Ethics Advisory Opinion
25-02

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.

S.C. Rules of Professional Conduct: 1.5, 5.4, 5.5, 8.4 and 8.5

Facts:

An Arizona Alternative Business Structure ("ABS") advertises for personal injury cases nationwide. The ABS operates on two models: paid referrals[1] and joint representation. Under the co-counsel model, when clients retain the ABS, its custom and practice is to associate a local lawyer licensed in the relevant jurisdiction and enter into a joint representation agreement with the client and local counsel, providing for joint responsibility and a fee split arrangement. Local counsel is expected to perform most, if not all, of the substantive legal work in the cases originated by the ABS.

ABS is seeking to co-counsel with a South Carolina lawyer ("Lawyer") to serve as local counsel on South Carolina personal injury cases. A portion of attorney's fees earned in the cases will be paid to the ABS and by extension, its nonlawyer partners, some of whom have decision-making authority pursuant to Arizona rules. In addition, some portion of the attorney's fees paid to the ABS may then be passed on and paid to a nonlawyer who referred the Client to the ABS.

Questions Presented:

1) Is it ethical for Lawyer to serve as local co-counsel with the ABS under this arrangement?

2) Is it ethical for a South Carolina law firm or lawyer to own an interest in an ABS if the ABS has non-lawyer partners and/or pays referral fees?

Summary:

1. No, a South Carolina licensed lawyer may not ethically serve as local co-counsel with an ABS that provides legal services and has nonlawyers who are owners or partners, some of whom have decision making authority under the law in the ABS' jurisdiction, or who may receive some portion of the attorney's fees paid to the ABS, or who pays a portion of the attorney's fees received by the ABS to a nonlawyer who referred the client to the ABS.

[1] The paid referral model is not a permissible option for the South Carolina lawyer Rule 7.2(c) and is not, therefore, directly addressed in this opinion in detail.

2. No, a South Carolina licensed lawyer may not ethically own or invest in an ABS that practices law.

Opinion:

ABS has proposed a joint representation with Lawyer of ABS's Client pursuant to Rule 1.5(e) SCRPC, Rule 407, SCACR, on a joint responsibility basis with a division of the fee on a basis agreed to by the client.[2] Per Comment 7 to Rule 1.5, a division of a fee under the Rule "is a single billing to a client covering the fee of two or more lawyers in a matter who are not in the same firm." Thus, the fee earned from the Client referred to Lawyer necessarily must be split between ABS, which is owned by both lawyers and nonlawyers, and Lawyer and his Firm.

The Proposed Conduct Violates Rule 5.4.

Rule 5.4 prohibits the sharing or splitting of legal fees with a nonlawyer, thus emphasizing South Carolina's strong policy of preserving professional independence. First, section (a), with four exceptions not applicable here, in plain, unadorned language states "[a] lawyer or law firm shall not share legal fees with a nonlawyer …." Second, section (d) prohibits a South Carolina lawyer from practicing law "***with*** … a professional corporation or association authorized to practice law for a profit, if: (1) a nonlawyer owns an interest therein …" [with an exception not applicable to this matter]; (2) a nonlawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or (3) a non-lawyer has the right to direct or control the professional judgment of a lawyer." (emphasis added).[3] This rule is stated in the disjunctive; so, if any one of these prohibitions applies, the conduct is unlawful.

Though the mechanics of how the fee split will be accomplished are not specified in the inquiry, the manipulation of the method of effectuating the split between Lawyer and his law firm and ABS or a licensed lawyer that is part of ABS is irrelevant. Under Rule 8.5(a), Lawyer's conduct is subject to the South Carolina Rules "regardless of where the lawyer's conduct occurs" and ABS's lawyer's conduct (whether admitted *pro hac vice* or not), because it occurs with providing or offering to provide services in South Carolina, is also subject to the South Carolina Rules. *See also*

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[2] The fee received need not be split proportionally to the work performed if joint responsibility for the work is truly undertaken. *Cf. In Re Jordan*, 421 S.C. 594, 809 S.E.2d 409 (2017)(rule violated where referring lawyer did no work and wasn't kept informed about the case).

