

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2017-02
Issued March 31, 2017**

FACTS

The inquiring attorney seeks the Panel's guidance regarding his/her law firm's representation of the seller and the buyer in a business transaction. The buyer, the manager of a division of the seller's business, will purchase certain tangible and intangible assets of this division of the business. The buyer will then lease from the seller the portion of the seller's business premises in which the division currently operates. The seller and the buyer are current clients of the law firm. The inquiring attorney has provided legal services to the buyer on matters unrelated to the business. Another lawyer in the law firm has provided legal services to the seller relative to the seller's business. The buyer and the seller want the law firm to represent them with regard to negotiations and the drafting of documents for the purchase and sale, and for the lease.

The inquiring attorney states that the seller is experienced in business, including the ownership, purchase, and sale of businesses. He/she states that the buyer is sophisticated in the industry of the division, but has never owned, purchased, or sold a business. He/she further states that the buyer and seller will negotiate the sale price and the rent, but they want the two attorneys who have been representing them to advise them on the negotiation of these economic terms.

The inquiring attorney also states that he/she has provided no legal services to the seller, and has no knowledge of the seller's confidential information that is relevant to the transaction. Likewise, the lawyer in the firm who has represented the seller has provided no legal services to the buyer, and has no knowledge of the buyer's confidential information. To prevent confidential information relevant to the transaction from becoming known by each client's lawyer, the firm will create a "screen" by placing all documents in a locked drawer and limiting access to electronic files to preserve confidentiality and the attorney-client privilege.

ISSUE PRESENTED

The inquiring attorney asks whether the law firm may represent the buyer and the seller, two current clients of the firm, in the sale of a division of the seller's business to the buyer.

OPINION

The law firm, which represents the seller in matters relating to the seller's business, has a non-waivable conflict of interest under Rule 1.7 (a) and (b) in the proposed representation of both the buyer and the seller for the purchase and sale of a division of the seller's business.

REASONING

The facts of this inquiry present a conflict of interest under Rule 1.7 of the Rules of Professional Conduct. The seller and the buyer are current clients of the law firm, and the law firm seeks to represent both of them in a business transaction. Rule 1.7 states:

Rule 1.7. Conflict of interest: Current clients. (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

The law firm proposes that one lawyer in the firm will represent the seller, and another lawyer in the firm will represent the buyer, with a "screen" to protect the attorney-client privilege, and the confidentiality for each client. The Rules of Professional Conduct permit screening in only three situations, none of which is presented in the facts of this inquiry: screening for lateral hires under Rule 1.10, screening for former government officers and employees under Rule 1.11, and screening for former judges, arbitrators and mediators under Rule 1.12. "Screened" is defined in the Rules as follows:

"Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

The purpose of screening is to assure a law firm's clients that confidential information which is known by a disqualified lawyer remains protected. Rule 1.0, Comment [9]. Thus, it is a disqualified lawyer in a conflicts situation that is screened. The securing of documents and electronic information serves as an adjunct to the isolation of a lawyer from his or her law firm's representation in a matter.

The inquiring attorney has stated that he/she has not represented the seller and is not aware of seller's confidential information; and the other lawyer in the firm who proposes to represent the seller, has never represented the buyer and is not aware of buyer's confidential information. These facts, even if coupled with a "screen" as proposed, will not suspend the reality that the seller and the buyer are clients of one law firm, and are not clients of two independent lawyers. For purposes of the rules governing conflicts of interest under Rule 1.7, a firm of lawyers is essentially one lawyer. See R.I. Ethics Advisory Panel Op. 2016-01 (2016).

The sale of a business, or as here, the sale of a division of a business, is an adversarial process. The law firm's representation of both the seller and the buyer in this inquiry exemplifies a direct conflict of adverse interests under Rule 1.7(a)(1). What is in the buyer's best interests is not necessarily in the seller's best interests. Substantive terms may need to be negotiated. The buyer and seller in this inquiry have initially negotiated the sale price and the lease terms, but they want their respective attorneys to advise them about the negotiations of these economic terms. The sale price and lease terms are but two of an exhaustive list of other material terms, conditions, and warranties which typically require negotiation in the purchase of a company's assets. Material terms that have not been addressed by the parties may lead to disagreements or conflicts. Situations as this, in which lawyers in a law firm are required to negotiate with each other on behalf of multiple clients, will rarely be consentable. See N.Y. Bar Assoc. Comm. Prof. Ethics, Formal Op. 2001-2 (2001).

The Panel notes that the seller is a sophisticated business client of the law firm with experience in the purchase and sale of businesses. By contrast, the purchase of seller's division is the buyer's first purchase of a business. Particularly noteworthy is the fact that the law firm has regularly represented the seller on matters relating to the seller's business which is the subject matter of the firm's proposed dual representation.

Based on the foregoing, the Panel is of the opinion that the lawyers in the law firm cannot reasonably believe that they will be able to provide competent and diligent representation to the buyer and to the seller in this business transaction. The law firm cannot satisfy Rule 1.7(b)(1) and therefore, may not seek the informed consent of the buyer and the seller. The Panel concludes that the proposed representation presents a non-waivable conflict under Rule 1.7(a) and (b), and is ethically prohibited.