

JACPA Ethics Alert

South Carolina ethics advisory opinion states that matching legal services such as those offered by AVVO are prohibited

Hello everyone and welcome to this Ethics Alert which will discuss the recent South Carolina ethics advisory opinion which states that marketing fees to non-lawyer companies collected as part of legal fees are prohibited. The advisory opinion is here: <http://www.scbart.org/Bar-Members/Ethics-Advisory-Opinions/Opinion-View/ArticleId/2455/Ethics-Advisory-Opinion-16-06>

The July 14, 2016 ethics advisory opinion discusses a marketing program and fee arrangement similar to the one used by Avvo Legal Services. Avvo states that the service matches lawyers willing to provide specific legal services to clients who pay a fee to AVVO, which includes a marketing fee. Lawyers who participate then receive earned fees from Avvo once a month and Avvo takes its marketing fee from the lawyers in a separate transaction.

The South Carolina advisory opinion states that this type of fee arrangement/program constitutes improper fee sharing with non-lawyers, and, in the alternative, constitutes improper payment of a referral fee to a non-lawyer, which is also prohibited.

According to the opinion, "In the situation described above, 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.'"

The opinion also states that marketing fees must represent the reasonable cost of the service, and these fees do not meet that criteria. "Presumably, it does not cost the service any more to advertise online for a family law matter than for the preparation of corporate documents. There does not seem to be any rational basis for charging the attorney more for the advertising services of one type of case versus another."

"The service, however, purports to charge the lawyer a fee based on the type of service the lawyer has performed rather than a fixed fee for the advertisement, or a fee per inquiry or "click." In essence, the service's charges amount to a contingency advertising fee arrangement rather than a cost that can be assessed for reasonableness by looking at market rate or comparable services."

Avvo representatives have previously stated that their “matching services” fee arrangement does not violate lawyer disciplinary rules. I discussed AVVO’s program in my January 15, 2015 Ethics Alert, which is here: <https://jcorsmeier.wordpress.com/2016/01/25/lawyer-directory-website-avvo-is-offering-fixed-fee-legal-services-on-a-limited-basis-and-plans-to-expand-the-services/>

An online FAQ about the legal services program on Avvo’s website states that “(l)ocal clients purchase legal services, choose the attorney they want to work with, and pay the full price of the service up front. The chosen attorney then completes the service for the client and is paid the full legal fee. As a separate transaction, the chosen attorney pays a per-service marketing fee for the completed, paid service.”

Avvo General Counsel Josh King also stated in the FAQ that Avvo is not acting as a lawyer referral service and that lawyers should not be concerned about fee splitting since “(f)ee 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, 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.”

Bottom line: The South Carolina ethics advisory opinion makes it clear that AVVO’s (and other similar) “matching service” arrangements constitute improper fee splitting and improper referral fees. Lawyers who are interested in participating should carefully review their jurisdiction’s Bar rules and/or consult with and consult their Bar or consult with a lawyer familiar with their jurisdictions Bar rules before considering participation in the service.

As always, if you have any questions about this Ethics Alert or need assistance, analysis, and guidance regarding these or any other ethics, risk management, or other issues, please do not hesitate to contact me.

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*Please note: Effective June 27, 2016, my new office address is:
29605 U.S. Highway 19 N., Suite 150, Clearwater, Florida 33761
E-mail addresses and telephone numbers below will remain the same.*

Joseph A. Corsmeier, Esquire
Law Office of Joseph A. Corsmeier, P.A.
29605 U.S. Highway 19 N., Suite 150,
Clearwater, Florida 33761
Office (727) 799-1688
Fax (727) 799-1670
jcorsmeier@jac-law.com
www.jac-law.com