefore, any concerns regarding the conduct of the attorneys who pay Avvo must be examined from the point of view of the law that relates to attorney advertising.<sup>49</sup> Obviously, this will only be accurate if attorneys are actually paying Avvo for advertising (as opposed to providing client leads).

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[http://www.abajournal.com/news/article/ethics\\_opinion\\_on\\_fee\\_sharing\\_is\\_bad\\_news\\_for\\_avvos\\_legal\\_referral\\_service#When:20:12:00Z](http://www.abajournal.com/news/article/ethics_opinion_on_fee_sharing_is_bad_news_for_avvos_legal_referral_service#When:20:12:00Z) [<https://perma.cc/3L8H-N388>].

47. MODEL RULES OF PROF'L CONDUCT r. 7.2 cmt. 5.

48. Avvo's explanation of its rating system states that the rating "is *our* effort to evaluate a lawyer's background," and that "[w]e create the rating." *What Is the Avvo Rating?*, AVVO (emphasis added), [http://www.avvo.com/support/avvo\\_rating](http://www.avvo.com/support/avvo_rating) [<https://perma.cc/TP8A-9MQZ>]. More importantly, the website states that the rating "is a tool that provides a snapshot assessment of a lawyer's background, and should be considered alongside other information such as client reviews and peer endorsements" when considering whether to hire an attorney. *Id.*

49. See King, *supra* note 10, at 2; Josh King, *Avvo Launches Legal Services*, SOCIALLY AWKWARD (Feb. 14, 2016), <http://sociallyawkwardlaw.com/avvo-launches-legal-services/> [<https://perma.cc/7GL4-6C5F>].

#### IV. ADVERTISING REGULATION AND AVVO'S LEGAL SERVICES

Assuming that attorneys truly pay Avvo for advertising services, Avvo then argues that states' attempts to regulate a lawyer's involvement with Avvo would be unconstitutional. According to Avvo's General Counsel,

For state regulation of advertising to survive constitutional review, such regulation must meet either the "intermediate scrutiny" standard (for regulation of misleading advertising) or a developing form of even-more-rigorous scrutiny (for restrictions on non-misleading advertising). 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.<sup>50</sup>

The implication in this explanation is that attorneys participating in Avvo Legal Services could defend themselves against a state's attempt to regulate their conduct by arguing that the regulation, as applied, violates the First Amendment, which would force a state to show empirical proof that its regulation is narrowly tailored to achieve its goal. Unfortunately, this argument is questionable in many important respects.

First, Avvo's explanation misstates the applicable doctrine. As the Supreme Court explained many years ago in *Zauderer v. Office of Disciplinary Counsel*,

Our general approach to restrictions on commercial speech is . . . by now well settled. The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction. Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of

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50. King, *supra* note 10, at 2 (citations omitted).

a substantial governmental interest, and only through means that directly advance that interest.<sup>51</sup>

Thus, the protection afforded by the First Amendment to commercial speech applies only to speech that is not misleading or deceptive. Misleading advertising is simply not protected.<sup>52</sup> In addition, in order to justify regulation of protected commercial speech, the State must show a substantial state interest and that the regulation directly advances that interest, not that it is narrowly tailored to meet the interest. The “narrowly tailored” test is reserved for the strict scrutiny mainly used in cases that do not involve commercial speech.<sup>53</sup> Thus, Avvo is wrong about the types of speech to which the constitutional protection applies, as well as to which constitutional standard applies, and confuses the elements of the intermediate scrutiny standard with those of the strict scrutiny standard, which is one that clearly does not apply.

The idea that there is an “even-more-rigorous” test that Avvo argues may apply comes from the Supreme Court’s decision in *Sorrell v. IMS Health Inc.*<sup>54</sup> In *Sorrell*, the Court held that a certain regulation should be subject to what it referred to as “heightened scrutiny” because the regulation was content-based or speaker-based.<sup>55</sup> Yet, the Court did not explain how that test differs from other constitutional tests and did not actually apply it to the facts of the case.<sup>56</sup> Moreover, if the Supreme Court had intended to elevate the level of constitutional protection for commercial speech to the level used for political speech, presumably it simply would have applied strict scrutiny in *Sorrell*. The fact that it did not suggests the Court still understands that there is an important distinction between the two types of speech. *Sorrell* appears to be the first case in which the Court mentioned a

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51. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) (citations omitted).

