



ETHICS ADVISORY OPINION

09-09

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 represented Client in a divorce against Spouse and in the subsequent appeal. The divorce was acrimonious, with many contempt motions filed against Spouse.

While the divorce appeal was pending, Spouse stalked Lawyer and threatened Lawyer with harm. When the Family Court's judgment was affirmed on appeal, Spouse carried out the threats by causing substantial damage to personal and real property of Lawyer. Spouse was subsequently criminally prosecuted, convicted, and incarcerated for the property damage caused to Lawyer.

Lawyer also represented Client in an action in Probate Court. Spouse had disclaimed an interest in his Mother's estate. This asset was to be used to pay Spouse's financial obligations to client as a result of the Family Court's divorce order which included payment of attorneys' fees, past due support, and future support. The Probate Court entered an order allowing Lawyer's firm and Client to "step into the shoes of" Spouse for purposes of receiving money from Mother's estate to pay these obligations. The Personal Representative of Mother's estate has appealed the Probate Court's order.

Lawyer currently represents Client on the appeal of the Probate Court order on an hourly basis. Lawyer desires to sue Spouse for damages for the stalking, threats, and destruction of property. Client currently owes Lawyer several thousand dollars in attorneys fees from the Family Court litigation. Client is owed a similar amount in past due support as a result of the Family Court order. The future support provided for in the Family Court order would also come from Spouse's share of Mother's estate assuming the Probate appeal is successful.

Summary:

With informed consent of Client, Lawyer may continue to represent Client from a divorce matter under a limited representation pursuant to Rule 1.2 on appeal from a Probate Court order in which their interests are aligned in preserving greater assets for Client's former Spouse from which to satisfy the Family Court judgment even though Lawyer has a personal claim against Client's Spouse for personal injuries that Lawyer intends to pursue. If Client declines continued

representation by Lawyer after being informed of the circumstances, Lawyer may pursue Lawyer's personal claim against Spouse without violating Rule 1.9 so long as confidential information from the divorce and probate representations is not used to the disadvantage of Client in the case against Spouse or any subsequent effort to execute upon any judgment Lawyer may obtain against Spouse.

Questions Presented:

Does Lawyer's personal claim against Spouse for damages create a concurrent conflict of interest Client requiring that Lawyer withdraw from further representation of Client in the Probate appeal?

Does Lawyer's representation of Client in the Probate appeal while suing Spouse for damages violate Rule 1.8?

If Client declines continued representation by Lawyer in the Probate appeal, would Lawyer's pursuit of claims against Spouse violate Rule 1.9

Opinion:

Client is a current client of Lawyer for the appeal of the Probate Court's order. Initially, therefore, the evaluation of a potential conflict is governed by Rule 1.7. Under that rule, a "concurrent conflict of interest" exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rule 1.7(a).

Neither the Probate Court appeal, nor the contemplated suit of Lawyer against Spouse involves a "directly adverse" interest to Client. In the Probate appeal, only the personal representative of Mother's estate and, indirectly, Spouse are directly adverse. In Lawyer's contemplated suit against Spouse, only Spouse is directly adverse. The mere obtaining of a judgment against Spouse, in the absence of any law giving priority to Lawyer's judgment over the judgment of Client against Spouse, does not create any direct adversity between Client and Lawyer.

There is also no reason to believe that Lawyer's representation of Client in the Probate appeal would be "materially limited by . . . a personal interest" of Lawyer in seeking a judgment against Spouse in a suit by Lawyer. On the contrary, the interests of Client and Lawyer are entirely aligned on the Probate appeal. Preservation of the Probate Court's judgment on appeal benefits both Client and Lawyer as Spouse's share of Mother's estate, given Spouse's incarceration, may be the only substantial asset available to satisfy the claims of actual creditors such as Client and potential creditors such as Lawyer. Given the facts as stated, Lawyer's pursuit of a judgment against Spouse for damages in no way undermines or limits the stated goal of the Probate appeal to preserve the Probate Court's judgment voiding the disclaimer of Spouse's interest in Mother's estate and placing that interest at the disposal of Client and Lawyer to satisfy Spouse's obligation to pay for Client's support and Client's attorneys' fees incurred in the divorce action.

To the extent Lawyer's ongoing representation of Client is limited to prosecution of the Probate appeal, as permitted by Rule 1.2, there is, on the facts presented, no direct conflict of interest and no significant risk that Lawyer's pursuit of a personal judgment against Spouse will in any manner materially limit Lawyer's diligent pursuit of the appeal to preserve the rejection of Spouse's attempted disclaimer of interest in Mother's estate.

If, however, the scope of Lawyer's representation of Client is not limited to defending the Probate Court judgment on appeal, and Lawyer is expected to seek out other assets of Spouse and assist Client in executing upon such assets to satisfy Client's existing Family Court judgment against Spouse, then a concurrent conflict of interest may exist. Under those circumstances, there could be a significant risk that Lawyer's ongoing representation of Client to collect on the judgment would be materially limited by Lawyer's own interest in obtaining and satisfying a personal judgment against Spouse.

