ETHICS ADVISORY OPINION

24-02

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.

S.C. Rules of Professional Conduct: 1.6; 1.7(a) and (b); 1.8(a), (e) and (i); and 8.4(a).

Facts: Lawyer owns a personal injury firm in South Carolina. With the weight of inflation and financial woes, some of Lawyer's clients request pre-settlement funding for their cases. There are a host of pre-settlement funding companies in the marketplace, and Lawyer believes far too many offer predatory loans. Lawyer wants to provide Lawyer's clients with pre-settlement funding options that are the least predatory and burdensome for them. Lawyer's spouse is interested in beginning a pre-settlement funds company and would like to earn the business of Lawyer's clients.

Question Presented: May Lawyer advise Lawyer's clients of the availability of spouse's company as a pre-settlement funding option without violating the South Carolina Rules of Professional Conduct?

Summary: Only in unusual circumstances where a lawyer's financial interests are not significantly intertwined with the lawyer's spouse's should a lawyer consider referring clients to a pre-settlement funding business owned by a lawyer's spouse. If either the business of the lawyer's spouse benefits the lawyer financially or otherwise or the lawyer assists the spouse financially or otherwise in the creation or operation of the spouse's business, then the lawyer would, by advising a client about or referring a client to the spouse's business, violate Rule 1.8(e) through the acts of another in violation of 8.4(a). Even if the lawyer does not financially or otherwise contribute to or benefit from the business of the lawyer's spouse and, thus, is not prohibited under Rule 8.4(a) from referring the client to the business of the lawyer's spouse, the lawyer should fully disclose the spouse's interest in the business.

Opinion:

Rule 1.8, SCRPC, Rule 407, SCACR, addresses conflicts of interest with current clients, arising from, *inter alia*, the business and financial interests of the lawyer. Rule 1.8(a) generally prohibits a lawyer from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to a client subject to some specified exceptions. Rule 1.8(e) prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation other than advancing court costs and expenses of litigation or paying court costs and expenses of litigation on behalf of indigents client. See also Rule 1.8, Comment [1] and [10].

The Supreme Court of South Carolina has addressed constraints imposed by the South Carolina Rules of Professional Conduct on financial business transactions between lawyers and their clients. *See, e.g., Osprey, Inc. v. Cabana Ltd. Partnership*, 340 S.C. 367, 532 S.E.2d 269 (2000) ("Various ethical constraints closely control and in many instances prohibit business transactions between a lawyer and his or her client."). More specifically, Rule 1.8(e) has been consistently interpreted by our Supreme Court to prohibit a lawyer from giving, advancing, or loaning a client funds for purposes other than court costs and expenses related to contemplated or pending litigation. *See, e.g., In the Matter of Mayer*, 396 S.C. 515, 517, 722 S.E.2d 800, 801 (2012) (lawyer violated 1.8(e) by loaning client money); *In the Matter of Walker*, 393 S.C. 305, 309-310, 713 S.E.2d 264, 266 (2011) (lawyer violated 1.8(e) by guaranteeing loan for client); *In the Matter of Mitchum*, 385 S.C. 618, 620, 685 S.E.2d 811, 812 (2010) (Mitchum violated 1.8(e) by giving check to client that did not result from any settlement); *In the Matter of Hoffmeyer*, 376 S.C. 221, 656 S.E.2d 376 (2008) (lawyer violated 1.8(e) by giving client funds to resolve property settlement and for spending money); *In the Matter of Strait*, 343 S.C. 312, 315, 540 S.E.2d 460, 462 (2000) (lawyer violated 1.8(e) by advancing money to client for payment of client's electric bill).

This Committee has previously addressed whether lawyers may advise clients of or refer clients to loan or litigation funding businesses. In S.C. Bar Eth. Adv. Op. 91-15, this Committee addressed whether lawyers who had assisted a lender in establishing a loan business but had no equity or financial interest in it, could ethically refer clients who wished to borrow money to it. The Committee concluded that, because the lawyers had no interest in the business, the acts of the business could not be attributed to them, and a referral would not violate Rule 1.8(e).

In S.C. Bar Eth. Adv. Op. 94-04, the Committee was informed that lawyers had received communications from a company engaged in the business of financing litigation by purchasing or taking assignments of personal injury causes of action. The inquirer asked if a lawyer may ethically participate in such a financial transaction. The Committee first noted the possible applicability of S.C. Code Ann. 16-17-10, prohibiting barratry, and stated that, if the transaction is illegal under South Carolina law, a lawyer may not ethically participate under Rules 1.2(d) and 8.4(b). The Committee then answered that, assuming that the transaction is not illegal and the lawyer does not have a financial interest in the financing entity, the lawyer may ethically counsel a client of the availability of opportunities to finance litigation when the client either asks for or the lawyer concludes that a client's legal and economic position merits advice about such information. The Committee also opined as to additional obligations the lawyer would have if providing such information. The Committee expressly noted that, if the lawyer had a financial interest in the financing entity, the lawyer could not ethically participate in the transaction because the lawyer would be violating Rules 1.8(e).

The prior opinions of our Supreme Court and this Committee make clear that, under Rule 1.8 (a) and (i), Lawyer cannot make a loan to a client. The question then is whether Lawyer may advise a client about or refer a client to a business owned or operated by Lawyer's spouse for the purpose of providing funds to Lawyer's clients for purposes other than court costs and expenses. Rule 8.4(a) provides that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another…."

In the context of potential conflicts for lawyer-spouses representing opposing parties, the ABA Standing Committee on Ethics and Professional Responsibility has noted that the relationship of spouses is "so close that the possibility of an inadvertent breach of a confidence … is substantial." ABA Formal Eth. Op. 340 at 2 (1975), quoted in S.C. Bar Eth. Adv. Op. 90-28 at 2. The ABA Opinion also recognizes the possibility that the financial or personal interests of spouses may reasonably affect the ability of a lawyer-spouse to represent the lawyer-spouse's client with undivided loyalty. ABA Formal Eth. Op. 340; S.C. Bar Eth. Adv. Op. 90-28. The relationship created by marriage results in a myriad of unified interests, ordinarily including financial ones, the potential impact of which is that referral of a client to the lawyer's spouse for a financial transaction will often be tantamount to the lawyer acting "through another" as contemplated by Rule 8.4(a). In Opinion 340, the ABA concluded that such a connection "may" satisfy the language of 8.4(a). The New York State Bar concluded that, in the case of financial transactions, it necessarily does, and that advising a client about or referring a client to the spouse's money-lending business would violate Rule 1.8 through the acts of another in violation of 8.4(a). *See* N.Y. St. Bar Assn. Eth. Op. 855 at (2011) ("Referring clients to the spouse's financing company would violate Rule 1.8(e) 'through the acts of another,' essentially using the spouse as a front for advancing improper financial assistance to a client for whom the lawyer is conducting litigation.")

This Committee does not believe it is within its purview to declare these circumstances to be a *per se* violation of 1.8(e) via 8.4(a), consistent with the New York opinion, but cautions lawyers that spousal relationships seem to be the kind of relationships that *ordinarily* intertwine financial interests so significantly that it would be an unusual departure from the norm that a lawyer referring clients to their spouse for a litigation loan would not be violating Rule 1.8(e) through the acts of another.