



ETHICS ADVISORY OPINION

08-14

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 A, a family law practitioner, would like clarification on the propriety of including information in affidavits for temporary hearings that is not based on the witness's personal knowledge or is based on hearsay.

Question Presented:

May a lawyer representing a client in a divorce action file affidavits in support of *ex parte* requests or temporary hearings that include hearsay or information that is not based on the witness's personal knowledge?

Summary:

A lawyer may file affidavits that include hearsay or information not based on a witness's personal knowledge in support of *ex parte* requests or temporary hearings so long as the hearsay or other information is clearly identified as such. The admissibility of that evidence is a matter of substantive law.

Opinion:

While a lawyer may file affidavits which include hearsay, the hearsay must clearly be identified as such. Admissibility of the evidence is a matter of law. However, Rule 3.3 (a)(3) prohibits a lawyer from tendering false information to a court. Therefore, to the extent that the lawyer is preparing affidavits which contain hearsay for signature, the attorney has a duty to ensure that the affidavit clearly identifies such information as hearsay. For example, a lawyer may not knowingly present an affidavit in which Party A testifies to Fact X unless Party A has first-hand knowledge of Fact X; if Party A merely heard from Party B that Fact X occurred, the affidavit must so state.

To the extent that the lawyer is submitting a pre-signed and sworn affidavit which the lawyer knows to contain hearsay not identified as such, the lawyer has a duty to advise the court of the hearsay. Furthermore, in *ex parte* proceedings, a lawyer must comply with the duties enunciated in Rule 3.3(d) and ensure that all material facts known to the lawyer will enable the court to make an informed decision.