

ETHICS ADVISORY OPINION

08-08

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:

John was riding as a guest passenger in a vehicle driven by his girlfriend Jane. The vehicle left the road striking a tree and causing great bodily injury to John.

John asked a lawyer at Law Firm to assist him in perfecting his claims against the insurance companies involved in his accident. The only insurance company involved was the provider of Jane's family's liability coverage. The lawyer was successful in reaching a settlement with Jane's family's insurance carrier, and no formal legal action was ever filed.

Almost one year later, the State of South Carolina served a warrant on Jane for Felony Driving Under the Influence causing great bodily injury, based on the injury to John resulting from the accident. Jane is seeking to be represented in the criminal action by the same lawyer who represented John in his civil action.

John had nothing to do with the charges being filed against Jane and does not believe that Jane did anything wrong on the evening of the accident. John also wishes for the same attorney to assist Jane in her criminal matter and has agreed to sign off on any conflicts of interest, as has Jane and her family. The lawyer has been a close family friend of both Jane and her parents and siblings as well as John, his parents and siblings. Both Jane and John are now over the age of 18.

Question Presented:

After full disclosure and written waivers of all conflicts, may the lawyer represent Jane in her Felony DUI case?

Summary:

Yes. Full disclosure must include informing John of the potential that information learned in the course of the earlier representation may be relevant to, and subject to disclosure in, the criminal matter. Provided John knowingly waives any objections to such disclosure and the representation,

the attorney is free to represent Jane in the criminal matter.

Opinion:

When asked to represent a person in a matter related to a prior representation of a former client, counsel must evaluate the ethical propriety of the representation under the standards set forth in Rule 1.9(a), South Carolina Rules of Professional Conduct:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Here, it is doubtful that Jane's interests are materially adverse to John's. Although Jane is being prosecuted for acts or omissions allegedly causing John's injuries, John appears to oppose such prosecution. As the former client, it is his opinion that matters; the state's apparent belief that Jane was culpable is not determinative. Thus, despite the fact that Jane and John would have been adverse parties if the insurance matter had been litigated, it does not appear that their interests are materially adverse with respect to the criminal matter.

Assuming for the sake of argument that Jane's interests are materially adverse to John's, Rule 1.9(a) clearly permits John to waive any conflict. Provided John is given appropriate information about the nature and consequences of the waiver, the attorney may rely on John's waiver as sufficient to dispose of any conflict issues.

In any event, Rule 1.9(c) places conditions and limitations on the use of information gained in the representation of a former client. Rule 1.9(c)(2) makes clear that these limitations apply regardless of whether Jane and John have materially adverse interests.

There is a chance that information gained in the course of counsel's prior representation of John may be relevant to the representation of Jane. Counsel may not compromise his professional obligations to Jane by withholding such information. Thus, he should carefully explain to John the risk that information gained in the prior representation may be subject to disclosure and that once the representation of Jane begins, withholding such information will not be an option. Ideally, John's written consent should include acknowledgement of this possibility and waiver of the right to protect such information from disclosure.

Subject to the conditions discussed above, the Committee believes that counsel may represent Jane without creating an impermissible conflict.