



ETHICS ADVISORY OPINION

12-06

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:

Lawyer A is a certified civil court mediator. Lawyer A is also a solo practitioner with her own law practice. Lawyer A wishes to form a partnership or agreement with several non-lawyers who are trained mediators to provide mediation services to different groups and individuals at a reduced cost. The organization will operate for a profit, in which Lawyer A wishes to share. The organization will expressly exclude from its activities the provision of any legal services.

Lawyer A also wishes to serve as one of the mediators providing mediation services for the organization to groups and individuals solicited and recruited by the organization.

Question Presented:

Is the arrangement of the type described above prohibited by the Rules of Professional Conduct, in particular, Rules 5.4 and 7.2(c)?

Summary:

Rules 5.4 and 7.2 (c) do not prohibit an attorney from joining a mediation firm and sharing in its profits, as long as no portion of the work of the mediation firm consists of the practice of law and clients understand that the firm is not engaged in the practice of law. See also Ethics Advisory Opinion 94-10, which concludes that mediation is not a legal service, and that admission to the Bar is not a prerequisite to service as a mediator.

Opinion:

Rule 5.4 places strict limits on the ways in which a lawyer may include a non-lawyer in the fees generated from the professional practice of law. The general purpose of the rule is to protect the lawyer's "professional independence of judgment" with regard to the practice of law or in the rendering of legal services. The scope of Rule 5.4 is limited to fee sharing of legal fees. It does not apply to business activities which, although engaged in by a person who is a lawyer, do not have any connection to that lawyer's practice of law. The significant inquiry under Rule 5.4 is, therefore, whether the proposed business arrangement would place the attorney in the position of sharing legal fees with non-lawyers. In Ethics Advisory Opinion, 94-10, this Committee opined that mediation is not the practice of law and that admission to the Bar is not a prerequisite to service as a mediator. The mere fact that a mediator is also a licensed attorney does not convert the activity of mediation into the practice of law. Since mediation fees are not legal fees, and the proposed business entity expressly will not be offering legal services, Rule 5.4 does not prohibit the arrangement.

On the other hand, the practice of mediation does involve activities which can be similar to services that are offered by attorneys. For instance, mediators and attorneys both facilitate negotiations, assist parties in agreeing on terms that affect legal rights, and draft memoranda of agreement that can become legally binding documents. In light of the risk that mediation services might be confused with legal services, it is therefore advisable for a mediator who is also an attorney to avoid carefully any appearance that he or she is practicing law concomitantly with the practice of mediation.

Rule 7.2 (c), with some exceptions, prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services. In this case, no legal services are contemplated. Rule 7.2 (c) therefore does not apply.