Articles

Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators

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This Article explores controversies over bar regulation of new online technologies that help address the routine legal needs of low- and middle-income consumers. It is critical that lawyer regulators resist the temptation to restrict organizations that respond to the nation's huge unmet needs of individuals of limited means. After briefly reviewing the rise of technology in this space, this Article discusses efforts to rein in three of the largest U.S. providers of consumer-oriented legal services, LegalZoom, Rocket Lawyer, and Avvo Legal Services. Analysis then focuses on the lawsuits and regulatory restrictions faced by Avvo, and the ultimate demise of Avvo Legal Services in the face of bar ethical objections. The final Part of this Article considers the policy implications of the Avvo case history, and concludes that efforts to restrain these initiatives do not serve the interests of the profession or the public.

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INTRODUCTION

We are honored to publish this Article in a symposium dedicated to Geoffrey Hazard, Jr., the founding father of the field of American legal ethics. I (Professor Rhode) had the good fortune to know him in that context as a student, mentor, coauthor, and friend, and his death marks an enormous loss for me personally as well as professionally. Geoff was my only professor at Yale Law School who ever mentioned ethics. When I attended in mid-1970s, Yale had no required course in professional responsibility. In theory, legal ethics was taught by the pervasive method. In practice, it was pervasive only in its absence. My recollection is that none of us in his basic course on civil procedure paid much attention to his occasional references to ethical issues.

They seemed peripheral and unlikely to be on the exam. But they were, and I am ashamed to admit that I did not distinguish myself in responding. I at least spotted the problematic behavior and pronounced simply, "This would be wrong." It was not the balanced analysis that he was looking for.

But I ended up taking other courses from him and when I became interested in the topic later, we coedited one of the first books of legal ethics teaching materials together.[1] We later coauthored a reader on the subject.[2] We did not always agree. Geoff went on to become a reporter on the American Bar Association's Model Rules of Professional Conduct, and I spent much of my early career critiquing those Rules and the organized bar's stance on competition and access to legal services. But he, too, recognized the self-interest that compromised professional regulatory practices, and I think he would be pleased to know that an Article exploring how lawyers *should* respond to problems of unmet legal needs is part of a symposium in his honor.

We are in the early stages of a technological revolution in legal services. Technology is displacing lawyers in a wide array of tasks such as document drafting, review, and assembly, and is also reshaping the way that lawyers find clients and deliver assistance. For most consumers, these are welcome developments. Such innovations generally reduce costs and increase both accessibility and efficiency. The potential gains are particularly great for low- and middle-income consumers, who cannot afford to address a vast array of basic, often urgent, legal needs. Yet for lawyers, the consequences of technology have been more mixed. Many feel that their professional independence and livelihoods are threatened by the growth of online forms, computerized algorithms, and price competition with internet providers. Responding to these concerns, bar regulators have often fought back through ethics rulings that attempt to rein in organizations such as LegalZoom, Rocket Lawyer, and Avvo Legal Services.

This Article explores the contested technological terrain of legal services for low- and middle-income Americans. It uses the regulatory battle over Avvo Legal Services as a case study of how bar regulators are, and should be, responding to innovations in the legal market for consumers of limited means. After a wave of bar objections to Avvo Legal Services, Avvo's new parent company, Internet Brands, announced the cancellation of the program in July 2018. Some bar regulators (and lawyers) will consider this a rare triumph in their battle against the provision of legal services on the Internet. We however, consider the demise of Avvo Legal Services to be bad news for American consumers and, paradoxically, also bad news for the American legal profession. Our argument is that defeating Avvo Legal Services, which packages and sells the services of licensed attorneys, while leaving interactive

1. *See generally* GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION (1985).

2. *See generally* DEBORAH L. RHODE & GEOFFREY C. HAZARD, JR., PROFESSIONAL RESPONSIBILITY AND REGULATION (2002).

forms providers like LegalZoom and Rocket Lawyer in place, does nothing more than freeze lawyers out of a growing marketplace, and cedes too much of the field to computer programs.

Part I offers a brief overview of the rise of technology in this arena. Part II describes the three big players in consumer-oriented internet legal services—Avvo, LegalZoom, and Rocket Lawyer—with a special focus on the history of Avvo Legal Services. Part III covers some of the lawsuits and regulatory restrictions that Avvo Legal Services encountered and describes its ultimate demise. Part IV assesses the objections of bar regulators to that program and argues that it should have been allowed with some minor reforms. Part V discusses the policy implications of this case history and concludes that initiatives such as Avvo Legal Services can not only enhance access to justice but also assist a struggling part of the legal profession.

Our central argument is that lawyers should embrace the inevitable. Technological innovations are here to stay, and the organized bar should be looking for ways to harness their potential to help underserved constituencies that need help most. The best estimates are that over eighty percent of the legal needs of the poor, and forty to sixty percent of the needs of middle-Americans remain unmet; these figures have not budged over the last three decades.[3] According to the World Justice Project, the United States ranks ninety-fourth out of 113 countries in the "accessibility and affordability" of its civil justice system, below every other high income country, and even below struggling nations such as Afghanistan and Sierra Leone.[4] We can, and *must* do better, and technological innovations such as those pioneered by Avvo are part of the way forward.

We also argue that purely from the standpoint of self-interest, the legal profession should have supported Avvo's entry into this market. Lawyers in all fields, but particularly those who serve small businesses and middle-class consumers, face increasing competition from online legal services. In the past, Americans who wanted to handle their own routine needs without a lawyer might have tried to buy a book of forms or consulted a form-processing service with limited ability to provide customized assistance. Now those customers can meet their legal needs with LegalZoom or Rocket Lawyer, frequently at a price that no attorney can afford to match.

In order to compete in this new marketplace, lawyers serving middle- or low-income consumers must learn how to provide services with greater

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3. For estimates regarding the poor, see LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 7–8 (2017). For earlier estimates, see Deborah L. Rhode & Scott L. Cummings, *Access to Justice: Looking Back, Thinking Ahead*, 30 GEO. J. LEGAL ETHICS 485, 487 n.12 (2017). For estimates pertaining to the middle-class, see REBECCA BUCKWALTER-POZA, CTR. FOR AM. PROGRESS, MAKING JUSTICE EQUAL 2 (2016), https://cdn.americanprogress.org/content/uploads/2016/12/07105805/MakingJusticeEqual-brief.pdf.

4. *See* Carolyn Mobley, *U.S. Again Ranks Among Worst in World for Access and Affordability of Legal Help*, RESPONSIVE L. (Mar. 5, 2018), https://www.responsivelaw.org/blog/us-again-ranks-among-worst-in-world-for-access-and-affordability-of-legal-help.

efficiency and lower cost. They will also need to spend more of their time servicing clients and less of their time finding clients or managing their businesses. And because no lawyers will be able to compete with internet computer programs like LegalZoom's on price, they must learn to compete on quality, cost-effectiveness, and personal responsiveness.

That is no small task. But neither is it impossible, and Avvo Legal Services was an example of how to market routine legal services delivered *by lawyers*, not machines. Instead of smothering this attempt, bar regulators should have tried to find ways to make it work because one way or another technology is going to increase competition and reduce prices in the market for legal services. Either lawyers can get in the game and use technology to compete against online forms or onerous bar restrictions may drive lawyers out of that competition and leave the field open for computers to dominate.

We argue that Avvo Legal Services was an opportunity for bar regulators and lawyers to do well *and* do good. We still have the opportunity to expand access to justice at the same time as we make lawyers more competitive with online legal services. Others are, and will be, trying to marry lawyers, technology, and fixed-fee assistance, and bar associations should find a way to "get to yes" next time, for the good of consumers and the profession.[5]

I. TECHNOLOGICAL INNOVATION IN THE MARKET FOR SERVICES

A. MARKET TRENDS

The extent to which technology will transform the practice of law is in dispute. Some see a future in which legal artificial intelligence ("AI") will largely replace humans in providing legal advice and drafting documents.[6] Others doubt that AI will progress that far.[7] But, everyone agrees that computers are already displacing human lawyers in areas like document review and assembly and will likely continue to do so.[8]

There is, however, a less noticed revolution occurring under our noses: the computerization of legal services aimed at America's low- and middle-income consumers. For individuals with relatively routine needs, technology is opening up whole new markets and disrupting existing markets. The

5. For examples, see *infra* text accompanying notes 22–24.

6. *See, e.g.*, John O. McGinnis & Russell Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3041–42 (2014) (arguing that legal AI will prove extremely disruptive and may largely replace humans).

7. *See, e.g.*, Dana Remus & Frank Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law*, 30 GEO. J. LEGAL ETHICS 501, 536–37 (2017) (arguing that legal AI will be much more circumscribed in effect).

8. *See, e.g.*, Rhys Dipshan, *Looking Beyond Document Review, Legal Is Branching Out with Artificial Intelligence* (July 23, 2018, 10:00 AM), https://www.law.com/legaltechnews/2018/07/23/looking-beyond-document-review-legal-is-branching-out-with-artificial-intelligence/?slreturn=20190128214952; William Henderson, *What the Jobs Are: New Tech and Client Needs Create a New Field of Legal Operations*, A.B.A. J. (Oct. 2015), http://www.abajournal.com/magazine/article/what_the_jobs_are.

companies at the forefront of this revolution are not just replacing lawyers on selected tasks, or using technology as part of a team run by a lawyer. Instead, they are replacing lawyers wholesale in areas like preparing wills or forming limited liability corporations. A vast array of interactive legal forms are now available for sale by LegalZoom, Rocket Lawyer, and others.[9] Similar services are available for free to the poor through court-sponsored websites and programs such as A2J Author.[10]

Technology is also radically reshaping the way that middle-class consumers find lawyers. Traditionally, most people found lawyers through personal referrals.[11] The Yellow Pages were another common resource. In the early 2000s, lawyers reportedly received 328 million references a year from ads in the Yellow Pages.[12] As late as 2011, an American Bar Association ("ABA") survey asked consumers how they would find a lawyer for a personal legal matter, and "look in the Yellow Pages" out-polled "look online."[13]

In response to this demand, lawyers often bought larger and splashier Yellow Page ads, some of which featured surprisingly unflattering photos of the lawyers themselves.[14] But as Americans spent more of their lives online, their method of finding a lawyer followed suit. By 2014, the Internet was the primary way of finding a lawyer, preferred by thirty-eight percent of the public.[15] Twenty-nine percent would ask a friend and only four percent reported that they would consult the Yellow Pages.[16] Another recent survey found that three-quarters of consumers seeking a lawyer would use online

9. *See Easy Legal Documents at Your Fingertips*, ROCKET LAW., https://www.rocketlawyer.com/legal-documents-forms.rl/ (last visited Apr. 16, 2019); *Legal Forms*, LEGALZOOM, https://www.legalzoom.com/legalforms/ (last visited Apr. 16, 2019).

10. *See Welcome to A2J Author*, A2J AUTHOR, https://www.a2jauthor.org (last visited Apr. 16, 2019) ("A2J Author is available for free to interested court, legal services organizations, and other non-profits . . . .").

11. *See* Mary E. Vandenack, *Sustainable Trusts and Estates and Real Property Practices*, PROB. & PROP., Nov./Dec. 2018, at 31 ("Traditionally, personal relationships and personal referrals were the primary way that lawyers connected with clients.").

