

THE DEAN'S LIST

A Welcome From the New Dean

By Patrick McCormick

As I write this, the trips to Bed Bath & Beyond have commenced, as my middle daughter prepares to return to the University of Scranton for her senior year. As she gears up for her last year of college, I'm reminded of the excitement of back-to-school — from the pencils and textbooks of my youth to the iPads and laptops of my daughter's experience.

Even for those of us for whom summers off are a distant memory, I hope you will share my enthusiasm for the start of a new term at the Suffolk Academy of Law. First, an introduction: I'm Patrick McCormick, a partner at Campolo, Middleton & McCormick, where I chair our Litigation & Appeals practice. I focus on complex commercial litigation, landlord-tenant matters, and state and federal appellate advocacy, and regularly collaborate with my colleagues in varied practice areas, from Corporate to Estate Planning to Real Estate to Cybersecurity. This experience has helped shape my vision for the Academy as the go-to educational resource for the lawyers of Suffolk County and beyond, no matter what their practice area or industry.

I've had the privilege of serving as an

officer and the Associate Dean of the Academy, and now, as dean, I'm happy to share some of the new initiatives we've been working on to make your educational experience with the Academy innovative and relevant. Below are a few of these initiatives:

- **Exploring marketing and networking through CLEs**

Gone are the days when word of mouth and an entry in the Yellow Pages were a lawyer's ticket to success. Social media, online reviews, and creative marketing have changed the game, and you don't want to be left behind. Similarly, networking and relationship-building play a critical role in cultivating clients, referral sources, and your reputation. We held numerous successful programs over the summer delving into these issues, and we believe a deep understanding of these topics is critical to the success of the modern lawyer. We hope you'll join us throughout the year for more programs on these topics, which will also analyze the ethical considerations surrounding referral relationships and advertising.



Patrick McCormick

- **Diversity, Inclusion, and Elimination of Bias courses**

You may have heard that attorneys admitted to the New York Bar for more than two years who are due to re-register on or after July 1, 2018 must complete at least one credit hour in a new CLE category: Diversity, Inclusion, and Elimination of Bias. (The biennial CLE requirement for experienced attorneys remains 24 credit hours, including four in the Ethics and Professionalism category.) As your one-stop CLE provider, the Academy is working on a full schedule of courses that address topics such as equal access to justice, serving a diverse population, and cultural sensitivity. We plan to combine some of these courses with the opportunity to work with nonprofit organizations that are dedicated to exploring diversity issues.

- **Bring on the accountants**

The Academy of Law is now an accredited provider of CPE credits for certified public accountants. Be on the lookout for joint programs offering both CLE and CPE credits, and take advantage of networking opportunities with account-

ants who can refer your next client.

- **Networking** (Have you noticed a theme here?)

The Academy recognizes the convenience of online CLEs, and as such, we will continue to offer a robust selection of online courses from which to choose. But there's just no replacing the interactive experience you get from attending a live, in-person course, which gives you the opportunity to ask questions of the presenters and meet new connections in the classroom. We're offering a mix of topics and schedules (breakfast events, lunch and learns, and traditional evening courses) to meet your needs.

Stay tuned for more programming details, and if you have any course suggestions, comments, or ideas for the Academy, I'd love to hear them. Please feel free to contact me at pmccormick@cmmlp.com.

Welcome back!

Note: Patrick McCormick is a partner at Campolo, Middleton & McCormick, LLP, a premier law firm with offices in Ronkonkoma and Bridgehampton.

ETHICS

Unmatched — Avvo's Marketing Fees Unethical in New York State

By Cory Morris

New York State's Ethic Opinion 1132 ("Opinion 1132") bars attorneys for paying a marketing fee to participate in Avvo Legal Services (Avvo, Inc. hereinafter "Avvo") because the fee is considered an improper payment for a recommendation.¹ While Avvo may opine that the New York State Bar Association is a voluntary bar and this opinion is not binding, attorneys beware. From the solicitation of the entire legal field to flattening consumer expectations into an online attorney rating system, AVVO's latest expansion into obtaining marketing fees in exchange for clients finally has run aground in several² states.

