ETHICS ADVISORY OPINION
23-04

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.

SC Rules of Professional Conduct: 1.7, 1.9, 1.14, 2.1

Facts:

Lawyer drafted wills and powers of attorney for a married couple about ten years ago. They left almost everything to each other (a few specific gifts to children) and named each other as power of attorney. Wife has since been diagnosed with dementia and cannot make her own decisions. Her Husband is acting as her power of attorney. Husband now wants to change his will to remove Wife as his primary beneficiary and change his powers of attorney to his children since Wife can no longer serve. He would still leave her the contents of their house and possibly a life estate in their home - she is not a co-owner.

Questions Presented:

1. Since Lawyer represented both Husband and Wife in preparing the previous documents, is it a conflict of interest per Rule 1.9 to prepare the will and power of attorney for Husband with the requested changes?

2. If there is a conflict under Rule 1.9, can Husband give written informed consent to the conflict as Wife's Agent under her power of attorney?

Summary:

Lawyer previously represented both Husband and Wife, so for purposes of Rule 1.9, the questions are: i) whether drafting new documents for Husband with the proposed changes is a "substantially related matter" to drafting the documents for Him, and if so, ii) whether the changes would be "materially adverse" to the interests of Wife; and iii) whether there is any information from the prior representation that could be used to the disadvantage of Wife that was not already shared with Husband during the prior joint representation. Section 1.9(b) would not apply to this fact situation.

Although the prior representation may be related to Lawyer's work in drafting the new documents, it will not be regarded as "substantially related" unless they "involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual

information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Because one can assume the documents executed 10 years ago effected Husband's intentions and direction at that time, any facts giving rise to Husband's direction to prepare a new will and power of attorney presumably would have arisen since that time. Furthermore, the preparation and execution of the new documents are not based on any substantive legal issues or claims, but merely the present intentions and direction of the husband. Lawyer does not need any information from the former representation or to reveal any such information for the preparation or execution of the new documents. New estate planning documents could be drafted to effectuate Husband's intentions regardless of whether any prior documents exist. It therefore cannot be said that the proposed representation is substantially related to the prior representation.

Opinion:

When an attorney submits an inquiry to this Committee, ordinarily the facts submitted will be deemed to be true, and unless the Committee believes those facts to be ambiguous, the Committee will not ask for details regarding the circumstances underlying the facts. Although there may be undisclosed circumstances that might affect the Committee's opinion if known, the opinion of the Committee will be based only upon the facts submitted. If additional facts that might be material to the opinion are not covered by the facts, the Committee's opinion may be qualified to take the unknown facts into account. See Comment 5 to Rule 2.1.

1. Duty to Former Client

Rule 1.9 outlines a lawyer's duties to former clients. Here, Rule 1.9(a) and Rule 1.9(c) are directly relevant:

> **1.9(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.**
>
> **1.9(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:**
> **(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or**
> **(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.**

Lawyer previously represented both Husband and Wife, so for purposes of Rule 1.9(a) and (c) the questions are: a.) whether drafting new documents for Husband with the proposed changes is a "substantially related matter" to drafting the documents for Him, and if so, ii) whether the changes would be "materially adverse" to the interests of Wife; and iii) whether there is any information from the prior representation that could be used to the disadvantage of Wife that was not already shared with Husband. Section 1.9(b) would not apply to this fact situation.

i) Substantially Related Matter. Leaving aside the analysis of Husband's power to act on behalf of Wife as her agent, which will be discussed below, Husband's new will disinheriting her, and his new power of attorney would be adverse to her (although not necessarily materially adverse, as discussed below), and Lawyer's representation in drafting his new documents could be prohibited if it was substantially related to drafting the earlier documents. (Paraphrasing SC Bar Ethics Opinion10-03, extensively quoted in this section of the opinion.)

