Ethical Dilemmas Facing Family Law Practitioners

Hot Tips CLE

October 1, 2010

Nathan M. Crystal

Distinguished Visiting Professor
Charleston Law School

Summaries of Ethics Opinions

- I have prepared summaries of all of the ethics advisory opinions of the South Carolina Bar dealing with family law. I hope this summary will be helpful to you in researching ethical issues in South Carolina.
- If you would like an electronic copy please contact Sheryl Dimock, Sheryl.Dimock@scbar.org.
- In this segment I will discuss some issues that were raised with me by email.
- I'd also be happy to address any issues that you would like to raise.

Prospective Client

- Potential client calls law office and legal assistant gathers basic information. During the call, the potential client "blurts out" confidential information such as, "I committed adultery, but my spouse does not know." Question: Would this blurting out of information conflict the attorney from representing the opposing spouse if the attorney never talks to or meets with this first caller/spouse?

Prospective Client (2)

- Duties to a prospective client are governed by SCRPC 1.18.

(a) A person with whom a lawyer discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client only when there is a reasonable expectation that the lawyer is likely to form the relationship.

Prospective Client (3)

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

Prospective client (4)

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d)

Prospective client (5)

- What to do?
  - What are the goals of the intake information process?
    - Is this a case I want to handle?
    - Do I have a conflict?

    Limit the information necessary to achieve these goals.
  - Have a disclosure prior to intake. In writing if possible, otherwise read by assistant.

Prospective client (6)

- "Thank you for expressing an interest in retaining this firm. The first step in the process is for you to provide us with basic information about you and your case so that we can determine whether we are in a position to handle your case and if so the terms of our engagement. Please do not share with us any confidential information information about your case except as requested by my assistant."

Prospective client (7)

- If the lawyer does not personally receive the information, perhaps screening of the assistant to avoid disclosure of the information to the lawyer would be possible. Case law has allowed screening of nonlawyers who join firms to avoid conflicts of interest even though screening is not permitted when a conflicted lawyer joins a firm. Possibility of screening could be incorporated into previous disclosure.

Prospective client (8)

- Note that a person who calls your office and leaves a voice mail message that contains confidential information would not be entitled to the protections of 1.18.
- Comment 2 provides: **“Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, therefore is not a "prospective client" within the meaning of paragraph (a).”**
- However, avoid this problem by not allowing voice mail messages to attorney from individuals who are not clients.

Fees in subsequent collateral matter

- Former client has a subsequent lawsuit, such as a modification of custody case.
- Opposing party wants to call first attorney as a witness.
- What are attorney's ethical obligations?
- How does attorney get paid for time involved in responding to subpoena and appearing as a witness?

Fees in subsequent collateral matter (2)

- First, discuss with former client whether client is represented by counsel with regard to new matter.
- If not represented, discuss with client whether she should get counsel. Lawyer cannot do it because of the advocate-witness rule. Although perhaps another lawyer in firm could do with client, SCRPC 3.7(b).
- Second, if not represented discuss with her whether to object to subpoena on grounds of attorney-client privilege. If client wishes to object, attorney has ethical duty to raise privilege. See SCRPC 1.6, comments 13-14.

Fees in subsequent collateral matter (3)

- Third, if subpoenaed by opposing party, lawyer may be entitled to compensation for time involved in collateral matter from the party calling the attorney as a witness. See SCRCP 45(c)(3)(A)(iv); cf 45(c)(3)(B)(iii).
- Ethically, payments are not limited to witness fees under SCRCP 45(b), see EAO 97-42.

Fees in subsequent collateral matter (4)

- Original engagement agreement with client could provide for compensation for collateral matters to extent not paid by opposing party.

Fees in subsequent collateral matter (5)

- *"If I or any member of my firm is called as a witness on your behalf following the conclusion of your representation or if your file is subpoenaed because you waive your attorney client privilege, any costs, fees, expenses, including but not limited to fees I may incur researching the law to further protect you or possibly hiring counsel to represent me to protect you, will all be charged to you, and by your signature below, you agree to pay these fees within ten days of my sending you the bill and you agree to hold me harmless and indemnify me for any fees and costs I may incur to protect your interests as your former attorney following the conclusion of your case."* [Courtesy of Melissa Brown, esq.]