12. BARRY MAHER, GETTING THE MOST FROM YOUR YELLOW PAGES ADVERTISING: MAXIMUM PROFITS AT MINIMUM COST 39 (3d ed. 2006).

13. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., PERSPECTIVES ON FINDING PERSONAL LEGAL SERVICES: THE RESULTS OF A PUBLIC OPINION POLL 8 (2011), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/20110228_aba_harris_survey_report.authcheckdam.pdf [hereinafter PERSPECTIVES ON FINDING PERSONAL LEGAL SERVICES].

14. *See, e.g.*, Lloyd Duhaime, *Outrageous Attorney Ads: The Good, the Bad and the Ugly*, DUHAIME.ORG, http://www.duhaime.org/LawFun/LawArticle-1394/Outrageous-Attorney-Ads-The-Good-The-Bad-And-The-Ugly.aspx (last updated Dec. 13, 2012).

15. *Internet Is Now the Most Popular Way to Find and Research a Lawyer, Says FindLaw Survey*, THOMSON REUTERS (Apr. 17, 2014), https://www.thomsonreuters.com/en/press-releases/2014/internet-lawyer-search-survey.html.

16. *Id.* The Internet is now so dominant in this area that we thought the weirdest finding of the survey is that there were still people in 2014 who have the Internet but would use the Yellow Pages for anything, let alone finding a lawyer.

resources at some point in the process.[17] Avvo has been the leader in this segment of the market, calling itself "the largest online legal marketplace for lawyers to connect with consumers."[18]

Technology has not only changed the ways that Americans find lawyers, it has created new ways of retaining them. LegalZoom and Rocket Lawyer both sell monthly plans for legal advice from attorneys.[19] It's Over Easy is a website that offers couples several packages of divorce services.[20] The basic plan offers downloadable forms and spousal support calculators, and more expensive plans serve papers and offer telephone and email consultations.[21] The TIME's UP Legal Defense Fund, handled by the National Women's Law Center, is an online matching service that pairs lawyers with individuals seeking assistance for sexual harassment and discrimination.[22] Avvo Legal Services is also a matching program that sold basic legal services such as divorces, wills, and incorporations for a flat fee.[23] At first glance, this may not appear all that innovative. Low, flat fees for routine services are the hallmark of LegalZoom and Rocket Lawyer. Avvo Legal Services' innovation was that the customers hire a licensed lawyer to do the work, rather than proceeding through a computer-driven forms program.[24]

In some ways, this approach seems like the least tech savvy of these largest online innovations. Unlike LegalZoom or Rocket Lawyer, Avvo Legal Services only automated the shopping experience, not the work itself. Given its modest fees, participating lawyers may well have used their own standardized forms, but that is between the lawyer and the client, not the lawyer and Avvo. What made this program innovative was its pivot from computer programs that replace lawyers to computer programs that connect lawyers with clients. LegalZoom and Rocket Lawyer started this trend with their legal advice subscription services, but those programs do not directly link attorneys and consumers on specific legal work. Avvo provided this link in a readily accessible and affordable form, and not just for a narrow range of services, such as divorce or gender-related misconduct.

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17. Sarah Mui, *People Look to Yelp to Find Lawyers Online, Survey Says: Fallout over Facebook Mood Study?*, A.B.A. J. (July 11, 2014, 1:30 PM), http://www.abajournal.com/news/article/around_the_blawgosphere_yelp_facebook_e-signature.

18. Karen West, *Pardon the Disruption: Consumers Get to 'Test Drive' Attorneys with Avvo's On-Demand Service*, SEATTLE BUS. MAG., Nov. 2015, at 20, 24.

19. *See Let's Do This Together: We'll Make Sure You're on the Right Path to Success for Your Legal and Tax Matters*, LEGALZOOM, https://www.legalzoom.com/attorneys/ [https://perma.cc/Y8KS-YTVR] (last visited Apr. 16, 2019); *Tell Us What You Need—We'll Recommend the Plan for You*, ROCKET LAW., https://www.rocketlawyer.com/plans-pricing.rl#/ [https://perma.cc/LZY4-CXP5] (last visited Apr. 16, 2019).

20. Amy Sohn, *Easier Path to Divorce? Go Online*, N.Y. TIMES, Feb. 8, 2018, at 1L.

21. *Id.*

22. Elizabeth Blair, *Here's How the Time's Up Legal Defense Fund Actually Works*, NPR (Mar. 11, 2018, 8:16 AM), https://www.npr.org/2018/03/11/592307856/heres-how-the-time-s-up-legal-defense-fund-actually-works.

23. *See generally Avvo Legal Services*, AVVO, https://www.avvo.com/legal-services [https://perma.cc/UR69-VU3C] (last visited Apr. 16, 2019).

24. *See infra* notes 93–123 and accompanying text.

B. THE MIXED BENEFITS OF NEW TECHNOLOGIES

One key benefit of new technologies is that they enhance providers' ability to differentiate their offerings. So, if customers want a true do-it-yourself experience of legal services, they can buy a form through LegalZoom and fill it out themselves. If they want somewhat more guidance, they can opt for an interactive program that asks questions and then generates completed forms. If a LegalZoom or Rocket Lawyer client wants some legal advice to go with their forms they can pay for the subscription service, and an It's Over Easy client can buy a more expensive package.

If consumers want to pay a flat fee for more traditional legal services, however, there were few options before the launch of Avvo Legal Services. Avvo hoped that its matching service would demystify the process and help lawyers and clients find each other with minimal transaction costs and a fixed price point that works for both.

There are some further upsides for consumers from this tech explosion. First, when a service or product is commoditized and sold on the Internet, the price of that service tends to drop, sometimes dramatically. This is of particular benefit in the legal services market for low- and middle-income Americans, which, as noted earlier, is characterized by pervasive unmet needs. Second, the Internet offers greater transparency and information in a market that has lacked both for years. One reason that consumers traditionally relied so heavily on the recommendations of friends or family in hiring lawyers was that it was difficult to find more credible information concerning quality. Bar-run referral services did not rate lawyers. Nor did bar regulatory authorities disclose lawyer disciplinary and malpractice records in a form accessible to consumers.[25] One of Avvo's greatest contributions to the market for legal services is its national data bank on lawyer disciplinary actions, as well as its platform for client reviews and its own quality rating.[26]

The impact of these technologies on lawyers is more mixed. Some experts, including Great Britain's leading authority Richard Susskind, believe that technologies will eventually displace attorneys in any context where services can be routinized and commodified.[27] Other commentators are less pessimistic.[28] They believe that technology has the potential to bring new consumers into the market by making services more accessible and affordable. In their view, a growing market and more demand for services would compensate for the inevitable fall in prices. Many commentators similarly argue that technological innovation and standardization can help lawyers increase profits by reducing costs. A wide array of research indicates that solo and small practitioners are spending too much time on running their businesses

25. DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS 107–08 (2015).

26. *See infra* notes 39–54 and accompanying text.

27. *See* RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 57 (2013).

28. *See, e.g.*, BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW 110–37 (2017).

and seeking clients.[29] Technology can help streamline these processes as well as relieve lawyers from some of the most routine, mind-numbing aspects of legal practice.

The rank and file of the profession, however, has not always been eager to embrace these opportunities. At first, this allowed early non-lawyer adopters to capitalize on technological innovations without attracting competition or regulatory attention. For example, bar regulators did not get around to trying to stem LegalZoom until 2007, long after the company was already well known and hard to dislodge.[30] This late start may help explain why the organized bar has largely failed in its efforts to curtail LegalZoom's online forms business.[31]

By contrast, bar regulators immediately sought to ban lawyers from participating in the new Avvo Legal Services Plan, which is part of why they succeeded in killing it. By Summer 2018, ethics committees in Illinois, Indiana, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Utah, and Virginia had all issued opinions condemning certain aspects of the plan.[32] The collective weight of these opinions helped convince Avvo's new parent company to terminate its Legal Services Plan. There was an irony to this result—bar regulators have been unable to restrict many of the technological innovations that are in direct competition with lawyers, including computerized forms and free legal advice. Instead, regulatory authorities are attempting to curtail a technology that seeks to bring consumers and lawyers together (albeit at a much lower price), which could benefit under-employed tech-savvy practitioners.

What accounts for this anomalous outcome? One explanation is that bar regulators are at their most powerful when regulating licensed lawyers, rather than non-lawyer competitors. For example, when LegalZoom received a cease and desist order from the North Carolina Bar, it just plowed on, and eventually challenged the bar in the courts.[33] By contrast, the bar ethics opinions condemning Avvo Legal Services placed the participating lawyers at risk of professional discipline. Many may have been reluctant to assume that risk.

Another reason that the bar targeted Avvo Legal Services is that lawyers serving individual consumers have long hated price competition. For years, bar associations published mandatory fee schedules and banned advertising that included fees.[34] Avvo created a national, fixed price point for a large number of bread and butter legal services. If it had survived and prospered, other lawyers might have had to match these prices or explain to consumers why they should pay more.

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29. *See infra* notes 91–107 and accompanying text.

30. Deborah L. Rhode & Benjamin H. Barton, *Rethinking Self-Regulation: Antitrust Perspectives on Bar Governance Activity*, 20 CHAP. L. REV. 267, 277–79 (2017).

31. *Id.*

32. *See infra* notes 149–169 and accompanying text.

33. Rhode & Barton, *supra* note 30, at 277–79.

34. *See, e.g.*, Bates v. Ariz. State Bar, 433 U.S. 350, 359 (1977) (applying antitrust laws to advertising); Goldfarb v. Va. State Bar, 421 U.S. 773, 792–93 (1975) (applying antitrust laws to minimum fee schedules).

II. THE EVOLUTION OF THE ONLINE MARKET FOR LEGAL SERVICES

To understand the current regulatory debate, a bit of history is helpful. Starting in the 1970s, Nolo Press published a groundbreaking series of books of legal forms that consumers could fill out themselves, together with limited advice about how to do so.[35] LegalZoom launched in 2001 with a similar set of online fill-in forms for purchase.[36] Over time, LegalZoom added a more sophisticated, interactive question-and-answer approach that assembled the completed forms online.[37]

Rocket Lawyer launched in 2008 with a slightly different business model. It too provided interactive legal forms, but it offered the first form "free," as long as the client signed up for a legal advice subscription service.[38] This may seem like a small difference, because the main draw at both sites was the forms. But, prioritizing subscriptions actually signals a very different business model. Rocket Lawyer uses its forms business to drive clients into its lawyer-centered legal advice business. When Rocket Lawyer was founded in 2008, LegalZoom still pitched itself mostly as a replacement for the work of lawyers.

Rocket Lawyer's approach was apparently promising, because LegalZoom added a similar offering in 2010, "creating an 'independent attorney network' for people to get personalized legal advice to address their individual needs."[39] Although other interactive internet forms providers have sprung up, LegalZoom and Rocket Lawyer remain the largest players.[40]

A. AVVO LAUNCHES AS A RATINGS SITE FOR LAWYERS

Mark Britton co-founded Avvo in 2007.[41] As the general counsel for Expedia, he watched his company cut into the market for travel services by replacing individual agents with online programs that quickly compared prices and services while eliminating the middle man.[42] This experience led Britton to wonder whether there was a similar way to monetize online information about legal services.[43] As noted earlier, the traditional sources of information about lawyers' performance were quite limited. Neither the Yellow Pages nor bar referral networks offered reliable quality assessments, and friends and family members seldom had enough expertise to evaluate the cost-effectiveness of the assistance they received or how it compared with that available from other

35. *See Our History*, NOLO, https://www.nolo.com/about/history (last visited Apr. 16, 2019).

