

ETHICS ADVISORY OPINION

14-03

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 regularly represents clients in mediations and arbitrations. Recently, Lawyer executed a Mediation Agreement that states as follows: “The parties and their attorneys agree that the attorney(s) representing each party will bear the responsibility for and pay that party’s respective share of the mediator’s bill for services rendered.”

Question Presented:

Having agreed to be responsible for payment of the mediator fees, is Lawyer ethically responsible for payment of such fees?

Summary:

Yes. Lawyer chose to guarantee payment of mediator fees. Refusing to honor this obligation would likely violate Rules 8.4(d) (dishonesty) and (e) (conduct prejudicial to the administration of justice).

Opinion:

Compensation of mediators is normally an obligation of litigants and not their lawyers. SC Court-Annexed ADR Rule 9; S.C. Dist. Ct. Local Civil Rule 16.11. Applicable ADR rules set forth the obligations of counsel in connection with mediation, and ensuring payment of mediator fees is not among them. SC Court-Annexed ADR Rule 6; S.C. Dist. Ct. Local Civil Rule 16.08. Thus, the default rule is that counsel does not serve as a guarantor of her client’s debt to a mediator.

Here, however, Lawyer has chosen to sign an agreement promising to pay the mediator. Absent some legal justification, refusing to fulfill this promise would be dishonest, and thus in violation of Rule 8.4(d), which prohibits “conduct involving dishonesty.” Moreover, because the

contractual promise was made in the course of representing a client and in connection with a pending matter, failing to honor it would be “prejudicial to the administration of justice,” in violation of Rule 8.4(e). While Rule 8.4(e) is not implicated every time an attorney fails to perform under a contract, it would be implicated here because the contract was made in connection with representation of a client in a pending matter and non-performance would have the potential to adversely impact the availability and cost of mediation generally, to the detriment of other litigants.