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Ethics Advisory Opinion 12-03

2012 12-03

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Opinion



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.

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Facts

The website www.justanswer.com allows members of the public to post questions concerning a number of different topics for a fee. The website allows different professionals, which it calls “experts”, to answer a question in his or her respective field. The website’s “Terms of Use” provides that “Use of the term ‘Expert’ by the website and on the Site is only meant to describe users who answer questions on the Site, and not to guarantee any particular level of expertise of these Experts.”

Members of the public may ask questions that will be answered by lawyers, doctors, nurses, mechanics, and other professionals. Members of the public pay the website a fee to be able to ask questions. In turn, the professional, here a lawyer, would receive the questions from the member of the public and would answer the question. After the question is answered, the lawyer is paid a fee from the website for answering the question for the member of the public. Members of the public could be from and ask a question concerning any state or other jurisdiction and are not limited to South Carolina.

The lawyer and the website enter an agreement that provides the terms of their relationship. In pertinent part, the following applies specifically to lawyers: Experts in the Legal categories must be attorneys licensed to practice law, and be in good standing in at least one jurisdiction in the United States or foreign country. Such Experts shall provide general information only, such as providing descriptions of general principles of law, and shall not provide legal advice. In responding to questions, Experts in the Legal Category shall not apply their legal knowledge or skills to resolve or advise on the Customer's specific factual circumstances described in the question, such as by proposing a specific course of action (other than advising the User to seek the advice of an attorney

licensed to practice in the relevant jurisdiction). Experts in the Legal Category shall not form an attorney-client relationship on the Site.

Question

May a South Carolina lawyer answer questions on this site or similar sites for compensation without violating any Rules of Professional Conduct?

Summary

The website's use of testimonials, endorsements, the word "expert," and other misleading statements prohibit Lawyer's participation. The site invites specific questions about specific legal matters and offers specific legal advice but uses buried small-type statements to attempt to disclaim the creation of attorney-client relationships and to warn against reliance on the advice. The Committee believes Lawyer's participation under these circumstances would be improper.

As to legal information websites in general, if a website complies with all communications and advertising rules, Lawyer could participate in such a program but with specific caution against inadvertently forming an attorney-client relationship by offering more than basic information of general applicability. Where legal advice is provided, it is improper for Lawyer to accept compensation from the website provider without complying with Rule 1.8(f).

Opinion

This inquiry raises essentially three issues: 1) advertising or communicating through third-party legal information providers, 2) offering legal advice through such providers, and 3) receiving compensation from someone other than a client.

The Committee's review of this specific website disclosed several additional facts relevant to this analysis. The website provides a boilerplate initial response to posed questions that reads in part, "Hi, JustAnswer has asked me to answer your question ... because it falls

within my area of expertise. I just need a few more details about your situation and I will get to work.” The website states “CUSTOMER SATISFACTION GUARANTEED.”

The attorneys available to respond to questions are initially identified by photograph and user name (e.g. “John1234”). It is not clear whether lawyer names or contact information is available later in the inquiry process. Some lawyers are described as “expert” in several places and “VERIFIED EXPERT.” Lawyers’ profiles include lists of practice areas under the heading “Expert in:...”. Lawyers’ profiles include testimonials and endorsements without disclaimers under the heading “Recent Feedback for [lawyer].” The “Recent Answers” attributed to the individual lawyers consist mostly of specific legal advice given in response to detailed questions about specific matters. A small percentage of answers were legal information of general applicability. At the bottom of the page containing a lawyer’s answer to a question, in smaller type than all of the substantive and promotional information on the page, is the following disclaimer:

DISCLAIMER: Answers from Experts on JustAnswer are not substitutes for the advice of an attorney. JustAnswer is a public forum and questions and responses are not private or confidential or protected by the attorney-client privilege. The Expert above is not your attorney, and the response above is not legal advice. You should not read this response to propose specific action or address specific circumstances, but only to give you a sense of general principles of law that might affect the situation you describe. Application of these general principles to particular circumstances must be done by a lawyer who has spoken with you in confidence, learned all relevant information, and explored various options. Before acting on these general principles, you should hire a lawyer licensed to practice law in the jurisdiction to which your question pertains.

The responses above are from individual Experts, not JustAnswer. The site and services are provided “as is”. To view the verified credential of an Expert, click on the “Verified” symbol in the Expert’s profile. This site is not for emergency questions which should be directed immediately by telephone or in-person to qualified professionals. Please carefully read the Terms of Service.

Finally, paragraph 7 of the “Terms of Service” for paying customers states, “Experts in the Legal category will provide only general information about the law, and will not provide legal advice nor propose a specific course of action for a User. By answering questions, Experts do not form attorney-client relationships with Users of the Site.”

Communication and Advertising

In this case, the provider’s website identifies its lawyers as “experts.” Rule 7.4(b) prohibits the use of the word “expert” or any variation thereon in lawyer advertising and public statements, with few exceptions not applicable here. The inquiry does not state whether Lawyer would be identified to inquirers through the website. If so, the provider’s use of the word “expert” would prohibit Lawyer’s participation. The website’s disclaimer regarding the meaning of the word “expert” will not prevent Lawyer’s participation therein from violating Rule 7.4.

A lawyer considering using a legal-advice website or similar program should be careful to review the information provided to the public and ensure that it would not violate any of South Carolina’s communication and advertising rules before participating in the program. Where such a program identifies the participating lawyer, whether she may participate will depend upon whether the provider’s public content conforms to the rules governing lawyer communications and advertising. If Lawyer is not identified by the web site, but merely answers questions anonymously, the advertising concerns are not present but the general communications rules still apply to Lawyer’s communications through the service. See Rule 7.1.

