

ETHICS ADVISORY OPINION

09-08

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:

Attorney brought two collection lawsuits on behalf of a corporate client. When the cases came up for trial on the roster, the Circuit Judge strongly "suggested" that the cases be referred to a Special Referee (not the Master in Equity) for trial. All parties consented. The plaintiff lost one of these cases, and the Special Referee rendered an order which stated:

Plaintiff shall pay the balance of the special referee's fee in the amount of \$1,125 within 30 days of filing this order.

The plaintiff is insolvent.

Summary:

A Special Referee is a court of record and is part of the judicial process, unlike an arbitrator. Therefore, attorney is not obligated to pay the fee of the Special Referee.

This Committee does not have jurisdiction to discuss under what circumstances the principals of a corporation are liable for the corporate entity's debt, as this is a question of substantive law. It therefore follows that the attorney has no per se obligation to try to persuade the principals of the corporation.

Questions Presented:

1. Is the attorney required to pay this Special Referee?
2. Is the attorney obligated to try to persuade the principals to pay the corporate debt?

Opinion:

Numerous court opinions have held that a lawyer has the duty to pay costs of depositions which he has ordered and things of this nature. However, there is no rule within the South Carolina Rules of Professional Conduct which requires payment of fees of Special Referees.

Rule 9 of the Alternative Dispute Resolution Rules states that each party shall equally split the costs of the neutral unless other arrangements are made. It would appear that this particular case would not implicate Rule 9 because the trial judge ordered appointment of the Special Referee. However, even if Rule 9 were applicable, the parties are required to pay the neutral; there is no mention of an obligation upon the lawyer. Rule 11 of the ADR Rules identifies certain duties of attorneys, none of which involve payment of the neutral. The above begs the question, because this situation is not truly "Alternative Dispute Resolution," as it was compelled by the Circuit Judge.

The South Carolina Bar Ethics Advisory Committee has addressed this issue in the form of a "Frequently Asked Question," Question 11. This opinion states:

[I]f an attorney hires a mediator, the attorney is responsible for ensuring timely payment. If the Court orders a mediator, the attorney should look to the Courts for assistance in determination of how the payment will be rendered.

This FAQ did not attempt to discuss what constitutes court compulsion in appointing a Special Referee. Instead, it was implied in the FAQ that the attorney is responsible for payment of a mediator if the mediator is hired for the convenience of the parties, such as avoiding a long wait for trial, etc. The fact that a Special Referee is a Court of Record from which appeals may be filed as a matter of right adds further support to this conclusion. By contrast, arbitration is not subject to appeal as a matter of right absent impropriety in selection or gross abuse, etc.

FAQ 11 also cited the line of cases which state that the failure to pay a court reporter's fee in a timely fashion has been held by the Supreme Court to be conduct prejudicial to the administration of justice. It is not contrary to the administration of justice for a lawyer to assume that the courts hear cases. If a judge in essence forces a lawyer to agree to a Special Referee, the Special Referee stands in the shoes of the Circuit Judge. Therefore, the attorney is not liable to pay any costs for the Special Referee. Further support for this conclusion is the statement in the facts that the Special Referee ordered the parties to pay the Special Referee's fees, and did not order the lawyers to do so.

The statement in FAQ 11 that if the court orders a mediator, the attorney should look to the courts for assistance in determination of how the payment will be rendered, is essentially a truism in this situation. The Special Referee is a court of record, so if the Special Referee

ordered the attorneys to pay the fee directly, such an order would be subject to appeal. In theory the case could be appealed all the way to the Supreme Court, which would have the ultimate authority to decide the issue.

This conclusion is not altered by any applicable Rules of Professional Conduct. Rule 1.15(d) only applies to cases wherein a lawyer receives a fund in which a 3rd party or client has an interest. Rule 8.4(e) involves the somewhat vague statement that a lawyer should not “engage in conduct that is prejudicial to the administration of justice.” Comment [4] to Rule 8.4 states that a lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. If the Special Referee ordered the lawyer himself to pay the Special Referee’s fees, the case could, as discussed above, be appealed all the way to the Supreme Court, which of course would have the final authority in the case. The filing of an appeal itself would violate no ethical rule. This same analysis would apply to Rule 7(a)(5) of Rule 14 of the Rules for Lawyer Disciplinary Enforcement, which is similar to Rule 8.4(e) of the Rules of Professional Conduct.