

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2014-02
Issued February 21, 2014**

FACTS

Attorney A and Attorney B, who is the inquiring attorney, are attorneys in a law firm. Attorney B proposes to serve as the lawyer for a municipality's pension board. Attorney A represents unions for employees of the municipality. Attorney A also represents individual union members, and individual retired employees who were members of the union. On behalf of the unions, Attorney A negotiates with the municipality in pursuit of collect bargaining agreements, and files grievances and lawsuits related to the collect bargaining agreements, against the municipality. Attorney A recently represented a firefighter before the pension board in his application for a service-related disability pension. Attorney A currently represents several municipal employees who are union members in their appeal from a decision of a superior court judge who reversed an arbitrator's decision relating to the manner in which disability pensions are calculated. Attorney A had represented the union members in proceedings below.

The pension board is a five-member board created by the municipal charter. Members are appointed by the municipal council. The pension board is charged with the administration of the retirement plans for the municipality's police, fire, and other employees, excepting employees of the school department. Administration of the retirement plans includes establishing regulations related to applications for benefits, making individual disability determinations, conducting recertification of disabilities, ensuring that applicants are eligible for benefits, calculating benefits, and investing funds appropriated by the municipality and withheld from employee wages for the pension fund. Pursuant to the municipality's request for qualifications for legal services, a lawyer for the pension board will provide general legal advice and counsel to the pension board, will negotiate and review contracts for the board, will represent the board in the appeals process and in the various courts, and will "address other matters as delegated by the board."

Pursuant to the response to the municipality's request for qualifications for legal services, Attorney B is designated as the primary provider of legal services to the pension board, and each of the law firm's attorneys would be available to Attorney B for consultation on issues relating to the pension board's representation.

ISSUE PRESENTED

Is it a conflict of interest for the Attorney B to serve as lawyer for the municipality's pension board while Attorney A represents several union members who are employees of the municipality in a pending lawsuit relating to the issue of the calculation of disability pension benefits?

OPINION

Yes. Attorney B's representation of the municipality's pension board presents a concurrent conflict of interest pursuant to Rule 1.7 and is not permitted.

REASONING

Attorney B seeks to serve as the lawyer for the municipality's pension board while another lawyer in the firm, Attorney A, represents several municipal employees in a pending appeal from a decision of a superior court relating to the manner in which disability pension benefits are calculated. Attorney A had represented the employees in proceedings below. This inquiry raises issues of conflict of interest and imputed disqualification under Rule 1.7 and Rule 1.10 of the Rules of Professional Conduct. Rule 1.7 states:

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.

In pertinent part, Rule 1.10 states:

Rule 1.10. Imputation of conflicts of interest: General rule. (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.

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

The position advanced by Attorney A on behalf of his/her clients in the pending case is that the municipality's recent change in the manner in which disability benefits are calculated violates the terms of the collective bargaining argument. Attorney B highlights the fact that the lawsuit names the municipality as the defendant, and not the pension board. It is, however, the pension board who is charged with determining and calculating disability benefits, and the Panel believes that Attorney A's representation of the municipal employees in this case is directly adverse to both the interests of the pension board and of the municipality. The pension board has an interest in the substantive matters at issue in the pending lawsuit against the municipality, and both the pension board and the municipality have a shared concern in its outcome. The Panel believes that the pension board and the municipality should be regarded as a single client for conflict of interest purposes under these facts. Cf. ABA Formal Op. 97-405 (1997) (discussing employing functional approach to determine whether government entities in same jurisdiction should be regarded as single client for conflict of interest purposes.) As such, there is a concurrent conflict of interest pursuant to Rule 1.7(a)(1) which prohibits Attorney B from undertaking the position of lawyer for the pension board.

Even if it could be argued that Attorney A's representation of the union members in the pending case is not directly adverse to the pension board, the Panel believes that Attorney B's undertaking the representation of the pension board creates a concurrent conflict of interest under Rule 1.7(a)(2). Under paragraph (a)(2), a concurrent conflict of interest exists if there is a significant risk that a lawyer's proposed representation would 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. Rule 1.7(a)(2). How now will

Attorney B counsel the pension board relative to calculating disability benefits? Does Attorney B advise the board to comply with the municipality's new rules, in direct opposition to his/her law firm's clients in the pending lawsuit? Does Attorney B advise it to honor the contractual rights of a union member who applies for disability benefits? Does Attorney B advise the board to calculate benefits in accordance with its past practice, consistent with the interests of the law firm's other clients?

The Comment explains:

The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

The Panel believes that there is a significant risk that Attorney B's representation of the pension board will be materially limited by his/her duties to advance the interests of the law firm's union clients and the interests of the law firm. Further, the Panel does not believe that Attorney B can comply with Rule 1.7(b) which addresses waiver. The simultaneous representation proposed in this inquiry cannot be reconciled, as Attorney B could not reasonably conclude that he/he would be able to provide competent and diligent representation to the pension board in these circumstances. See Rule 1.7(b)(1).

Abstaining from representing the pension board in matters relating to disability pensions does not cure the conflict of interest. The pension board would remain Attorney B's current client and the law firm's client whether or not Attorney B advises or represents the board on a particular matter.

The Panel concludes that Attorney B's representation of the municipality's pension board presents a concurrent conflict of interest, and pursuant to Rule 1.7 is not permitted. Even in the absence of the pending lawsuit, the simultaneous representation of the pension board and of the union and active or retired union members, by two lawyers in the same law firm is fraught with potential conflicts of interest. The Panel advises Attorney B to decline the representation.

The Panel's guidance is restricted to interpretations of the Rules of Professional Conduct and does not extend to issues under the State Ethics Code or any other rules, regulations or laws that may have bearing on the issues raised by this inquiry.