



ETHICS ADVISORY OPINION

18-06

The Ethics Advisory Committee renders opinions exclusively to members of the South Carolina Bar concerning ethical issues raised by the inquirer's contemplated conduct not relating to a pending matter. This Committee has no disciplinary authority. Lawyer discipline in South Carolina is administered solely by the South Carolina Supreme Court through its Commission on Lawyer Conduct.

South Carolina Rules of Professional Conduct: 1.7, 1.8, 5.4

Factual Background:

The Ethics Advisory Committee received two inquiries regarding the propriety of associating with a financial brokerage company. The Committee is addressing both inquiries in this opinion because they concern the same legal issue. Lawyer or law firm desires to offer legal services to individuals or parties who are not able to afford the services. The cases are not appropriate for contingent fee contracts. Therefore, the lawyer would associate with a financial brokerage company or other third-party financing vendor. The broker or vendor would apply for financing for the client to pay the attorney's fee, and, if approved for financing, the client would receive financing completely independently of the lawyer or law firm. The broker or vendor charges an initial setup fee, a monthly technology fee for maintaining the payment web page and an administration fee. The lawyer would also pay the vendor or broker a merchant fee, which would be a percentage of the amount financed for the legal fee. The loan service would be explained to clients as a payment option along with any other options such as credit cards, checks, cash, etc. The proceeds of the loan are paid directly to the potential client by the lender. The client then pays a fee to the lawyer in accordance with the relevant fee agreement. The potential client is not required to hire this particular lawyer or law firm, nor is the potential client required to use the money for legal fees. The lawyer or law firm is not responsible for repayment of the loan, either directly or indirectly. The brokerage company or vendor is not referring potential clients to the lawyer; the lawyer/law firm simply desires to use the brokerage company or vendor to enable potential clients to pay legal fees.

Questions Presented:

1. May a lawyer or law firm associate with the brokerage company or vendor under the proposed arrangement?

2. Do any of the fees paid to the broker or merchant constitute the prohibited sharing of legal fees with non-lawyers pursuant to Rules 1.7, 1.8, 5.4 or any other Rule?

Summary:

The arrangement does not violate any Rules of Professional Conduct assuming the fees paid by the lawyer or law firm to the broker or vendor are reasonable fees for the service provided in the industry. The fees are not paid for the purpose of getting a referral. The fees are not paid for legal work performed by a non-lawyer. The broker is not referring cases to the lawyer so the lawyer is not paying for referrals.

Discussion:

Rule 1.7 and Rule 1.8 relate to conflicts of interest involving current clients. Rule 1.7(a) prohibits representation if the representation involves a concurrent conflict of interest. Under the facts presented, the representation of the potential client will not be directly adverse to another client, and there is no significant risk that the representation of the potential client will be materially limited by the lawyer's responsibility to anyone else. The lawyer is not undertaking any responsibility to the broker, the vendor, or the lender to repay the loan.

Rule 1.8 is not applicable because the lawyer has not acquired an ownership or other interest in the lending institution company or the brokerage/vendor. The lender has loaned the money to the client and the client then pays the lawyer. Rule 1.8(e) states that a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation. 1.8(e) only applies to pending or contemplated litigation, so if the matter is anything other than a litigation matter, this particular rule is irrelevant. Even with regard to pending or contemplated litigation, the lawyer has not provided financial assistance to the client in connection with the litigation. The lawyer is merely paying a fee akin to advertising to the broker or vendor. In return for the service of the broker or vendor, the broker/vendor arranges a loan to the potential client.

The lawyer has not given the potential client anything; instead the lawyer has paid money to the lender or vendor or broker in order to help the lawyer himself receive a fee. While the lawyer's actions have indirectly enabled the client to obtain legal services, it is no different than if a lawyer reduces his fee; a lawyer has the discretion to charge a reduced fee. Comment 10 to Rule 1.8 discusses financial assistance. This Comment prohibits making or guaranteeing loans for living expenses; the lawyer has not loaned the client anything in this case. This is the case only if the client is not responsible for paying the merchant fee and the basis for the imposition of the fee does not exceed the amount of the legal fee.

Rule 5.4 states that a lawyer shall not share fees with a non-lawyer or form a partnership with a non-lawyer. It also prohibits a lawyer from permitting a person who pays the lawyer from directing or regulating the lawyer's professional judgement. None of this applies because the lender is not paying the lawyer. The lender is paying the client who then pays the lawyer; in any event the lender, the broker, or the vendor are not directing or regulating the lawyer's professional judgement in rendering the legal services.

Previous Ethics Advisory Opinions of the South Carolina Bar have addressed issues such as payments by lawyers to third parties. The use of “Daily Deal” websites to sell vouchers for discounted services when the proceeds of the purchase are split between the lawyer and the service offering the voucher was found not to violate Rule 5.4(a) prohibiting the splitting of legal fees with non-lawyers in Ethics Advisory Opinion 11-05. The Committee found that the payment to the website provider was either the reasonable cost of advertisement or communications permitted by Rule 7.2(c)1 or was consistent with the policy of the rule, which is to prevent interference with a lawyer’s independent professional judgement. Regarding the payment to the third-party service provider, EAC 11.05 opined:

The fee charged by a company for use of its service (i.e., a percentage of the money paid by the customer for the discounted coupon) constitutes the payment of ‘the reasonable cost of advertisements or communications’ permitted under Rule 7.2(c)1 and not the sharing of a legal fee with a non-lawyer prohibited by Rule 5.4(a).

South Carolina Ethics Advisory Opinion 08-02 found that a lawyer may ethically enter into a fee payment arrangement with clients and a trade credit account processor, when “the lawyer here pays the associated fees as a premium for receiving payment early from TCAP.”