ETHICS ADVISORY OPINION

18-01

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.

South Carolina Rules of Professional Conduct: 1.0(f); 1.7(a)(2); 1.7(b); 5.7; 8.5(c)

Factual Background:
Lawyer is licensed to practice law in South Carolina. Lawyer is also a licensed property and casualty insurance agent in South Carolina. Lawyer wishes to sell automobile insurance on behalf of insurance carriers against which Lawyer's law practice may submit claims. Lawyer proposes to inform the carriers in advance of his law practice and not to work with any carriers that object. He will not submit claims in connection with any of the policies he actually sold. Further, he intends to keep his law practice and insurance agency work separate, and not to advertise or publicize his status as a lawyer in connection with his insurance work.

Questions Presented:
May Lawyer act as a property and casualty insurance agent for a local insurance agency selling automobile insurance for insurance carriers Lawyer may submit claims against in Lawyer's law firm?

Summary:
Yes, provided Lawyer ensures that (1) he does not perform legal work as an insurance agent, and (2) his representation of clients against insurance carriers with which he works as an insurance agent is not materially limited by his responsibilities as an agent.

Discussion:

1. Rule 8.5(c); 5.7

A threshold question is whether Lawyer's work as an insurance agent is "giving advice or providing services that would be considered the practice of law if provided while the lawyer was affiliated with a law firm" for purposes of Rule 8.5(c). The Rule provides that a lawyer who gives such advice or provides such services be treated as though he or she is representing a client. Here, if Lawyer's work as an insurance agent were deemed legal work pursuant to

Rule 8.5(c), Lawyer would face recurring conflict issues if it filed claims against carriers it represented.

Authority concerning the scope and application of Rule 8.5(c) is scarce. The Rule is unique to South Carolina, and has not been discussed at length in any prior opinions of this Committee or the courts. The sole Comment addressing Rule 8.5(c) clarifies that even activities that would not be considered the unauthorized practice of law if engaged in by a non-lawyer could constitute the practice of law if engaged in by a lawyer. Rule 8.5(c), Comment 8. The Comment provides a single example of such activities: giving tax advice. *Id.*

Our Supreme Court appears to have acknowledged that "assisting clients in loan modification matters is the practice of law in South Carolina when performed by a lawyer." *In re Emery*, 419 S.C. 498, 504, 799 S.E.2d 295, 298 (2017). However, the attorney in question stipulated that she violated Rule 8.5(c), and thus it cannot be said that the Court made a definitive ruling on the matter.

The Committee believes it is unlikely that selling insurance would fall within the scope of Rule 8.5(c). Providing tax advice and negotiating contracts are activities routinely performed by lawyers, while selling automobile insurance is not. However, in light of the lack of guidance as to the scope of Rule 8.5(c), an attorney operating in a non-legal capacity should always exercise caution.

It is reasonable to assume that Lawyer may use his legal training and expertise in his role as an insurance agent, such as, for example, in evaluating a consumer's insurance needs or determining the scope of coverage of a particular policy. It is entirely possible that insurance carriers and/or consumers who are aware of Lawyer's legal expertise might believe he is utilizing such expertise in connection with his work as an agent. Lawyer thus would be wise to take steps to guard against any perception that he is performing legal work or offering legal opinions in connection with his sales activities.

Based on Lawyer's description of his intentions, and in particular his plan to keep his law practice separate from his agency work, we also believe the arrangement will not implicate the law-related services restrictions of Rule 5.7. Under the circumstances, and provided Lawyer takes the precautionary measures described above, selling auto insurance is not a law-related service.

2. Rule 1.7

Rule 1.7 states, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Rule 1.7(a), RPC, Rule 407, SCACR. A "concurrent conflict" exists if "the representation of one client will be directly adverse to another client" or if "there is a significant risk that the representation of one … will be materially limited by the lawyer's responsibilities to another client … a third person or by a personal interest of the lawyer."

Here, a concurrent conflict would exist if there were a significant risk that Lawyer's representation of law firm client(s) against the insurance carrier would be materially limited by Lawyer's responsibilities to the carrier. Because Lawyer does not intend to undertake legal representation in connection with any policies he actually sold, it does not appear likely that a concurrent conflict would arise.

However, if a concurrent conflict is found to exist, Lawyer may still undertake the representation if all four requirements of Rule 1.7(b) are met: "(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."

Rule 1.7(b)(4) requires the consent to be "confirmed in writing" but not signed by the client. Prudent lawyers, however, will seek to obtain signed consents to multiple representations if possible. It should also be noted that the concept of informed consent requires discussion between the attorney and client regarding the "material risks of and reasonably available alternatives to the proposed course of conduct." S.C. Rule 1.0(f) and comment 6. See also comments 16-17 and 21-31 to Rule 1.7.

See also SC Ethics Advisory Opinion 04-11, outlining a lawyer's obligations under the Rules of Professional Conduct related to practicing law and operating another business from the same location.