In Opinion 10-3, the question was whether it was a conflict under Rule 1.9 for an attorney whose firm closed a real estate transaction to later represent a Homeowners' Association whose interest was potentially opposed to that of the owner of the property. Opinion 10-3 was based on *In re Anonymous*, 298 S.C. 163, 378 S.E.2d 821 (1989), in which the South Carolina Supreme Court held that representing a borrower in a residential transaction and later representing the lender in foreclosure does not create an appearance of impropriety. As stated in the opinion, "The appearance of impropriety'" standard, applicable at the time, was a higher standard of conduct (i.e., a lower conflict threshold) than the "substantially related" test under Rule 1.9. … Therefore, what was proper under the former test must be proper under [Rule 1.9]."

Per Opinion 10-3, "the rule and comments appear directed at subsequent representation that involves either legal advice on the same specific substantive issues or legal claims based on the same facts. In short, not all related matters are substantially related for Rule 1.9 purposes."

Comment 3 to Rule 1.9 states that "Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."

Because one can assume the documents executed 10 years ago effected Husband's intentions and direction at that time, any facts giving rise to Husband's direction to prepare a new will and power of attorney presumably would have arisen since that time. Furthermore, the preparation and execution of the new documents are not based on any substantive legal issues or claims, but merely the present intentions and direction of the husband. Lawyer does not need any information from the former representation or to reveal any such information for the preparation or execution of the new documents. New estate planning documents could be drafted to effectuate Husband's intentions regardless of whether any prior documents exist. It therefore cannot be said that the proposed representation is substantially related to the prior representation.

ii) Materially Adverse. According to the reasoning of ABA Formal Opinion 05-434, December 8, 2004 (concerning concurrent representation under Rule 1.7), discussed a testator who

wished to disinherit a beneficiary where both the testator and the beneficiary were current clients of the same lawyer:

> "Direct adverseness requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests. … [A] testator is, unless limited by contractual or quasi-contractual obligations or by state law, free to dispose of his estate as he chooses, or to consume his entire estate during his lifetime or give it all away, leaving nothing to pass under his will. A potential beneficiary, even one who has been informed by the testator that he has been named in a testamentary instrument, has no legal right to that bequest but has, instead, merely an expectancy. Thus, except where the testator has a legal duty to make the bequest that is to be revoked or altered, there is no conflict of legal rights and duties as between the testator and the beneficiary and there is no direct adverseness.
>
> The preparation of an instrument disinheriting a beneficiary ordinarily is a simple, straightforward, almost ministerial task, without call for the lawyer to consider alternative courses of action, and it is difficult to imagine a circumstance in which a responsibility of the lawyer to her other client (even a client who is a presumptive beneficiary of the testator's bounty) would pose a significant risk of limiting the lawyer's ability to discharge her professional obligations to the testator."

The facts as given do not indicate that Husband has asked for Lawyer's advice to the effects of the new documents beyond merely informing Lawyer of his desire for change of beneficiary in the will, or the change of agent in the power of attorney. If the impetus for new documents came from Husband and not on the advice of Lawyer, there is no direct adversity. Even if Husband and Lawyer did consult on the matter, and the change was made on the advice of Lawyer, it would be a matter of fact whether the new documents were adverse to Wife's interest. It should be noted that Wife's personal representative could produce the same result by executing a disclaimer of her inheritance from Husband.

iii) Information from Prior Representation. Except as noted above, in drafting the new documents for Husband, Lawyer does not need to refer to any information from the prior representation or to reveal any such information. Thus, Rule 1.9(c)(2) is not implicated.

2. Power of Attorney

Although the Committee has concluded that no conflict exists in this scenario, even if there had been a conflict, what power Husband has as Wife's Agent is a matter of fact and law and dependent upon just what is specified in the power of attorney, and the application of the South Carolina Uniform Power of Attorney Act, Title 62, Article 8, South Carolina Code of Laws. Section 62-8-114 of the Act appears to have language relevant to this matter, but the interpretation of that section and application to the facts herein in connection with Husband's authority under Wife's power of attorney are not within the remit of this Committee, and no opinion can be expressed on those matters. The issue of informed consent is also a matter of fact and law, and no opinion can be given on that issue for much the same reasons.