

NEW HAMPSHIRE BAR ASSOCIATION  
Ethics Committee Formal Opinion #1989-90/17  
**Conflicts of Interest/Multiple Representation of Parties in Commercial Litigation.**  
August 25, 1990

**RULE REFERENCES:**

- \*Rule 1.6
- \*Rule 1.7
- \*Rule 1.7(a)
- \*Rule 1.9

**SUBJECTS:**

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| *Adverse Effect on Professional Judgment | *Consultation   |
| *Adverse Representation                  | *Files of Client  |
| *Client Communications                   | *Harsh Reality Test                                     |
| *Confidentiality                         | *Independent Judgment                                   |
| *Conflict of Interest                    | *Multiple Representation                                |
| *Consent                                 | *Real Estate/Realtors                                   |
|  | *Termination/Withdrawal of Attorney-Client Relationship |

**ANNOTATIONS:**

A lawyer shall not represent a client if the representation will be directly adverse to another client, unless the client relationship will not be adversely affected, and each client consents after consultation and with knowledge of the consequences. (Rule 1.7(a))

A lawyer shall not represent a client if the representation of that client may be limited by responsibilities to another client, a third person, or by the lawyer's own interests, unless the representation will not be adversely affected, and the client consents after consultation and with knowledge of the consequences. (Rule 1.7(b))

In matters involving multiple representation, an attorney should apply the "harsh reality test" in making the threshold determination as to whether to proceed with representation. (Rule 1.7)

Full disclosure of potential consequences under Rule 1.7(b) must be appropriate in light of the client's legal sophistication and experience. (Rule 1.7(b))

Confidential information obtained in the course of the attorney-client relationship shall not be revealed, unless the client consents after consultation. (Rule 1.6; 1.9)

A lawyer who has formerly represented a person in a matter shall not thereafter represent another person in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client consents after consultation and with knowledge of the consequences. (Rule 1.9)

**QUESTION:**

May an attorney represent a general contractor in a claim against a construction lender where the attorney has been representing both the general contractor and the developer and the success of the general contractor's claim would probably give the construction lender a claim against the developer?

## **FACTS:**

The pertinent factual background to this inquiry is as follows: the inquiring law firm has represented a developer of property and the general contractor on the project, a corporation whose president is the developer's brother. The law firm defended claims brought by various creditors of the general contractor and the developer and defended an action for foreclosure against the developer by the construction lender. The general contractor now wants the law firm to make a claim against the construction lender for wrongfully failing to disburse a retainage which was held back from the construction requisitions. If the general contractor succeeds in this claim, the construction lender will probably have a claim against the developer to recover the funds paid to the general contractor. The developer was apparently aware that the lender was utilizing the retainage for other purposes prior to the completion of construction. Had the general contractor known that the funds were being so utilized, it would not have completed construction.

The developer, having been advised of the potential for a claim against him by the construction lender if the general contractor succeeds, is prepared to sign a written authorization to allow the law firm to undertake the general contractor's representation against the construction lender and to utilize any information contained in the joint file created for both parties. The law firm has advised the developer that there may be outstanding issues between him and the general contractor which the law firm will not either advise the general contractor on or undertake any other form of representation.

## **RESPONSE:**

Rule 1.7 provides as follows:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
  - 1. the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  - 2. each client consents after consultation and with knowledge of the consequences.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
  - 1. the lawyer reasonably believes the representation will not be adversely affected; and
  - 2. the client consents after consultation and with knowledge of the consequences. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Although not entirely free from doubt, it would appear that the proposed representation of the general contractor against the construction lender would not implicate Rule 1.7(a) as the interests of the general contractor and the developer cannot be considered "directly adverse" at this stage.<sup>1</sup> However, given the probability of a claim against the developer by the construction lender as a result of the general contractor's suit, the inquiring law firm's representation of the general contractor is materially limited by the law firm's responsibilities to the developer. Accordingly, the law firm must have a reasonable belief that such representation would not be adversely affected by its independent responsibilities to the developer and both the general contractor and the developer consent to such representation with knowledge of the consequences. This threshold determination cannot be undertaken lightly as under the "harsh reality test" articulated by this Committee, the attorney:

should ask himself or herself whether, if a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent ... If this 'harsh realty test' may not be readily satisfied by the inquiring attorney, the inquiring attorney and other members of the inquiring attorney's firm should decline representation [of the second client]. NH Op 1988-89/24

In making this initial determination, the inquiring law firm must take into account numerous potential consequences of its representation. For instance, would an independent attorney conclude that the general contractor's best strategy would be to sue both the construction lender and the developer and let them fight it out as to which one is legally liable to the general contractor? How will representation of the general contractor be affected if the construction lender decides to bring a third party claim against the developer at the outset of this litigation? What is the effect of the family relationships which exist in this case?

The complexities inherent in this situation dictate extreme caution and, in the Committee's judgment, should lead the inquiring law firm to conclude that it would not be reasonable to seek the clients' consent to this representation. The Committee believes that given, among other things, the family relationships which exist and the potential economic consequences to the developer if the general contractor's suit is successful, it will be difficult, if not impossible, for the inquiring law firm to zealously represent the general contractor and, at the same time, fail to harm the interests of its other client, the developer. The Committee notes that the First Circuit has stressed an attorney's duty of individual loyalty on analyzing multiple representation of clients with conflicting interests in such circumstances. *Fiandaca v. Cunningham*, 827 F.2d 825, 829 (1st Cir., 1987) (Counsel disqualified for conflict of interest). Therefore, the Committee concludes that the inquiring law firm could probably not meet the objective standard of the "harsh reality test" articulated by this Committee.

Nonetheless, if, following the law firm's careful weighing of these factors, the inquiring law firm has a reasonable belief that it may proceed to represent the general contractor, it must provide full disclosure of the potential consequences and obtain the client's or clients' consent to proceed. In light of the potential effects on both the general contractor and the developer, the Committee believes that in this instance, the consent of both clients would be necessary. Disclosure must be appropriate, in light of the level of the clients' legal sophistication and experience. While not required by the Rule, it would be preferable to obtain the clients' consent in writing.

These same standards should govern the use of any confidential information obtained in the course of the attorney/client relationship between the law firm and the developer. *See* Rule 1.6.

Finally, the Committee notes that the inquiry does not make it clear whether the law firm is presently representing both the general contractor or the developer. However, Rule 1.9 dealing with conflicts of interest pertaining to former clients provides:

A lawyer who has formerly represented a person in a matter shall not thereafter:

- (a) represent another person in the same or a substantially related matter in which that client's interests are materially adverse to the interests of both unless the former client consents after consultation and with knowledge of the consequences; or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

The Committee believes that the general contractor's claim arises out of the same or substantially related matter and its interests could be considered "materially adverse to the developer's in the context of the proposed claim. Therefore, the same analysis as laid out above with respect to Rule 1.7 should apply even if the developer is not a present client of the law firm's. Similarly, no confidential information about the developer can be used except in accordance with the standards of Rule 1.6 which requires the developer's consent with knowledge of the consequences.

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<sup>1</sup>The Committee notes that a significant minority of the Committee was of the view that given the potential consequences to the developer of a successful suit by the general contractor against the Bank, the interests of the general contractor and the developer should be considered directly adverse" within the meaning of Rule 1.7(a). This split of opinion further illustrates the complexity of the issues presented and supports the Committee's conclusion that the objective standards of the "harsh reality test" probably cannot be met in this case.