

ETHICS ADVISORY OPINION

07-09

CAUTION: In In re Anonymous Member of the South Carolina Bar, 386 S.C. 133, 140 687 S.E.2d 41, 45 (2009), the Court held that this opinion (07-09) did not present a correct interpretation of Rule 7.3(a).

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.

SC Rules of Professional Conduct: 5.3(c), 7.1, 7.2, 7.3(a), 7.3(d), 8.4(a)

Facts:

Lawyer proposes to issue coupons for fee discounts to prospective clients for residential real estate loan closings. Lawyer will provide the coupons to mortgage loan originators and real estate agents. The mortgage loan originators and real estate agents will give homebuyers the coupons at the time that the homebuyers are asked to choose a lawyer to close the real estate transactions.

Questions Presented:

Would the lawyer violate Rule 7.3 by using a third party (real estate agent or mortgage originator) to solicit potential clients who are known to have a legal issue by use of the discount coupon?

Summary:

CAUTION: In In re Anonymous Member of the South Carolina Bar, 386 S.C. 133, 140 687 S.E.2d 41, 45 (2009), the Court held that this opinion (07-09), did not present a correct interpretation of Rule 7.3(a).

Yes. Personal delivery of the coupons violates the Rule 7.3(a) prohibition against in-person solicitation. Although the agent or loan originator, not the lawyer, has in-person contact with the prospective client under these facts, a lawyer cannot do indirectly what she is prohibited from doing directly. Also, the coupons likely violate the written solicitation requirements of Rule 7.3(d).

Opinion:

Rule 7.3 of the South Carolina Rules of Professional Conduct states:

A lawyer shall not by in person, live telephone or real time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

is a lawyer; or

has a family, close personal, or prior professional relationship with the lawyer.

In this case, the prospective clients do not appear to satisfy either exception (subparts 1 and 2); therefore, direct contact by the lawyer is prohibited. Because the lawyer is prohibited from making direct contact herself, she is also prohibited from using another person to make direct contact. See Rule 5.3(c) (holding a lawyer responsible for the acts of a nonlawyer where the lawyer either orders or ratifies the conduct) and 8.4(a) (prohibiting violating the Rules of Professional Conduct “through the acts of another” or “assist[ing] or induc[ing] another to do so”).

This Committee considered a similar situation in S.C. Bar Ethics Op. 96-27, the “Welcome Wagon” opinion. In that situation, the lawyer was submitting coupons as advertisements in a “welcome package” given to new homeowners or incoming residents in the neighborhood. The lawyer’s coupon was one of many coupons for local businesses included in the package. The hostess personally delivered the coupon packages to the new neighbors upon their move-in to the neighborhood. The Committee advised, “A discount coupon or an offer of a special discounted fee for a new client, while perhaps undignified, may not be a substantive violation of the Rules of Professional Conduct, so long as it is not false or misleading. (Rule 7.1)” S.C. Bar Ethics Op. 96-27. The difference in this case is that the lawyer here knows that each prospective client will be in need of legal services in a particular matter, whereas the lawyer in 96-27 was giving a coupon to all new homeowners in case any of them might need legal services in the future.

Rule 7.3(d) also requires extensive specific language to be contained in “[e]very writing directed to someone known to be in need of legal services on a particular matter.” Unless the coupon contains all the language required by subparts 1 through 3 of Rule 7.3(d), which does not seem practicable on a coupon, the coupons will violate this rule.

Conclusion:

While this Committee is extremely sensitive to the practices of residential real estate closings in our state, we are hard-pressed to find a manner in which the inquiring lawyer could participate in the activity without violating the Rules of Professional Conduct.