

ETHICS ADVISORY OPINION

19-05

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.R. Prof. Conduct: 1.7

Factual Background: Attorney represents Subcontractor against Contractor regarding payment for work performed on a new home being built for Prospective Clients. The time for filing a mechanic's lien on behalf of Subcontractor has run and Contractor has received full payment from Prospective Clients for the new home.

Prospective Clients wish to retain Attorney to sue Contractor for breach of contract and negligently performed construction work. Prospective Clients' claims for breach of contract and negligently performed work do not appear, at this time, to involve the work of Subcontractor. Based on current information, Attorney is concerned that Contractor may not have sufficient assets to satisfy judgments that might be obtained by both Subcontractor and Prospective Clients.

Question: May Attorney undertake representation of Prospective Clients?

Summary: An attorney may represent both a subcontractor and homeowners against contractor for breach of contract and negligence provided that the attorney analyzes the prospective representation under Rule 1.7, SCRPC, and then considers whether the "material limitation" conflicts section in (a)(2) might apply.

The attorney also must evaluate the risk of future availability of assets and should engage in a course of ongoing assessment for conflicts of interest using section (b) of the Rule, particularly those that may arise if claims are reduced to judgments and the clients dispute the recovery amounts relative to one another.

Response: Subcontractor is a current client of Attorney. Therefore, the question of whether he may simultaneously represent Prospective Clients is governed by S.C.R. Prof. Conduct 1.7, which provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be

materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

Based on the facts presented, Rule 1.7(a)(1) is not presently applicable. Attorney is not being asked to represent Subcontractor against Prospective Clients or vice versa. As noted, there appears to be no significant risk that the claims of Prospective Client and the work of Subcontractor overlap such that Attorney would be called upon to attack the claim or work of either party. Further, while there is some concern regarding sufficiency of the Contractor's assets to satisfy the claims of Subcontractor and Prospective Clients, the claims are contingent and the ability of Contractor to satisfy any judgments is not fully known.

Rule 1.7(a)(2) involving "material limitation" conflicts may apply. Comment 8 outlines the general application of this rule:

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Given Attorney's concern regarding the future availability of assets sufficient to satisfy any judgments he may obtain for Subcontractor and Prospective Clients, Attorney must evaluate the risk and whether that potential risk might materially limit his ability to represent either party. If he determines that such a risk exists, then a conflict exists and he may only undertake the representation of Prospective Clients if he complies with the consent requirements of Rule 1.7(b), which provides:

- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;

- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Based on the facts presented, it does not appear that the proposed representation is prohibited by law. Comment 14 to the rule describes the types of representations that fall within the proscription of 1.7(b)(2).

The proposed representation also does not appear to fall within the proscription of 1.7(b)(3) at this time. Comment 15 describes the situations covered by this provision. Should, in the future, Subcontractor and Prospective Clients reduce their claims to judgments and dispute who should recover first or how much each should recover relative to the other, Attorney would be prohibited from representing one against the other as to that issue.

Consequently, the ability to proceed with the representation depends upon Attorney's assessment whether he can provide competent and diligent representation to both Subcontractor and Prospective Client and whether they consent to the representation after being informed of the benefits and risks of joint representation, particularly of the possibility of inadequate assets and the possibility of needing new counsel should they dispute recovery between themselves.