

Lawyer must be careful when bringing pro se case with spouse

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If you're an attorney and you and your spouse file a lawsuit pro se, you may have to take some extra precautions to avoid running afoul of ethics rules, especially when it comes to communicating with opposing parties.

So said the S.C. Bar's Ethnic Advisory Committee in response to an inquiry based on a fact pattern in which a lawyer and his non-lawyer wife represented themselves in a suit against a country club.



Crystal

In the scenario, an insurance company retained a lawyer to represent the club. Up for debate was whether either plaintiff could contact the insurance company or the club management directly to discuss the case under the S.C. Rules of Professional Conduct. With regard to the lawyer, the answer was that he could contact the insurer's counsel, unless the company had none, in which case he could contact the company. ■ See CAREFUL on PAGE 5

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pany as long as he had permission to do so. Also, he should exercise caution in contacting the club's management, the panel said.

As for the wife, the committee declined to comment on her, saying non-lawyers were beyond its purview.

A law professor and a practitioner said such situations don't happen often in real life.

"Situations in which a lawyer is representing himself and/or his or her spouse do arise but are not that frequent," Professor Nathan Crystal of the Charleston School of Law told Lawyers Weekly in an e-mail.

Desa Ballard, a West Columbia practitioner who focuses on professional ethics, agreed.



Ballard

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"I think most lawyers are aware enough of the circumstances that they're going to be stumbling into if they set themselves up in this situation," Ballard said.

But when it does happen, Ballard said, it can be "very awkward" for a lawyer because any action by the spouse would be imputed to him "even without actual evidence of his actual knowledge of it."

"There's going to be some presumption, or implication, anyway, that he is aware of or participating in whatever she is doing. So this is a very bad position for him to put himself in, in my opinion," she said.

The committee said the lawyer should avoid having his spouse do anything that the lawyer would be forbidden to do under the rules.

"He may not through the acts of his wife pursue a course of conduct which would violate the rules if done directly by him," the committee said, citing Rule 8.4(a).

Also, a lawyer should be cautious when advising a spouse on contacting opposing parties, the committee said, citing Rule 4.2.

"Husband may advise wife as to the rights of a non-lawyer party to contact the other party directly as contemplated in comment 4 to Rule 4.2, but cannot do so in a manner that circumvents the rule by directing or monitoring the wife's contacts or counseling her as to the sub-

stantive content of such conversations," the committee said.

Rule 4.2 generally bars a lawyer from communicating about the subject of a representation with anyone he knows is being represented by a lawyer in the same matter. Under Rule 8.4(a), it is misconduct for a lawyer to violate or try to violate ethics rules, to knowingly help or induce anyone else to violate them, or to break the rules through another's conduct.

The fact pattern didn't say whether the club had counsel of its own. As a result, the panel said the lawyer would have to be careful in contacting club managers because Rule 4.2 would prohibit contact with anyone who had authority to bind the club with respect to the case or who supervised, directed or regularly consulted the club's lawyer on the case.

Crystal said the opinion was straightforward.

"Generally lawyers are bound by the rules of professional conduct whether they are engaged in representation of clients or not. This opinion seems to be an application of the general principle that lawyers are bound by the rules even if they are acting in a personal capacity," he said.

Ethics Advisory Opinion 11-01, issued Feb. 21, may be viewed on the S.C. Bar's website.