36. *About Us*, LEGALZOOM, https://www.legalzoom.com/about-us (last visited Apr. 16, 2019).

37. BENJAMIN H. BARTON, GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION 88–97 (2015).

38. *Id.* at 95.

39. *About Us*, *supra* note 36.

40. Lawdepot.com offers a free trial and then guides users into a subscription model, for example. *See About*, LAWDEPOT, https://www.lawdepot.com/about.php (last visited Apr. 16, 2019).

41. Mark Britton, *Five Questions: Mark Britton on the Avvo Online Legal Directory*, OREGONIAN (June 12, 2009), http://www.oregonlive.com/business/index.ssf/2009/06/five_questions_mark_britton_on.html.

42. *Id.*

43. *Id.*

practitioners. Nor was there any easy way to find out if a lawyer had been subject to disciplinary charges. Avvo aimed to fill this market gap. Britton named the company Avvo as a shorthand for *avvocato*, the Italian word for lawyer.[44]

Avvo began by gathering as much public information on lawyers as it could, including information from bar disciplinary authorities and lawyers' own websites.[45] Eventually, Avvo provided a ten-point rating for individual attorneys based on the data it was able to collect. Its exact formula is proprietary, but Avvo claimed that it relied on information supplied by attorneys regarding their professional experience and accomplishments, as well as "public records (state bar associations, regulatory agencies, and court records) and published sources on the internet [including attorneys' websites]."[46]

Avvo claims that it does not disclose exactly how it weighs information "primarily because we don't want anyone gaming the Avvo Rating system."[47] For lawyers who find the system overly opaque, a cottage industry of websites and advisors has sprung up to help practitioners boost their Avvo scores.[48] The easiest way is to "claim" your Avvo profile and then provide as much positive information as possible on your experience, awards, and so forth.[49] By providing lawyers an incentive to become active participants on the site, Avvo also enlists them as potential purchasers of advertising and related services.[50]

This is, of course, the genius of the Avvo model. It is hard to make money providing free information on the internet, especially in a niche market like law. Anyone who doubts this point should just ask their local newspapers how the online revolution has worked out for them. Avvo sidesteps this difficulty by drawing potential clients onto the site with free ratings and other legal information, and then charging lawyers to advertise to those clients. Avvo was founded to provide information to consumers, but its profits come from

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44. *Id.*

45. Kevin O'Keefe, *Coffee with Avvo Founder Mark Britton*, REAL LAWS. BLOG (July 3, 2007), http://kevin.lexblog.com/2007/07/03/coffee-with-avvo-founder-mark-britton/.

46. *What Is the Avvo Rating?*, AVVO, https://support.avvo.com/hc/en-us/articles/208478156-What-is-the-Avvo-Rating- (last visited Apr. 16, 2019).

47. *See* Stacey L. Romberg, *Attorney Rating Systems: Should You Play? Part 1*, A.B.A. GPSOLO EREPORT (May 2015), https://www.amercanbar.org/publications/gpsolo_ereport/2015/attorney_rating_systems_should_you_play_part_1.html [https://perma.cc/5ER6-RHCA] (internal quotation marks omitted) (quoting Avvo's website as it existed at the time).

48. *See, e.g.*, William Pfeifer, *What Is Avvo and the Avvo Lawyer Ranking System?*, BALANCE, https://www.thebalance.com/what-is-avvo-and-the-avvo-lawyer-ranking-system-2151221 (Jan. 25, 2019); *Understanding & Increasing Your Avvo Rating*, JURIS DIGITAL, https://jurisdigital.com/guides/increase-avvo-rating/ (last visited Apr. 16, 2019).

49. *Understanding & Increasing Your Avvo Rating*, *supra* note 48.

50. Scott H. Greenfield, *Avvo: Up to 5, Down from 10*, SIMPLE JUST. BLOG (Sept. 11, 2012), https://blog.simplejustice.us/2012/09/11/avvo-up-to-5-down-from-10/.

sales to lawyers. This is a textbook illustration of the internet quip: "If you're not paying for a website, you're not a consumer, you're the product."[51]

Avvo's original business model is thus quite different from that of LegalZoom or Rocket Lawyer, which started out as direct competitors to lawyers. Avvo started in the opposite place; it makes its money from lawyers. Therefore, Avvo has a stake in the success of at least some practitioners, that is, those who pay to support it. As to other lawyers, not so much.

Avvo offers a number of services to practitioners.[52] They can purchase advertising on the Avvo site or pay Avvo to manage their personal website.[53] In addition, the company offers peer ratings and client ratings with comments.[54] The client rating runs from one to five stars, and client testimonials appear in a section of the lawyer's profile.[55] The testimonials tend to be positive, partly because savvy lawyers can encourage their happy clients to post on Avvo, and partly because Avvo lawyers may be more keenly aware that positive client feedback is critical to success on the Internet. But Avvo includes some scathing client reviews as well, which do not affect the Avvo rating, but have caused enough concern that there are websites and consultants dedicated to how to react to bad reviews (lesson number one is that escalating the dispute never helps).[56]

In early 2018, Internet Brands, a portfolio company owned by hedge funds, purchased Avvo.[57] Avvo joined Internet Brands' other legal offerings, including Martindale.com, Lawyers.com, and Nolo.[58]

B. AVVO'S PLACE IN THE COMPETITIVE WORLD OF ONLINE LEGAL SERVICES

At the time of its launch, it was not clear that Avvo would end up in direct competition with LegalZoom or Rocket Lawyer. Avvo was primarily a site for clients to find lawyers. Its revenue came from lawyers who purchased advertising or services to reach those clients. In order to stay successful, Avvo needed to keep drawing in potential clients, because without their eyeballs, lawyers would have no reason to buy advertising. This business model helps explain why most of what was originally on Avvo's platform was free (the rankings, the "ask a lawyer" Q&A function), while most of what was on

51. Scott Goodson, *If You're Not Paying for It, You Become the Product*, FORBES (Mar. 5, 2012, 12:34 PM), https://www.forbes.com/sites/marketshare/2012/03/05/if-youre-not-paying-for-it-you-become-the-product/#76232425d6ee.

52. *Pricing*, AVVO, https://www.avvo.com/for-lawyers/pricing (last visited Apr. 16, 2019).

53. *Id.*

54. *Avvo: Love It? Loathe It? Or Maybe a Little of Each?*, FOSTER WEB MARKETING, https://www.fosterwebmarketing.com/blog/should-attorneys-claim-their-avvo-listing-.cfm (last visited Apr. 16, 2019).

55. *Id.*

56. *How Should an Attorney Handle Negative Online Reviews?*, MOD. FIRM (Feb. 19, 2018), https://www.themodernfirm.com/blog/qotw/how-should-an-attorney-handle-negative-online-reviews/.

57. *See Internet Brands to Acquire Avvo*, PR NEWSWIRE (Jan. 11, 2018, 12:30 PM), https://www.prnewswire.com/news-releases/internet-brands-to-acquire-avvo-300581042.html.

58. *Id.*

LegalZoom or Rocket Lawyer came with a charge. Given the structural differences in these service providers, it initially seemed possible that Avvo could coexist in uneasy détente or even in alliance with its internet siblings. But the economic forces operating on high tech companies pushed Avvo in a different direction. Avvo, LegalZoom, and Rocket Lawyer are all are under continual, hydraulic pressure to expand revenues and eventually profits for at least three reasons.

First, all of these companies have benefitted from major investments by some very serious and savvy venture capital and all three are still privately held.[59] In 2011, LegalZoom filed the paperwork to go public, but sold itself to the private equity firm Permira instead when it looked like the offering might not be as profitable as hoped.[60] The deal was private, but estimates placed LegalZoom's value in 2011 at around $500 million.[61] In 2018, Francisco Partners and GPI Capital invested another $500 million.[62] LegalZoom's estimated value in the new deal was $2 billion, reflecting a 300% growth in just six years.[63]

The investors in internet companies do not just want to see steady growth. They want to see explosive growth.[64] This puts significant pressure on company leaders either to expand existing product areas or to enter new product areas.[65] Steady or flat growth can be a death sentence for a tech company with venture capital financing.

Second, consumer review sites such as Avvo (and to a lesser extent legal services sites such as LegalZoom and Rocket Lawyer) have to worry about what economists call "network effects." These effects occur when the value of a product increases when more people use the product.[66] The classic example is a fax machine. If there were only one fax machine on earth, the owner of that machine would not find it very useful. Each additional fax machine makes all the other fax machines more useful.

Social media networks are a more modern example. A public social network with few users is pretty useless. Most people don't want to join

59. *See Avvo*, CRUNCHBASE, https://www.crunchbase.com/organization/avvo#/entity (last visited Apr. 16, 2019); *LegalZoom*, CRUNCHBASE, https://www.crunchbase.com/organization/legalzoom-com#/entity (last visited Apr. 16, 2019); *Rocket Lawyer*, CRUNCHBASE, https://www.crunchbase.com/organization/rocketlawyer (last visited Apr. 16, 2019).

60. BARTON, *supra* note 37, at 92, 94–95.

61. Zach Warren, *LegalZoom Announces $500 Million Investment, Among Largest in Legal Tech History*, LAW (July 31, 2018, 12:29 PM), https://www.law.com/2018/07/31/legalzoom-announces-500-million-investment-among-largest-in-legal-tech-history/.

62. *Id.*

63. *Id.*

64. *See, e.g.*, Mara Zepeda, *Out with the Old: Silicon Valley Needs a New Kind of Sex Education*, QUARTZ (Feb. 18, 2016), https://qz.com/618886/feminism-can-fix-silicon-valley/.

65. For an example of the pressure on Twitter, see Dan Frommer & Kurt Wagner, *Twitter Only Grew by Two Million Users During Trump Mania—Facebook Grew by 72 Million*, RECODE (Feb. 9, 2017, 8:58 AM), https://www.recode.net/2017/2/9/14558890/trump-twitter-user-growth.

66. Catherine Tucker & Alexander Marthews, *Social Networks, Advertising, and Antitrust*, 19 GEO. MASON L. REV. 1211, 1217–20 (2012).

multiple social networks or buy different types of fax machines. Thus, over time, network effects guide users to one dominant player, crowding out competitors. This is why Facebook has become so omnipresent and other competitors like Myspace have failed or stalled.[67]

Ratings sites like Avvo benefit from network effects in at least two ways. To the extent that they rely on user-generated content such as customer or peer reviews, the more the merrier. Users of the site prefer seeing large numbers of reviews. And because the point of the ratings is to draw eyeballs and advertising dollars, the larger the audience, the better.

