

Lawyers Must Protect the Public We Serve

"Do the Public Good."

– Motto of the New York State Bar Association

The Real Justice Gap

When we discuss the lack of availability of legal services to those who need them, often referred to as the "justice gap," we generally think of it in the context of providing pro bono legal services to the poor. However, the public, lawyers and the organized bar are faced with another, perhaps more difficult, gap – non-lawyer entrepreneurs attempting to make a profit on the backs of solo and small firm attorneys seeking work, and a public that wants easy answers to legal issues.

Increasingly our profession and the public we serve are threatened by non-lawyer "legal services" businesses that not only demean the profession, but also diminish the complexity and nuances of providing competent and effective legal services and reduce the attorney-client relationship to an online form that needs to be completed. Although these services claim to be innovative, they subvert the fundamental principles of our profession.

The New York State Bar Association and our profession have worked hard to help address the real justice gap for the poor and underserved. We make great efforts, working with our sister bars, pro bono legal service organizations and the courts to help address legal needs of the poor in this state. Our Association has three new staff members whose responsibilities include the promotion and coordination of pro bono activities, and we're partnering with the ABA to

provide a justice portal to find new ways to deliver limited scope pro bono legal services via the Internet and email. We have taken the lead in looking to establish a statewide justice center in Albany to help coordinate and facilitate pro bono activities statewide. We also continue our longstanding and steadfast advocacy for increases in our state's budget to fully fund the judiciary and for legal services initiatives.

But there is also the second "justice gap" for lower and middle income New Yorkers with some resources to pay for legal services. This gap is frustrating because many attorneys, especially those who are newly admitted or who practice as solos or in small firms, report difficulty finding new ways to connect with clients. Along with other bar associations, NYSBA is working on enhancing our lawyer referral service to provide support to all attorneys, focusing on solo and small firms.

The legal profession and the organized bar must use the collective strength of their resources and expertise to address this issue. We must work together to support struggling attorneys and connect them with a public that seeks access to affordable legal services. Some argue we should let our profession be co-opted by the influx of venture capitalists and internet entrepreneurs purporting to "market" legal services without being encumbered by rules of professional conduct or the various laws that apply to our profession. Each year



hundreds of millions of dollars of venture capital are poured into non-lawyer legal service technology companies; well over 1,000 legal tech start-up companies are selling legal services to the public, and their numbers are growing.

These companies started on the fringe of what might be considered legal services by offering legal forms that customers could purchase and complete themselves, or easy-to-use electronic databases where listings of attorney contact information could be found. They have attracted millions of dollars of venture capital, not to help close the justice gap for the poor, but to profit from consumers who can afford to pay for legal services. Operating mostly unfettered, they have blossomed into marketing machines for legal services and legal advice, furnishing attorneys for legal services. Two of the most aggressive and well-funded of these companies are LegalZoom and Avvo.

LegalZoom began as a legal forms service and is now offering attorney consultations and legal plans. For about \$10 a month, consumers can sign a contract for unlimited 30-minute attorney consultations on new or "unique" legal matters. It also offers fixed-rate services

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such as a \$39 living will with review by a “document specialist” or a \$149 estate plan bundle that includes a year’s worth of “attorney advice.” It is not a law firm, but it has thousands of attorneys willing to pay for the referrals they receive.

Avvo started as an attorney directory and rating service. It now furnishes lawyers for a fee. Lawyers who agree to work to Avvo’s terms and conditions will be referred to perform document review or start-to-finish services. Avvo has recently launched a free legal forms service, with the option to click a button and chat for a fee with a practicing attorney. The consumer pays Avvo directly; Avvo holds the money until the work is completed and Avvo then deposits the money into the attorney’s Avvo account, taking back what it calls a “marketing fee.”

These new practices raise many concerns: compliance with laws regulating legal advertising; the line drawn between “marketing” and “fee-splitting”; can a non-lawyer corporation provide legal services; is it permissible for a business to act as a referral service; can a business charge fees to refer clients to lawyers?