52. *See id.*

53. *See, e.g., United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (discussing the application of strict scrutiny to content-based restrictions).

54. 564 U.S. 552 (2011); King, *supra* note 10, at 2.

55. 564 U.S. at 565–66.

56. *See id.* at 563–80.

“heightened scrutiny” standard for commercial speech, and lower courts have struggled to find a way to understand its definition.<sup>57</sup>

Thus, even assuming that *Sorrell* modified the standard that applies when evaluating the constitutionality of regulation that affects attorney advertising, it is not clear what the effect would be in a case involving discipline for sharing fees with a nonlawyer. Lawyers facing discipline for sharing fees with Avvo, of course, would argue that the ban on fee sharing is speaker-based, which they would argue forces the state to meet the new “heightened scrutiny” mentioned in *Sorrell*.<sup>58</sup> Unfortunately, because the Court did not define the contours of this new test, it is not entirely clear what the standard is. According to one court that has tried to apply it, the new test should require the state to show, in addition to the old elements of the standard used in *Zauderer*, that the harms the regulation seeks to prevent “are real,” that the regulation will “in fact” prevent them, and that the regulation is drawn to achieve the governmental interest.<sup>59</sup> Even under this new standard, however, the state would not need to show that the regulation meets the elements of the strict scrutiny standard.<sup>60</sup> More than likely, at

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57. See *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 649 (9th Cir. 2016) (quoting *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014)) (“According to the Eight Circuit, because *Sorrell* ‘did not define what “heightened scrutiny” means, . . . [t]he upshot is that when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*’” (alteration in original) (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980))). In addition, the Second Circuit has held that heightened scrutiny may be applied to content-based regulations of commercial speech using the framework of the *Central Hudson* test. *Appelsmith*, 810 F.3d at 649 (citing *United States v. Caronia*, 703 F.3d 149, 164 (2d Cir. 2012)); see also *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 604 (7th Cir. 2012) (“[*Sorrell* requires] the government [to] establish that the challenged statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.” (internal quotation marks omitted)). One court has interpreted *Sorrell* to require strict scrutiny of content-based burdens on commercial speech in some circumstances. See *King v. Governor of N.J.*, 767 F.3d 216, 235, 236 (3d Cir. 2014), cert. denied sub nom. *King v. Christie*, 135 S. Ct. 2048 (2015). Although a plausible interpretation, it is surprising since it would elevate some commercial speech to the level of political speech when it comes to protection under the First Amendment.

58. 564 U.S. at 566.

59. *Appelsmith*, 810 F.3d at 648.

60. *Id.* at 648–49.

most, only “a fit that is . . . reasonable . . . [and] whose scope is in proportion to the interest served” would be required.<sup>61</sup>

Also, courts have not applied the heightened test to attorney commercial speech, which is important, because at least according to Justice Breyer and the dissenters in *Sorrell*, “the Court has emphasized the need, in applying an ‘intermediate’ test, to maintain the “‘commonsense’ distinction between speech proposing a commercial transaction, *which occurs in an area traditionally subject to government regulation*, and other varieties of speech.”<sup>62</sup> This is important because, obviously, attorney advertising is a form of commercial speech within an area traditionally subject to regulation.

Whatever the case may be regarding the standard that applies, at a minimum, the state of the law is not quite as straightforward as Avvo suggests. It is just not entirely clear how the Court would apply the “even-more-rigorous scrutiny” that Avvo suggests would apply if a state attempts to impose sanctions on a lawyer that participates in Avvo Legal Services.<sup>63</sup> Avvo seems very confident that 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 nonlawyer lead generators. After all, as stated above, “[f]ormal arrangements in which lawyers give money or other things of value to third persons for recommending the lawyer’s services” have always raised concerns about interference with a lawyer’s independent professional judgment.<sup>64</sup> Indeed, as the comment to the Model Rule itself states, the rule expresses a “traditional limitation[.]” on the practice of law, which means the policy upon which it is based is deeply entrenched and respected.<sup>65</sup> Avvo feels confident in its view, but given the basis of Avvo’s argument and the state of the law, what lawyers ought to be

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61. *Id.* at 649 (citation omitted).

