

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2024-9
Issued August 15, 2024**

FACTS

The inquiring attorney's law firm regularly represents clients before a certain municipality's various boards and commissions, including its Planning and Zoning Boards. Recently, the municipality offered the inquiring attorney's law firm the opportunity to represent the municipality in misdemeanor criminal prosecutions in the Rhode Island District Court. According to the inquiring attorney, such prosecutions have historically been undertaken by law firms other than the firm that acts as the municipality's Solicitor and represents the municipality's boards and commissions.

ISSUE PRESENTED

The inquiring attorney asks whether his or her law firm's engagement to represent the municipality in misdemeanor criminal prosecutions in the Rhode Island District Court would preclude the law firm from continuing to represent private clients before the municipality's various boards and commissions.

OPINION

It is the Panel's opinion that the inquiring attorney's law firm's representation of the municipality in misdemeanor criminal prosecutions in the Rhode Island District Court and of private clients before the municipality's various boards and commissions constitutes a concurrent conflict of interest under Rule 1.7(a). However, this conflict of interest can be waived if the requirements of Rule 1.7(b) are met, including obtaining the written, informed consent of the municipality and the private clients the law firm seeks to represent before the municipality.

REASONING

Rule 1.7 of the Rules of Professional Conduct addresses concurrent conflicts of interest:

(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].

Should the inquiring attorney’s law firm agree to represent the municipality in misdemeanor criminal prosecutions in the Rhode Island District Court, it would have an attorney-client relationship with the municipality. Accordingly, pursuant to Rule 1.7(a)(1) the firm could not represent clients with interests directly adverse to those of the municipality. The Panel has found in multiple prior cases that the interests of a party with a matter before a municipal board or commission are necessarily adverse to the interests of the municipality. See, e.g., Rhode Island Supreme Court Ethics Advisory Panel Op. 2007-03 (concluding that an attorney who represented a municipality as special counsel was not permitted to represent private clients before the municipality’s zoning board or town council.); Rhode Island Supreme Court Ethics Advisory Panel Op. 2003-06 (finding that an attorney’s simultaneous representation of a municipality in a pending lawsuit and of private clients before the municipality constituted a conflict of interest under Rule 1.7); Rhode Island Supreme Court Ethics Advisory Panel Op. 90-36 (determining that a part-time town solicitor could not represent private clients before the town’s zoning board).

As such, pursuant to Rule 1.7(a)(1) a concurrent conflict of interest would preclude the inquiring attorney’s law firm from representing private clients before the municipality’s various boards and commissions. Moreover, this conflict of interest would be imputed to all lawyers in the firm pursuant to Rule 1.10(a). See Rhode Island Supreme Court Ethics Advisory Panel Op. 2023-01; Rhode Island Supreme Court Ethics Advisory Panel Op. 97-06.

However, “clients may consent to representation notwithstanding a conflict.” Rule 1.7, Comment [13]. The Panel finds that this matter is one in which the conflict may be waived if the requirements of Rule 1.7(b) are met, including obtaining the written, informed consent of the municipality and each of the private clients the inquiring attorney’s law firm seeks to represent

before the municipality. See Rule 1.7(b)(4); see also Rule 1.7, Comment [6] (observing that “[l]oyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed consent”). 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). Such written, informed consent must be obtained on a case-by-case basis.

In reaching this conclusion, the Panel reminds the inquiring attorney that depending on the facts and circumstances of the particular matter at hand, some conflicts of interest are nonconsentable. See Rule 1.7, Comment [13] (recognizing that “as indicated in paragraph (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”). Such a situation may arise, for example, if the prospective private client is involved in a misdemeanor case handled by the inquiring attorney’s law firm on behalf of the municipality. See, e.g., Rule 1.7(b)(3); Rule 1.7, Comment [22] (noting that “[p]aragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients’ consent”). Therefore, the Panel urges the inquiring attorney and his or her law firm to carefully vet each prospective private client with a matter implicating a board or commission of the municipality before accepting the representation.