

Ethics Advisory Opinion

21-01

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.

S.C.R. Prof. Conduct: Rule 7.2

Factual Background Client A applied for a loan refinance with Bank. Bank issued a loan estimate package that provided the name of a specific licensed SC attorney that “We [the Bank] identified” as one who could provide legal services related to the loan closing. The package expressly stated that Client A could “shop for your own providers” for legal and other services related to the transaction. The package and disclosures are assumed to be compliant with federal and state requirements for loan applications and attorney-preference notices.

Client A then informed Bank that she intended to use a different lawyer, Lawyer A, to serve as her lawyer for the loan closing. Subsequently, bank-created loan estimate documents provided to borrower prior to closing again identified as a potential service provider a SC licensed lawyer other than Lawyer A, while again noting Client A could choose “your own provider.”

Client A inquired of Bank why another lawyer’s name, instead of Lawyer A who had previously been specifically elected, had appeared on the estimate form. Bank responded by offering information regarding how Lawyer A could sign up with a third-party company that Bank had contracted with to produce such loan forms, and Lawyer A learned that an annual fee of \$249 was required to be included as an “identified” service provider on such forms.

Lawyer A, Client A’s chosen provider, did not enroll in the offered program to become listed as a potential service provider on bank forms, but did close Client A’s loan transaction as desired by Client A.

Question Presented

May Lawyer A participate in Company’s service provider network for an annual fee of \$249.00 and be listed as an “identified” service provider that a Bank customer may choose without violating S.C. Rule of Professional Conduct 7.2(c)?

Summary

Yes. Lawyer A may pay the fee and participate in Company’s network of legal service providers and be “identified” as a possible service provider to customers of the Banks serviced by Company.

Discussion

Rule 7.2(c) generally provides that a “lawyer shall not give anything of value to a person for recommending the lawyer's services” It contains three exceptions, one of which is relevant here: “a lawyer may (1) pay the reasonable costs of advertisements or communications permitted by this Rule....” S.C. Rule of Prof. Responsibility 7.2(c)(1).

Comment 7 to Rule 7.2 states that “[a] communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities.” The Bank’s and Company’s form only provides contact information for the participating lawyers and only makes three statements regarding the lawyers: (1) “this list identifies some providers for services you can shop for;” (2) “You can select these providers or shop for your owner providers;” and (3) “Provider We Identified.” These limited statements hardly match up to the verbs and nouns used to describe a “recommendation” in the comment. The language of the forms says nothing substantive about the listed lawyer’s credentials, abilities, competence, character, or professional quality beyond the fact that the lawyer might provide services should the customer “shop for” the lawyer and choose to use the listed lawyer. In this regard, the service is more like a directory listing of lawyers holding themselves out as able to provide services (like a phone book) as described in Comment 7 to Rule 7.2 rather than a third-party statement directing a potential client to a particular lawyer based on some credential or quality of the lawyer. If these statements are recommendations at all, they are of the faintest quality. In the absence of a recommendation, Rule 7.2 does not apply. Rather, the payment fits neatly within the stated exception for paid advertising in the form of listings.

Assuming the form generated for Bank by the Company and listing lawyers enrolled in the program is “recommending the lawyers services,” based on the information provided, participation in the network appears to be open to any attorney practicing in the area of real estate law willing to provide services. The fee charged appears to be reasonable in light of the enrollment, onboarding, and maintenance charges of Company in including attorneys in its network. *See* S.C. Bar Ethics Adv. Op. # 01-03 (Lawyer may participate in internet service that charges based on a reasonable schedule of monthly or yearly advertising fees or on a “per hit” basis); S.C. Bar Ethics Adv. Op. # 07-08 (Lawyer may participate in advertisement in conjunction with real estate company “as long as Lawyer pays the reasonable costs of the advertisement”) Thus, paying the Company’s fee for participation in its network of services providers does not violate Rule 7.2.