

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2024-05
Issued July 11, 2024**

FACTS

The inquiring attorney represents a client (the “Client”) in a third-party, work-related slip-and-fall case against the worksite general contractor and other entities. The defendants have disclaimed liability on the ground that they are not responsible for the Client’s injuries and/or the Client is responsible for his or her own injuries. In support of their position, the defendants have identified as one of their witnesses a safety coordinator who investigated the Client’s allegations on behalf of the defendants (the “Witness”).

The inquiring attorney intends to depose the Witness. However, the inquiring attorney has learned that the Witness is in fact his or her current client with an unrelated workers’ compensation matter dating from 2016 with an open claim for medical benefits but no recent claim activity. Based on this revelation, the inquiring attorney has postponed the deposition and asks whether a conflict of interest exists such that he or she must withdraw from representing the Client and/or the Witness.

ISSUE PRESENTED

The inquiring attorney asks whether a conflict of interest exists such that he or she must withdraw from representing the Client and/or the Witness under the Rules of Professional Conduct?

OPINION

It is the Panel’s opinion that a conflict of interest does exist, such that the inquiring attorney must withdraw from representing both the Client and the Witness under the Rules of Professional Conduct.

REASONING

This inquiry implicates several interrelated Rules of Professional Conduct. The Panel’s first step is to determine the existence or absence of a conflict of interest. Conflicts of interest are governed by Rule 1.7:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(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 is grounded primarily upon the attorney’s duty of loyalty to his or her client.” Markham Concepts, Inc. v. Hasbro, Inc., 196 F. Supp. 3d 345, 349 (D.R.I. 2016) (interpreting Rhode Island Rule of Professional Conduct 1.7). “Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing.” Rule 1.7, Comment [2].

Here, the inquiring attorney represents both the Client and the Witness in unrelated matters. However, the interests of the Client and the Witness are nonetheless directly adverse because the Witness is a material witness for the defendants in the Client’s slip-and-fall case, obligating the inquiring attorney to depose him or her on the Client’s behalf. This is a classic conflict-of-interest scenario under Rule 1.7(a)(1). See Rule 1.7, Comment [6] (recognizing that “a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit”).

Accordingly, the Panel must next ascertain whether the conflict may be overcome by obtaining the Client’s and the Witness’ written, informed consent. See Rule 1.7(b)(4); see also Rule 1.7, Comment [13] (observing that “[o]rdinarily, clients may consent to representation notwithstanding a conflict”). 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); see also Rule 1.7, Comment [17] (explaining that “[i]nformed consent requires that each affected client be

aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client”). The written instrument evincing the clients’ consent “may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent.” Rule 1.7, Comment [19]; see Rule 1.0(n) (defining the term “writing” to include electronic transmissions).

“However, as indicated in [Rule 1.7](b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.” Rule 1.7, Comment [13]. “Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest.” Rule 1.7, Comment [14]. Such interests are set forth in Rule 1.7(b)(1) through (3).

In this case, the Panel finds that the conflict is nonconsentable because the inquiring attorney’s coincident duties to zealously represent both the Client and the Witness are incompatible. See Rule 1.3, Comment [1]. On the one hand, the inquiring attorney’s duty to the Client obligates him or her to depose the Witness in an adversarial manner because the Witness is acting on behalf of the defendants who stand in opposition to the Client. This obligation extends throughout the litigation, as the inquiring attorney may be required to cross-examine the Witness at trial, impeach the Witness’ credibility, challenge the content of the Witness’ testimony, present contrary evidence, or otherwise confront the Witness in furtherance of his or her representation of the Client. However, owing to the inquiring attorney’s simultaneous representation of the Witness, the Client may justifiably fear “that the [inquiring attorney] will pursue [the C]lient’s case less effectively out of deference to the [Witness], i.e., that the representation may be materially limited by the [inquiring attorney’s] interest in retaining the [Witness as his or her] client.” Rule 1.7, Comment [6]. Such fear could impair the Client’s attorney-client relationship with the inquiring attorney and undermine the representation. See id.

On the other hand, the inquiring attorney also owes the Witness the same duty of zealous representation in the Witness’ workers’ compensation matter. His or her actions when representing of the Client could irretrievably sunder this relationship due to the fundamentally adversarial nature of such advocacy as described above. See Rule 1.7, Comment [6] (recognizing that “[t]he client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively”). As such, there is no way for the inquiring attorney to reconcile his duties to both the Client and Witness without prejudicing them. See Rhode Island Ethics Advisory Panel Op. 2004-06 (determining that a conflict of interest was nonconsentable because the inquiring attorney could not effectively represent either party even with their informed consent). As such, it is functionally impossible for the inquiring attorney to adequately represent either the Client or the Witness under these limitations. See Rule 1.7, Comment [4] (recognizing that “[w]here more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer’s ability to comply with duties owed to the former client and by the lawyer’s ability to represent adequately the remaining client or clients, given the lawyer’s duties to the former client”).

Accordingly, the Panel finds that withdrawal from both representations is the inquiring

attorney's sole remedy here. Withdrawal from and termination of a representation is governed by Rule 1.16. Subsection (a)(1) authorizes withdrawal when "the representation will result in violation of the rules of professional conduct or other law" The concurrent conflict of interest here, and the inquiring attorney's circumstantial inability to represent either party with the appropriate zealousness and commitment resulting therefrom, satisfies this condition. See Rule 1.16, Comment [1] (observing that a lawyer should not accept or continue a representation "unless it can be performed competently, promptly, without improper conflict of interest and to completion").

Before withdrawing from and terminating his or her representation of the Client and the Witness, the inquiring attorney should take all reasonable steps required by Rule 1.16(d) to mitigate the consequences to them of his or her withdrawal, including, but not limited to, providing notice to them of his or her intention to terminate representation—permitting them time to select replacement counsel—returning their papers and property, and refunding any unearned fees or expenses. This is a non-exhaustive list of mitigation steps; the particular circumstances of the matter may require additional efforts. See Hazard, Hodes, Jarvis, and Thompson, The Law of Lawyering, § 21.18 n. 56, pg. 34 (2023).