

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2023-13
Issued December 14, 2023**

FACTS

The inquiring attorney represented a client in a probate matter following the death of the client's mother. As part of the representation, the inquiring attorney assisted the client in rescinding a waiver to the admission of the decedent mother's will into probate, entered his or her appearance in the probate matter, conducted informal discovery, reviewed the decedent mother's estate plan, communicated with opposing counsel, and advised the client. According to the inquiring attorney, the client had once been named as a beneficiary of the decedent's estate plan but had subsequently been removed pursuant to an amendment to the plan. Under the amended plan, the estate property passed into a trust over which the decedent's husband had a Limited Testamentary Power of Appointment to direct the trust proceeds. The client had only a contingent beneficiary right under the trust following the death of the decedent's husband. The inquiring attorney reports that the client questioned the decedent mother's competency when she executed the amendment to the estate plan but chose not to challenge the amendment.

The inquiring attorney's representation of the client has since ended, and the inquiring attorney has joined a new law firm. The new law firm is the same firm that represented the decedent's estate during the inquiring attorney's representation of the now-former client in the probate matter. The inquiring attorney has been asked to assist on the remaining matters related to the administration of the trust.

ISSUES PRESENTED

The inquiring attorney asks the following: (1) may the inquiring attorney properly work on the remaining matters related to the trust; (2) if not, may the former client consent to the inquiring attorney working on the trust; and (3) must the inquiring attorney provide the former client with notice of his or her new position with the law firm that represents the decedent mother's estate?

OPINION

It is the Panel's opinion that: (1) the inquiring attorney is disqualified from working on the remaining matters related to the trust; (2) however, the former client may remove the disqualification by giving his or her written informed consent to the representation; and (3) if the former client does not provide such consent, no lawyer in the inquiring attorney's new law firm may work on the remaining matters related to the trust unless the inquiring attorney is screened from the matter, and the former client is informed in writing of the nature of the former representation and is given a description of the screening procedures employed.

REASONING

Both Rule 1.9 and Rule 1.10 of the Rules of Professional Conduct are relevant to this inquiry. Each shall be addressed below in turn.

Rule 1.9—Duties to Former Clients.

Rule 1.9 pertains to a lawyer's duties to former clients:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

In this case, the inquiring attorney states that he or she has moved to a new law firm, which firm represented the decedent's estate in the probate matter in which the inquiring attorney once represented the former client. The former client's interests are materially adverse to those of the decedent's estate because the former client had a beneficiary interest in the estate that was subsequently extinguished by an amended estate plan executed by the decedent. Based on these facts, the Panel finds that the inquiring attorney is disqualified from representing the decedent's estate pursuant to Rule 1.9(a). See Rule 1.9, Comment [2] (noting that "[w]hen a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited"). That the inquiring attorney's representation of the former client was more than minimal—involving such actions as entering an

appearance in the matter, helping the client rescind a waiver to the admission of the decedent's will into probate, conducting informal discovery, reviewing the decedent's estate plan, communicating with opposing counsel, and advising the client—only reinforces Rule 1.9(a)'s applicability. See id. (observing that “[t]he underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question”).

However, the disqualification may be removed if the former client gives his or her written informed consent to the new representation. See Rule 1.9, Comment [9] (noting that “[t]he provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b)”). To be informed, consent may be made only “after the [inquiring] lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Rule 1.0(e). Should the former client provide such written consent to the inquiring attorney, the inquiring attorney must adhere to the restrictions of Rule 1.9(c) with regard to use of information obtained during his or her representation of the former client when representing the decedent's estate. See Rule 1.9, Comment [8] (observing that “information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client”).

Rule 1.10—Imputation of Conflicts of Interest: General Rule.

Rule 1.10 concerns imputation of conflicts of interest:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Relevant here is Rule 1.10(c), which applies because the inquiring attorney has moved to a new law firm. See Rhode Island Supreme Court Ethics Advisory Panel Opinion 2010-03. Under this Rule, no lawyer of the new law firm may represent a person in a matter in which the inquiring attorney is disqualified under Rule 1.9, unless two (2) conditions are met. Therefore, should the former client not consent to the inquiring attorney's representation of the decedent's estate, the Panel finds that no lawyer in the inquiring attorney's new law firm may represent the decedent's estate unless the following occurs. See Rule 1.10, Comment [6] (remarking that "[w]here the conditions of paragraph (c) are met, imputation is removed . . .").

First, the inquiring attorney must be "timely screened from any participation in the matter and . . . apportioned no part of the fee therefrom." Rule 1.10(c)(1). Rule 1.0(k) defines "screened" to mean "the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law." See also Rhode Island Supreme Court Ethics Advisory Panel Opinion 2010-03.

Second, the former client must be given prompt written notice enabling him or her to determine the firm's compliance with Rule 1.10(c). See Rule 1.10(c)(2). Comment [8] to Rule 1.10 clarifies that such notice should contain "a description of the screened lawyer's prior representation and of the screening procedures employed[, and] generally should be given as soon as practicable after the need for screening becomes apparent." See also Fedora v. Werber, 84 A.3d 812, 813 (R.I. 2013) (construing the requirements of Ruler 1.10(c)(2)).