

You have advised that a law firm had been approached by a subcontractor on a Virginia Department of Transportation ("VDOT") tunnel project and was asked to represent that subcontractor in connection with potential litigation over tile supplied and installed by the subcontractor on the project. The law firm rendered advice to the subcontractor on various issues related to the potential litigation. After the firm's invoice was rendered to the subcontractor, communication was discontinued with the firm and the subcontractor handled negotiations, attended meetings with the other parties, and prepared position papers on the claim, without advice from the law firm. Based on the lack of communication from the subcontractor, its knowledge that the dispute was on-going, and the lack of payment or any communication regarding the firm's invoice, the law firm considered its relationship with the subcontractor to be terminated and closed its files on the matter.

Several months after its last contact with the subcontractor, the law firm was approached by the project's prime contractor seeking representation in connection with requests to VDOT for additional compensation under the claims procedure contained in § 33.1-386, et. seq., Code of Virginia. The prime contractor asked the law firm to accept representation in connection with its requests for additional compensation from VDOT on the matters of (1) substantially higher river currents than represented by VDOT in the initial bidding process; and (2) increased costs incurred by the prime contractor when a portion of the project site was not available on the date specified in the contract, resulting in a change of sequence for the beginning of construction to another portion of the project site. You indicate that both of these matters took place long before the subcontractor supplied or installed the disputed tile, and neither had any relation to the tile installed by the subcontractor. Furthermore, you posit that "under federal and Virginia state guidelines, each claim for additional compensation must be considered independently by VDOT on its own merits."

You indicate further that the law firm then advised the prime contractor of its previous representation of the subcontractor; that the firm would be unable to represent the prime contractor in connection with any dispute it might have with the subcontractor concerning the tile subcontract; and that, without the written consent of the subcontractor, the firm would be unwilling to represent the contractor in connection with its claim and the subcontractor's claim for additional compensation from VDOT based upon VDOT's improper rejection of tile.

The facts you provide indicate further that the law firm apprised the subcontractor of its intention to represent the prime contractor before VDOT in connection with the contractor's two requests for additional compensation which were unrelated to the tile dispute, while also advising the subcontractor that, in spite of the law firm's belief that the interests of the prime contractor and the subcontractor were in parity, the firm would not represent the prime contractor before the VDOT in connection with any request for additional compensation on the tile claim without prior written permission from the subcontractor. The subcontractor responded by contending that any representation by the law firm of the prime contractor on any request for additional compensation from VDOT on the project would be impermissible based on the firm's prior representation of the subcontractor in connection with its potential litigation with the prime contractor over the tile dispute.

You have asked the Committee to opine whether, under the facts of the inquiry, the law firm may represent the prime contractor, a potential client, over the objection of the subcontractor, a former client.

The appropriate and controlling disciplinary rule related to your inquiry is DR:5-105(D), which states that a lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interests of the former client unless the former client consents after disclosure.

The Committee believes that the propriety of the representation turns on whether or not the requests for additional compensation by the prime contractor from VDOT on the tunnel project are the same or substantially related to the subcontractor's earlier materials dispute. Under the facts you have presented, it is the opinion of the committee that, although the issues for which the prime contractor seeks the firm's representation grow out of the same matter as did the issues for which the firm provided assistance to the subcontractor, the prime contractor's claims for additional compensation do not appear to be the same or substantially related to the subcontractor's dispute regarding VDOT's improper rejection of tile. Thus, the Committee opines that the firm may properly represent the prime contractor on the two issues currently in dispute and consent from the subcontractor to that representation would not be required.

The Committee cautions, however, that should the firm or a finder of fact determine at any time in the future that the matters are the same or substantially related and, furthermore, that the interest of the prime contractor is adverse in any material respect to the interest of the subcontractor, the firm would then need to withdraw from further representation of the prime contractor unless the subcontractor provided the requisite consent.

Committee Opinion
May 14, 1991