

ETHICS ADVISORY OPINION

08-12

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:

Party A and Party B obtained a divorce, the terms of which included child custody arrangements. Thereafter, the parties reached an agreement to modify their child custody arrangements. Party A approached Lawyer for the purpose of drafting an agreement and related pleadings to submit to the family court. Party B paid Lawyer for the legal work in connection with preparing the documents. It does not appear that there was any written agreement establishing the scope of the representation or the means of handling potential conflicts.

After the modification agreement and related pleadings were prepared but before they were filed, Party A informed Lawyer that he/she no longer consented to the modifications. Party B has urged Lawyer to file the documents anyway.

Questions Presented:

1. Does Lawyer have a conflict of interest now that the parties are not in agreement?
2. Does Lawyer have an obligation to file the pleadings as agreed at the time Lawyer was retained?
3. Does Lawyer have an obligation not to file the pleadings due to the withdrawal of Party A's consent?

Summary:

Whether Lawyer has a conflict depends on whether an attorney-client relationship was created with Party B. In either case, Lawyer should not file the pleadings.

Opinion:

As a preliminary matter, the Committee has not been asked about, and does not express an opinion on, the propriety of Lawyer's initial decision to undertake the representation or the manner in which such representation was undertaken. The Committee does not offer opinions about past conduct. Members of the Bar who are contemplating representation of multiple parties in which

there is any possibility of future conflicts should carefully evaluate the risks and take proactive steps to ensure all potential clients are well-informed about such risks. *See* Rules 1.7 & 1.8(f), South Carolina Rules of Professional Conduct; John Freeman, *Ethics Watch: Conflicts of Interest: Multiple Ways to Lose*, 7 S.C. LAWYER 11 (March/April 1996).

Party B appears to have been given an expectation that an attorney-client relationship with Lawyer was created. However, that question is a matter of substantive law and the facts do not indicate a clear answer, so the Committee cannot resolve that issue. If such a relationship was created, however, the facts reflect a plain conflict of interest and, when the parties' interests diverged due to Party A's change of heart with respect to the agreement, Lawyer became responsible for two separate clients with opposing positions in a single matter.

This dual-representation would present a conflict under Rule 1.7(a)(1), exacerbated by the clients' conflicting demands with respect to the filing of the agreement and associated pleadings. In that case, Lawyer should take no further action on behalf of either Party A or Party B, but should immediately withdraw from representation of both pursuant to Rule 1.16. Lawyer should take such steps as are necessary to best mitigate the harm to Party A and Party B in connection with the withdrawal, pursuant to Rule 1.16(d).

Even if Party B is not a client, Party A became a client when he or she engaged Lawyer to draft the custody modification documents. As such, Party A was entitled to expect Lawyer to act in his or her interest and to follow instructions with respect to the subject of the representation.

Filing the pleadings, as requested by Party B, conflicts with the expressed instructions of Party A. While the inquirer points out that Party A's change of heart is contrary to the initial purpose of the representation, this does not entitle Lawyer to disregard Party A's current wishes. When Lawyer undertook to represent Party A, Lawyer assumed the risk that Party A's intentions might change over the course of the representation. It is not ethically permissible for Lawyer to file the pleadings over Party A's objection. *See* Rule 1.2(a).

The Committee advises that engagement agreements and fee agreements should be in writing and should clearly specify who is and who is not a client whenever the potential for misunderstanding exists.