Given the long-term attorney/client relationship between Lawyer and Client through the divorce proceedings, the appeal from the Family Court judgment, the Probate Court proceedings, and the now-pending Probate appeal, Client may not readily understand the limitation of representation to just defending the Probate appeal as opposed to looking out for all aspects of Client's interests relative to the divorce. Rule 1.4(b) requires that Lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.2(c) states that a limited representation is permitted if the client gives informed consent—"agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.1(f).

Thus, while no concurrent conflict of interest exists, informed consent, confirmed in writing pursuant to Rule 1.7(b)(4), which is consistent with the consent requirement of Rule 1.2(c), is needed to insure that Client fully understands the limited scope of the ongoing representation and the potential future conflict that could exist between Client's interests and Lawyer's interests in

satisfying the their respective judgments if the assets of Spouse are not sufficient to meet the demands of all creditors.

The analysis under Rule 1.8 leads to the same conclusion. Rule 1.8(a) states:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

According to comment 1, Rule 1.8 “does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5,” except in limited circumstances not applicable to this situation. Entry into a standard fee arrangement is not a “business transaction with a client” as contemplated by the rule. Thus, entry into a representation agreement limited to defending the Probate Court’s order on appeal does not violate Rule 1.8. Any fee agreement must comply with the provisions of Rule 1.5. To the extent that agreement limits the scope of the continued representation of Client, it must also comply with Rule 1.2(c). As set forth above, entering into a limited representation for the appeal only is reasonable under the circumstances since Client’s and Lawyer’s interests are entirely aligned in that matter and there is no significant risk that Lawyer’s pursuit of a judgment against Spouse will materially limit Lawyer’s ability to prosecute the Probate appeal in Client’s full and best interest.

Given the stated facts, it cannot be determined whether or not Lawyer’s obtaining a judgment against Spouse for injuries suffered will ultimately constitute acquiring a “security or other pecuniary interest adverse to a client.” The value of Spouse’s interest in Mother’s estate is not stated. If, however, Spouse’s assets, including the value of the estate interest, are reasonably expected to be well in excess of any amount necessary to pay the judgment for attorneys’ fees, support, future support and other monetary compensation awarded to Client by the Family Court and any judgment obtained by Lawyer against Spouse, then there is no adversity and, thus, no violation of Rule 1.8(a).

If it is reasonably clear that Spouse's assets, including the interest in Mother's estate will not be sufficient to cover the judgment from the divorce in favor of Client and any anticipated recovery by Lawyer against Spouse, then Lawyer's initiating a suit for damages against Spouse might constitute, under a very broad interpretation of Rule 1.8(a), acquiring an pecuniary interest adverse to Client, particularly if means existed by which Lawyer could gain priority for satisfying his future judgment lien over any judgment lien in favor of Client. Given these circumstances, Lawyer may satisfy the requirements of Rule 1.8 by giving written disclosure of the possible adversity, advising Client of the seeking and giving Client an opportunity to seek independent legal counsel regarding the proposed representation, and obtaining the informed consent, in writing, of Client. As noted in comments 2 and 3 to Rule 1.8, these requirements dovetail with the requirements of Rule 1.7(b), discussed above, regarding disclosure of potential concurrent conflicts of interest arising in the event Lawyer's pursuit of claims against Spouse results in competition with Client to satisfy competing judgments from limited assets.

If Client declines Lawyer's continued representation, Rule 1.9 governing duties owed to former clients does not bar Lawyer from pursuing Lawyer's claims against Spouse.

First, Rule 1.9(a) would not apply by its terms if Lawyer retained counsel to represent Lawyer in the suit against Spouse to recover damages. Lawyer would not be representing another person against Client or with interests adverse to Client, but would be presenting Lawyer's own claim through other counsel. It would also probably not apply even if Lawyer represented himself in the action against Spouse, although the term "another person" in the rule is ambiguous and could include self-representation.

1. Second, if Rule 1.9(a) is inapplicable, consent of Client is not necessary to pursue the claim against Spouse. Nonetheless, Rule 1.9(c) protects confidential information of Client obtained by Lawyer in the course of representation and prohibits Lawyer from using such information "to the disadvantage of the former client" except as provided in Rule 1.6(b). Based on the facts presented, there is no readily apparent confidential information about Client from the divorce representation that would be relevant or could material advance the suit against Spouse to the disadvantage of Client. See S.C. Bar Ethics Adv. Op. 00-05 (lawyer may represent wife in divorce after representing spouses in purchase and refinancing of residence); S.C. Bar Ethics Adv. Op. 03-02 (military prosecutor may prosecute pornography and molestation matter against officer after doing earlier estate planning for officer and spouse). Cf. Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (1996) (lawyer who had previously served as GAL for child disqualified from representing father in action against mother to reduce child support in which the child was joined as a party since information obtained in the custody matter might prove relevant to the child support claim and the college education support claim raised in the father's action against mother).