Withdrawal

- How should lawyer proceed when case has been pending for a long time, fees continue to mount, client is way behind in paying fees, and perhaps client has made the representation difficult by giving inaccurate information, criticizing lawyer, and other conduct?
- Suppose the same conduct by the client but the trial is half concluded and has been continued for six months, or the trial is over and the lawyer is waiting for the judge to issue his order?

Withdrawal (2)

- The short answer is that the lawyer can move to withdraw on various grounds under Rule 1.16(b), provided the lawyer gives the client reasonable notice of his intent to do so.
- Withdrawal will not get the lawyer paid and probably makes payment more difficult.
- Lawyer could consider having some form of mortgage or security agreement as part of original engagement. However, a lawyer could not obtain a mortgage on property subject to domestic litigation, Rule 1.8(j). This would probably not preclude a mortgage on nonmarital property, but such an agreement would also be subject to 1.8(a). See EAO 96-25.

Withdrawal (3)

- If the case is in midtrial or is awaiting an order, the lawyer could move to withdraw, but it would be difficult for a new lawyer to take over the case. Even if the lawyer had good cause for the motion, the court would be likely to deny it because grounds for good cause are overcome by harm to the client and interests of the administration of justice.

Withdrawal (4)

- If you anticipate the client being a problem at the inception of the case, either decline representation or demand a larger retainer.

Judicial Disqualification

- Family Court attorney gets divorced. Unfortunately, it is ugly, and judge hears a great deal about attorney's personal life, while the attorney argued spouse was not truthful, the entire matter was embarrassing. Now, attorney has another contentious case representing a client and trial is before the same judge. Should the attorney ask the judge to recuse himself if the attorney is concerned that that judge will look poorly upon the attorney, whether rightly or wrongly, from information that arose from attorney's own divorce?

Judicial Disqualification (2)

- Grounds for recusal motion would be either:
  - Judge's impartiality might reasonably be questions, Canon 3(E)(1) or judge has personal bias or prejudice concerning a party's lawyer, Canon 3(E)(1)(a).
  - Answer may depend on how the judge decided in the lawyer's case and whether the order included any negative findings about the lawyer.
  - If not, then I doubt that disqualification would be required under the rules.

Judicial Disqualification (3)

- If the lawyer is concerned that the client might be harmed, the lawyer could, rather than moving formally, write a letter with copy to opposing counsel, raising the question of whether the judge should step aside to avoid even the appearance of impropriety.
- Given recent events in this state, most judges would probably do so.
- If lawyer practices in a firm, another lawyer in the firm may be able to handle the case.

Judicial Disqualification (4)

- New Family Court Judge who previously had a family court practice.
- When is the judge disqualified from handling cases involving his old firm?

Judicial Disqualification (5)

- Judge is disqualified under Canon 3(E)(1)(b) when **"(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;"**

Judicial Disqualification (6)

- Thus, when matter was "in the office" when judge was in private practice, judge is disqualified under this rule, otherwise not.
- However, general impartiality standard continues to apply, 3(E)(1). Application of this depends on a number of factors:
  - How long ago did judge leave the firm?
  - Is the judge receiving any compensation from the firm?

Judicial Disqualification (7)

- Prudent judges will follow the remittal procedure set forth in Canon 3(F):

  "Remittal of Disqualification. A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding."

Duty of Competency and Limited Engagements

- Divorce practice is complicated. A divorce touches on all personal and financial aspects of the couple's lives: tax, real estate, estate planning, social security.
- Experienced domestic attorneys will have general knowledge in many of these areas, but it is important to alert clients to the limitation of your representation and the need for obtaining qualified counsel who specialize in these areas.
- I recommend that your engagement agreements clearly limit your engagement to the divorce itself and exclude other matters, informing clients of their need to retain competent professionals with regard to such matters. See SCRPC 1.2(c).

Dangerous Clients

- How to handle the potentially dangerous client?
- Under the Rules of Professional Conduct lawyers are permitted to reveal confidential information to the extent necessary to prevent reasonably certain death or substantial bodily harm. See EAO #99-12.

Dangerous Clients (2)

- A recent New York Times article reported that one divorce lawyer felt that danger was so great that she decided to keep a taser in her office.
- Even more frightening, she had used it twice.
- Remember the first rule of nature, which overrides the Rules of Professional Conduct -- PROTECT YOURSELF!!!