

Final

Rhode Island Supreme Court Ethics Advisory Panel
Opinion No. 2007-09 Request No. 939
Issued June 7, 2007

Facts:

The inquiring attorney was employed by the Department of Administration as the labor relations administrator for the Office of Labor Relations. The Office of Labor Relations represents the state in labor relations matters in negotiating state employee contracts, and before the state labor relations board, the personnel appeals board, and state and federal courts. The inquiring attorney states that as administrator, he/she represented the state in every aspect of labor and employment law. After many years of service in this capacity, the inquiring attorney retired from state service in 2005 and entered private law practice. He/she has not been associated with the Office of Labor Relations since June 2004.

Recently, a state employee, facing the threat of termination, requested the inquiring attorney to represent him/her in a pre-disciplinary hearing. The inquiring attorney states that he/she did not participate in any aspect of the matter related to this employee during his/her tenure as administrator. Before the hearing, counsel for the state objected to the inquiring attorney's representation of the state employee on the basis that the inquiring attorney possessed inside information about the operation of the Office of Labor Relations, as well as extensive background information that would place the inquiring attorney in a conflict situation. The inquiring attorney did not represent the employee at the pre-disciplinary hearing, but intends to represent him/her at subsequent proceedings.

Issue Presented:

The inquiring attorney asks whether his/her prior employment as a labor relations administrator presents a conflict of interest that precludes him/her from representing the state employee whose interests are adverse to the state as an employer.

Opinion:

Pursuant to Rule 1.11, the inquiring attorney, a former state labor relations administrator, may represent the state employee whose interests are adverse to the state as an employer, provided that the inquiring attorney did not participate personally and substantially in the matter relating to the state employee's termination while he was a public employee.

Reasoning:

The rule applicable to this inquiry is Rule 1.11 entitled “Special Conflicts of Interest for Former and Current Government Officers and Employees.” Rule 1.9 entitled “Duties to Former Clients” does not apply in this instance. Representation adverse to a former government client is determined under Rule 1.11(a), which states as follows:

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

- (1) is subject to Rule 1.9(c); and
- (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

Unlike Rule 1.9 which is triggered when a lawyer represented a former client whose interests were adverse to a subsequent client in the same or a substantially related matter, Rule 1.11(a) disqualifies a former government lawyer if the lawyer *participated personally and substantially* in the *same* matter while a public officer or employee. The range of matters covered by Rule 1.11(a) is limited to those involving a specific party or parties. Limiting disqualification to particular matters involving a specific party, rather than extending disqualification to all substantive issues on which a former government lawyer previously worked, prevents the Rule from imposing too severe a deterrent from entering public service. See Comment (4) to Rule 1.11. The Comment to Rule 1.11 explains that the Rule represents a balancing of interests that are unique to lawyers in government service.

On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer’s professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client’s adversary obtainable only through the lawyer’s government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus, a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially.

In the instant inquiry, the inquiring attorney has represented to the Panel that during his employment, he was not involved in employment matters relating specifically to the termination of the employee. Insofar as the inquiring attorney did not participate personally and substantially in the matter relating to the employee's termination, the Panel concludes that his/her representation of the terminated employee is permissible.

The Panel advises that pursuant to Rule 1.11(a)(1) the inquiring attorney must comply with Rule 1.9(c) which states that a lawyer who has formerly represented a client shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

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.