

ETHICS ADVISORY OPINION

13-08

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 A is in private practice and represents clients in family court in abuse and neglect cases against the South Carolina Department of Social Services (DSS). Attorney A's spouse, Attorney B, formerly worked for DSS. Attorney B is no longer employed by DSS, and Attorney A and Attorney B do not practice in the same firm.

Questions Presented:

1. May Attorney A defend clients against whom his spouse (Attorney B) litigated cases on behalf of DSS?
2. May Attorney A serve as guardian for clients against whom Attorney B litigated cases?

Summary:

Attorney A may defend clients or serve as guardian for clients against whom Attorney B litigated cases on behalf of DSS. Attorney A is not prohibited from such representation by Rule 1.8(k) since his spouse, Attorney B, is no longer employed by DSS. Attorney A is not prohibited from such representation by Rule 1.9, as Attorney A was not previously employed as counsel by DSS. Finally, Attorney A is not prohibited from such representation by Rule 1.11(b) since Attorney A and Attorney B do not practice in the same firm.

Opinion:

An attorney is not precluded from representing a party who is directly adverse to a party formerly represented by her/his spouse. Rule 1.8 contemplates conflicts that arise when directly adverse parties are represented on an on-going basis by counsel who are related to each other. Rule 1.8(k) provides (in part):

“A lawyer related to another lawyer as . . . spouse shall not personally represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer unless the client gives informed consent.” Since Attorney B is no longer employed by DSS, her spouse, Attorney A, is not prohibited from representing or serving as guardian for clients against whom Attorney B formerly litigated cases on behalf of DSS.

The conflicts envisioned by Rule 1.9 exist solely between an attorney and the party formerly represented by that attorney. Rule 1.9 does not indicate that this conflict is imputed to the former counsel’s spouse. Since Attorney A was not previously employed as counsel by DSS, he is not precluded from representing parties directly adverse to DSS.

The imputation of a former government lawyer’s conflict in representing parties in a matter in which that lawyer has previously appeared adversely on behalf of the governmental entity does not extend to a spouse or family member. The conflict addressed by Rule 1.11(b) involves the imputation of a former government lawyer’s conflicts to members of that lawyer’s firm. Rule 1.8(k) provides (in part):

When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless....

Since Attorney A and Attorney B do not practice in the same firm, any conflict Attorney B has as a former DSS attorney is not imputed to her spouse, Attorney A. In addition, Attorney A is not precluded from representing or serving as guardian for clients against whom Attorney B formerly litigated cases on behalf of DSS.

The attorney should refer to Rules 1.6 and 8.4(a) for additional guidance on the issue of confidentiality as applicable to the spousal relationship.