

Final

**Rhode Island Supreme Court Ethics Advisory Panel
Opinion No. 2006-02 Request No. 916
Issued June 8, 2006**

FACT:

The inquiring attorney has applied for the position of executive legal counsel to the director of the Rhode Island Department of Environmental Management (RIDEM). The inquiring attorney is currently employed as counsel for a nonprofit environmental organization. On behalf of the organization, the inquiring attorney has submitted numerous comments to RIDEM regarding its rules, regulations, and permits, and has brought litigation on behalf of the organization's members. The inquiring attorney currently represents the organization in several matters that are pending before RIDEM's administrative adjudicative division (AAD.) Decisions of the AAD are recommendations to the director.

As executive legal counsel to the director, the inquiring attorney would advise the director on legal matters, represent RIDEM in litigation, and manage and oversee RIDEM litigation handled by other agency counsel.

The inquiring attorney has disclosed to the environmental organization the fact he/she has applied for the legal position at RIDEM. The organization has requested that the inquiring attorney refrain from discussing the organization's pending cases at RIDEM during his/her interviews for the position, and refrain also from participating in those matters should he be hired by RIDEM.

ISSUE PRESENTED:

The inquiring attorney asks whether applying and interviewing for the legal counsel position at RIDEM, and whether accepting the position, create a conflict of interest under the Rules of Professional Conduct.

OPINION:

It is not a conflict of interest for the inquiring attorney to apply and interview for the position of executive legal counsel to the director of RIDEM. The inquiring attorney may accept the legal counsel position provided that pursuant to Rule 1.11 (d) (1) he/she does not participate in those matters in which he/she participated personally and substantially while in private practice. Pursuant to Rule 1.9 (b), he/she is prohibited from using information relating to the representation of the environmental organization to its disadvantage.

REASONING:

Applying and interviewing for the executive legal counsel position at RIDEM do not create a conflict of interest for the inquiring attorney. In doing so, however, the inquiring attorney must abide by the obligation of confidentiality he/she owes to his/her present client, the organization, under Rule 1.6.

If the inquiring attorney is successful in his/her pursuit of the legal position at RIDEM, the pertinent Rule of Professional Conduct is Rule 1.11 entitled, "Successive Government and Private Employment." In applicable part, it states as follows:

(d) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

Rule 1.11 (d) (1) does not prohibit the inquiring attorney from serving as the executive legal counsel to the RIDEM director. However, having represented the environmental organization in several cases that are pending before the agency's AAD, the inquiring attorney as executive legal counsel would be prohibited from participating in those pending matters. Rule 1.11 (d) (1) does not disqualify other lawyers in the agency from participating in those matters. Comment to Rule 1.11. The inquiring attorney as executive legal counsel would be prohibited, however, from managing or overseeing other agency counsel handling those matters.

The inquiring attorney has submitted comments to RIDEM on behalf of the environmental organization regarding various agency rules, regulations, and permits. The term "matter" is defined in Rule 1.11 (e) (1) as follows:

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

The Panel does not believe that comment on proposed rules, regulations, and permits, constitutes a “matter” for purposes of Rule 1.11. As executive legal counsel to the director, therefore, the inquiring attorney is not prohibited from participating in proceedings or from providing legal services relating to those rules, regulations, or permits.

The Panel concludes that it is not a conflict of interest for the inquiring attorney to apply and interview for the position of executive legal counsel to the director of RIDEM. The Panel further concludes that the inquiring attorney may accept the legal position at RIDEM provided that pursuant to Rule 1.11 (d) (1) he/she does not participate in those matters in which he/she participated personally and substantially while in private practice. Pursuant to Rule 1.9 (b), the inquiring attorney is prohibited from using information relating to the representation of his/her present client to its disadvantage.

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.