Avvo is not the first business to enter off the legal profession. "Certain entrepreneurs, seeking to profit from the market for legal services, while avoiding compliance with lawyers' rules of professional responsibility, argue the law is just a business, not a profession."³ Others would go as far to say that the "notion that law isn't a commercial enterprise may come as a surprise, since some lawyers now charge more than \$1,000 an hour."⁴ Like Uber and Airbnb,

Avvo may not own a single car, home or lawyer, but it sought to collect fees in exchange for cases that it doled to participating attorneys who paid the vig. As with other emerging technologies, the regulatory bodies have struggled to catch up with the new business model.

The change occurred when Avvo's longstanding attorney rating system was complemented with the ability for consumers to purchase legal services. "Clients choose a service and an attorney and make full payment up front through Avvo's website. Avvo notifies the attorney, who then contacts the client directly and completes the service." While innovative, industry advances in technology must comply with professional regulation just as the driverless car must still follow the rules of the road. Unfortunately for Avvo, the New York State Bar Association has put the brakes on Avvo Legal Services.

The New York State Bar Association's ban on paying for cases or case recommendations (even if there appears to be a choice of attorney) should not come as a surprise. While lawyer fi-



Cory Morris

nanced lawsuits are not contrary to ethical rules governing lawyers, fee splitting with a non-lawyer has long been prohibited. Albeit there is still an ethical bar on solicitation, recent changes were made that allow non-lawyer organizations to offer prepaid or group legal services and solicit per-

sons who are not otherwise known to need legal services. ABA "Resolution 105, aim[ed] to address the justice gap by taking the modest step of acknowledging that some states may want to let nonlawyers provide legal services." Also not surprising was that "[o]ne day after the ABA adopted [this] hotly contested resolution to guide states in their regulation of nontraditional legal service providers, Avvo rolled out Avvo Legal Services, offering fixed-fee, limited-scope legal services through a network of attorneys in 18 of the nation's most populous states."⁵ While slow moving, the legal profession is reacting to Avvo Legal Services and its representations made to potential clients.

The New York State Bar Association rejected Avvo's new scheme. Opinion 1132 made factual findings that "[t]he

inquirer would offer legal services through Avvo's website and pay the marketing fees that Avvo charges to lawyers who obtain clients via the Avvo website." The consumer pays Avvo first and "Avvo pays each participating attorney all of the legal fees generated through Avvo by that attorney in the previous month, and separately charges each attorney a 'marketing fee' for each legal service the attorney has completed during the prior month (unless Avvo has refunded the client's payment)." Along with New York, states such as South Carolina⁶ and New Jersey have rejected this novel idea.

Avvo's marketing fees are unethical. Purportedly giving clients a choice, "Avvo describes its service as simply 'facilitating a marketplace' where consumers can choose from among all of Avvo's participating lawyers." Not a lawyer referral service, the fees charged by Avvo to participating attorneys varies with the type of case. Opinion 1132 further differentiated Avvo in so far as "[i]t is not a third party, but rather the very party that will benefit financially if potential clients hire the lawyers rated by Avvo" finding that "lawyers who pay Avvo's marketing fee

(Continued on page 25)

Inside The Courts (Continued from page 4)

two baseballs previously hit to him without incident (*id.*).

Injuries caused by fans and spectators

Stadium vendors are similarly not immune from injury at the ballpark. For example, in *Cohen v. Sterling Mets, L.P.*, a concession vendor at Shea Stadium was injured by a fan diving for a t-shirt during an in-between inning promotional activity. The court concluded the t-shirt launch was similar to a player tossing a ball into the stands at the end of an inning, and since the vendor had knowledge of the inherent risks of his employment and those associated with the t-shirt launch, he assumed the risk of working in that area (840 N.Y.S.2d 527 (Queens Cnty. Sup. Ct. 2007)).

Likewise, in *Napolitano v. Madison Sq. Garden Ctr.*, the action commenced by a hockey fan for injuries allegedly sustained during a fight with another fan was dismissed. The Appellate Term reached this outcome after concluding the altercation was “spontaneous and unexpected,” and none of the approximate 80 security officers on-duty had any reason to anticipate the fight (760 N.Y.S.2d 807 (App. Term, 1st Dep’t 2003)).