[3] Rule 5.4(b) further emphasizes South Carolina's policy against possible impairment of lawyers' professional judgment, stating "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." Though not directly applicable to this inquiry, this provision, like all of Rule 5.4, point to the ethical impropriety of entering into the arrangement with the ABS which, by its very nature, will put earned fees for legal work in the hands of nonlawyers and give nonlawyers the proverbial "camel's nose under the tent" for exercising control over the legal matter in which Lawyer is exercising joint responsibility for the representation of the client and the client's matter in South Carolina ***with*** the mixed lawyers and nonlawyers of the ABS.

Rule 8.4(b)(1)(rules applicable to the tribunal where the matter is pending apply, which, in this case, is South Carolina).

Consequently, Rule 8.4(a) applies and prohibits Lawyer and members of his firm (and ABS Lawyer per Rule 8.5(a) discussed in the preceding paragraph) from knowingly violating or attempting to violate the South Carolina Rules that prohibit fee sharing or "assist or induce another to do so, or do so through the acts of another." Thus, Lawyer cannot split the jointly earned fee from a South Carolina client and matter with the ABS attorney knowing that the jointly earned fee will, by the very purpose of the ABS structure, be distributed contrary to South Carolina law.

Support for this conclusion can also be found in Texas Professional Ethics Committee Opinion 707 (May 2025).[4] The opinion addressed whether the arrangement also violated Tex. Disciplinary R. Prof'l Conduct 5.04(a), which—like South Carolina Rule 5.4(a)[5]—prohibits lawyers from sharing legal fees with nonlawyers. The Texas committee acknowledged that some jurisdictions, such as Arizona and the District of Columbia, authorize Alternative Business Structures (ABS) that may allow nonlawyer entities to receive a portion of legal fees. However, the company described in the inquiry was not an ABS and did not hold itself out as a law firm, because Texas law does not permit such entities. Instead, the company described itself as a litigation management services company that provides software and technology support and also employs in-house lawyers who give legal advice to customers.

The opinion concluded that if the company earned a profit beyond the cost of employing the lawyers, the lawyers working for the company would violate Rule 5.04(a) because the arrangement would effectively result in sharing legal fees with nonlawyers. See also ABA Formal Opinion 95-392, which addressed a similar situation in which a corporate in-house lawyer performed legal work for third parties and the employer received fees exceeding the lawyer's cost to the company. The opinion stated that such arrangements "run afoul of the literal language of Rule 5.4(a) of the Model Rules of Professional Conduct," which provides that a lawyer or law firm may not share legal fees with a nonlawyer. Similarly, Texas Professional Ethics Committee Opinion 706 (February 2025) states that a lawyer may not agree to pay a nonlawyer-owned vendor based on a percentage of the revenues of the lawyer or the lawyer's firm.

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[4] In that opinion, the Texas Committee first held the entity in that case (it was not a business structured like an Arizona ABS, but involved a legal services organization providing software and technology help in which nonlawyer owners shared legal fees generated by in-house lawyers supplied to customers) violated Tex. Disciplinary R. Prof'l Conduct 5.05(a)(2), which prohibits a lawyer from assisting a nonlawyer in performing activity constituting the unauthorized practice of law. This Committee does not reach the issue of whether the arrangement between Lawyer and ABS constitutes a violation of the analogous provision in Rule 5.5(a), SCRPC, since the question of what constitutes the unauthorized practice of law is a legal question outside the Committee's jurisdiction. Similarly, we do not address whether the splitting of fees proposed violates S.C. Code Ann. § 40-5-360, a criminal statute, and thus Rule 8.4(b) and (c).

[5] The Texas rule is different in that it adds the phrase "or promise to share" after the world "share."

The Maryland State Bar Association Committee on Ethics also supports this conclusion. MSBA Ethics Comm. Op. 2025-01 involved an accounting firm with offices in states (like Arizona) that allowed nonlawyer-owned entities to practice law. A Maryland matter was involved, and the Committee noted that Maryland's ethics rules controlled per MRPC 19-300.119-308.5.[6] The court held, albeit without specifically citing the Maryland equivalent of S.C. Rule of Prof. Conduct 5.4,[7] that a Maryland attorney working for the accounting firm "would not be allowed to share any fees resulting from those Maryland legal services with non-attorneys."

