Ethics Advisory Opinion

26-03

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.

Facts:

In connection with a commercial real estate refinancing, borrower's counsel has performed all title searches and has investigated all use aspects of the land. The title insurance company (Title Co) has retained Attorney A to review the closing documents solely to determine whether they are in recordable form. Title Co is a large, national, publicly traded organization with in-house legal and risk-management departments, as well as outside counsel. Title Co is sophisticated and well-versed in their line of work.

Questions Presented by Inquirer

1. Is it ethical for Attorney A to enter into an agreement prospectively limiting Attorney A's liability to Title Co for malpractice?

2. Is it ethical under Rule 1.2(c) for Attorney A to enter into an agreement with Title Co limiting the scope of Attorney A's representation solely to determination of whether the closing documents are in recordable form?

3. If the answer to #2 is "yes," is it ethical for Attorney A to enter into an agreement prospectively limiting Attorney A's liability to Title Co for malpractice related to aspects of the closing outside of the agreed-upon scope of representation.

Summary of Answers

1. Yes. Under the facts presented, Rule 1.8(h) permits a lawyer to enter into an agreement prospectively limiting the lawyer's liability to the client for malpractice if the client is independently represented in making the agreement.

2. Yes. Under the facts presented, Rule 1.2(c) permits a lawyer to limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.

3. Yes, although such an agreement would be unnecessary because a client cannot assert a malpractice claim against a lawyer for work outside the agreed-upon scope of representation.

Opinion

Question One:

Rule 1.8(h) of the Rules of Professional Conduct provides:

> A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement.

Comment 15 further explains, with respect to settlement of potential malpractice claims, that:

> in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement.

Together, Rule 1.8(h) and Comment 15 indicate that under the facts presented, Attorney A may enter into an agreement with Title Co to prospectively limit Attorney A's malpractice liability as to the determination of the recordability of the loan documents. Regardless of Title Co's sophistication and Attorney A's knowledge that Title Co has both in-house and outside counsel, Rule 1.8(h) requires that Attorney A specifically advise Title Co in writing to obtain the advice of independent counsel prior to executing the agreement.

Question Two:

Rule 1.2(c) provides:

> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

"Informed consent" means that "the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(g), RPC. Title Co's sophistication and the presence of in-house and outside counsel may be relevant to the reasonableness of the scope limitation, but neither factor removes from Attorney A the burden of providing sufficient information for Title Co to make an informed decision. *See In re Breckenridge*, 416 S.C. 466, 479, 787 S.E.2d 466, 472 (2016); *In re Pstrak*, 357 S.C. 1, 5, 591 S.E.2d 623, 625-26 (2004).

It appears that on the facts presented, limiting representation to determining the recordability of the closing documents would be reasonable under South Carolina law. In *Boone v. Quicken Loans, Inc.*, 420 S.C. 452, 803 S.E.2d 707 (2017), the South Carolina Supreme Court considered a loan refinancing process wherein an attorney "personally reviewed the title abstract and accompanying documents" and certified them. *Id.* at 457-58, 803 S.E.2d at 710. It appears the attorney who certified the title abstract performed no other work relating to the transaction and did not verify that any other step in the transaction had been performed by an attorney. Here, Title Co—a commercially sophisticated actor independently advised by counsel—has itself determined the limited scope of services it is asking Attorney A to provide. Under these circumstances, it appears that the limitation on the scope of representation is reasonable. *Cf.* EAC 26-01; EAC 05-08.

Question Three:

The third question asks whether Attorney A and Title Co may agree to prospectively limit Attorney A's malpractice liability for tasks he or she was not retained to perform. Consistent with the answer to Question One, such a limitation is permissible so long as Title Co is advised by independent counsel. However, such an agreement would be superfluous because a lawyer cannot be liable for malpractice as to tasks the lawyer was not retained to perform.