

ETHICS ADVISORY OPINION

11-05

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

Lawyer would like to use “daily deal” websites that offer products and services at discounted rates to market her legal services. In particular, lawyer would like to use sites in which users purchase a voucher through the website to be subsequently redeemed for a discounted product or service. The proceeds of the purchase are split between the website offering the voucher and the business at which it is to be redeemed. Lawyer envisions using such websites to offer legal services such as preparation of wills.

Question Presented:

Does a lawyer violate the Rules of Professional Conduct by contracting with a website to offer vouchers that can be purchased from the website and then subsequently redeemed for discounted legal services such as the preparation of wills?

Summary:

The use of “daily deal” websites to sell vouchers to be redeemed for discounted legal services does not violate the Rule 5.4(a) prohibition on sharing of legal fees, but the attorney is cautioned that the use of such websites must be in compliance with Rules 7.1 and 7.2 and could lead to violations of several other rules if logistical issues are not appropriately addressed.

Opinion:

The use of services as described in the facts does not violate Rule 5.4(a) prohibiting the splitting of a fee with a non-lawyer. The Committee's members arrived at this conclusion via two different analyses.

The fee charged by a company for use of its service (i.e., a percentage of the money paid by the customer for the discounted coupon) constitutes the payment of "the reasonable cost of advertisements or communications" permitted under Rule 7.2(c)(1) and not the sharing of a legal fee with a non-lawyer prohibited by Rule 5.4(a). The fact that the charge for this form of advertising service is deducted up front by the company rather than invoiced and then paid from the lawyer's operating account does not transform the transaction from the payment of advertising costs into an improper fee split. To the extent the payment to the companies of a percentage of the coupon value as a cost of participating in the service does constitute a splitting of a fee with a non-lawyer, members of this group believe it would violate the prohibition as written in Rule 5.4(a).

A second analysis leading to the same conclusion is that the transaction does constitute the splitting of an attorneys' fee with a non-lawyer, but that the prohibition of fee-splitting in Rule 5.4(a) only applies in situations where such fee-splitting interferes with "the lawyer's professional independence of judgment" on behalf of the client as stated in comment one to the rule. The sharing of fees with a non-lawyer may be permitted where the circumstances do not suggest any encroachment on the lawyer's independent judgment. Even where a website retains a portion of each fee paid for services to be subsequently rendered by an attorney, the use of such websites as a marketing tool does not violate Rule 5.4(a), provided the website does not have the ability to exercise any control over the services which are to be subsequently rendered by the attorney. Without the ability to exercise such control, there does not appear to be any possibility of encroachment on the lawyer's independent judgment and therefore, Rule 5.4(a) prohibiting the sharing of legal fees with a non-lawyer is not violated.

While the use of "daily deal" websites may not be prohibited by Rule 5.4(a), the Committee is concerned with the effect the use of such websites may have on the reputation of the legal profession if the attorney does not ensure compliance with the Rules of Professional Conduct concerning advertisements. For this reason, the lawyer is cautioned that the use of "daily deal" websites must be in compliance with Rules 7.1 and 7.2. The lawyer is responsible for the communication to potential clients which she asked to be placed on the "daily deal" website.[1] While the "effectiveness and taste in advertising are matters of speculation and subjective judgment,"[2] Rule 7.1 expressly provides that an attorney must ensure that the communication does not contain any false, misleading, deceptive or unfair information about the lawyer or her services.

The Committee does not believe the use of "daily deal" websites would violate the requirements of Rule 7.3 concerning contact with prospective clients, because the lawyer will not be communicating directly with the users of the website and because the lawyer does not know

whether the prospective clients who may use the website will be in need of legal services in a particular matter.[3]

The lawyer is further cautioned that various other logistical issues should be addressed by an attorney using “daily deal” websites to prevent a violation of the Rules of Professional Conduct. For example, the lawyer must ensure that she complies with Rule 1.5(b), requiring the lawyer to disclose the scope of representation and the basis of her fee within a reasonable time of the commencement of representation. Further, the lawyer must ensure that she is in compliance with Rule 1.15(c) which requires unearned fees to be deposited into a client trust account until the fees are actually earned. If a consumer purchases a voucher from a “daily deal” website and the lawyer is paid a percentage of the purchase price prior to rendering any services, then the compensation paid to the lawyer may be considered an unearned fee. Lastly, the lawyer must address the logistical issue of how she will handle conflict of interest situations that may arise under Rules 1.7 and 1.9.