

Final

**RHODE ISLAND SUPREME COURT
ETHICS ADVISORY PANEL
Opinion No. 2000-1, Request No. 792
Issued February 10, 2000**

Facts

The inquiring attorney states that he/she has had a good relationship for several years with a long-standing client, who was also the director of an agency. In his capacity as director, the client referred a matter to the inquiring attorney in which the agency was named in a lawsuit. The inquiring attorney filed an answer and a counterclaim on behalf of the agency, and conducted some discovery. While that litigation was pending, the agency terminated the director. The director has asked the inquiring attorney, who has represented the director and his family in several matters over the years, to represent him/her regarding his/her termination.

The inquiring attorney thereafter withdrew as counsel for the agency in the pending litigation. The inquiring attorney states that he/she withdrew because his/her relationship with the agency had substantially deteriorated, and also because the agency suggested that he/she has a conflict of interest.

Issues Presented:

Having withdrawn as counsel for the agency in the pending litigation, the inquiring attorney asks if he/she may now represent the director in an action against the agency relating to the director's termination.

Opinion:

The inquiring attorney has a conflict of interest pursuant to Rule 1.7 of the Rules of Professional Conduct, and the Panel advises him/her to decline the representation of the director in an action against the agency relating to the termination. Pursuant to Rule 1.7, the inquiring attorney may represent the director if the agency consents to the representation.

Reasoning:

Although the inquiring attorney has withdrawn as counsel for the agency in the pending litigation, the rule which is applicable to this inquiry is Rule 1.7 which applies to conflicts between current clients, and not Rule 1.9 which applies to conflicts relating to former clients. In The Law of Lawyering, Hazard and Hodes have stated:

“...[A] law firm may not withdraw from a representation when

the purpose of the representation is to undertake a new representation

adverse to the first client, even in an unrelated matter, and apparently even if the withdrawal would not have an adverse impact on the client. [Footnote omitted.] This is commonly referred to as the “hot potato” rule, after the colorful statement by a federal district court judge that ‘a firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client ‘ Picker International v. Varian Associates, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987).’” Geoffrey C. Hazard, Jr. And W. William Hodes, The Law of Lawyering, § 1.16:302, at 483 (2nd ed. Supp.1998).

In the instant inquiry, the inquiring attorney withdrew as counsel for the agency not only because of the conflict of interest, but also because of the breakdown of the relationship between the attorney and the agency. The Panel notes that the permissive nature of Rule 1.17 entitled “Declining or Terminating Representation” allows lawyers to terminate the representation of a client where to do so would not have an adverse effect on the client’s interests, or for other good cause. See Rule 1.17(b). A breakdown in the attorney-client relationship would appear to constitute good cause. Nevertheless, the Panel is of the opinion that the inquiring attorney’s withdrawal from the representation of the agency does not place the conflicts problem presented in this inquiry within the rubric of conflicts with a former client. See R.I. Sup. Ct. Ethics Advisory Panel Op. 97-03 (1997) (where law firm represented two clients with adverse interests, eventual settlement of one client’s lawsuit did not cure the conflict or place the conflicts problem under Rule 1.9.) Therefore the Panel looks to Rule 1.7 in guiding the inquiring attorney.

Rule 1.7 entitled “Conflict of Interest: General Rule” states:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.

- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The Panel is of the opinion that, under these facts, the representation of the director whose interests are adverse to those of the agency is impermissible under Rule 1.7 unless the agency consents. The Panel therefore advises the inquiring attorney to decline the representation of the director regarding the director's termination by the agency, absent the consent of the agency. See Alabama State Bar Disciplinary Commission Op.92-21 (1992) (law firm may not represent one client against another even if subject matters of suits are unrelated, and withdrawal from representation of one client will not make situation a conflict with former client); Ethics Committee of Massachusetts State Bar Op.92-3 (1992) (law firm may not represent long-term client in a matter which is detrimental to another client's interests where the firm withdrew from the other client's ongoing and unrelated representation.)