

ETHICS ADVISORY OPINION

11-03

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 would like to offer to the general public, probably through one or more charities or religious organizations, that he will prepare powers of attorney for no compensation to the lawyer. Lawyer will instead require that each power-of-attorney client make a contribution to the charity or religious organization involved of \$25 or more. Each power-of-attorney client will be responsible for all out-of-pocket expenses, such as recording costs where required.

The incentive to do this is the perception that many people do not have powers of attorney. Some of these persons are active clients, and some are not but have no means in place of managing property in the event of incapacity

Only "basic" powers of attorney will be provided. It is not the purpose of this program to serve people who need more than a basic power of attorney. Lawyer will meet with each client to discuss the need for a power of attorney, the details of the program, and the requirement of a competency letter from a medical provider to show the client's competency to execute a power of attorney. Lawyer will then set appointment times when Lawyer will see many clients in a short period of time to complete and execute each power of attorney, not spending much time on any one. Clients who need more attention will be advised to seek advice from a qualified attorney. They will be advised to talk to their own attorney if they have one, or they can call Lawyer's office to make an appointment. No further assistance will be provided at the appointments held under this program.

Question Presented:

Does providing free powers of attorney in exchange for donations to charitable or religious organizations violate the Rules of Professional Conduct?

Summary:

No, the proposed program does not violate the Rules, provided Lawyer does not allow the charitable organization to influence his independent judgment.

Opinion:

The proposed program does not violate the Rule 5.4(a) prohibition on sharing legal fees with a non-lawyer. In the Committee's view, the donations are not legal fees for several reasons. First, the amount of the donation is unspecified by Lawyer and possibly unknown to Lawyer, beyond the \$25 minimum. \$25 is not reflective of a legal fee for even a simple power of attorney, considering that Lawyer will meet with each client individually regarding competency and powers of attorney generally, then meet again to complete and execute each document. Finally, there appears to be no direct or indirect benefit to Lawyer from the \$25 other than the marketing of his practice. Under the facts of this inquiry, the Committee does not believe the donations equate to fees for purposes of Rule 5.4. Even if it is a "fee," in the Committee's view, it does not violate Rule 5.4 because the facts do not suggest any encroachment on Lawyer's independent judgment. See Rule 5.4 cmts. 1 & 2 ("These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client ... recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment. ... This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another.")

The program also does not violate Rules 7.2 or 7.3. Whatever the form of Lawyer's "offer" of services through the charity, the offer will surely be an advertisement; therefore its content must conform to Rule 7.2 (and, as with any communication, it must conform to Rules 7.1 and 7.4 regardless). However, once a client signs up for the program, offering further legal services for an additional fee does not violate the in-person solicitation prohibition of Rule 7.3 because, by then, the person is an existing client excepted from the prohibition by subsection (a)(2). Furthermore, even if members of the charitable organization initially solicit clients for Lawyer (or solicit donations by offering Lawyer's services as an inducement), in-person solicitation through a non-employee who is not paid or controlled by the lawyer does not violate Rule 7.3(a). See *In re Anonymous*, 386 S.C. 133, 687 S.E.2d 41 (2009).

In *Anonymous*, a lawyer gave discount coupons for his services to realtors and lenders, asking them to give the coupons directly to their customers who may be in need of legal services. This Committee had advised in Opinion 07-09 that a lawyer who does so would violate Rule 7.3(a) through the acts of another, which is prohibited by Rules 5.3(c) and 8.4(a). The Supreme Court in

Anonymous expressly overruled 07-09, finding that the realtors and lenders are not controlled by the lawyer and “because the lawyer is not physically present, there is no insistence upon immediate retention or ‘importuning of the trained advocate.’” Id. at 141, 687 S.E.2d at 46.

As in Anonymous, the members of the charity are not Lawyer’s employees and are not paid or controlled by him. Thus they are free to disregard his offer (whatever form it takes) and not pass it on. Unlike the discount coupon in Anonymous, Lawyer is offering free services, or a 100% discount. The Committee sees no meaningful distinction here for advertising and solicitation purposes. Unlike the facts in Anonymous, the charitable organizations here will receive a benefit—a donation of \$25 or more—but not from Lawyer. Lawyer will not control, and may not even know, the amount of the donation beyond the \$25 minimum. Therefore, the Committee does not believe that requiring clients to donate at least \$25 to a charity violates the Rule 7.2(c) prohibition on a lawyer giving something of value in exchange for the referral of business. Were Lawyer charging a fee and then giving it or any portion of it to the charity, the conduct would violate Rule 7.2(c). Furthermore, if a specific dollar-value donation resulted in an equivalent fee discount (e.g., a \$25 fee discount for a \$25 donation), the arrangement might more closely resemble a lawyer indirectly giving something of value in exchange for referrals. However, in the Committee’s view, free powers of attorney in exchange for a mere \$25 minimum—and otherwise unspecified—donation to charity is more in the nature of a “loss-leader” service to advertise a lawyer’s practice and not an improper referral fee.

This Committee advised in 2000 that a lawyer may conduct free public seminars to generate business, but whether any in-person contact constituted a solicitation depended on whether the lawyer or the potential client initiated the contact. See EAO 00-09. In the present inquiry, by the time Lawyer meets with any client, the client has initiated the contact and made an effort toward receiving legal services from Lawyer. To view the charity’s contact with the client as an initiation on behalf of Lawyer would be to ignore In re Anonymous.

The Committee advises, however, that Lawyer must reasonably ensure the charity’s conduct in promoting Lawyer’s services complies with Rules 7.1, 7.2, 7.3(b)-(i)[1], and 7.4. See Rules 5.3 and 8.4(a).