62. 564 U.S. at 584 (Breyer, J., dissenting) (emphasis in original) (quoting *Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447, 455–56 (1978), which is, of course, about attorney commercial speech).

63. King, *supra* note 10, at 2.

64. ROTUNDA & DZIENKOWSKI, *supra* note 28, at 1191.

65. MODEL RULES OF PROF’L CONDUCT r. 5.4(a) cmt. 1.

asking themselves is how confident *they* would feel risking discipline on the basis of Avvo's advice.

## V. HANDLING CLIENTS' MONEY

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, which in many jurisdictions has to be an interest bearing account (IOLTA).<sup>66</sup> 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."<sup>67</sup> Thus, again Avvo is telling lawyers they have nothing to worry about. However, given the model followed in a majority of jurisdictions, a more accurate answer is that lawyers probably *should* worry about this issue.

Avvo seems to suggest that the fact that the fee is paid in advance 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) explicitly states that "[a] lawyer shall 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."<sup>68</sup>

The only way this clear rule does not apply is if the fee is considered earned upon payment. If that is the case, then the money belongs to the lawyer and the lawyer can do with it as the lawyer pleases, including allowing Avvo to keep it until Avvo wants to release it. 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 earned*."<sup>69</sup> In other words, Avvo seems to be admitting the money it keeps has not been earned yet. By definition, since it has not been earned yet, the money belongs to the client and the lawyer has an obligation to place the money in a trust account.<sup>70</sup> Thus, by allowing Avvo to keep possession of a client's money

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66. See MODEL RULES OF PROF'L CONDUCT r. 1.15; ROTUNDA & DZIENKOWSKI, *supra* note 28, at 677–79.

67. King, *supra* note 10, at 9; Josh King, *Avvo Legal Services and the Rules of Professional Conduct*, LAWYERNOMICS BY AVVO (Feb. 9, 2016), <http://lawyernomics.avvo.com/ethics/avvo-legal-services-and-the-rules-of-professional-conduct.html> [https://perma.cc/GP95-AT3P].

68. MODEL RULES OF PROF'L CONDUCT r. 1.15(c).

69. King, *supra* note 10, at 9 (emphasis added).

70. See ROTUNDA & DZIENKOWSKI, *supra* note 28, at 669.

that the lawyer has an obligation to keep in a trust account, the lawyer violates the rule.

Avvo could perhaps try to argue that since the fee is a flat rate, it is earned upon payment and exempts the lawyer from placing the money in a trust account. However, aside from the fact that Avvo's own terms defeat the argument that the fee is earned upon payment, this argument would only be valid in the few jurisdictions that have held that a client can agree that a flat fee is nonrefundable or that it can be deemed to be earned upon payment.<sup>71</sup> Unfortunately for lawyers seeking to do business with Avvo, this is not the case in many jurisdictions.<sup>72</sup>

In fact, it was for this reason that the ABA Standing Committee on Ethics and Professional Responsibility expressed in an Ethics Opinion that structuring prepaid marketing deals to comply with applicable ethical obligations "may prove difficult."<sup>73</sup> Prepaid deals, just like Avvo Legal Services, involve nonlawyers collecting in advance all the money to which the lawyer will be entitled for legal services yet to be performed. The Committee concluded that the nonlawyer was collecting advance legal fees and that, therefore, those fees needed to be deposited into a trust account.<sup>74</sup> Since, as the Committee also makes clear, lawyers bear the responsibility for properly handling advanced legal fees, lawyers considering whether to

