

Final

Rhode Island Supreme Court
Ethics Advisory Panel Opinion No. 2004-06 Request No. 884
Issued October 27, 2004

FACTS

Several years ago, the inquiring attorney represented Wife, who was an alien, and Husband, a United States citizen, in the application of Husband for an immigrant visa and an adjustment of status to that of permanent United States citizen for Wife. The Husband subsequently withdrew the application after he and Wife had a disagreement. The couple reconciled and engaged the inquiring attorney to file a second application. After another disagreement, Husband withdrew the second application.

The inquiring attorney states that Wife is presently in a position to obtain lawful permanent residence in the United States based on her bona fide relationship with Husband, a United States citizen, and based also on a claim that she had been subjected to extreme cruelty by Husband. Wife has asked the inquiring attorney to represent her in her application for permanent residence in which Wife will assert and offer evidence that Husband subjected her to extreme cruelty. The inquiring attorney states that he/she had no knowledge of Wife's extreme cruelty claims during his/her prior representation of Husband and Wife.

ISSUE PRESENTED

May the inquiring attorney represent Wife in an application for permanent U.S. residence in which she claims extreme cruelty by Husband where the inquiring attorney formerly represented Husband in an application for immigrant visa and permanent residence for Wife?

OPTION

No. The inquiring attorney has a nonwaivable conflict of interest pursuant to Rule 1.9, and therefore is prohibited from representing Wife in her application for permanent residence.

REASONING

Husband is a former client of the inquiring attorney. Therefore Rule 1.9 applies. The Rule states:

Rule 1.9. Conflict of interest: Former client. – A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

The Panel concludes that the inquiring attorney has a conflict of interest pursuant to Rule 1.9. Wife's own application for adjustment of status to that of permanent resident is substantially related to the two prior applications for immigrant visa and status adjustment filed by Husband for Wife. In the application which Wife now seeks to file, she will assert among other things that Husband subjected her to extreme cruelty. These assertions and testimony that will support them are materially adverse to the interests of Husband.

The Panel must next resolve whether the conflict of interest under these facts is waivable by Husband. The Panel believes it is not.

The Comment to Rule 1.7 regarding consultation and consent vis a vis conflicts of interest is instructive. It states:

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

The inquiring attorney has an obligation to fully disclose and fully explain to Husband the nature of Wife's allegations and their intrinsically negative impact on Husband's interests. Consultation must be meaningful, and consent must be informed. At the same time, the inquiring attorney has duties of confidentiality and loyalty to Wife who may refuse to consent to all the disclosures necessary to permit Husband to make an informed decision. The Panel is of the opinion that the inquiring attorney cannot reconcile these dual obligations. Moreover, the Panel believes that a disinterested lawyer would conclude that Husband should not consent to the inquiring attorney's representation of Wife under these facts.

The Panel concludes that the inquiring attorney has a conflict of interest which is not waivable. As such, the inquiring attorney cannot properly seek the Husband's consent. The Panel advises the inquiring attorney to decline the representation of Wife in her application for adjustment of resident status.