The network effects for Rocket Lawyer and LegalZoom are less clear, but scale is also an advantage to them for reasons in addition to increased revenue. The more users a site has, the more data it can collect on what legal forms are most popular and what features work best. It can also share that information with consumers. For example, LegalZoom often offers a feature indicating, "How did most people answer this question?" on some of its interactive forms. Users can then see the most common response, which may help them answer the same question.[68] The more users, the better the information available to everyone. More users also offer more data about potential problems with the forms. LegalZoom and Rocket Lawyer have obvious reasons to want to improve the consumer experience and to avoid potential liability for mistakes. More feedback allows for more tweaking, and over time this process improves the product.

Finally, network effects push information markets toward monopoly, and once a monopoly position is established, it is generally hard to dislodge.[69] This is why there are so many internet monoliths.[70] There are system-wide advantages to having only one eBay for online auctions, one Facebook for social networking, and one Google for search. In these markets, individuals generally prefer to go to the one site that everyone uses, because as more people use the service, the service actually improves. Network effects make the competition in emerging information markets particularly fierce, because often

67. On Myspace, see Harrison Jacobs, *Former MySpace CEO Explains Why Facebook Was Able to Dominate Social Media Despite Coming Second*, BUS. INSIDER (May 9, 2015, 6:13 AM), http://www.businessinsider.com/former-myspace-ceo-explains-why-facebook-was-able-to-dominate-social-media-despite-coming-second-2015-5. On Twitter, with a bonus discussion of Snap, see Nick Bilton, *Oh Snap: Is Snap the Next Facebook—or Twitter?*, VANITY FAIR (Mar. 1, 2017, 6:00 PM), https://www.vanityfair.com/news/2017/03/is-snap-the-next-facebookor-twitter.

68. To find this feature, start any of the LegalZoom interactive forms. For LLC creation, for example, answer the first few pages of questions and you get to a page that asks "[h]ow many owners will your business have?" and "[a]re you forming a new business?" For each of these questions LegalZoom lets you see how most users answered the question. *Business Formation: LLC (Limited Liability Company)*, LEGALZOOM, https://www.legalzoom.com/business/business-formation/llc-overview.html (last visited Apr. 16, 2019). If you answer the first few pages of questions, you will see the common responses.

69. Alan Devlin, *Analyzing Monopoly Power Ex Ante*, 5 N.Y.U. J.L. & BUS. 153, 182 (2009).

70. Deepak Ravichandran et al., *Network Effects—the Keys to Ascending the Consumer-Internet Throne*, BATTERY VENTURES (Feb. 3, 2017), https://www.battery.com/powered/network-effects-keys-ascending-consumer-internet-throne/.

there will be only one survivor.[71] This is one of the central drivers of the "winner-take-all" economy.[72] The victor will also reap monopoly profits, which further increases the stakes. Add all of these factors together and you have a pretty rough and tumble battle for market dominance. That helps explain why LegalZoom has sued Rocket Lawyer for false advertising and the companies have expanded their competitive battle into the United Kingdom and other countries.[73]

Avvo's various expansions have brought it into more direct competition with LegalZoom and Rocket Lawyer. By 2017, Avvo was, by its own account, the web's largest and most heavily trafficked legal resource with over eight million visits per month.[74] Despite, or perhaps partly because of that success, it has also come into increasing conflict with state regulators of legal services.

C. AVVO'S FREE LEGAL SERVICES

Avvo's earliest efforts at expansion involved adding free legal services to its site in the form of searchable legal advice. At first this move seems puzzling. If Avvo makes money from lawyer advertising, wouldn't free legal advice or forms undercut the business? Apparently, no. Avvo wants to be the first (and hopefully only) site that an American with a legal question or problem consults. A site with only lawyer profiles would limit its reach. Providing some free legal services drives traffic to the site, and some of those visitors may decide that they need a lawyer, and browse for one right there on Avvo.

Since 2007, Avvo has offered limited free legal advice in a Q&A forum.[75] Users who ask an anonymous question online receive a brief answer from a lawyer.[76] The question is limited to 128 characters, supplemented by a 1200-character section titled "Explain your situation." The Forum (wisely) encourages consumers to "ask a concise question—be brief and to the point" and to "provide key details," but to feel no pressure "to tell the whole story."[77]

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71. Adi Ayal, *Monopolization via Voluntary Network Effects*, 76 ANTITRUST L.J. 799, 799–810 (2010).

72. ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL-SOCIETY: WHY THE FEW AT THE TOP GET SO MUCH MORE THAN THE REST OF US (Penguin Books 1996) (1995).

73. Leena Rao, *Online Legal Services Company LegalZoom Sues Rival RocketLawyer for Misleading Advertising, Trademark Infringement and More*, TECHCRUNCH (Nov. 20, 2012), https://techcrunch.com/2012/11/20/online-legal-services-company-legalzoom-sues-rival-rocketlawyer-for-misleading-advertising-trademark-infringement-and-more/; Laura Snyder, *Does the UK Know Something We Don't About Alternative Business Structures?*, A.B.A. J. (Jan. 2015), http://www.abajournal.com/magazine/article/does_the_uk_know_something_we_dont_about_alternative_business_structures.

74. Letter from Avvo to the Va. State Bar (May 5, 2017) (on file with authors) (commenting in opposition to proposed Legal Ethics Opinion 1885).

75. *Avvo Launches Free Legal Advice Forum to Answer Consumer Questions*, AVVO (Dec. 11, 2007), http://stories.avvo.com/media-resources/press-releases/avvo-launches-free-legal-advice-forum-to-answer-consumer-questions. You can find the current version here: *Avvo Q&A Forum*, AVVO, https://www.avvo.com/for-lawyers/legal-qa (last visited Apr. 16, 2019).

76. *Free Q&A with Attorneys*, AVVO, https://www.avvo.com/ask-a-lawyer# (last visited Apr. 16, 2019).

77. *Id.*

The website indicates that a lawyer will likely respond within twelve hours. There are a lot of these questions and answers. By September 2017, Avvo claimed to offer "free legal guidance" to a customer every five seconds, and to have 10.7 million searchable legal questions and answers.[78]

Avvo also allows lawyers to create longer form "legal guides."[79] The guides do not respond to an individual question, but rather offer an overview, such as constitutional rights during a criminal prosecution.[80] Avvo aggregates these questions, answers, and guides into a permanent and searchable "legal advice page," where users can browse previous answers or guides before or after asking a specific question.[81] There are a wide range of topics available on these pages, covering most routine needs such as divorce, bankruptcy, debts, wills, and evictions.

Avvo encourages lawyers to provide this free assistance in order to "boost your [Avvo] contributor level" and also to "generate new leads from potential clients."[82] Not everyone agrees. A blog post titled *How Not to Find Clients: Avvo.com* describes the surly and unprofitable potential clients whom the author encountered while answering questions on Avvo.[83] Likewise, Luke Ciciliano of SEO for Lawyers warned that lawyers providing free content for Avvo were undercutting their own websites by driving traffic to Avvo.[84] Avvo has responded by rating lawyers on their "contributor level" and providing a weekly and "All-Time Leaderboard" that rewards lawyers' engagement with Avvo users.[85] The sheer volume of free legal work shown on these leaderboards is astounding.[86] Avvo's top ranking "All-Time Leader" is a Philadelphia personal injury lawyer who has answered over 140,000 questions by users of the site.[87] If you assume that he has been providing such assistance every day for ten years without taking a single holiday or vacation, this valiant soul has averaged more than thirty-eight answers a day. Avvo's ability to convince lawyers to provide free legal advice for its site may stem from the

78. *About Us*, *supra* note 36.

79. Stephen Fairley, *Internet Marketing for Lawyers: How to Use Avvo to Generate Leads*, RAINMAKER BLOG (Dec. 27, 2011), http://www.therainmakerblog.com/2011/12/articles/law-firm-marketing/internet-marketing-for-lawyers-how-to-use-avvo-to-generate-leads/.

80. Nikiki Tavia Bogle, *Criminal Legal Guide: Knowing Your Constitutional Rights*, AVVO (Jan. 9, 2010), https://www.avvo.com/legal-guides/ugc/knowing-your-constitutional-rights.

81. *Research Legal Advice*, AVVO, https://www.avvo.com/free-legal-advice (last visited Apr. 16, 2019).

82. Megan Hargroder, *Avvo to Attract New Clients*, LAW FIRM AUTOPILOT (Oct. 4, 2016), https://smallfirmbootcamp.com/avvo-to-attract-new-clients/.

83. Leo M. Mulvihill, Jr., *How Not to Find Clients: Avvo.com*, PHILLY L. BLOG (Jan. 23, 2012, 11:40 AM), https://phillylawblog.wordpress.com/2012/01/23/how-not-to-find-an-attorney-avvo-com/.

84. Luke Ciciliano, *Should Attorneys Use Avvo?*, SEO LAWS. LLC (Nov. 27, 2013), https://www.seo-for-lawyers.com/should-attorneys-use-avvo/.

85. *See Legal Leaderboard: This Week*, AVVO, https://www.avvo.com/legal-leaderboards/weekly (last visited Apr. 16, 2019); *Legal Leaderboard: All-Time*, AVVO, https://www.avvo.com/legal-leaderboards (last visited Apr. 16, 2019).

86. *Legal Leaderboard: All-Time*, *supra* note 85.

87. *Id.*; *Christian K. Lassen II*, AVVO, https://www.avvo.com/attorneys/19102-pa-christian-lassen-1580478.html (last visited Apr. 16, 2019).

public relations ("PR") value they achieve, but also by appealing to lawyers' competitive instincts and desire to excel in any ranking contest.

D. AVVO LEGAL SERVICES

In January 2016, Avvo launched Avvo Legal Services, which offered a range of legal services for a fixed fee.[88] The services varied in cost and complexity. For example, for $595, a lawyer would form a limited liability corporation. The assistance included a thirty-minute phone call and preparation of the necessary documents. For help challenging an eviction, the $149 fee covered a thirty-minute phone call and a review of paperwork.[89] A living trust cost $895.[90] The most expensive service was a family green card, priced at $2,995.[91]

The process started with a consumer choosing a general area of law, such as business, and then specifying a specific need, such as "employment and labor," "starting a business," or "contracts and agreements."[92] Once the consumer identified one of those areas, a list of fixed fee legal services appeared.[93] After choosing a service, the consumer next chose a lawyer within reasonable geographic proximity.[94]

After the consumer chose a lawyer and paid the fee to Avvo, the lawyer contacted the consumer within a day.[95] Participating lawyers could decide what matters to accept.[96] After taking a case and completing the work, lawyers got the full fee deposited in their bank account.[97] Avvo then took back a marketing fee, which varied in amount based on the cost of the services.[98] Here are some examples of how much a lawyer got paid and how much Avvo charged:

- Document review services: $199 client payment, $50 marketing fee.
- Start a single-member LLC: $595 client payment, $125 marketing fee.
- Uncontested divorce: $995 client payment, $200 marketing fee.

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88. Robert Ambrogi, *Avvo Begins Offering Fixed-Fee Legal Services in Certain Locations*, LAWSITES BLOG (Jan. 11, 2016), https://www.lawsitesblog.com/2016/01/avvo-begins-offering-fixed-fee-legal-services.html.

89. *See Landlord or Tenant*, AVVO, https://www.avvo.com/real-estate/landlord-tenant/legal-services [https://perma.cc/2BWL-GF3W] (last visited Apr. 16, 2019) (see heading "Document Review: Eviction Notice").