Businesses Advertising Legal Services

The well-funded marketing campaigns of non-lawyer legal service businesses employ a tone that is both bold and deliberately vague. They offer legal services. They are simply facilitators so attorneys and clients can find each other. They furnish legal help. They do not furnish legal help. They give legal advice. They do not give legal advice. They create one impression to an unknowing public. They include disclaimers for the regulators.

LegalZoom provides a small-print disclaimer on its site, “We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies.” Its marketing campaign aims to create a very different impression: “Whatever your legal need, we have an answer. Let us help you protect all that matters easily and affordably” and “LLC Documents Created

by Top Attorneys – Up-to-Date Legal Documents. Our attorneys continually maintain our documents to be up to date with the latest legal requirements in each state.”

Avvo’s website features: “Fixed-fee legal services. Choose your lawyer. Choose your service. Satisfaction guaranteed.” “Free Q&A with Attorneys.” “Every 5 seconds someone gets free legal advice from Avvo.” Its tagline: “Legal. Easier.”

This advertising if used by a lawyer, or to market a law firm, might put the lawyer on the wrong side of the Rules of Professional Conduct.

For example, Rule 7.1(a) “Advertising” states: “(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: (1) contains statements or claims that are false, deceptive or misleading.” Thus, advertising that is not false violates this Rule if it is deceptive or misleading.

Rule 8.4(a), entitled “Misconduct,” states: “A lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” Consequently, if advertising is deceptive or misleading, responsibility falls on the attorney.

These businesses claim the Rules of Professional Conduct do not apply to them because they are non-lawyer corporations, not law firms. However, even if they are correct, New York’s Judiciary Law § 495, prohibiting non-lawyer corporations from furnishing legal services, clearly applies.

Judiciary Law § 495

No Corporation Shall Furnish Attorneys or Counsel

There is some debate about whether what these businesses are doing constitutes the unauthorized practice of law. By their own account, they have licensed attorneys that perform the legal work. They purport to maintain an arm’s length distance from the actual attorney performing the actual representation, but their business collects the fee and controls its distribution.

Several options for fixed-fee services are offered: document provision only; document service with review by a non-lawyer “document specialist” of unknown experience; more expensive attorney review. However, as noted above, these businesses imply in their advertising and promotions that they are offering legal services.

Even if these businesses are not in violation of our ethics rules, they may be in violation of N.Y. Judiciary Law § 495(1) which provides:

No corporation or voluntary association shall . . . (c) . . . render legal services or advice, nor (d) furnish attorneys or counsel, nor (e) render legal services of any kind in actions or proceedings of any nature or in any other way or manner, nor (f) assume in any other manner to be entitled to practice law, . . . nor (h) advertise that either alone or together with or by or through any person whether or not a duly and regularly admitted attorney-at-law, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel.

If these businesses are found to be “rendering legal services or advice” or “furnishing attorneys or counsel,” then they would be in violation of this section. If not, it would seem that New York’s broader false advertising laws would be implicated.

Fee Splitting with Non-lawyers

These businesses often offer fixed-rate, flat-fee consultations and services, as well as hourly based fee plans. For example, consumers seeking services through Avvo go to the company website and are steered toward a list of attorneys in their geographic and practice area.

After an introductory discussion between the consumer and the lawyer, if the lawyer is hired, the company immediately collects the fee, retaining the entire fee until the representation is completed. Pricing depends on the service the client wants, and the company’s cut depends on the cost of the legal service. After the representation has ended,

the company transfers the balance of the payment into the attorney's assigned account and, at the same time, directly withdraws its "marketing" fee.

A lawyer may pay a business for advertising; however, fee-splitting violates Rule 5.4, entitled "Professional Independence of a Lawyer." This Rule states: "A lawyer or law firm shall not share legal fees with a non-lawyer."

A recent NYSBA Ethics Opinion, No. 1081, from January of this year, discussed the topic, where lawyers were employees of the non-lawyer company:

Rule 5.4 contains a number of provisions intended to ensure the professional independence of a lawyer. . . . Rule 5.4(a) provides that a lawyer "shall not share legal fees with a nonlawyer". . . . If the Company's clients are paying the Company for legal services rendered by the inquirers, then the inquirers would be violating Rule 5.4(a).