A different result was achieved in *Curran v. CXR Holding Inc.* There

the Nassau County Supreme Court denied a motion to dismiss the negligence suit for injuries caused by a “rowdy male beachgoer” attempting to catch a t-shirt “catapulted” by a radio station employee during a July Fourth fireworks celebration (2006 N.Y. Misc. LEXIS 9187 (Nassau Cnty. Sup. Ct. 2006)). In holding the case should proceed to trial, the court noted that the radio station neither provided security nor any instruction or warnings about the potential risk of injury for attendees (*id.*). A similar result occurred in *Brosnan v. 6 Crannell St., LLC*, when a concertgoer was “slam danced” without warning (2017 N.Y. App. Div. LEXIS 1765 (2d Dep’t March 15, 2017)). Although the Appellate Division, Second Department noted that the attendees had assumed the risk, the owner’s motion for summary judgment was denied because there was a question whether the organizers had fulfilled their responsibility of making the venue safe (*id.*).

In closing, attending a sporting event or other amusement activity involves risks for which a fan may bear ultimate responsibility. However, in the context of a personal injury lawsuit, the assumption of risk defense

may minimize, as opposed to outright bar, the amount of the award.

Note: The Honorable Stephen L. Ukeiley is a Suffolk County District Court Judge. Judge Ukeiley is also an adjunct professor at the Touro College Jacob D. Fuchsberg Law Center and New York Institute of Technology, and the author of numerous legal publications, including

The Bench Guide to Landlord & Tenant Disputes in New York (Third Edition)[®].

** The information contained herein is for informational and educational purposes only. This column should in no way be construed as the solicitation or offering of legal or other professional advice. If you require legal or other expert advice, you should consult with an attorney and/or other professional.*

FREEZE FRAME

An experience to remember



SCBA intern Cameron Bonhurst visited U.S. Federal Senior Judge Leonard D. Wexler this summer.

Avvo’s Marketing Fees Unethical in New York State (Continued from page 6)

are paying for a recommendation.” Couched in comfortable terminology and made user friendly to those who can perform a Google search, the instant gratification provided by Avvo Legal Services has finally met some resistance from the legal profession.

Opinion 1132 does not ban Avvo altogether. As with other states, Opinion 1132 goes through great lengths to describe Avvo and highlights the impropriety of paying such fees in exchange for cases. By way of example, although New Jersey Lawyers cannot participate in Avvo Legal Services, “[t]wo other services linking clients to lawyers, LegalZoom and Rocket Lawyer, appear to be offering legal services plans that would pass muster under those ethics rules — if they were registered with the courts’ administrative office,” states the New Jersey Opinion.⁷ These ethical opinions focus on the exchange of money for a particular case. In response, “Avvo’s chief legal officer, Josh King, told the ABA Journal that New York’s voluntary state bar, the opinion of which is advisory and not binding, has focused, as have some other state bars both mandatory and voluntary, ‘on the marketing fee and whether it’s fee-splitting — we believe not.’”⁸ Whether considered fee splitting or paying a referral fee, Avvo stands to profit enormously

should the profession allow attorneys to pay for cases in this manner.

The integrity of the legal profession is vested with attorneys. Avvo is a business and not a profession. There are longstanding restrictions against nonlawyer practice and nonlawyer ownership of a law firm. “With the exception of the District of Columbia, no jurisdiction in the country permits non-lawyer ownership of law firms.” Opinion 1132 helps provide guidance and ameliorate the regression of the legal profession to food-critique like ratings and prepaid advertisements. Perhaps with the demise of the 800 phone-line jingles,⁹ this ethics opinion will deter the temptation of attorneys and clients to engage in a marketing scheme driven by profits and restore the public’s faith in a system that does not pay per case or click? In any case, New York attorneys beware that “[a] lawyer paying Avvo’s current marketing fee for Avvo Legal Services is making an improper payment for a recommendation in violation of Rule 7.2(a).

Note: Cory Morris is a civil rights attorney, holding a Master’s Degree in General Psychology and currently the Principal Attorney at the Law Offices of Cory H. Morris. He can be reached at <http://www.coryhmorris.com>.

