

Final

Rhode Island Supreme Court Ethics Advisory Panel
Opinion No. 2009-02 Request No. No. 961
Issued June 11, 2009

FACTS:

Several individuals seek to retain the inquiring attorney to represent them at legislative proceedings. The resultant legislation would affect not only the individuals who seek to retain the inquiring attorney, but also a substantial number of others. If the resultant legislation is not favorable to the individuals, it is likely that they will retain the inquiring attorney to represent them in a class action.

The inquiring attorney currently represents parties in a real estate matter that is in litigation. Two opposing parties in the real estate case (hereinafter, Mr. and Mrs. Doe) are persons who share the same interest in the legislative proceedings as the individuals who seek to retain the inquiring attorney for the legislative proceedings and the eventual class action. Mr. and Mrs. Doe would be members of the class should a class action proceed on the resultant legislation. The real estate matter is unrelated to the class action.

ISSUE PRESENTED:

The inquiring attorney asks whether he/she may represent the individuals seeking to retain him.

OPINION:

The Panel concludes that it is not a conflict of interest under Rule 1.7 for the inquiring attorney to represent individuals who seek to retain him/her in an eventual class action where two unnamed members of the class are adverse parties to the inquiring attorney's current clients in a real estate matter that is unrelated to the class action.

REASONING:

Rule 1.7 of the Rules of Professional Conduct is pertinent to this inquiry. It states as follows:

Rule 1.7 Conflict of Interest: Current Clients (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.

For purposes of this discussion, the Panel makes the following assumptions: (a) The resultant legislation is not favorable to the individuals who seek to retain the inquiring attorney, and the inquiring attorney is retained by the individuals to represent them in a lawsuit which is a class action; and (b) Mr. and Mrs. Doe are members of the class, but are not the individuals who retained the inquiring attorney. What, then, is the relationship between the inquiring attorney and Mr. and Mrs. Doe for purposes of the conflict-of-interest rules?

The Comment to Rule 1.7 is instructive. It provides:

[24] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purpose of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

In discussing the conflicts-of-interest issues presented to class lawyers, the N.Y.C. Bar Association Committee on Professional and Judicial Ethics concluded that if a class member did not individually retain the class lawyer or consult with that lawyer, the lawyer would not be prohibited from accepting an unrelated matter against the class

member during the pendency of the class action. N.Y.C. Bar Association Committee on Professional and Judicial Ethics, Op. 2004-01 (2004).

The Panel is of the opinion that Mr. and Mrs. Doe, as unnamed members of the class that would be represented by the inquiring attorney, would not be clients of the inquiring attorney. Comment [24], Rule 1.7. Moreover, the pending real estate matter, in which Mr. and Mrs. Doe are the defendants and the inquiring attorney's clients are the plaintiffs, is unrelated to the class action. The Panel concludes that it is not a conflict of interest under Rule 1.7 for the inquiring attorney to represent individuals who seek to retain him/her in an eventual class action where two unnamed members of the class are adverse parties to the inquiring attorney's current clients in a real estate matter that is unrelated to the class action.