The same Maryland Committee, in Opinion 2012-12, reached the same conclusion regarding a Maryland licensed attorney associating as outside local counsel with a District of Columbia ABS firm for representation of a Maryland client in a Maryland matter. Citing Maryland's equivalent rule to SCRPC 5.4(a), the Committee concluded that "[n]o Maryland-licensed attorney could ethically associate as outside local co-counsel with an Alternative Structure Firm because doing so, under the 'fee-splitting arrangement" … would require the outside Maryland-licensed attorney to share fees with the Alternative Structure Firm and its nonlawyers." Citing Rules 8.4(b) & (d) and 8.5(b), the Committee made it clear that where the matter involved Maryland clients, Maryland law, Maryland courts, and was otherwise significantly connected to Maryland, no manner of manipulation such as screening the non-lawyer owners from sharing in the fees generated from the Maryland matter would permit the Maryland-licensed lawyer from associating in the matter with the ABS or the ABS from in any way participating in the Maryland matter.

As set forth above, the plain language of Rule 5.4—consistent with the interpretation of its equivalent in other states—prohibits the proposed arrangement. The Georgia Supreme Court's actions regarding lawyers entering fee-splitting arrangements with ABS-affiliated firms and their lawyers further supports this conclusion. Until early 2016, Ga. R. Prof. Conduct 5.4 was worded almost identically to South Carolina's 5.4. Neither the Georgia Supreme Court nor the Georgia Bar attempted to circumvent the plain language of the rule against fee-splitting with non-lawyers. Rather, the Georgia Supreme Court, adopting a proposal from the Georgia Bar, amended Rule 5.4 to expressly allow fee-splitting as follows:

> (e) A lawyer may:
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> (1) provide legal services to clients while working with other lawyers or law firms practicing in, and organized under the rules of, other jurisdictions, whether domestic or foreign, that permit nonlawyers to participate in the management of such firms, have equity ownership in such firms, or share in legal fees generated by such firms; and
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> (2) share legal fees arising from such legal services with such other lawyers or law firms to the same extent as the sharing of legal fees is permitted under applicable Georgia Rules of Professional Conduct.

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[6] This rule is the substantial equivalent of South Carolina Rule 8.5, cited, *supra*, regarding choice of law.

[7] Md. Rule 19-305.4 is substantially the same as SCRPC 5.4 on fee sharing with nonlawyers.

(f) The activities permitted under the preceding portion of this paragraph are subject to the following:

(1) The association shall not compromise or interfere with the lawyer's independence of professional judgment, the client-lawyer relationship between the client and the lawyer, or the lawyer's compliance with these rules; and

(2) Nothing in paragraph (e) is intended to affect the lawyer's obligation to comply with other applicable Rules of Professional Conduct, or to alter the forms in which a lawyer is permitted to practice, including but not limited to the creation of an alternative business structure in Georgia.

Comment:

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[2] The provisions of paragraphs (e) and (f) of this rule are not intended to allow a Georgia lawyer or law firm to create or participate in alternative business structures (ABS) in Georgia. An alternative business structure is a law firm where a nonlawyer is a manager of the firm, or has an ownership-type interest in the firm. A law firm may also be an ABS where another body is a manager of the firm, or has an ownership-type interest in the firm. This rule only allows a Georgia lawyer to work with an ABS outside of the state of Georgia and to share fees for that work.

In the absence of some similar change, such fee splitting is not allowed in South Carolina matters.

Existing South Carolina laws and rules do not permit either the practice model or fee splitting contemplated by the inquiry. Thus, Lawyer cannot directly, or by indirection or willful blindness, do what South Carolina laws and rules do not permit regarding the practice of law in South Carolina, in South Carolina courts, in matters governed by South Carolina law. Undertaking co-representation under these circumstances violates Rules 5.4.

A South Carolina Licensed Lawyer May Not Invest in an ABS that Practices Law.

As to the second question, for the reasons set forth above, a South Carolina lawyer may not become an owner (practicing or non-practicing) in an ABS entity co-owned with nonlawyers that purports to practice law directly through its own lawyers or by association with other lawyers licensed in states where, as in South Carolina, the other states mentioned above, or in other states, rules like SCRPC 5.4, 8.4, or 8.5, statutes or court decisions prohibit fee-splitting with non-lawyers. *See* Tex. Prof. Ethics Comm. Op. 706, sec. 2 (February 2025) (Texas Rule 5.04 prohibits partnering or practicing with a non-lawyer or non-lawyer owned or controlled entity that practices law. "Although a Texas lawyer is generally free to invest in a nonlawyer-owned business that does not engage in the practice of law, a lawyer may not violate the Rules 'through the acts of' the business. *See* Rule 8.04(a)(1)(a lawyer shall not 'violate these rules, knowingly assist or induce another to

do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship').”