90. *See Trusts*, AVVO, https://www.avvo.com/estate-planning/trusts/legal-services [https://perma.cc/QK59-4SM4] (last visited Apr. 16, 2019).

91. *See We Bring the Clients. You Bring the Legal.*, AVVO, https://advisor.avvo.com/providers/welcome (last visited Apr. 16, 2019).

92. *Start Your Business Off Right*, AVVO, https://www.avvo.com/business/legal-services [https://perma.cc/MAU8-8Y95] (last visited Apr. 16, 2019).

93. *See Starting a Business*, AVVO, https://www.avvo.com/business/starting-a-business/legal-services [https://perma.cc/AV69-FHHQ] (last visited Apr. 16, 2019).

94. *See Start a Single-Member LLC*, AVVO, https://www.avvo.com/business/legal-services/start-a-single-member-llc [https://perma.cc/7L86-BFJA] (last visited Apr. 16, 2019).

95. *Id.*

96. Ambrogi, *supra* note 88.

97. *Id.*

98. *Id.*

- Green card application: $2,995 client payment, $400 marketing fee.[99]

Avvo offered a satisfaction guarantee for the services within ninety days of purchase, offering either a refund or a different lawyer if the client was unsatisfied.[100]

Avvo did not provide forms or other assistance to the lawyers who handled this work, which meant that they were responsible for figuring out how to provide satisfactory, low-cost, fixed-fee services while still turning a profit. Above the Law speculated that the only lawyers who would be able to hit this sweet spot were those who could do the work quickly and routinely:

> Usually an attorney new to a practice area will not have the requisite expertise to complete a client's task within the boundary of time and labor defined by the prescribed fee less the marketing fee. . . .
>
> But if you're an experienced attorney in business, family or immigration law and feel confident you can competently complete certain fixed-fee services, the monthly check can augment your income and the new clients can become long-term customers . . . .[101]

The possibility of losing money working for Avvo was pretty clear. But the upside was the chance to spend less time drumming up clients or collecting payment and more time actually working as a lawyer. Particularly for practitioners who had expertise and some tech skills, Avvo was likely to produce a win-win relationship for both lawyer and client.

E. THE DISTINCTIVE ASPECTS OF THE AVVO MODEL

To understand the business model and ethical implications of Avvo Legal Services, a comparison with LegalZoom and Rocket Lawyer is helpful. As noted previously, those latter companies sell guided legal forms along with legal advice or lawyer review of their forms. They do not, and under bar ethics rules and statutory prohibitions, cannot offer services that constitute the "practice of law."[102] Their disclaimers make clear that they are, as LegalZoom notes in bold on its platform, **"not acting as your attorney,"** and "**not a substitute for the advice of an attorney.**"[103] Rocket Lawyer similarly declares it does not provide legal advice, but only "a platform for legal information and self-help."[104] Of course, as noted above, LegalZoom and Rocket Lawyer also sell a subscription service for legal advice and then pay

99. *Id.*

100. *Satisfaction Guarantee for Avvo Legal Services*, AVVO, https://www.avvo.com/legal-services/satisfaction-guarantee [https://perma.cc/35PT-PZN3] (last visited Apr. 16, 2019).

101. Sean Doherty, *Avvo Bares Fixed-Fee Legal Services*, ABOVE L. (Jan. 14, 2016, 4:32 PM), http://abovethelaw.com/2016/01/avvo-bares-fixed-fee-legal-services/?rf=1.

102. For a review of rules and statutes concerning the unauthorized practice of law, see Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587 (2014).

103. *LegalZoom Disclaimer*, LEGALZOOM, https://www.legalzoom.com/disclaimer.html (last visited Apr. 16, 2019).

104. *Legal Terms*, ROCKET LAW., https://www.rocketlawyer.com/terms-of-service.rl (last updated Oct. 4, 2018).

lawyers to provide that advice. Avvo Legal Services differed in that it sold attorneys' work in single, discrete transactions. Its modest fees and easy process for selecting a lawyer had obvious advantages for many clients who would otherwise have to call around, consult websites and Yellow Pages, and then attempt to compare prices.

III. NO GOOD DEED GOES UNPUNISHED—A BRIEF TOUR THROUGH AVVO'S LEGAL CHALLENGES

Avvo has faced a series of legal challenges over the years, and initially escaped largely unscathed. The first wave of suits challenged the rankings themselves, and there Avvo prevailed. Avvo Legal Services, however, faced a series of bar regulatory challenges, and here Avvo decided to terminate the program.

A. LAWSUITS CHALLENGING THE AVVO RATINGS

Just ten days after Avvo launched, it faced a class action lawsuit in Washington State.[105] The plaintiffs were attorneys who claimed that they were harmed by Avvo's ratings system and that Avvo had violated the Washington State Consumer Protection Act by disseminating unfair and deceptive information.[106] The suit's lead plaintiff, John Henry Browne, had a low Avvo rating partially because of a previous public admonition by the state bar.[107] The district court dismissed the lawsuit on the ground that the First Amendment protected Avvo's ratings, and that the damages claimed were too speculative for a consumer protection claim.[108] Cyberspace Lawyer Eric Goldman called it "a big win for Avvo."[109]

In 2010, a Florida practitioner, Larry Joe Davis, similarly sued Avvo for a low rating.[110] Like Browne, Davis had a low rating primarily because of a public reprimand by the bar.[111] Avvo transferred the case to federal court in Washington, where the trial judge dismissed the complaint. The court also found that Davis had violated the Washington State anti-SLAPP statute and ordered Davis to pay Avvo's legal fees plus a $10,000 fine.[112] That judgment

105. Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1721 (2008).

106. *Id.*

107. Class Action Complaint at 8, Browne v. Avvo, Inc., 525 F. Supp. 2d 1249 (W.D. Wash. 2007) (No. C07-0920RSL).

108. *Browne*, 525 F. Supp. 2d at 1251, 1255.

109. Eric Goldman, *Avvo Wins Big in Ratings Lawsuit*—Browne v. Avvo, TECH. & MARKETING L. BLOG (Dec. 19, 2007), http://blog.ericgoldman.org/archives/2007/12/avvo_wins_big_i.htm.

110. Debra Cassens Weiss, *Another Lawyer Sues Avvo Rating Site, Claims Its Practices Are 'Beyond Unfair'*, A.B.A. J. (Sept. 2, 2010, 10:30 AM), http://www.abajournal.com/news/article/another_lawyer_sues_avvo_rating_site_claims_its_practices_are_beyond_unfair/.

111. *Id.*

112. Davis v. Avvo, Inc., No. C11-1571RSM, 2012 WL 1067640 (W.D. Wash. Mar. 28, 2012) (order granting motion to strike); Eric Goldman, *Lawsuit Against Avvo for Lawyer's Profile Dismissed as SLAPP—*

sent the intended message, and challenges to the legality of Avvo's core ratings have declined, though they have not entirely vanished.[113] For example, in 2018, Avvo settled a New York Attorney General's Office investigation into the transparency of its lawyer ratings by paying a small fine and enhancing its consumer disclosures.[114]

B. AVVO LEGAL SERVICES

Avvo Legal Services, however, faced more persistent challenges. Shortly after the program launched in early 2016, Susan Cartier Liebel, who blogs at the site Solo Practice University, identified two potential ethical problems.[115] Liebel noted that because Avvo's marketing charges were pegged to the amount of the legal fee, they look more like fee splitting than advertising.[116] She also questioned whether Avvo's practice of holding client fees and paying lawyers once a month violated rules requiring placement of fees in IOLTA (interest on lawyer trust accounts).[117] Other critics piled on quickly. David Miranda, the President of the New York State Bar Association, condemned Avvo's various offerings as unethical fee splitting, the unauthorized practice of law, and a danger to the public.[118] Similar articles appeared in the state bar magazines in Arizona and Wisconsin.[119] Professor Alberto Bernabe wrote the fullest treatment of the issue for the online *Georgetown Law Journal*.[120] In his view, Avvo Legal Services violated the ABA's Model Rules of Professional Conduct governing fee splitting, referral fees, and lawyer trust accounts.[121]

By June 2018, bar ethics committees in eight states had issued opinions that agreed and condemned programs structured along the lines of Avvo Legal

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Davis v. Avvo, TECH. & MARKETING L. BLOG (Mar. 29, 2012), http://blog.ericgoldman.org/archives/2012/03/lawsuit_against_1.htm.

113. For recent cases challenging the legality of the Avvo rating system, see Vrdolyak v. Avvo, Inc., 206 F. Supp. 3d 1384 (N.D. Ill. 2016); Darsky v. Avvo, Inc., No. 3:15-cv-05495-HSG (N.D. Cal. Mar. 10, 2016) (order dismissing all claims with prejudice); Hollister & Brace v. Avvo, Inc., No. 1440443 (Santa Barbara Cty. Super. Ct. Dec. 20, 2017), *appeal docketed*, No. B284394 (Cal. Ct. App. Jan. 4, 2018).

114. Jason Tashea, *Avvo Will Improve Lawyer-Rating Transparency, Pay $50K Fine in Agreement with New York AG*, A.B.A. J. (Sept. 24, 2018, 4:37 PM), http://www.abajournal.com/news/article/avvo_will_improve_lawyer_rating_transparency_says_agreement_with_new_york_a/.

115. Susan Cartier Liebel, *Is Avvo's New 'Marketing Fee' Really a 'Referral Fee' in Sheep's Clothing*?, SOLO PRAC. U. (Jan. 12, 2016), http://solopracticeuniversity.com/2016/01/12/is-avvos-new-marketing-fee-really-a-referral-fee-in-sheeps-clothing/.

116. *Id.*

117. *Id.*

118. David P. Miranda, *Lawyers Must Protect the Public We Serve*, N.Y. ST. B. ASS'N J., May 2016, at 5, 6–7.

119. David D. Dodge, *Fee-Splitting and Avvo*, ARIZ. ATT'Y, Feb. 2017, at 8; Aviva Meridian Kaiser, *The "Uberization" of Legal Services: Consistent with Ethics Rules?*, WIS. LAW. (Feb. 2017), http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=90&Issue=2&ArticleID=25384.

120. Alberto Bernabe, *Avvo Joins the Legal Market; Should Attorneys Be Concerned?*, 104 GEO. L.J. ONLINE 184 (2016), https://georgetownlawjournal.org/articles/195/avvo-joins-legal-market/pdf.

121. *Id.* at 191–205.

Services.[122] It does not appear from these opinions that any of the committees had collected any evidence of customer injury or, except for the Virginia State Bar, even solicited comments from clients or consumer groups.[123] Although such committee opinions are advisory only, and are not binding precedent in a future enforcement actions, they can be considered by a regulatory authority in such an action.[124] Although we found no examples of bar disciplinary charges against Avvo or any lawyers participating in its programs, the threat of such charges likely discouraged many practitioners from involvement and helped prompt Avvo's new parent company to terminate the program.