In this case, justanswer.com provides testimonials and endorsements that do not contain the statements required by Rule 7.1(d). It also provides misleading information in that it disclaims the creation of attorney-client relationships despite that it appears likely to create them, as discussed below. Attempting to disclaim (through buried language) an attorney-client relationship in advance of providing specific legal advice in a specific matter, and using similarly buried language to advise against reliance on the advice given is patently

unfair and misleading to laypersons.

Finally, the language of the disclaimer, including the “as is” clause, may be construed as an attempt to prospectively limit the lawyer’s liability for the advice given, which would violate Rule 1.8(h) and therefore be deceptive in violation of Rule 7.1.

Attorney-Client Relationship

In Ethics Advisory Opinion 86-04, the Committee noted that “[l]awyers have long been encouraged to participate in educational and public relations programs concerning our legal system.” In Ethics Advisory Opinion 94-27, this Committee advised that an attorney may participate in online educational and informational programs for the purpose of discussing legal topics generally, as long as he provides no specific legal advice. The Committee likened such an online service to a lawyer’s participation in live public informational seminars and educational programs, citing several jurisdictions that likewise allow the practice, provided that no specific legal advice is given to individuals. A website, like a radio call-in show, is more problematic than a public seminar, as it is more likely to result in specific advice to an individual.

A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writing by lawyers for laymen should caution them not to attempt to solve individual problems upon the basis of the information contained therein. The attorney requesting this ethics advisory opinion would attempt to comply with these restrictions by providing general advice, only, and by cautioning listeners that answers given might not apply to their individual cases, and that they should seek the services of an attorney for advice on their specific problems.

S.C. Ethics Adv. Op. 86-04 (discussing a lawyer’s participation in an “ask-a-lawyer” radio call-in show).

The Ohio Supreme Court's Board of Commissioners on Grievances and Discipline advised in opinion 94-13 that "particular caution is warranted" in formats that invite individuals to ask questions. The website in this inquiry likewise appears to invite questions and is therefore more likely to result in the creation of attorney-client relationships than a public seminar.

This website specifically disclaims the formation of any attorney-client relationships through its web service; however, such a disclaimer may not be effective if a participating lawyer provides specific advice to an individual:

Even the use of a disclaimer may not prevent the formation of attorney-client relationships if the parties' subsequent conduct is inconsistent with the disclaimer. Indeed, a lengthy scholarly examination of various jurisdictions' law on the topic reached the same conclusion. Professor Catherine Lanctot argues that the broad "click through" disclaimers typically used by web sites offering live attorney chat rooms, though helpful in avoiding inadvertent formation of attorney/client relationships, may not prevent the formation of such relationships in cases in which subsequent on-line communications involve a consumer asking for and an attorney providing specific legal advice tailored to the facts of the consumer's particular situation.

D.C. Ethics Adv. Op. 316 (2002) (footnotes omitted).

The D.C. Ethics Advisory Committee advised against providing legal advice to putative clients, but distinguished legal advice from legal information. As that committee noted, discussion of legal principles, trends, and majority/minority rules amounts to nothing more than information of general applicability, similar to giving a speech or writing a newspaper article, whereas inviting or responding to unique facts of a particular person's circumstances may amount to legal advice and may inadvertently create an attorney-client relationship. See also Florida Bar Standing Comm. on Advertising Op. A-00-1 (2010 revised).

Because this specific website asks lawyers to provide specific legal advice in response to detailed questions, it is substantively inviting the creation of attorney-client relationships despite its likely ineffective attempts to disclaim them. Initial boilerplate responses to questions include requests for “more details about your situation” and the advice provided is often specific and contains legal conclusions based on application of the law to the facts presented. At a minimum, justanswer.com provides, not just question-and-answer, but a specific question-and-paid-professional-answer service that removes it from the radio call-in show/public seminar paradigm described in prior advisory opinions and is irreconcilable with the site’s disclaimers.

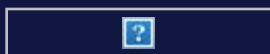
The present inquiry goes beyond justanswer.com and seeks an opinion regarding lawyers’ participation in legal web sites in general. Lawyers may participate in such sites only to the extent their participation (1) is limited to providing information of general applicability, and (2) the lawyer’s individual responses clearly advise against any reliance on the information as advice or application of it to a specific situation without a more thorough consultation with counsel. See also New York City Ethics Op. 1998-2 (1998). When an inquirer attempts to explore specific circumstances with a participating lawyer, the lawyer should decline to respond beyond advising the inquirer to seek legal advice; otherwise, she risks creating an attorney-client relationship.

If a lawyer is willing to create an attorney-client relationship through a general information service, all the rules and other law applicable to the relationship would apply. The Committee specifically cautions lawyers to treat online communications with potential clients just as they would a live meeting, specifically regarding conflict checking and “prospective clients.” However, because this particular website specifically disclaims the creation of attorney/client relationships, a lawyer’s use of the website to create them would be tantamount to false, “bait and switch” advertising by the lawyer.

Third Party Compensation

Rule 1.8(f) prohibits a lawyer from receiving compensation for representing a client from anyone other than the client unless: “(1) the client gives informed consent; (2) there is no

interference with the lawyer’s independent professional judgment or with the client-lawyer relationship; and (3) information relating to the representation is protected as required by Rule 1.6.” Where information provided through a website is limited to general information and not specific advice, and no attorney-client relationship is created, Rule 1.8(f) is not implicated. However, where providing legal advice regarding a specific matter does result in the formation of an attorney-client relationship, a lawyer may not accept compensation from the service provider unless she complies with Rule 1.8(f).



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