¹ Committee on Professional Ethics, *Opinion 1132*, New York State Bar Association (August 8, 2017); available at: <http://www.nysba.org/EthicsOpinion1132/>.

² Christine Simmons, *Avvo Blasts New Ethics Opinions on Attorney Match Services*, New York Law Journal (August 9, 2017), <http://www.newyorklawjournal.com/id=1202795114863/Avvo-Blasts-New-Ethics-Opinions-on-Attorney-Match-Services>.

³ David Miranda, Letter to the Editor: The Law Remains a Noble Profession, American Bar Association (GPSolo eReport, Vol. 5, No. 4), http://www.americanbar.org/publications/gpsolo_e-report/2015/november_2015/letter_law_remains_noble_profession.html (citing Dan Lear, “I Hate to Break it to You Lawyers, But Law Is a Business,” (GPSolo eReport Vol. 5, No. 3), http://www.americanbar.org/publications/gpsolo_e-report/2015/october_2015/lawyers_jaw_is_business.html).

⁴ Jennifer Smith, *Law Firms Split Over Nonlawyer Investors*, Wall Street Journal (April 1, 2012), <http://www.wsj.com/articles/SB10001424052702304750404577317761468323458?mg=id-wsj>.

⁵ Robert J. Ambrogi, *Is Avvo’s fixed-cost service a fee-sharing violation?*, ABA Journal (May 1, 2016), http://www.abajournal.com/magazine/article/is_avvos_fixed_cost_legal_service_a_fee_sharing_violation/

⁶ Ryan Mac, *This Silicon Valley Billionaire Has Been Secretly Funding Hulk Hogan’s Lawsuits Against Gawker*, Forbes (May 24, 2016), <http://www.forbes.com/sites/ryan-mac/2016/05/24-this-silicon-valley-billionaire-has-been-secretly-funding-hulk-hogans-lawsuits-against-gawker/>.

⁷ See American Bar Association, *Rule 7.3: Direct Contact with Prospective Clients*, ABA (2016), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_3_direct_con

[tact_with_prospective_clients.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_3_direct_contact_with_prospective_clients.html).

⁸ Susan Beck, *Divided ABA Adopts Resolution on Nonlawyer Legal Services*, The Am Law Daily (Feb. 8, 2016), <http://www.americanlawyer.com/id=1202749202171/Divided-ABA-Adopts-Resolution-on-Nonlawyer-Legal-Services#ixzz40QhTCz00>

⁹ Robert J. Ambrogi, *Is Avvo’s fixed-cost service a fee-sharing violation?*, ABA Journal (May 1, 2016), http://www.abajournal.com/magazine/article/is_avvos_fixed_cost_legal_service_a_fee_sharing_violation/

¹⁰ Debra Cassens Weiss, *Ethics opinion on fee-sharing is bad news for Avvo Legal Services*, ABA Journal (August 11, 2016), http://www.abajournal.com/news/article/ethics_opinion_on_fee_sharing_is_bad_news_for_avvos_legal_referral_service/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

¹¹ Debra Cassens Weiss, *‘Marketing fees’ paid to Avvo violate New Jersey lawyer conduct rules, ethics opinion says*, ABA Journal (June 25, 2017), http://www.abajournal.com/news/article/avvo_violates_nj_ethics_rules_banning_fee_sharing_lawyer_referral_payments/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

¹² Terry Carter, *Avvo ‘marketing fee’ pays for an endorsement and violates New York lawyer ethics rules, opinion says*, ABA Journal (August 9, 2017), http://www.abajournal.com/news/article/new_york_ethics_opinion_lawyers_avvo.

¹³ Jacob Gershman, *ABA Resolution Stirs Fears of Non-Lawyer Firm Ownership*, Wall Street Journal (Feb. 5, 2016), <http://blogs.wsj.com/law/2016/02/05/aba-resolution-stirs-fears-of-non-lawyer-firm-ownership/>

¹⁴ See Julia Marsh, *Cellino & Barnes breakup turns nasty amid poaching claims*, New York Post (July 25, 2017), <http://nypost.com/2017/07/25/cellino-barnes-breakup-turns-nasty-amid-poaching-claims/>.