The first opinion came from the Ohio Board of Professional Conduct around four months after the launch of Avvo Legal Services.[125] Its conclusion was that "[t]his business model presents multiple, potential ethical issues for lawyers. These include fee-splitting with nonlawyers, advertising and marketing, a lawyer's responsibility for the actions of nonlawyer assistants, interference with the lawyer's professional judgment, and facilitating the unauthorized practice of law."[126] In a lengthy opinion, the Ohio Board made clear that whatever Avvo called its marketing fees, the board considered them illegal referral fees.[127] In addition, the Board raised concerns about confidentiality, competence, and unauthorized practice.[128] The opinion is a soup-to-nuts indictment of Avvo's business model and the lawyers who staff it.

A few weeks later, the South Carolina Bar Ethics Advisory Committee weighed in against the program.[129] Although less comprehensive than Ohio's indictment, the opinion is identical on the central point:

> The arrangement described herein violates the prohibition of sharing fees with a non-lawyer as described in Rule 5.4(a). In the alternative, assuming, for the purposes of this question only, that the arrangement does not violate Rule 5.4(a), the arrangement would violate the Rule 7.2(c) prohibition of paying for a referral . . . .[130]

The Pennsylvania Bar's Legal Ethics and Professional Responsibility Committee followed suit in the Fall 2016 with the most comprehensive indictment.[131] Its fifteen-page opinion listed potential violations of *eleven* different rules of professional conduct ("RPCs") by what it called a "Flat Fee Limited Scope" or "FFLS" program. Among the concerns it raised were: fee sharing with non-lawyers, failure to place advance fees in lawyers' trust accounts, threats to lawyers' independent judgment, unethical conduct by non-

122. See *infra* text accompanying notes 149–169.

123. Avvo makes this point in its comments on the Virginia Bar's proposed opinion. *See* Letter from Avvo to the Va. State Bar, *supra* note 74.

124. BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM 125–26 (2011).

125. Ohio Bd. of Prof'l Conduct, Advisory Op. 2016-3 (June 3, 2016).

126. *Id.* at 2.

127. *Id.* at 4–5.

128. *Id.* at 3, 6–7.

129. S.C. Bar Ethics Advisory Comm., Advisory Op. 16-06 (2016).

130. *Id.* at 1.

131. Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., Formal Op. 2016-200 (Sept. 2016).

lawyer subordinates; disclosure of confidential information; and unauthorized practice of law.[132] The general tone was along the lines of "Apart from that Mrs. Lincoln, how did you enjoy the play?"[133]

The organized bars in Indiana, New Jersey, New York, Utah, and Virginia came to similar conclusions for similar reasons.[134] The New York State Bar Association raised the concern that Avvo's marketing fee constituted a payment for a recommendation or referral in violation of Model Rule 7.2(b).[135] The New Jersey opinion attracted particular attention because it seemed to condemn the advice programs of Rocket Lawyer and LegalZoom as well. However, those companies avoided difficulties by quickly registering their programs as legal services plans, leaving Avvo Legal Services as the only potentially affected internet offering.[136]

Three states expressed more flexibility. In 2017, North Carolina's committee suggested ways that Avvo and its lawyers could comply.[137] For example, "[t]o preserve confidentiality [of information learned during the professional relationship,] Avvo may not be a party to client-lawyer communications about the substance of the representation."[138] To insure lawyers' independent judgment, Avvo should confirm its non-interference in writing.[139] To avoid concerns about the unauthorized practice of law, Avvo's advertising and website "must make abundantly clear that Avvo does not provide legal services to others and that its only role is as a marketing agent or platform for the purchase of legal services from independent lawyers."[140] Most importantly, with respect to concerns about fee sharing, the opinion states:

> Although Avvo has taken care to separate the transfer of the intact legal fee for a particular legal service to the lawyer from the payment of the marketing fee to Avvo from the lawyer's operating account, the fact that the marketing fee is a percentage of the legal fee implicates the fee-sharing prohibition. Nevertheless, similar arrangements have been approved when the nonlawyer exercised no

132. *Id.* at 2.

133. This quote has been attributed to the satirist Tom Lehrer. *See Tom Lehrer Quotes*, BRAINY QUOTE, https://www.brainyquote.com/quotes/quotes/t/tomlehrer128116.html (last visited Apr. 16, 2019).

134. For Indiana's opinion, see Ind. Supreme Court Disciplinary Comm'n, Advisory Op. 1-18 (Apr. 2018). For New Jersey's opinion, see N.J. Supreme Court Advisory Comm. on Prof'l Ethics et al., Joint Op. 732/44/54 (June 21, 2017). For New York's opinion, see N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1132 (Aug. 8, 2018). For Utah's opinion, see Utah State Bar Ethics Advisory Op. Comm., Op. 17-05 (Sept. 27, 2017). For Virginia's opinion, see Va. State Bar Legal Ethics Comm., Op. 1885 (Nov. 8, 2018).

135. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, *supra* note 134.

136. Gabrielle Orum Hernandez, *Rocket Lawyer, LegalZoom Register in NJ; Avvo Weighing Pullout*, LEGAL INTELLIGENCER (July 11, 2017, 5:41 PM), https://www.law.com/thelegalintelligencer/almID/1202792760553/?slreturn=20190116232104. For the ruling, see N.J. Supreme Court Advisory Comm. on Prof'l Ethics et al., *supra* note 134.

137. N.C. State Bar Council Ethics Comm., Proposed 2017 Formal Ethics Op. 6 (July 27, 2017), *in* N.C. ST. B. J., Fall 2017, at 38, 39–40.

138. *Id.* at 39.

139. *Id.*

140. *Id.*

> influence over the professional judgment of the lawyer and the fee was a reasonable charge for marketing or advertising services.[141]

It is not entirely clear why the North Carolina Bar took a more permissive view of Avvo Legal Services than other states. One possible explanation is its unsuccessful experience in attempting to curtail LegalZoom.[142] Another contributing factor may have been the equally unhappy experience of a similar state regulatory authority, the Board of Dental Examiners, when it attempted to protect dentists from competing providers of teeth-whitening services. In *North Carolina Board of Dental Examiners v. Federal Trade Commission,* the United States Supreme Court found that state regulatory boards were "nonsovereign" actors and thus not automatically entitled to state action immunity from antitrust claims.[143] According to the majority, when "a controlling number of decisionmakers" on a board were "active market participants in the occupation the board regulates," the board would not enjoy immunity unless it was subject to a clear articulation of state policy and active supervision by a non-market participant.[144] Because the North Carolina Board had not received "active supervision" of its efforts to preempt non-dentist provision of teeth whitening services, state-action immunity was not available.[145] As we have argued elsewhere, because many bar regulatory authorities fail to meet the criteria set forth in *North Carolina Board of Dental Examiners*, they may be equally vulnerable to challenge for anticompetitive activities.[146] And online legal service providers have become increasingly willing to challenge bar regulatory activity on antitrust grounds, as a recent Florida lawsuit makes clear.[147] Given this historical context, the North Carolina Bar may have been wary of adopting an overly hostile stance toward Avvo's competitive efforts. That history also may have prompted them to be more thoughtful and open to evidence. According to Avvo counsel Josh King, the committee "was initially opposed to

141. *Id.* at 40.

142. Rhode & Barton, *supra* note 30, at 276–80.

143. N.C. State Bd. of Dental Exam'rs. v. F.T.C., 135 S. Ct. 1101, 1110–12 (2015).

144. *Id.* at 1113–15.

145. *Id.* at 1116–17.

146. Rhode & Barton, *supra* note 30, at 280–82.

147. *TIKD Services LLC v. Florida Bar* is a federal antitrust claim by a company that matches drivers who receive traffic tickets with lawyers willing to represent them for a flat fee less than the cost of paying the ticket. Complaint at 4, TIKD Servs. LLC v. Fla. Bar, No. 1:17-cv-24103-MGC, 2017 WL 5180986 (S.D. Fla. Nov. 8, 2017), *appeal filed* (11th Cir. Dec. 28, 2018). After the Bar launched an investigation concerning unauthorized practice of law and issued a non-public staff opinion raising ethical concerns, the Ticket Clinic, a local law firm specializing in speeding ticket defense, began filing bar complaints and publicizing the Bar's opinion. *Id.* at 4–5. This allegedly discouraged lawyers from participating in TIKD defense work and sparked the company to bring a federal lawsuit against the bar and the Ticket Clinic. *See Tech Start-Up TIKD Sues the Florida Bar and the Ticket Clinic Law Firm for Violating Federal and State Antitrust Laws*, PR NEWSWIRE (Nov. 9, 2017, 10:45 AM), https://www.prnewswire.com/news-releases/tech-start-up-tikd-sues-the-florida-bar-and-the-ticket-clinic-law-firm-for-violating-federal-and-state-antitrust-laws-300553062.html.

Avvo Legal Services but reversed course as they learned more. It was a far, far more open and detailed process than we've seen with other states."[148]

Another more tempered state response came from the Illinois Attorney Registration and Disciplinary Commission, which in 2018 released an almost 100-page study of "Client Matching Services."[149] The study noted the access-to-justice crisis nationally and in Illinois and recommended amendments to the state's Rules of Professional Conduct to allow lawyers to participate in programs such as Avvo Legal Services.[150] The Oregon State Bar's Futures Task Force similarly recommended changes to their Rules of Professional Conduct that might remove ethical challenges for a program like Avvo Legal Services.[151]

Internet companies are known for working around, over, or through regulatory issues. Uber's decision to offer rides in some jurisdictions without first getting taxi medallions or licenses is the most famous example, but LegalZoom and Rocket Lawyer's decisions to offer online legal services first and fight bar challenges later are close parallels. Avvo's initial decision to post lawyer ratings without lawyer approval was a similar online leap of faith.

Nevertheless, by June 2018, Avvo's new parent company had heard enough to decide to terminate the Legal Services program.[152] Part of the reason may have been the departure of much of Avvo's previous management following the acquisition. This left Avvo Legal Services without its creators and most vocal defenders.[153] Second, the sheer volume of negative opinions from bar regulators likely led the company to decide the fight was not worth it in the long run.

IV. BAR ETHICAL CHALLENGES EVALUATED

Avvo Legal Services may be dead, but the idea itself is too good to remain buried forever. Many lawyers are underemployed and need work and clients. Many clients need legal help and would like an online way to purchase inexpensive, fixed fee legal services. For example, in 2018 a new company called Basic Counsel announced a somewhat similar website that allows

148. E-mail from Josh King, Chief Legal Officer, Avvo, Inc., to Benjamin Barton, Distinguished Professor of Law, Univ. of Tenn. Coll. of Law, and Deborah Rhode, Professor of Law, Stanford Law School (Nov. 9, 2017, 5:33 PM) (on file with authors).

149. ATT'Y REGISTRATION & DISCIPLINARY COMM'N OF THE SUPREME COURT OF ILL., CLIENT-LAWYER MATCHING SERVICES (2018), https://www.iardc.org/Matching_Services_Study_Release_for_Comments.pdf.

150. *Id.* at 4–56.

151. OR. STATE BAR FUTURES TASK FORCE, REPORTS AND RECOMMENDATIONS OF THE REGULATORY COMMITTEE & INNOVATIONS COMMITTEE 30–40 (2017), https://www.osbar.org/_docs/resources/taskforces/futures/FuturesTF_Reports.pdf.

