



## ETHICS ADVISORY OPINION

### 18-03

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:** 1.2, 1.4, 2.1, 3.5

#### **Factual Background:**

Inquirer is one of three attorneys employed by a state administrative agency (“the Agency”). The Agency’s duties include enforcement of antidiscrimination laws in two distinct subject areas, and Inquirer has posed questions regarding the possible existence of ethical conflicts under the applicable statutory enforcement mechanisms. Both statutory enforcement mechanisms operate in essentially the same way, and may be summarized as follows:

1. A person who claims to have been injured by a prohibited discriminatory practice submits a written complaint to the Agency.
2. An Agency employee is assigned to investigate the matter. One set of statutes, but not the other, provides that a voting member of the Agency shall be designated to supervise the investigation.
3. Upon completion of the investigation, the investigator submits (to the supervising Agency member or to the Agency head, depending on the applicable set of statutes) a statement of facts revealed by the investigation and recommends either that the complaint be dismissed or that a panel of Agency members be assigned to hear the complaint.
4. The supervising Agency member or the Agency head shall review the investigator’s report and recommendation and issue an order of dismissal or for a hearing.
5. If the matter is not dismissed, the complainant will receive information regarding further proceedings. The complainant also receives a letter intended to notify the complainant that there is no attorney-client relationship between the complainant and Agency attorneys, who “represent [Agency], the state, and the public’s

interests.” The letter further advises, “[W]hile your interests and the interests of the State of South Carolina are expected to be the same, the possibility does exist that at some point our respective interests may differ and you will have the right to retain your own attorney and to intervene in the case.”

6. At any time before the hearing, the Agency may amend the complaint upon the request of the investigator, the complainant, or the respondent.
7. A panel of three agency members will be assigned to hear the matter. At the hearing:
  - a) The case in support of the complaint will be presented by one or more Agency employees, and/or by a legal representative of the complainant; and
  - b) The complainant is entitled to attend and submit evidence.
8. If the panel determines that the respondent has engaged in a prohibited discriminatory practice, it must state its findings and issue, in the name of the Agency, an opinion and order providing for appropriate relief.
9. If the panel determines that the respondent has not engaged in a discriminatory practice, it must state its findings and issue an order dismissing the complaint.
10. If an application for review is filed within 14 days of the panel’s order, the Agency, for good cause, shall review the order and the evidence, receive additional evidence, rehear the parties or their representatives, and decide whether to amend the order.
11. Thereafter, either party to the dispute may appeal the Agency’s order to the Administrative Law Court. Appeals are governed by the Administrative Procedures Act, S.C. Code Ann. §§ 1-23-380(B), 1-23-600(D).

As noted above, Inquirer is one of three attorneys employed by the Agency. For each complaint filed with the Agency, one of the attorneys is designated to serve as the Prosecuting Attorney. Although the investigator may have incidental contact with any of the attorneys, the Prosecuting Attorney answers legal questions from the investigator and reviews the investigator’s report and recommendation before it is submitted to the supervising Agency member or the Agency head. In the event of a hearing before a panel of the Agency, the Prosecuting Attorney presents the case in support of the complaint. One of the other two attorneys will act as Advice Counsel to the panel. Advice Counsel—who has limited or no knowledge of the case being presented and does not participate in the panel’s adjudications—assists the panel with evidentiary matters, clarification of points of law, and the form of the panel’s order.

### **Questions:**

#### **1. Questions Regarding the Role of Advice Counsel**

May an Agency attorney, who has not been designated as the Prosecuting Attorney for a particular matter, serve as Advice Counsel under any or all of the following circumstances:

- A. The attorney has had no contact with an investigator concerning the matter;
- B. The attorney has had contact with the investigator regarding non-substantive matters, such as answering a general legal question or assisting with issuance of a subpoena;
- C. The attorney has had contact with the investigator regarding substantive matters, such as the legality of the conduct complained of or review of the investigator's report and recommendation.

