

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.

S.C. BAR ETHICS ADVISORY OPINION 03-02

Facts:

Attorney is an active duty Army JAG attorney, currently serving as a senior prosecuting attorney.

Approximately two years ago, Attorney worked in Army Legal Services and prepared wills, living wills, and durable powers of attorney for Army Officer and his wife. In this capacity, Attorney met with Army Officer and his wife, and the couple revealed their financial information, including assets, liabilities, and insurance, as well as the names and ages of all of their children. Attorney did not know the couple before they came in for the estate planning and has had no contact with them since that time.

Army Officer is now facing potential criminal charges of (1) possession of child pornography (discovered recently on his home computer), and (2) committing indecent acts on one of his children (allegedly committed 12 years ago). Attorney learned no confidential information concerning these potential charges during the prior representation.

The Committee is informed that neither the Uniform Code of Military Justice nor the JAG Manual provide any guidance to the inquiring attorney.

Question:

Given Attorney's past representation of Army Officer, may Attorney act as the prosecutor in the Army's criminal case against Army Officer?

Summary:

Because Attorney's former representation of Army Officer does not appear to be substantially related to the present criminal charges against Army Officer and Attorney learned no confidential information relating to the present criminal charges, Attorney may act as the prosecuting attorney in the Army's criminal case against Army Officer.

Opinion:

Rule 1.9(a) of the South Carolina Rules of Professional Conduct provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's

interests are materially adverse to the interests of the former client unless the former client consents after consultation.” Rule 1.9, S.C. App. Ct. R. 407 (emphasis added). Given the facts of this inquiry, the former estate planning representation appears to be wholly unrelated to Army Officer’s present criminal charges and Attorney did not gain any confidential information during the prior representation. Therefore, no conflict of interest appears to exist and Attorney may as the prosecuting attorney in the Army’s criminal case against Army Officer.

Although no conflict of interest appears to exist in the present case, Attorney should be mindful that, if any confidential information he learned during the estate planning representation should become necessary for the prosecution of Army Officer, Attorney should withdraw as the prosecuting attorney in the criminal case. Rule 1.9(c), S.C. App. Ct. R. 407.

This opinion is consistent with past opinions of the Committee. *See* Ethics Advisory Opinion 00-05. In Opinion 00-05, the Committee found that no conflict of interest existed, pursuant to Rule 1.9, where an attorney sought to represent a wife during her divorce. The attorney had previously represented both the husband and wife during their residential mortgage closing and later refinancing of their home. Because the matters were not substantially related and the attorney was not privy to any confidential information that could be used in the divorce, no conflict of interest existed. *But see* Ethics Advisory Opinion 02-01 (stating that attorney, who was involved as a solicitor in an arson case in which client was a criminal defendant, may not represent client in subsequent civil suit against an insurance company because the civil suit was substantially related to the underlying criminal action and the attorney previously had access to all confidential information in the criminal case).

Therefore, under the facts presented to the Committee, there does not appear to be a conflict of interest and Attorney may act as a prosecutor in the Army’s criminal case against Army Officer.

Index:

Conflict of Interest

-- Former client