

ETHICS ADVISORY OPINION

13-05

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 A, a South Carolina lawyer, proposes to enter into a co-operative style TV based advertising contract with a for profit, non-lawyer, out-of-state third party advertising company, Company B. Other attorneys licensed in South Carolina and its neighboring states will also join and participate in the advertising campaign, a rotation- based system where the attorney at the top of the rotation receives the next call from advertiser's call center, then moves to the bottom of the rotation. Costs of advertising for each participating member are based on a pro-rata share for each participating attorney of the total advertising costs of production of ads, television air time costs, administration expenses and a reasonable profit for Company B, paid monthly or yearly by each attorney, regardless of call volume, or the number of calls made to any participating member which are accepted by attorneys as new cases.

The non-lawyer call center operators exercise no discretion in the handing of calls as to the merits of any particular case, but functions only to identify those that involve a claim for personal injury or death. The call center operator connects the caller to the attorney's office at the top of the rotation, at which time he moves to the bottom of the rotation. Lawyer A will only receive calls originating from South Carolina.

The ads contain the names of all participating attorneys and their geographic location, and the television signal reaches into portions of the two states contiguous to South Carolina. Attorney A reviews the ads before airing to ensure compliance with Rules 7.1 and 7.2 of the S.C. Rules of Professional Responsibility.

Question:

1. Can attorney A enter into such advertising arrangement consistent with the South Carolina Rules of Professional Responsibility?

Summary:

Yes, provided the advertisements and relationship with Company B are carefully structured to comply with Rules 7.1, 7.2, 7.4 and 7.5. Advertisements must include the name and office address of a responsible South Carolina attorney and, in order to avoid misleading the public, should state that the advertising company is not acting as a referral service and not performing any screening function, but merely serving as an agent of the advertising lawyers. The advertisement must also avoid misleading the public with labels such as “Legal Helpline” or “Injury Hotline” that, combined with a toll-free number, might imply a bar or other governmental or charity affiliation. Finally, the advertisement may not falsely imply a practice affiliation among the advertising lawyers.

Opinion:

The issue in this inquiry is whether the group advertising scheme described by the inquirer amounts to the reasonable costs of advertising, which is allowed under Rule 7.2(c)(1), or a for profit lawyer referral service, which is not. Rule 7.2(c) prohibits a lawyer from “giv[ing] anything of value to a person for recommending the lawyer’s services,” and provides exceptions including “the reasonable costs of advertisements,” see Rule 7.2(c)(1), and “the usual charges of ... a not-for-profit lawyer referral service,” see Rule 7.2(c)(2). Comment 7 to Rule 7.2 acknowledges that “group advertising” is permitted. The Committee believes the scheme described involves only the reasonable costs of lawyer advertising and not a lawyer referral service.

Company B cannot satisfy the (c)(2) exception because it is a for-profit entity. In order to satisfy the (c)(1) exception, 1) the advertisement must be an advertisement for the lawyer’s services, 2) the costs must be “reasonable,” and 3) the content of the ad must be “permitted by this rule,” meaning the content of the ad must satisfy the requirements of Rule 7.2. The inquiry states that Lawyer A will review the ad and ensure its compliance with Rules 7.1 and 7.2. The Committee takes the inquirer at his word, but points out that Rule 7.2 requires the office address of a South Carolina lawyer, whereas the inquiry indicates only that the lawyer’s name and geographical location appear. The Committee further advises that the advertisement must also comply with Rules 7.4 and 7.5 in addition to the many details of Rules 7.1 and 7.2.