

ETHICS ADVISORY OPINION

08-09

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 received call from A requesting an appointment to discuss cousin ("Cousin") whom A informed Lawyer's staff was mentally deficient. Cousin is an only child, and Cousin's mother and father, both deceased, owned property at their deaths. Cousin's mother's estate had been probated, and the property was conveyed to Cousin and Cousin's father by deed of distribution. Cousin's father's estate had not been probated. Lawyer researched records and confirmed property ownership and estate status. A brought Cousin's aunt ("Aunt B") and uncle ("Uncle") to the appointment. A explained that Cousin is mentally incapacitated; however, there has never been a judicial determination of such. Cousin receives Medicaid and Veterans Administration benefits and has no brothers or sisters. Cousin's aunt ("Aunt C") acts as caretaker of Cousin, paying bills, property taxes and generally looking after Cousin. Aunt C is elderly and is concerned about Cousin in the event of her death; however, she did not attend the appointment.

Lawyer gave advice to A, Aunt B and Uncle concerning Cousin and how to protect his interests: appointment of conservator, probating of father's estate and sale of property for Cousin's benefit; however, Lawyer has reason to believe A was not receptive to such advice. Lawyer refused to participate since he has reason to believe that A, Aunt B and Uncle are intending to transfer Cousin's property without consideration of Cousin's best interests.

Questions Presented:

1. Is Lawyer prohibited from reporting this matter to the Department of Social Services or the appropriate protective service entity?
2. Who is Lawyer's client, if anyone?
3. What are Lawyer's obligations, if any, to Cousin?

Summary:

Ordinarily, a Lawyer has a duty of confidentiality to clients. Under these circumstances,

however, Lawyer is not prohibited from reporting the matter to the Department of Social Services or the appropriate protective service entity. The determination of who may be the client is a matter of law that the Committee declines to determine. However, regardless of which party may be a client, the result does not change. The Lawyer has no ethical obligation to Cousin unless Cousin is the client, in which case, the Lawyer again may take appropriate action including reporting the matter to the Department of Social Services or the appropriate protective service entity.

Opinion:

While the Committee believes that the determination of who may be a client is a matter of law, the analysis of which Rules may apply to this matter require such a determination. There appear to be four potential clients: A, Cousin, Uncle, and Aunt C. It appears from the facts that Aunt B only attended the meeting as a related party and without any intention to establish any relationship with Lawyer. If A or Uncle is intended to be the client, one must look first to Rule 1.18 regarding duties to prospective clients. Lawyer engaged in discussions with A and Uncle subsequent to research into the property and estate matters related to Cousin. The Lawyer anticipated the meeting to result in a client-lawyer relationship. A's request to meet may indicate A's anticipation that a client-lawyer relationship resulted from the meeting, and Uncle's presence at the meeting and indication of a desire to have Cousin's property transferred to him may indicate Uncle's anticipation that a client-lawyer relationship resulted from the meeting. Paragraph (b) provides that even if no client-lawyer relationship is formed, the lawyer may not use or reveal information learned in the consultation except as Rule 1.9 permits. Rule 1.9 would permit Lawyer to reveal information learned from A and Uncle as the Rules would permit or require, or if the information becomes generally known. Rule 1.6 addresses when a lawyer may reveal information relating to the representation of a client.

If Aunt C is intended to be the client, Rule 1.18 would not apply since Aunt C did not attend the meeting nor have any contact with Lawyer and therefore neither Aunt C nor Lawyer can have a reasonable expectation of a client-lawyer relationship. Rule 1.6 would then be applicable in determining whether the information obtained relating to the relationship of a client may be revealed.

If Cousin is intended to be the client, Rule 1.18 again would not apply since neither Cousin nor Aunt C, who could possibly be held as being able to act on behalf of Cousin, attended the meeting or had any contact with Lawyer. Cousin therefore cannot have a reasonable expectation of a client-lawyer relationship. If, however, Cousin is determined to be the client, Rule 1.14 is helpful to Lawyer. Lawyer is permitted to take protective action to insure Cousin is protected from "substantial...financial or other harm." Such protective action according to Rule 1.14(b) includes "consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." Comments to Rule 1.14 indicate that the fact that the information was obtained from A, Aunt B and Uncle does not diminish the client-lawyer relationship if one exists Rule 1.6

would then be looked at to determine whether information obtained relating to the relationship of a client may be revealed.

Rule 1.6 prohibits Lawyer from revealing information relating to the representation of a client unless the client consents, disclosure is impliedly authorized or disclosure is permitted by Rule 1.6(b). The presented facts do not indicate that A or Uncle would consent to disclosure of the information nor would disclosure be impliedly authorized in order to carry out the representation of A or Uncle. The facts do not indicate whether Aunt C or Cousin would consent to the disclosure, however, if Aunt C is actually acting in the best interests of Cousin, disclosure could be impliedly authorized since it would be necessary to protect Cousin's interests. If Cousin is the client, Rule 1.14 gives authorization; if Rule 1.14 did not apply, Rule 1.6 could allow disclosure based on implied authorization since it would be necessary to protect Cousin's interests. If disclosure was not consented to or impliedly authorized by A, Uncle or Aunt C, Lawyer may still disclose the information under paragraph (b). Subsections (1) and (3) may allow Lawyer to disclose regardless of the identity of the client. These subsections allow Lawyer to disclose information "to the extent the lawyer reasonably believes necessary" to prevent A, Uncle or Aunt C from committing a criminal act against Cousin or to prevent A, Uncle or Aunt C from committing a crime or fraud that results in "substantial injury to the financial interests or property" of Cousin. The latter provision requires that the crime or fraud be committed in "furtherance of which the client has used or is using the lawyer's services." If A, Uncle or Aunt C utilized Lawyer's services to effect the property transfer, Lawyer may disclose under Rule 1.6(b)(3). Since Lawyer declined to participate in the transfer, Lawyer should look to Rule 1.6(b)(1) as the means to disclose.

Regardless of the identity of the client, Lawyer may disclose the information obtained relating to the potential harm to Cousin's interests; however, there is no ethical duty or requirement to disclose same. This opinion does not take into consideration any potential reporting requirements imposed by other law. If, however, any other law requires or permits Lawyer to disclose the information, Rule 1.6(b)(7) permits the disclosure in compliance with law.