## 2. Questions Regarding the Role of Prosecuting Attorney

- A. May the Prosecuting Attorney request reconsideration of the panel's order on the basis of:
  - (1) concern that the order contains an error of fact or law adverse to the complainant, but not adverse to the public interest?
  - (2) concern that the order contains an error of fact or law adverse to the public interest, but not adverse to the complainant?
- B. May the Prosecuting Attorney appeal the panel's order on the basis of:
  - (1) concern that the order contains an error of fact or law adverse to the complainant, but not adverse to the public interest?
  - (2) concern that the order contains an error of fact or law adverse to the public interest, but not adverse to the complainant?
- C. What are the Prosecuting Attorney's obligations in the following circumstances:
  - (1) The complainant requests an appeal but the Agency head directs the Prosecuting Attorney not to appeal;
  - (2) The Agency head directs the Prosecuting Attorney to appeal, but the complainant opposes an appeal.

### Summary:

In large part, the questions posed by the Inquirer involve legal issues that are beyond the Committee's purview. Addressing only those aspects of the Inquiry that potentially raise concerns under the South Carolina Rules of Professional Conduct, the Committee's opinion is as follows:

Question 1: An attorney who has been involved in substantive matters during the investigative phase of a complaint should not act as Advice Counsel during the adjudicatory phase. Acting in such a dual capacity raises the specter of undue influence on the Agency's decision-making process, regardless of the care taken by the attorney to avoid any actual impropriety.

Question 2: The decision to seek reconsideration of, or to appeal, the panel's order is one for the Agency head, as the client. The Prosecuting Attorney must communicate and

consult with the Agency head on whether to seek reconsideration or to appeal. In doing so, the Prosecuting Attorney should render candid advice regarding not only the law but also other relevant considerations, which may include the views of the complainant.

## Discussion:

### Question One:

Advice Counsel's involvement in substantive aspects of the investigation primarily presents issues of due process that are beyond the scope of this Committee's authority to address. *See* S.C. Const. Art. I, § 22; *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432 (1998). Aside from the potential legal ramifications, acting as Advice Counsel following substantive involvement in the investigation of a complaint may implicate Rule 3.5 (Impartiality and Decorum of the Tribunal). More specifically, involvement in substantive aspects of the investigation creates the possibility that Advice Counsel's guidance to the panel will be explicitly or implicitly informed by direct knowledge of the facts, which may differ from the evidence presented by the Prosecuting Attorney. Thus, the circumstances described in Question 1(C) are fraught with the potential for influencing the tribunal in violation of Rule 3.5(a). The circumstances presented in Questions 1(A) and 1(B), in contrast, do not implicate Rule 3.5 because neither scenario contemplates Advice Counsel having independent knowledge of the facts of the matter.

### Question Two:

At first blush, the concerns raised by the various scenarios in Question Two appear to rest on the premise that the Prosecuting Attorney represents not just the Agency, but also the complainant. Whether an attorney-client relationship with the complainant is created by either or both of the statutory enforcement mechanisms described above is a legal question beyond the purview of this Committee. It is, however, within the scope of the Committee's authority to address the ethical issues that may arise when there is disagreement between the Prosecuting Attorney and his or her client, the Agency (acting through the Agency head), as to the means to be used in accomplishing the Agency's objectives in enforcing antidiscrimination laws.

Such issues are governed primarily by Rule 1.2, which addresses the allocation of authority between the client and lawyer. Rule 1.2(a) requires an attorney to abide by the client's decisions concerning the objectives of the representation and notes that Rule 1.4 imposes on the lawyer a duty to consult with the client as to the means for reaching those objectives. Comment [2] addresses the possibility that lawyer and client may disagree about what means should be used to accomplish the client's objectives. Of particular relevance to this Inquiry, Comment [2] notes that "lawyers usually defer to the client regarding such questions as the expense to be incurred and *concern for third persons who might be adversely affected.*" Rule 1.2, Cmt. 2 (emphasis added).

The obligation to defer to the client's decision regarding the objectives of the representation does not require a lawyer to keep mum about the pros and cons of a contemplated course of action. To the contrary, Rule 2.1 requires the lawyer to provide candid advice based on the lawyer's independent professional judgment. Echoing the commentary to Rule 1.2, Rule 2.1 comment [2] recognizes that "[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant."

In view of these principles, the answer to all of the issues posed in Question Two is essentially the same: under Rule 1.2(a), the Prosecuting Attorney must abide by the Agency's decision regarding whether to seek reconsideration or appeal in any given case. At the same time, Rule 2.1 requires the Prosecuting Attorney to provide candid advice to the Agency based on the Prosecuting Attorney's independent professional judgment. Depending on the circumstances, candid advice under Rule 2.1 may include an assessment of the public interest or information regarding the complainant's views.