

ETHICS ADVISORY OPINION

22-01

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. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

SC Rules of Professional Conduct: 1.18.

Facts: Lawyer receives an unsolicited email message from an individual (the “Sender”) with whom lawyer has no prior relationship. The unsolicited email message is captioned “Land Title Dispute”, requests the lawyer’s “legal insight on a real estate situation”, and includes a description of the underlying facts together with an inquiry as to the lawyer’s opinion about whether the Sender has “a legitimate claim” based on the recited facts.

Lawyer quickly realizes that the facts recited in the unsolicited email message relate to a matter in which the lawyer and a client of the lawyer have adverse interests to those of the Sender. By email reply, Lawyer promptly informs the Sender of those adverse interests and informs the Sender “that I cannot represent you”. Lawyer goes on to write, “Please let me know if and when you are represented by other counsel and I will happy to communicate with them regarding this matter.” Lawyer also takes the opportunity to inform the Sender that Lawyer believes the Sender’s “proposal to profit off of this mistake is both theft and fraud”. The Sender responds via email reply taking exception to Lawyer’s characterization of the Sender’s position.

Question Presented: Does Lawyer have an ethical obligation to maintain the confidentiality of the information provided by the Sender since it was provided in the course of seeking legal advice?

Summary: No, Lawyer has no ethical obligation to maintain the confidentiality of the information provided by the Sender, because the Sender is not a prospective client as defined in Rule 1.18.

Opinion: It is clear from the facts that the Sender is neither a current client nor a former client of Lawyer. The answer to the question of Lawyer’s confidentiality obligations to the Sender depends upon whether the Sender is a “prospective client” of Lawyer pursuant to Rule 1.18. Rule 1.18(a) reads: “A person who engages in mutual communication with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client only when there is a reasonable expectation that the lawyer is likely to form the relationship.” Comment 2 to Rule 1.18 is instructive on these facts and reads: “Not all persons who communicate information to a lawyer are entitled to protection under this Rule. ...A person who communicates information unilaterally to a lawyer without any reasonable expectation that the lawyer is willing to discuss the



possibility of forming a client-lawyer relationship is not a “prospective client” within the meaning of paragraph (a).”

These facts call for a clear application of Comment 2 to Rule 1.18. While Rule 1.18 imposes certain confidentiality requirements and other protections for the benefit of prospective clients, the Sender’s unilateral email message to Lawyer did not elevate the Sender to prospective client status since the Sender could not have had a reasonable expectation that Lawyer was likely to form a client-lawyer relationship. On these facts, the Sender does not meet the definitional test of “prospective client”; hence, the Sender is not entitled to the benefits afforded to prospective clients pursuant to Rule 1.18, and Lawyer has no ethical obligation to maintain the confidentiality of the information provided by the Sender.