152. Letter from B. Lynn Walsh, Exec. Vice President & Gen. Counsel, Avvo, to Joshua Walthall, N.C. State Bar Authorized Practice Comm. (June 6, 2018), https://www.responsivelaw.org/uploads/1/0/8/6/108638213/avvo_legal_services_discontinuation_letter.pdf.

153. *Id.*

lawyers to sell fixed-fee legal services online.[154] Examining the objections to Avvo Legal Services can help guide these new entrants to a format that can meet bar objections or prompt modifications in bar requirements.

A. CONCERNS REGARDING PROFESSIONAL INDEPENDENCE, CONFIDENTIAL INFORMATION, TRUST FUND ACCOUNTS, ASSISTING NON-LAWYER MISCONDUCT AND THE UNAUTHORIZED PRACTICE OF LAW

Because the Pennsylvania Ethics Committee raised the most objections to Avvo Legal Services, we start with its opinion. Not all of its challenges merit extended discussion. Some of what the Pennsylvania's Ethics Committee labeled "substantial risks" seem highly speculative or could be readily addressed. For example, there is no evidence that Avvo sought to interfere with a lawyer's exercise of professional judgment or had any interest in doing so. Many organizations that employ attorneys, such as accounting firms or prepaid legal service plans, have dealt with such concerns through explicit commitments to respect lawyer's professional independence, and there is no indication that such protections have been inadequate.[155] As the North Carolina Bar ethics opinion suggested, Avvo could make similar assurances.

Other concerns raised by the Pennsylvania Ethics Committee are equally speculative and unsubstantiated. For example, the Committee cited prohibitions on lawyers' revealing confidential information, and claimed that the "client's description of his or her perceived legal issues and needs is disclosed to [Avvo] before it is disclosed to the lawyer" along with the legal fee, both of which would normally be considered confidential information protected under Rule 1.6 of the Model Rules of Professional Conduct.[156] But as the Committee also noted, that Rule only applies to *lawyers'* disclosure of confidential information, so clients' disclosures prior to the formation of a lawyer client relationship "does not directly implicate the [rule]."[157] Nonetheless, the Committee expressed concern that the information would be "at risk of disclosure in future litigation, since the communications between the client and the Business would not be protected by the lawyer-client privilege."[158] The committee did not, however, indicate what litigation might be likely that would conceivably compromise a client's interest. Presumably the client had consented to any disclosure of its request for services on a

154. Bob Ambrogi, *Offering Flat-Fee, Limited-Scope Legal Help, New Site Sounds Like Avvo Legal Services, but with Key Differences*, LAWSITES (Nov. 6, 2018), https://www.lawsitesblog.com/2018/11/offering-flat-fee-limited-scope-legal-help-new-site-sounds-like-avvo-legal-services-key-differences.html.

155. The issue has arisen with respect to multidisciplinary practice, in which critics worried about lay owners' interference with professional decision-making. *See* RHODE, *supra* note 25, at 97; *see also* A.B.A. COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES (1999), *in* PROF. LAW., Fall 1998, at 1.

156. Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., *supra* note 131, at 11 (citing MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 1983)).

157. *Id.*

158. *Id.*

particular legal issue by using the site in the first instance. If any serious concerns materialize, the site could provide an explicit disclosure concerning confidentiality.

Another concern raised by the Pennsylvania Committee, as well as other bars and commentators, involved the handling of client fees. As noted earlier, Avvo collected these fees and sent them to the lawyers, which in ninety-nine percent of cases occurred after the services have been delivered. In the other one percent of cases, most attorneys' retainer agreements provide that they will earn their fees up front, before the matter is fully completed.[159] Some committees, however, raised questions about violations of the Rule 1.15, which requires lawyers to deposit fees that have been paid in advance in a client trust account.[160] The Pennsylvania Committee proposed that a solution to this concern would be to have Avvo immediately pay the advance fees to the client for deposit in the lawyer's trust account. It is not self-evident that the client would be better protected by such a process, given the financial resources, stability, and self-interest of Avvo in maximizing client satisfaction. Nor is it clear that the Committee members understood how small the percentage of cases was that presented possible ethical violations. But adjusting the Avvo process for those cases may not pose insurmountable obstacles if the concern seems well founded.

The Pennsylvania Committee raised further concerns that seem equally speculative and unsubstantiated. One such concern is that Avvo lawyers might not have time to discuss the limited scope of their representation with clients. However, as Josh King, Avvo's general counsel pointed out, consumers of its services, unlike many other clients of modest means, get a "crystal clear" description of what they are buying "up front and in plain English," which should help allay confusion about whether the potential service will be adequate to their needs.[161] As King also noted, in cases where clients had unrealistic expectations, Avvo lawyers would have an interest as well as ethical obligation to make that clear, and Pennsylvania's Committee cited no evidence that lawyers had failed to do so.[162]

Nor did the Committee offer factual support for other concerns that these lawyers would be assisting non-lawyers to violate professional rules or engage in the unauthorized practice of law, or fail to check for conflicts of interest.[163] Presumably any such violations could be dealt with through disciplinary

159. King, *supra* note 148. As King explains, this is because ninety-nine percent of Avvo Legal Services are advisor sessions or contract reviews; in those cases "the consumer's card is not even charged until after the legal services have been fully delivered." *Id.*

160. Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., *supra* note 131, at 11.

161. Josh King, *Avvo Legal Services and the Rules of Professional Conduct*, LAWYERNOMICS (Feb. 9, 2016), http://lawyernomics.avvo.com/avvo-news/avvo-legal-services-and-the-rules-of-professional-conduct.html.

162. *Id.*

163. *See supra* text accompanying notes 149–169.

actions against individual attorneys; they are not inherent to Avvo's business model, which seeks to prevent client dissatisfaction and injuries from arising.

B. REFERRAL SERVICES AND FEE SHARING BETWEEN LAWYERS AND NONLAWYERS

The most substantial objection to Avvo Legal Services involves fee sharing. All of the bar ethics opinions have addressed this issue and all but the North Carolina opinion concluded that Avvo's program violated their ethical rules. The vast majority of states have a version of Model Rule 7.2(b)(2) of the ABA Model Rules of Professional Conduct. It prohibits lawyers from giving "anything of value to a person for recommending the lawyer's services."[164] The Rule provides exceptions, of which two are relevant here. A lawyer may:

> (1) pay the reasonable cost of advertisements or communications permitted by this Rule; [or]
>
> (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority.[165]

Avvo did not seek approval for its Legal Services program and maintained that the program constituted a marketing platform and not a lawyer referral service. In support of that view, it quoted from an ABA Overview of LRS Regulation, which views the "defining characteristic of a lawyer referral service [as] . . . the use of an intermediary to connect a potential client to a lawyer based on an exercise of discretion within stated guidelines."[166]

Avvo noted that it does not exercise discretion to match a client with a particular lawyer. Rather it allowed clients to choose from multiple profiles, or if clients opted to have Avvo connect them directly with an attorney, "that connection is made to the first available lawyer in the client's practice area—not on the basis of Avvo's discretion" or a lawyer's purchase of "marketing exclusivity."[167] Because Avvo had no financial stake in selecting a particular lawyer, it plausibly claimed that it is not subject to the potential conflicts of interest that the Rule was meant to prevent.[168]

As to fee sharing arrangements, Avvo said this on its website:

> 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-

164. ELLEN J. BENNET ET AL., A.B.A. CTR. FOR PROF'L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT r. 7.2(b) (8th ed. 2015) [hereinafter ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT].

165. *Id.*

166. JOSH KING, AVVO LEGAL SERVICES AND THE RULES OF PROFESSIONAL CONDUCT 3 (2016), https://sociallyawkwardlaw.com/wp-content/uploads/Avvo-Legal-Services-and-the-RPC-with-supporting-details-2016-2-11.pdf [hereinafter KING, AVVO LEGAL SERVICES] (internal quotation marks omitted) (citation omitted).

167. *Id.* at 4.

168. *Id.*; ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 164, r. 7.2(b)(2).

> service marketing fee. . . . 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."[169]

In its fact sheet on professional rules, Avvo similarly claimed 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."[170]

The difficulty is that this is not what the Model Rules say. As Professor Alberto Bernabe points out, "[a]ccording to the Model Rules, splitting fees with non-lawyers *is* inherently unethical" unless the arrangement falls under one of the exceptions.[171] "[W]hat is really happening here is that Avvo is collecting a percentage of the fee the client pays the attorney. The fact that it does it separately, in a second transaction, does not change that fact."[172]

Avvo's second line of defense was that its marketing charges were permissible because they fall under the exception for fees reflecting the reasonable cost of advertisements. However, as the Pennsylvania Committee pointed out, "[t]he cost of advertising does not vary depending on . . . the amount of revenue generated by a matter."[173] Yet Avvo's marketing fees varied from $10 for an "Advice Session" costing $39, to $400 for a Green Card Application costing $2995.[174] "Clearly," the Pennsylvania Committee concluded,

> there cannot be a 4000% variance in the operator's advertising and administrative costs for these two services . . . . The variation in the amount of the marketing fees based upon the amount of the fees earned by the lawyer establishes that the non-lawyer business is participating directly in, and sharing in, the fee income derived by the lawyer. This is impermissible fee sharing . . . .[175]

Avvo's response was that the marketing fee reflects "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."[176] But the Model Rules do not list those factors in its exception for advertising. A bar ethics committee that reads Rule 7.2 literally is likely to end up where the Pennsylvania Committee did.

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169. Alberto Bernabe, *Avvo Joins the Legal Market; Now Offers Legal Services Through Network of Attorneys; Should Attorneys Be Concerned?*, PROF. RESP. BLOG (Jan. 25, 2016), https://bernabepr.blogspot.com/2016/01/avvo-joins-legal-market-now-offers.html (internal quotation marks omitted) (quoting *Attorney FAQ for Avvo Legal Services*, AVVO, https://www.avvo.com/support/avvo_legal_services_attorney_faq (last visited Apr. 16, 2019)).

170. *Id.* (quoting KING, AVVO LEGAL SERVICES, *supra* note 166, at 5).

171. *Id.*

172. *Id.*

173. Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., *supra* note 131, at 5.

174. *Id.*

175. *Id.* at 5–6.

176. KING, AVVO LEGAL SERVICES, *supra* note 166, at 7.

There are four ways around this problem. One is for Avvo or another provider to change its marketing fee to reflect a flat rate, based on a pro rata share of its costs, not a rate that varies with the amount of the client's charges. But this makes no sense from a business standpoint. A lawyer who is already making minimal amounts for advice and other low-cost services will not want to pay such a substantial marketing fee. And Avvo's leadership believes that this and other proposed changes by bar ethics committees would "make the product worse for both consumers and lawyers."[177]

A second possibility is for bar ethics committees to do what North Carolina did, and view "reasonable advertising costs" as an umbrella term to cover all marketing expenses. As Avvo pointed out to the Virginia Bar in comments regarding its proposed opinion, some of its marketing costs scale directly to the costs of services provided: credit card processing fees, risks of refund; and customer service assistance ("purchasers of more expensive services typically have more questions and concerns").[178]

A third possibility is for bar ethics committees to note that advertising on the internet, unlike on television or in a magazine, allows for fluctuating ad pricing depending on sales. For example, the Amazon affiliate program pays websites based upon Amazon sales that come through a website's links, rather than through a flat fee.[179] This solution requires bar regulators to recognize that advertising on the internet (and thus advertising expenses for lawyers on the internet) is different because it is so easy to track the exact sales amount from any particular advertisement. So instead of fee splitting, Avvo's program offers a more modern type of advertising—variable fees tied directly to sales achieved.

