

ETHICS ADVISORY OPINION

22-06

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.

SC Rules of Professional Conduct: 1.2(c)

Facts: Lawyer has consulted with Client who has requested limited scope representation by Lawyer in connection with a Family Court proceeding. Lawyer intends to provide assistance with drafting documents for a temporary hearing, including preparation of an answer, affidavit, and financial declaration. On each page of the answer, Lawyer will include the phrase "Prepared with the Assistance of Counsel." All pleadings will be signed under Client's name only, although Lawyer intends to serve as the notary for the affidavit and financial declaration. Lawyer will not be entering an appearance as counsel or participating in the forthcoming temporary hearing.

Questions Presented:

1. May Lawyer limit the scope of representation to assist in preparation of pleadings that will be signed and submitted directly by Client, under client's name exclusively, without participating further in Client's legal proceedings in Family Court?
2. Must Lawyer place the Family Court on notice of Lawyer's limited representation of Client via inclusion of a disclosure such as "Prepared with the Assistance of Counsel" on any documents that Lawyer helps draft, or otherwise?

Summary:

1. Yes, Lawyer may limit the scope of representation of Client in the Family Court if such limitation is reasonable under the circumstances and the Client gives informed consent.
2. No. When limited representation is reasonable under the circumstances, Lawyer is not required to make an affirmative disclosure of any sort regarding Lawyer's limited assistance. However, Lawyer may voluntarily do so, and reserves the right to require such disclosure as a condition of providing limited services to Client.

Opinion: Rule 1.2(c) provides that “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” The first consideration when limiting the scope of representation is the reasonableness of doing so under the circumstances. In this inquiry, Lawyer is consulting regarding Family Court proceedings, as part of which litigants frequently participate pro se, especially at the outset of litigation as in the circumstances described which concern the filing of an answer and documents for use in a temporary hearing. As Comment 6 to Rule 1.2 acknowledges, “A limited representation may be appropriate because the client has limited objectives for the representation,” or the client may impose limitations on the means a lawyer might otherwise employ to accomplish a client’s objectives when the client believes such actions would be too costly. It is the availability of limited scope representation, therefore, that allows for clients to receive at least some counsel and assistance at critical moments in a legal dispute when they may otherwise have to forego representation entirely. Such limited assistance directly benefits the client, but may also indirectly assist the other participants in the litigation. For example, when the lawyer’s assistance to the client includes refinement of pleadings such that they only present relevant facts and assert potentially meritorious claims, allowing for more efficient and effective consideration thereof by the Court and opposing party.

The next consideration for limited scope representation is the requirement of informed consent by the client. Although a written fee agreement is not required for such limited representation, Rule 1.5(b) states “The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.” Accordingly, as part of the process of obtaining the required informed consent from the client pursuant to Rule 1.2(c), Lawyer is encouraged to provide a clear communication as to the scope of representation in writing. As part of securing informed consent, Lawyer must also communicate that limited representation may exclude specific means that might otherwise be used to accomplish the client’s objectives, and the potential alternatives to such limited representation. See Rule 1.0(g). Despite consent to a limited scope of representation, Lawyer is not exempt from the duty to provide competent representation within the scope of services provided.

Assuming there is an appropriate limited scope of representation for which the client has provided informed consent, there is no ethical obligation on the part of Lawyer under the Rules of Professional Conduct to disclose Lawyer’s limited scope representation, either in conjunction with any pleading prepared or otherwise. ABA Formal Op. 07-446 (2007). However, Lawyer should check with the rules of a specific tribunal, as some have imposed such an obligation when practicing before certain tribunals.

Any rule requiring the same would be impractical in many circumstances. For instance, brief consultation with a prospective client may quell a prospective client's desire to formally retain counsel, yet be substantive and actionable enough legal advice and assistance that it notably influences any subsequent pleadings submitted pro se. In Lawyer's inquiry, more direct and meaningful assistance in the preparation of pleadings is contemplated, although Lawyer will not be responsible for executing and filing the pleadings, which the client may unilaterally alter and file in altered form without notice to the Lawyer. It would be inappropriate in that instance to require disclosure of the name of Lawyer and associate them with that pleading, as that would be potentially misleading as to the nature and extent of Lawyer's control over the final appearance thereof.

Nevertheless, the client is not exclusively in control over the nature and extent of any limitations in the scope of representation, and Lawyer retains the ability to set reasonable conditions upon which Lawyer may insist before agreeing to provide such limited representation. One such reasonable condition would be for Lawyer to insist upon inclusion of a disclosure of Lawyer's name on any pleadings prepared with the assistance of Lawyer. Consistent with Lawyer's general duty to "reasonably consult with the client about the means by which the client's objectives are to be accomplished" under Rule 1.4, Lawyer should make known any such requirements prior to providing limited scope representation. As a practical matter, however, unless Lawyer's name appears on a signature block within the pleading itself, as would occur when Lawyer serves as a witness or notary, Lawyer would only be able to ensure inclusion of a disclosure of Lawyer's assistance by maintaining control over the pleading and filing thereof to prevent alteration prior to filing.