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71. For example, the Comment to the applicable rule in Florida was amended in September 2015 to say that a "nonrefundable flat fee is the property of the lawyer and should not be held in trust." *In re* Amendments to Rule Regulating the Fla. Bar 4-1.5—Fees & Costs for Legal Servs., 175 So. 3d 276, 278 (Fla. 2015); *see also* Sup. Ct. of Ohio Bd. of Prof'l Conduct, Op. 2016-1, 4 (Feb. 12, 2016) (lawyers are required to deposit flat fees paid in advance into an IOLTA account, unless designated as "earned upon receipt"). Likewise, according to Ohio's Rule of Professional Conduct 1.5(d)(3), a lawyer can agree with a client to consider a flat fee as "earned upon receipt" and nonrefundable as long as the client is informed that the client may have a right to a refund. OHIO RULES OF PROF'L CONDUCT r. 1.5(d)(3); *see* Alberto Bernabe, *Flat Fees: Earned, Unearned or Both?*, 30 OHIO LAW., no. 3, July/Aug. 2016, at 14, 15 ("This notion of a nonrefundable fee that must be guaranteed to be refundable is an illogical inherent contradiction in terms. . . ."). Also, Tennessee Rule of Professional Conduct 1.5(f) and its comment 4a recognize nonrefundable fees paid in advance. TENN. RULES OF PROF'L CONDUCT r. 1.5(f) cmt. 4a.

72. *See, e.g., in re* Mance, 980 A.2d 1196, 1199 (D.C. 2009) ("[M]oney paid by a client as a flat fee for legal services remains the client's property, and counsel may not treat any portion of the money otherwise until it is earned, unless the client has agreed otherwise."); *in re* O'Farrell, 942 N.E.2d 799, 799 (Ind. 2011).

73. *See* ABA Comm. on Ethics and Prof'l Resp., Formal Op. 465, *supra* note 43, at 6.

74. *See id.*

participate in Avvo Legal Services ought to be concerned even though Avvo says there's nothing to worry about.

#### CONCLUSION

It is no secret that many people with legal needs do not have affordable access to lawyers. In an effort to find a solution to this problem, some nonlawyer companies have created platforms to connect potential clients with lawyers. Avvo is one of these companies. Originally the publisher of an online directory of lawyers, Avvo recently expanded its presence in the legal services marketplace when it launched Avvo Legal Services.

Avvo Legal Services is the kind of innovation that lawyers and nonlawyers alike have argued is needed to provide new solutions to issues facing the provision of legal services in the United States. Unfortunately, participating in Avvo Legal Services raises a number of ethical concerns for lawyers. Avvo has tried to assure lawyers that the concerns are unwarranted, but its arguments are questionable.

In response, Avvo, or the lawyers who want to associate themselves with Avvo, might argue that the arguments advanced in this article are too formalistic, that the rules should not be read so strictly, or that their interpretation should be flexible keeping in mind the overall goals for which the rules have been adopted. According to this view, as long as an attorney's conduct does not result in harm to a client, it would be justified, even if it violates the letter of a rule as long as it does not violate its "spirit."

Although this argument may sound reasonable as a good compromise between a strict application of the rules and one that takes into account the context and effect of the conduct at issue, in the end it is counterproductive. Adopting the view proposed by Avvo would allow lawyers who violate the rules to attempt to justify their conduct by arguing that no one got harmed or that the rule should be ignored. This, of course, eliminates any certainty in the mandate of the rules and eliminates their usefulness as proper guidance. The rules must have meaning; their text must be observed. If a rule is based on bad policy, the thing to do is to work toward changing the rule, not to ignore it because one thinks it is a bad rule. Lawyers are not allowed to violate a rule just because they do not like what the rule says. Avvo wants lawyers to trust Avvo's own interpretation of the rules arguing

that the rules should be understood to be flexible.<sup>75</sup> Instead, lawyers should be aware of what the rules actually say and then decide whether it is worth it to take the risk involved in taking action according to that flexible interpretation.

For this reason, and given that the issues raised by Avvo Legal Services have not been addressed directly by courts, and that the few state agencies that have addressed them have found serious problems, lawyers should be very careful and should seek guidance from their local authorities before taking unnecessary risks, particularly as it relates to advertising, sharing legal fees with nonlawyers, and safeguarding clients' property.

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75. Avvo's chief legal officer has stated: "We've looked at the rules. We have our own interpretation of the rules." Weiss, *supra* note 46.