

Final

**RHODE ISLAND SUPREME COURT
ETHICS ADVISORY PANEL
OPINION NO. 97-03, REQUEST NO. 704
Issued February 13, 1997**

FACTS

The inquiring attorney represents A in a lawsuit (A's lawsuit) in which A and B are co-defendants. A has a claim against B under the insurance and indemnity clauses of an agreement entered into by A and B (the Agreement). B is represented by an attorney from a different law firm. Before A's lawsuit was filed, the inquiring attorney had made demands upon B's insurer to defend and indemnify A pursuant to the Agreement. At about the same time, but unbeknownst to the inquiring attorney, another attorney in the same law firm, Attorney C, was retained by B's insurer to defend B in a separate matter (B's lawsuit).

Both lawsuits were pending for about two and one-half years, during which time the inquiring attorney again notified B's insurer and also notified the attorney representing B in A's lawsuit of A's indemnity claim against B. Attorney C learned about the inquiring attorney's representation of A and A's claim against B shortly before B's lawsuit was settled. Several months after the settlement of B's lawsuit, the inquiring attorney, on A's behalf, commenced an action against B seeking money damages under the Agreement. B then notified the inquiring attorney that he/she has a conflict of interest in the representation of A.

ISSUES PRESENTED

The inquiring attorney asks whether he/she may continue to represent A against Attorney C's former client B under Rule 1.9(a) of the Rhode Island Supreme Court Rules of Professional Conduct.

OPINION

The inquiring attorney is precluded under Rule 1.7(b) from continuing to represent A in the pending lawsuit. The Panel advises the inquiring attorney to withdraw from the representation of A in the lawsuit.

REASONING

This inquiry demonstrates the importance of diligent conflicts screening which law firms must conduct before undertaking and during the representation of clients. Resolving questions of

conflicts of interest is primarily the responsibility of the lawyer or law firm undertaking representation. See Comment to Rule 1.7.

Pertinent to this inquiry is Rule 1.10 entitled "Imputed Disqualification: General Rule" which provides:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9, or 2.2.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

For approximately two and one-half years, the inquiring attorney and Attorney C in the same law firm were each representing clients, namely A and B, whose interests were adverse. Even after discovering this fact, the attorneys did not disclose the conflict to the clients, or seek to obtain the clients' consent to waive disqualification under Rules 1.10(d) and 1.7. Since B now challenges the inquiring attorney's representation of A in the pending lawsuit, it appears unlikely that B would have consented and waived a conflict under Rule 1.7(a) during the period of simultaneous representation. The Panel is of the opinion that under these facts, the eventual settlement of B's lawsuit does not place the conflicts problem presented in this inquiry within the rubric of conflicts with a former client. See Alabama State Bar Disciplinary Commission Op. 92-21 (1992) (law firm may not represent one client against another even if subject matter of suits are unrelated, and withdrawal from representation of one client will not make situation a conflict with former client.)

Applicable to this inquiry is Rule 1.7(b). Rule 1.7(b) states:

(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 the law firm's representation of A would be materially limited by the firm's responsibilities to B. The law firm has continuing duties of confidentiality and of loyalty to B. See Rule 1.6 and Rule 1.7. Cross-examining B on behalf of A and conducting third party discovery on A's indemnity claim against B are likely to pit the duty of loyalty to one client against the duty of loyalty to the other, and pose the risk of breaching the duty of confidentiality to B. See ABA Committee on Ethics and Professional Responsibility Formal Op. 92-362 (1992). (In general, examining one's own client and conducting discovery on behalf of another client are material limitations on lawyer's representations.) A deferential cross-examination of B would compromise the representation of A, and an aggressive one could jeopardize B's confidences. As these hazards would constitute material limitations on the inquiring attorney's representation of A under Rule 1.7(b), the Panel advises the inquiring attorney to withdraw from the representation of A in the pending lawsuit.