

ETHICS ADVISORY OPINION

16-06

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:

An attorney directory website released a new fixed-fee legal referral service. The service works as follows: Attorney signs up for the service by agreeing to offer certain flat fee services. The fee for the service is set by the internet advertising directory website(service). The service makes the referral to the attorney, who then contacts the client to arrange a meeting and begin the representation. The service handles payment processing from the client and holds the funds until the service is completed. Upon completion of the work, the service transfers the full amount of the fee to attorney's account. Upon completion of the work, the service charges the attorney a "per service marketing fee" which seems to be based upon the service provided and is only incurred when the lawyer provides the service. For example, the fee for an uncontested divorce may be \$995, and the fee is \$200, while the fee to start a single member LLC is \$595, and the fee is \$125.

Questions Presented:

1. Does the arrangement above violate the prohibition against sharing fees with a non-lawyer as described in Rule 5.4?
2. Alternatively, does the arrangement violate the "reasonable costs of advertisements or communications" as described in Rule 7.2 (c) (1)?

Summary:

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 and is not saved by the exceptions found in Rule 7.2(c)(1), (2), or (3).

Discussion:

Fee Sharing

Rule 5.4 (a) prohibits a lawyer or law firm from sharing legal fees with a non-lawyer, subject to certain exceptions set forth in 5.4 (a) (1)-(4). The exceptions generally fall into two categories: payments to a deceased lawyer's estate or payment to non-lawyer employees in a compensation or retirement plan that is based in whole or in part on a profit sharing arrangement. The exceptions do not apply here.

In the situation described above, the service collects the entire fee and transmits it to the attorney at the conclusion of the case. In a separate transaction, the service receives a fee for its efforts, which is apparently directly related to the amount of the fee earned in the case. The fact that there is a separate transaction in which the service is paid does not mean that the arrangement is not fee splitting as described in the Rules of Professional Conduct.

A lawyer cannot do indirectly what would be prohibited if done directly. Allowing the service to indirectly take a portion of the attorney's fee by disguising it in two separate transactions does not negate the fact that the service is claiming a certain portion of the fee earned by the lawyer as its "per service marketing fee."

Reasonable costs of advertisements or communications

Rule 7.2(c) prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services, with three exceptions. The first exception, found in 7.2(c)(1) allows for a lawyer to pay for the "reasonable costs of advertisements or communications permitted by this Rule."

Assuming that any advertising or solicitation done by the service complies with the requirements of Rule 7.2, the question becomes whether the payments made by the lawyer to the service can be considered the "reasonable costs of advertisement or communication." Comment 7 to the rule discusses reasonable advertising costs and lists such items as newspaper ads, on-line directory listings, radio/television advertisement, etc. The permitted type of advertising described in the comments typically is of a type that has a fixed cost per ad or per run of air time, and reasonableness can be assessed by the market rate for the type of advertising.

The service, however, purports to charge the lawyer a fee based on the type of service the lawyer has performed rather than a fixed fee for the advertisement, or a fee per inquiry or "click." In essence, the service's charges amount to a contingency advertising fee arrangement rather than a cost that can be assessed for reasonableness by looking at market rate or comparable services.

Presumably, it does not cost the service any more to advertise online for a family law matter than for the preparation of corporate documents. There does not seem to be any rational basis for charging the attorney more for the advertising services of one type of case versus another. For example, a newspaper or radio ad would cost the same whether a lawyer was advertising his services as a criminal defense lawyer or a family law attorney. The cost of the ad may vary from

publication to publication, but the ad cost would not be dependent on the type of legal service offered.

By basing the advertising charge to the lawyer on the fee collected for the work rather than having a fixed rate per referral or other reasonable cost for the advertisement, a lawyer utilizing this service cannot claim the exception to the prohibition of paying for referrals contained in Rule 7.2(c)(1).

The remaining exceptions found in Rule 7.2(c)(2) and (3) are likewise inapplicable. Rule 7.2(c)(2) allows an exception to the rule for the usual charges of a legal service plan or not for profit lawyer referral service. The comments to Rule 7.2 define a legal service plan as a "prepaid or group legal service plan or similar delivery system" that assists clients in finding attorneys. The service's design does not appear to be a sort of prepaid system like commercial plans in which a person pays a fee to be a member. The service likewise does not appear to be a "not for profit" lawyer referral service. Therefore, the exceptions found in Rule 7.2(c)(2) do not apply.

Rule 7.2(c)(3) allows an exception for payment for a law practice in accordance with Rule 1.17, which is not applicable to this scenario.