



ETHICS ADVISORY OPINION

14-02

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:

Lawyer desires to serve as a contract prosecutor for a municipality. The municipality has a policy of no dismissals and no negotiations – the case must go to trial as charged unless the arresting officer or his supervisor reduces the charge. The municipality's policy prevents the lawyer from exercising prosecutorial discretion as to which charges should be tried, which charges should be subject to a plea agreement or reduced, and which charges should be dismissed.

Question Presented:

Can the lawyer ethically discharge his duties as a prosecutor in light of the municipality's policy of no prosecutorial discretion?

Summary:

No, the municipality's policy is inconsistent with the lawyer's obligation under Rule 3.8(a) of the South Carolina Rules of Professional Conduct ("SCRPC").

Opinion:

The SCRPC, as well as the Model Rules of Professional Conduct, recognize that a lawyer's role as a prosecutor in a criminal case creates special responsibilities (Rule 3.8 SCRPC). Specifically, Rule 3.8(a) requires the prosecutor to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." Comment 1 to Rule 3.8 is particularly instructive on these facts and provides some color to the basic rule established by Rule 3.8(a). That comment reads, in relevant part, as follows:

"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."

The Comment ends by noting that "a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4."

The mandate of Rule 3.8(a), amplified by the explanation provided in Comment 1, makes it clear that prosecutorial discretion is not just a good idea, but rather is an ethical requirement. Given that the municipality's policy seeks to eliminate the very prosecutorial discretion that is required by Rule 3.8(a), the Committee concludes that it would be improper for the lawyer to serve subject to that policy.