ETHICS ADVISORY OPINION

08-11

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:

Lawyers A and C share office space. They are two of 14 lawyers who share a common receptionist, errand runner, fax and copy machines, conference rooms and lobby. Faxes are distributed by the receptionist to the open mail slots of the individual attorneys which are accessible and visible to all attorneys and their staff in the office space. Receptionist receives all incoming calls and takes messages for the individual lawyers. Lawyers have their own letterhead, secretaries, paralegals, supplies and telephone lines. Clients in the office of one attorney are clearly visible to the other attorneys in the office, and vice versa. Lawyer C has a particular advantage in that he can view the lobby and anyone entering the office suite from within his individual office space. Lawyer C also has an office next to the conference room and within hearing distance of the receptionist. The walls of the suite are thin, and conversations can be overheard in the vicinity of the individual attorneys' offices. Lawyer A's office is removed from that of Lawyer C.

Clients A and B have a contested custody matter. Lawyer A represents Client A on this matter. Client B fired his former attorney and desires to hire Lawyer C.

Question Presented:

May Lawyer C ethically represent Client B in the contested custody matter where Lawyer A shares office space with Lawyer C and Lawyer A is the opposing party's attorney?

Summary:

While the contemplated representation is not a *per se* violation of the Rules of Professional Conduct, these specific facts are fraught with the danger of breaches of confidentiality as prohibited by Rule 1.6 and the potential for imputation of a conflict of interest under Rule 1.10(a). *See also* In re Craig, 317 S.C. 295, 454 S.E. 2d 314 (1995). Caution should be used prior to entering this type of representation.

Opinion:

Rule 1.10 (a) states:

> "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), or 1.9, unless the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."

Rule 1.0(d) defines a "firm" for purposes of these Rules as "lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." Comment 2 to Rule 1.0 confirms the normal exclusion of office sharing arrangements from the definition of "firm." Rule 1.0 Comment 2. It further states that whether two or more lawyers constitute a firm is a question of fact. "A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another." Comment 2, Rule 1.0. *See* Comments to Rule 1.0 [2] – [4].

As noted in the scholarly work Annotated South Carolina Rules of Professional Conduct (2005) Edition, the South Carolina Supreme Court may not subscribe to the literal exclusion of office sharing arrangements from the definition of "firm." In re Craig, 317 S.C. 295, 454 S.E. 2d 314 (1995), was a disciplinary action against lawyer who refused to withdraw from representation of wife in a domestic relations matter when husband had previously been represented in the same action by another lawyer in an office sharing arrangement. It should be noted that the Court did not specify what part of the office sharing arrangement made this a violation of the Rules, nor did the Court elaborate upon when, if ever, this type of imputation would not be operative in an office sharing arrangement.

Prior to this disciplinary action, office sharing arrangements were also addressed in S.C. Bar Ethics Adv. Op. No. 91-37. The Committee opined that whether two attorneys sharing resources and office space were considered a "firm" under the S.C. Rules of Professional Conduct was a fact-specific substantive issue. In this opinion, the main question was whether the office sharing arrangement was *per se* a violation of the S.C.R.P.C. In deciding that this was not clearly a violation of the Rules, the Committee cautioned that the imputation guidelines of Rule 1.10 could still apply dependent upon the facts of the specific situation and whether one of the clients was a former client of one of the attorneys sharing the office. Regardless of the outcome, it was noted that the use of a common office assistant requires strict adherence to the rules of supervision of nonlawyer assistants spelled out in Rule 5.3.

In the current situation, the litigation is clearly ongoing; Clients A and B would both be current clients. While Lawyers A and C do not share a secretary, they do share a receptionist, conference rooms and lobby. Further, they both have access to the same copy machines and fax machines, and *could* access each other's fax information. A lawyer's duty of confidentiality to his clients cannot depend upon the ethical standards of opposing counsel, regardless of the esteem in which the latter is held. *See* Rule 1.6, Comments [17] and [18]("A lawyer must act competently to safeguard the information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision."). Lawyer should take every reasonable practice to ensure that all communications remain confidential. This includes Lawyer's office activities that occur in the normal course of business.

While the representation contemplated is fraught with the danger of breaches of confidentiality and the potential for imputation of a conflict of interest, it is not a *per se* violation of the S.C. Rules of Professional Conduct. On the practical side, having two opposing domestic clients potentially in such close proximity to each other on a repeated basis may not be the most sound method of resolving the custody issues either. Lawyer C should seriously consider the consequences of this representation prior to entering a retainer agreement with Client B.