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Ethics Advisory Opinions

Ethics Advisory Opinion 99-09

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.

Full Text

Facts

Two attorneys have been retained on behalf of plaintiffs to represent their interests related to childhood sexual abuse of students by a teacher. The allegations include that one of the teacher's employers, a school, knew of the teacher's propensity to sexually abuse students and did not disclose that knowledge when it undertook to prepare for teacher recommendations to other schools. Students allegedly abused by the teacher have brought suit.

The case has aroused a high level of public interest. The attorneys have learned that one of their clients has taken it upon himself to create a web page devoted to the litigation. The web page contains a request to contact either attorney if any other witnesses or potential parties wish to come forward to identify themselves. After identifying all counsel involved in the case for both plaintiff and defendants, the site states in pertinent part: "If you are a victim, please do not hesitate to call/write" It identifies the attorneys and assures the contact will be safe and anonymous.

Attorneys have not requested or directed their client to create the web page and were not aware they would be identified in the web page. There is no fee information given nor a suggestion that either attorney be retained.

Question

Does the creation of a web page by a client dealing with current litigation and seeking potential witnesses, as well as prospective clients, which is unknown to the attorneys, require an analysis under Rules 7.2 and 7.3 of the Rules of Professional Conduct?

Summary

The attorneys have a duty to review the web page and to counsel their client about the advantages and disadvantages of the use of the page. S.C. Rule Prof. Cond. 1.2(a). If the client refuses to follow the attorneys' advice on the use of the web page, the attorneys would be authorized in seeking to

withdraw under Rule 1.16(b)(3). The web page is also being used in part to advertise for potential plaintiffs in the litigation. Whether to use the public media to advertise for clients is a decision that lawyers are entitled to make, not their clients. If the client refuses to make appropriate changes in the page, the attorneys would be justified in moving to withdraw under Rule 1.16(b)(3). The attorneys may conclude that they do not object to the web page being used to seek potential plaintiffs. If the web page does not comply with the rules on advertising, the attorneys should counsel the client about any changes that need to be made in the page to bring it into compliance with those rules. If the client refuses to make the suggested changes, the attorneys should give serious consideration to withdrawal from representation to avoid any implication that they have authorized or adopted the client's continued use of the web page.

Opinion

The web page is being used to seek witnesses and potential parties to the litigation. Lawyers have a duty to "consult with the client as to the means" by which a client's objectives are pursued. S.C. Rule Prof. Cond. 1.2(a). Ideally, the attorneys should have had the opportunity to consult with their client about the desirability of using the web page before the page was created, but the client's unilateral action deprived the lawyers of this possibility. Nonetheless, the attorneys should still review the web page and consult with their client about the advantages and disadvantages of continued use of the page. The page has the possible advantage of obtaining potential witnesses at a cost that would be less than the expense of hiring an investigator, but there are disadvantages that should be discussed with the client. The public nature of the web page may taint the jury pool. Further, the existence of the page might be viewed by some members of the community as inappropriate; negative community attitude would be harmful to the client's case. The attorneys should counsel the client about these matters. Since the use of the page involves a "means" rather than an "objective" of litigation, the attorneys have the authority to decide whether to use the page after consultation with their client. Rule 1.2(a). If the client refuses to follow the attorneys' decision on this matter, the attorneys would be authorized in withdrawing under Rule 1.16(b)(3).

The web page is being used in part to advertise for potential plaintiffs in the litigation. Whether to use the public media to advertise for clients is a decision that lawyers are entitled to make, not their clients. The client's web page is an unauthorized attempt to advertise for business for the attorneys. If the attorneys do not approve of this method of advertising, they should promptly inform the client of this and demand that the web page be changed. One way to change the page would be to include a disclaimer, stating that the page has been prepared by the client and has not been authorized or approved by the attorneys. Another possibility is to eliminate references in the page to seeking potential parties. The attorneys could insist on both of these changes. If the client refuses to take either or both of these steps, the attorneys would be justified in seeking to withdraw from the case under Rule 1.16(b)(3).

The attorneys may conclude that they do not object to the web page being used to seek potential plaintiffs. If the web page complies with the S.C. Rules on advertising of professional services, Rules 7.1 and 7.2, the attorneys may continue the representation without any further action. It appears to the Committee that the web page may, however, not comply with those rules. Rule 7.1(a) prohibits false or misleading communications.

The web page states that any contact with the attorneys by a third person will be "safe and anonymous." The Committee questions the accuracy of this statement. For example, a third person who contacts the attorneys may well become a witness in the matter. If the web page does not comply with the rules on advertising, the attorneys should counsel the client about any omissions and advise the client about how the web page could be changed to comply with those rules. If the client refuses to bring the page into compliance, the lawyer should give serious consideration to withdrawal from representation to avoid any impression that the lawyer has authorized or adopted the client's continued use of the web page.

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