

ETHICS ADVISORY OPINION

24-01

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.

S.C. Rules of Professional Conduct: 1.1, 1.3, 1.6, and 4.2.

Facts:

Lawyer A currently represents the prospective buyer of a certain property, and is aware that Lawyer B represents the purported seller of that property. Lawyer A desires to have a notice sent to the owner of the property, mailed to the owner's address listed on file with the local tax office. Lawyer A believes this mailing would help ensure the real owner was on notice of the purported sale prior to the recordation of any deeds that may be fraudulent. Lawyer A would like to send the letter directly, rather than have Lawyer B mail the notice, but Lawyer B does not consent to direct contact with their client.

For context, in June of 2023, the U.S. Secret Service observed a sharp increase in reports of real estate fraud. Through the release of an information sheet of these types of real estate scams, USSS provided information about criminals posing as real property owners and negotiating the sale of properties they have identified as vacant or unencumbered by liens.

Fraudulent sellers in such circumstances pose as the property owner and may even engage a real estate agent to list the targeted property for sale, requesting it be listed below current market value to generate immediate interest. The fraudulent sellers may even request no marketing signs, purportedly so "nosy neighbors" will not discover that the property is being sold. The fraudulent seller also demonstrates a preference for a cash buyer and quickly accepts an offer, but then refuses to sign closing documents in person, seeking a mail-away or remote notary signing. The fraudulent seller (or co-conspirator) also impersonates the notary and provides falsified documents to the title company or closing attorney. All communication is electronic, not in person. The title company or closing attorney unwittingly transfers the closing proceeds to fraudulent seller, who then disappears before any later discovery of the fraud by the true owner or those involved in the transaction.

Inquirer is aware of one such real estate scam having occurred in the Upstate, with the true owner contacting the buyer's attorney after receiving receipt of paid taxes.

Question Presented: May Lawyer A, who represents the prospective buyer in real estate transaction, send a letter to the owner of the subject property's address listed with the tax office in an attempt to put them on notice that a closing is taking place, when the purported seller is known to be represented by Lawyer B who does not consent to such contact?

Summary: No. Lawyer A would violate Rule 4.2 if Lawyer A communicates directly in any way with the represented purported seller without the consent of Lawyer B, unless the communication is otherwise allowed by law or court order. Lawyer A has an obligation under Rules 1.1 and 1.3 to take all action necessary to verify the seller and protect Lawyer A's client, but may not employ means that otherwise violate the Rules of Professional Conduct. However, "Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." Rule 4.2, Cmt. 4.

Opinion:

South Carolina Rule of Professional Conduct 4.2 states that a "lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Under the facts as presented, Lawyer A does not have the consent of Lawyer B to contact the purported seller, Lawyer B's client. The Ethics Advisory Committee is unaware of any law or order, from the Supreme Court of South Carolina or any other court, that would allow the type of direct communication in which Lawyer A seeks to engage over Lawyer B's objection.

Despite good faith intent and the laudable purpose of the desired communication, Lawyer A still may not attempt to contact the registered owner of the property for purposes of verifying ownership of the property being sold to Lawyer A's client. Good intentions do not create exceptions to clear rules of professional conduct. *See People v. Pautler*, 35 P.3d 571 (Colo. 2001) (prosecutor suspended for pretending to be a public defender for the primary purpose of having a suspect – who had killed three people, raped one person, and made statements that could be interpreted as threats to others – surrender without further harm).

If Lawyer A has concerns or a reason to believe that a specific seller may not be the actual owner of the property in question or that the purported seller does not actually consent to or know about the pending sale, then Lawyer A would have an obligation under Rules 1.1 (Competence) and 1.3 (Diligence) to conduct research or an investigation sufficient to address Lawyer A's concerns. This may include further request for Lawyer B's consent to direct contact, with such contact being proposed through use of a specific form/content of communication rather than an open-ended permission being sought, which may resolve Lawyer B's objections or concerns. A lawyer may not make a communication prohibited by Rule 4.2 through the acts of another. See Rule 8.4(a). However, "Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." Rule 4.2, Cmt. 4.

Lawyer A may request that Lawyer B verify the seller's identity as the owner of record. Under Rule 1.6(a), Lawyer B may reveal information relating to the representation of the client with the client's informed consent. Lawyer B may also reveal information about the seller's identity and notice of the proposed sale through implied authorization if necessary to carry out the representation, which may be the circumstance if Lawyer A's client refuses to proceed with the

transaction without such disclosures. Further, Lawyer B may reveal information if reasonably believed that such is necessary to prevent the client from committing a criminal act; to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; or to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services. Rule 1.6(b)(1), (3), and (4).