A fourth possibility is to follow Bernabe's suggestion: "[If] it is a good idea for potential clients to have access to legal services through platforms like Avvo, ... then we need to work to change the current rules."[180] Given that Illinois and Oregon are considering these types of changes, this route may eventually prove the most successful.

In our view, the best work-around would be for bar regulatory bodies to consider both the ethical concerns underlying their professional conduct rules and the public's interest in cost-effective services. Such an inquiry should include input from clients and consumer organizations. Rather than speculate about possible harms, the bar should look for evidence of purchasers' experience. And if significant harms are occurring or can be reasonably be expected to occur, bar regulators should look for ways to address them without compromising the public's access to affordable services. Indeed, this is consistent with the bar's approach in the context of "deal of the day" websites

177. Email from Josh King, *supra* note 148.

178. Letter from Avvo to the Va. State Bar, *supra* note 74.

179. *20 Tips I Used to Make $90,336.65 with Amazon*, UP FUEL (June 9, 2018), http://upfuel.com/make-money-with-amazon/.

180. Bernabe, *supra* note 169.

and credit card transactions that might be considered technical violations of the rules.[181]

On the basis of evidence available to date, we believe that bar oversight bodies should either interpret ethical rules to permit programs like Avvo's, or modify their rules to do so. As we argue below, such a result would be in the interest of the profession as well as the public. It is ironic that a growing number of states allow programs by LegalZoom and Rocket Lawyer, which pay lawyers very little for their work, but prohibited the Avvo program, which paid lawyers a more generous but still modest and transparent fixed fee. That result speaks volumes about whether current bar decisions serve the interests even of the profession, let alone the public at large.

V. POLICY IMPLICATIONS OF FIXED-FEE ONLINE MATCHING PROGRAMS

A. THE BENEFITS FOR LAWYERS OF FIXED-FEE ONLINE MATCHING PROGRAMS

To understand the benefits for lawyers of fixed-fee online programs that match them with clients, it helps to consider the financial realities of small firms or solo practitioners. Clio, a leading legal practice management software program, provides that economic context.[182] It helps lawyers, mostly small firms and solo practitioners, to track their time, send out bills, and collect the fees due.[183] Given its focus, Clio is in a good position to report on the state of the market for these practitioners. Its 2016 Legal Trends Report, aggregated anonymous data from approximately 40,000 users to analyze the consumer/small business market for legal services.[184] The Report found that the average hourly rate for solo practitioners/small firm lawyers is $232 an hour.[185] These rates run from a high of an average of $281 an hour in Washington, D.C., to a low of $155 an hour in Maine.[186] Bankruptcy rates averaged the most, at $275 an hour, and criminal charges were the lowest at $148 per hour.[187]

181. Josh King made this point. *See* KING, AVVO LEGAL SERVICES, *supra* note 166, at 5–7 (citing, for example, ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 465 (2013) (discussing lawyers' use of deal-of-the-day marketing programs); Neb. Supreme Court Lawyers' Advisory Comm., Advisory Op. 12-03 (2012); N.C. State Bar Ethics Council Comm., 2011 Formal Ethics Op. 10 (Oct. 21, 2011) (discussing lawyer advertising on deal of the day or group coupon website); S.C. Bar Ethics Advisory Comm., Advisory Op. 11-05 (2011); Colo. Bar Ass'n Ethics Comm., Formal Op. 99 (May 10, 1997) (discussing the use of credit cards to pay for legal services); State Bar of Ariz. Ethics Advisory Grp., Ethics Op. 89-10 (Dec. 20, 1989) (discussing the use of credit cards for the payment of legal fees and/or retainers)).

182. *See generally About Clio*, CLIO, https://www.clio.com/about/ (last visited Apr. 16, 2019).

183. *Id.*

184. CLIO, LEGAL TRENDS REPORT 3 (2016), https://files.goclio.com/marketo/ebooks/2016-Legal-Trends-Report.pdf [hereinafter CLIO REPORT 2016].

185. *Id.* at 4.

186. *Id.*

187. *Id.*

The average rates are the good news. Some simple math suggests that small firm and solo lawyers charging these rates and working reasonably hard could do pretty well. Assume that a lawyer works forty hours a week, forty-eight weeks a year, or 1920 hours a year, which some estimates suggest is on the low side.[188] If they billed half (twenty) of those hours at an average rate of $232, they would make $222,720 a year in gross earnings. Even if they charged a bargain rate of $100 an hour, they would still gross $96,000 for that amount of billed work.

Regrettably, the Clio Report suggests that these lawyers do not bill twenty hours a week. The report separates out the "utilization rate," which is the number of hours the lawyers billed internally, the "realization rate," which is the amount of that billed time the lawyers actually sent out to clients, and the "collection rate," which is the amount they were actually paid.[189] Of course, every lawyer experiences some slippage between their utilization rate and their collection rate. That slippage is just a cost of doing business.

What is startling about the Clio finding is just how little time lawyers for individual consumers spend on billable matters:

> **Utilization rate:** Lawyers logged 2.2 hours of billable time per day (28 percent of an eight-hour day).
>
> **Realization rate:** Lawyers billed 1.8 hours per day (81 percent of actual hours worked).
>
> **Collection rate:** Lawyers collected payment on 1.5 hours per day (86 percent of actual hours billed).[190]

This helps explain why solo practitioner and small firm lawyers have had such a hard time making a decent living; they are spending too little of their time practicing law and too much of it doing everything else.[191]

The 2017 Clio Report also showed what, exactly, lawyers are doing with the rest of their time.[192] They are not eating bon bons and watching soaps. They spend a third of their time on business development or, in other words, finding clients.[193] They spend about half of their time on administrative matters: keeping their licenses current, managing their offices, generating and collecting bills, and related tasks.[194] That leaves roughly twenty percent of their time for substantive legal work. These findings should be an urgent concern for the legal profession and those who regulate it. A very large cohort of lawyers is struggling to find enough billable work to make ends meet.

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188. Randall Ryder, *Three Myths About Solo Attorneys (Part 1 of 3)*, LAWYERIST (May 13, 2013), https://lawyerist.com/myth-solo-attorney/.

189. CLIO REPORT 2016, *supra* note 184, at 24–36.

190. *Id.* at 5.

191. On the earnings of small firm and solo practitioners, see BARTON, *supra* note 37, at 5–6.

192. CLIO, LEGAL TRENDS REPORT 11–13 (2017), https://files.goclio.com/marketo/ebooks/2017-Legal-Trends-Report.pdf [hereinafter CLIO REPORT 2017].

193. *Id.*

194. *Id.*

Someone who had not read the preceding Parts of this Article might wonder why technology could not help more in directing clients to lawyers and collecting their fees. This would eliminate much of the wasted effort on trying to generate business and dunning for payments. That would, in turn, enable lawyers to spend more of their day doing the thing they went to law school for in the first place: practicing law. Someone who had read the earlier part of this Article might wonder instead why bar regulators did not recognize that Avvo Legal Services is precisely the kind of technological advance that lawyers should embrace not resist.

What then accounts for the resistance? We believe that for the rank and file, it has more to do with price than ethics. Avvo Legal Services replaced billable hours with flat fees for a wide range of services. And those flat fees were relatively low. Many practitioners may justifiably worry that they will need to match those prices or lose business. Either option may seem like a disaster. And bar associations reflect these concerns.

But online form providers such as Rocket Lawyer and LegalZoom are *already* radically lowering the prices for many routine services. That horse is out of the barn. Avvo Legal Services attempted to compete with these providers by connecting consumers who would rather hire a lawyer with the lawyers who were willing to do the work at an affordable price. Lawyers and bar regulators who hope that prohibiting participation in Avvo Legal Services will hold the line against technology-driven competition have it exactly backwards. Programs like Avvo Legal Services are the profession's best hope at growing the number of clients willing to pay a lawyer rather than a form provider.

B. THE BENEFITS FOR CLIENTS AND ACCESS TO JUSTICE

We have both written at length about the breadth and seriousness of America's access-to-justice problems, and we will not belabor the point here.[195] Part of the access-to-justice problem is cost. Given prevailing fees, most Americans can at best afford little more than a few hours of legal work on any given issue.

But price is only part of the problem, as is clear from Rebecca Sandefur's recent American Bar Foundation study.[196] Her random sample found that two-thirds of those surveyed reported at least one civil justice situation in the previous eighteen months, almost half of which resulted in significant negative consequences.[197] However, people described only nine percent of these

195. BARTON & BIBAS, *supra* note 28; RHODE, *supra* note 25, at 30–59; Rhode & Cummings, *supra* note 3.

196. REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 3–4, 7 (2014), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa._aug._2014.pdf.

197. *Id.* at 5.

situations as "legal" and took only eight percent to lawyers.[198] Cost was not the major barrier to seeking legal help; it was critical in only seventeen percent of cases.[199] Rather, the most common reason for failing to obtain legal assistance was some variant of "I don't need any."[200] Even those who recognize that they have a significant legal problem are often loath to see a lawyer on the assumption that it will be expensive, time-consuming, unpleasant, and/ or unnecessary.[201] In countries that have fewer restrictions on the delivery of legal services, such as the United Kingdom and the Netherlands, a much larger percentage of individuals (roughly twenty-five percent to thirty-five percent) take their problems to a lawyer.[202]

American attorneys have contributed to consumer wariness by using hourly rates that seem to reward them for maximizing their time rather their efficiency. The bar's traditional resistance to flat fees and routinized services may lead to the highest quality assistance. But that is not what most consumers are willing and able to purchase. To address America's pervasive and persistent problems of access to justice, more lawyers must seek ways of serving more clients at more affordable rates. Technology can serve that end. LegalZoom and Rocket Lawyer have done exactly this. The sooner lawyers can follow suit, the better off they, and all the rest of us, will be.

Avvo Legal Services was a step in the right direction. It lowered the price of legal services, and gave consumers a readily accessible way of identifying a lawyer that they could afford. It also encouraged lawyers to work more efficiently. The only way to make a decent living through Avvo Legal Services was to handle a large volume of cases quickly and effectively.

The stated concern of bar ethics committees is that Avvo's approach could force participating lawyers to provide substandard work. Yet the effect of those rulings will be to push more price-conscious consumers in the direction of online form processing services that offer less assurance of quality assistance. In our view, innovative technologies like Avvo Legal Services deserve a chance. Bar regulators should have waited to see if problems materialized, and then looked for the least restrictive means of dealing with them. Their regulatory process should be more evidence-based, and open to comments from affected parties. Snuffing out innovation before it even launches seems more calculated to protect the profession than the public. And, in the long run, even the profession is ill served by such regulatory repression.

198. *Id.* at 14.

199. *Id.* at 13.

200. Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 450 (2016).

201. SANDEFUR, *supra* note 196, at 11–14.

202. Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: Legal Resources for Ordinary Americans*, *in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 21, 21–53 (Samuel Estreicher & Joy Radice eds., 2016).

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