

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2020-01
Issued January 9, 2020**

FACTS

Company A, an existing client of the inquiring attorney, asked the inquiring attorney to represent it with respect to the purchase of Company B. The acquisition did not take place. Instead Company A and Company B decided to form Company C in a joint venture. The parties engaged the inquiring attorney to form Company C, and to represent the joint venture. In addition to an engagement letter, the inquiring attorney prepared a conflicts letter in which the parties agreed that Company A was the inquiring attorney's existing client; that Company A and Company B "...waived any objection to, or any actual or potential conflict of interest arising from, and otherwise consent to [the inquiring attorney's] representation for the formation..." The parties also agreed that "[i]n the event that [the inquiring attorney's] representation of either party becomes adversely affected, [the inquiring attorney] will terminate [his/her] representation of Company C with respect to the Formation [of Company C], and [Company C] will be required to engage separate counsel. [The inquiring attorney's] continuing representation of either party on issues unrelated to the Formation will not be precluded should [the inquiring attorney's] representation of Company C with respect to the Formation become terminated."

The inquiring attorney drafted the documents for the formation of Company C. The documents were reviewed by separate counsel who was retained by Company B. The inquiring attorney states that the documents forming Company C envisioned that Company A would license certain products and technology rights to the newly formed Company C and also granted Company C an option to purchase such products and technology rights. Subsequent to the formation of Company C, Company A and Company C in fact entered into a license agreement whereby Company A licensed certain assets to Company C, and pursuant to which Company C has a right to purchase.

The inquiring attorney states that the formation documents did not give Company C a right of first refusal on Company A's assets, nor did it prohibit Company A from engaging in other business outside the joint venture. The inquiring attorney has continued to represent his/her existing client, Company A, during the engagement with Company C.

Several events have taken place since the formation of Company C. Shortly after the formation of Company C, Company A received a third party offer to sell its business to a foreign company. Company A has retained separate counsel for this purpose. There is currently a dispute between Company A and Company C about the scope of Company A's assets that are covered by the license and are subject to Company C's purchase rights. Company A has retained separate counsel relating to this dispute. The inquiring attorney has withdrawn from his/her representation of Company C. Company A has withdrawn as a member of the joint venture Company C, which is now owned by Company B.

The individual who is the principal in Company B has demanded that the inquiring attorney return to him all documents within the inquiring attorney's possession which relate to the inquiring attorney's representation of Company C. The inquiring attorney states that he/she is complying with this demand. The principal of Company B also has demanded that the inquiring attorney disclose to him whether the inquiring attorney has engaged in any talks with the potential buyer of Company A, and demanded that the inquiring attorney recuse from his/her representation of Company A in negotiations for the sale of Company A's assets. The principal of Company B further demanded copies of all the inquiring attorney's information and documents pertaining to a potential sale of Company A's assets by the foreign company and others.

ISSUE PRESENTED

The inquiring attorney asks whether he is permitted to disclose the information that the principal of Company B has requested.

OPINION

Absent the consent of his/her client Company A, the inquiring attorney is prohibited from disclosing information relating to the potential sale of Company A, including whether the inquiring attorney has participated in negotiations with a potential buyer on behalf of Company A.

REASONING

The inquiring attorney has withdrawn from his/her representation of Company C. The inquiring attorney does not represent his/her client Company A in the dispute between Company A and Company C relating to licensing and purchase rights, as Company A has retained separate counsel for that dispute. The inquiring attorney does not represent Company A in the sale of its business, as Company A has retained separate counsel for those negotiations. The inquiring attorney has provided facts that indicate that the parties to the joint venture waived conflicts of interests, if any. The Panel is therefore left to examine one issue: Whether the inquiring attorney's obligation of confidentiality under Rule 1.6 prohibits him/her from (a) disclosing whether he/she participated on behalf of Company A in negotiations for the sale of Company A; and (b) giving a third party copies of information and documents relating to the potential sale of Company A. The Panel is of the opinion that the inquiring attorney has a confidentiality

obligation to Company A under Rule 1.6(a), and is prohibited from disclosing such information without the consent of Company A.

Rule 1.6 entitled “Confidentiality of information” states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) to secure legal advice about the lawyer's compliance with these Rules; or

(4) to comply with other law or a court order.

Rule 1.6 dictates that a lawyer shall not reveal information relating to the representation of a client. Company A is the inquiring attorney's client. Communications with or on behalf of Company A relating to the potential sale of Company A are confidential pursuant to the Rule. As well, documents and all information acquired by the inquiring attorney which relate to the potential sale of his/her client are confidential under the Rule.

Accordingly, the Panel advises that absent the consent of Company A, the inquiring attorney is prohibited from disclosing information relating to the potential sale of Company A, including whether the inquiring attorney has participated in negotiations with a potential buyer on behalf of Company A.