Avvo and other companies reject the idea that they are engaging in fee-splitting, claiming that they are merely charging a marketing fee.

For example, Avvo claims it "is not referring people to a particular lawyer"; the client makes the choice. However, the choices are limited to those attorneys in a particular geographic area who have agreed to pay Avvo's "marketing" fee if they take on a representation. However, since Avvo rates all lawyers, regardless of whether any individual lawyer consents to the service, there is an implication that all lawyers are on the list of available attorneys.

There are two important factors when considering the ethics of fee-splitting in New York. First, does the marketing fee increase depend on the dollar value of the representation? Second, are these fees more like referral fees than marketing fees?

NYSBA Ethics Opinion No. 976 discussed the issue regarding an arrangement between a law firm and a non-legal service provider in relation to mortgage related referrals, where the fee paid, at least in part, would be based on success:

The firm may legitimately provide benefits to the Company for marketing and lien services, but if the

benefits are also to reward referrals, then it is difficult to harmonize the arrangement with Rule 7.2(a).

Rule 7.2(a), cited in the opinion, states:

A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client

Significantly, Comment [1] to this Rule adds:

[1] [L]awyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that would violate Rule 7.3 if engaged in by a lawyer.

The opinion also notes the existence of Judiciary Law § 482, which states:

It shall be unlawful for an attorney to employ any person for the purpose of soliciting or aiding, assisting or abetting in the solicitation of legal business or the procurement through solicitation either directly or indirectly of a retainer, written or oral, or of any agreement authorizing the attorney to perform or render legal services.

This law survived a challenge in *People v. Hankin*, 182 Misc.2d 1003 (Sup. Ct., App. Term 1999), where the court ruled the statute did not unconstitutionally restrict commercial speech.

NYSBA Ethics Opinion No. 887 also clarified Rule 7.2, stating that the Rule prohibits a lawyer from offering bonus compensation to an employee who is a non-lawyer marketer "based on referrals of particular matters . . . [or] . . . the profitability of the firm or the department for which the employee markets if such profits are substantially related to the employee's marketing efforts." In other words, marketing fees cannot be paid based on the dollar value of a representation or per representation that an attorney gets through the marketer. As for referrals, Rule 7.2(b) limits approved lawyer referral programs, including legal aid, public defender office or military legal assistance office; or a lawyer referral service operated, sponsored or approved by a bar asso-

ciation or authorized by law or court rule. Notably, for-profit corporate entities are not included among authorized law referral providers.

Impact on the Public and the Profession

The Rules of Professional Conduct are in place not to protect lawyers, but the public from unscrupulous lawyers who fail to meet the highest standards that we expect from officers of the court and defenders of justice. The Judiciary Law is in place to prevent unregulated non-lawyers from preying on an unknowing public.

Non-lawyers are not required to adhere to the Rules of Professional Conduct or the core principles of our profession. They are not bound by our ethics rules. They do not check for conflicts of interest. They do not have a duty of competent advocacy. They do not go to law school or pass the bar exam. They are not officers of the court.

Our Rules of Professional Conduct reflect the core values of our profession and they are designed to protect the public we are all privileged and licensed to serve. As attorneys we are sworn in as officers of the court, part of a legal system that our society relies on for justice and fairness. In our country, lawyers must complete a rigorous education just to be permitted to sit for a bar exam. Our system of examination to test knowledge and competency, determination of character and fitness, and adherence to a prescribed set of rules of professional conduct throughout an attorney's tenure not only serves to protect the public from untrained and unscrupulous would-be practitioners, but also far surpasses what is required to start a business.

Change to our profession should not come from profit-seeking entrepreneurs unencumbered by rules of ethical conduct and responsibility. It remains incumbent on us as attorneys and the organized bar to remain guided by rules of professional responsibility to find ethical and responsible ways to use new technologies to help attorneys better connect with and serve their clients. ■