

ETHICS ADVISORY OPINION

09-04

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:

Attorney tries Common Pleas and General Sessions cases for clients. Often, clients inform Attorney they wish to appeal verdicts and rulings, but also inform Attorney that they do not want Attorney to handle the appeal. In such circumstances, Attorney often believes that there are several issues for appellate review.

Questions Presented:

1. Does Attorney have an ethical obligation to file a notice of appeal for such clients in order to protect their ability to appeal, or merely refer the clients to the South Carolina Appellate Court Rules and inform them of their deadline to file a notice?
2. Should Attorney then petition the trial court or the Court of Appeals for an order relieving Attorney?
3. Would a provision limiting representation in the initial retainer agreement change Attorney's obligation?

Summary:

Rule 1.16(d) states, "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest . . ." In a criminal matter, Attorney may be required to file a Notice of Appeal and other documentation regardless of the limitations in the engagement letter or retainer agreement. In a civil matter, this obligation may be met by advising the client as to the steps necessary and time involved or by supplying client with a Notice of Appeal to file pro se and specific instructions for perfecting the appeal, depending upon the time of notice of the client of its desire to appeal the adverse decision. Attorney is cautioned about going beyond what is required by SCRPC Rule 1.16(d). See *In Re Tillman*, 319 S.C. 461, 462 S.E. 2d 283 (1995)

(reprimanding attorney for continuing to work on client's file after client terminated representation).

Opinion:

Attorney is required by S.C. Rule of Professional Conduct 1.16(d) to "take steps to the extent reasonably practicable to protect a client's interest" upon termination of representation. SCRPC Rule 1.16(d). The steps required depend greatly upon the type of law and the nature of the representation. The South Carolina Appellate Court Rules specifically place a duty upon an attorney appointed to a criminal case to file the Notice of Appeal and any and all documents necessary for the determination of indigent status to enable the client to qualify for further assistance from the Office of Appellate Defense. SCACR Rule 602. This rule also has specific instruction for when attorney is required to file to be relieved as counsel of record in this instance. SCACR Rule 602. Arguably, any criminal appeal would be governed by similar requirements. See *Jones v. State*, slip opinion 2009-SC-0513.330, March 18, 2009 (reciting when the criminal defendant has a constitutional right to advice on appeal from a negotiated plea).

The rules in general do not make this answer as clear in the civil context. While a limitation on representation in the engagement letter or retainer agreement is advisable, this may also not entirely fulfill the Attorney's burden under SC RPC Rule 1.16(d). Dependent upon the circumstances (such as very little time remaining to file) it may be reasonably practicable to supply the client with a Notice of Appeal to file pro se, along with clear instructions for perfecting the appeal. At the very least, the client desirous of appealing a negative ruling should be clearly advised on the specific time limits for filing appeal and the administrative requirements for perfecting the appeal. The Committee strongly suggests that this advice be reduced to writing as soon after the end of the trial as possible. In the event Attorney chooses to file the Notice of Appeal on client's behalf, Attorney would then be required to file a motion to be relieved as counsel of record with the Court of Appeals, or the court where the Notice of Appeal was filed, prior to ceasing to work on the client's appeal. Attorney is similarly cautioned to beware of going beyond what is required by SCRPC Rule 1.16(d). See *In Re Tillman*, 319 S.C. 461, 462 S.E. 2d 283 (1995) (reprimanding attorney for continuing to work on client's file after client terminated representation).