

Final

**RHODE ISLAND SUPREME COURT
ETHICS ADVISORY PANEL
OPINION NO. 97-08, REQUEST NO. 708
Issued April 10, 1997**

Facts:

The inquiring attorney represented a fraternal order of police lodge from 1989 to 1995 at which time the representation was terminated. During that period, the inquiring attorney negotiated a union contract, and rendered legal advice to the union usually through communications with the union president. The inquiring attorney also represented several union members in grievances relating to potential disciplinary actions in which the chief of police was involved adversely, although the parties to the action were the governmental entity and the employees-union members. The chief of police was recently the subject of a disciplinary action which culminated in his/her removal from his/her position. The chief has retained the inquiring attorney to represent him/her in the appeal from the decision to remove him/her from the position. A number of union members will be witnesses on behalf of the government entity at the proceedings on appeal. The union, through counsel, has charged a conflict of interest.

Issue Presented:

Does Rule 1.9 of the Rules of Professional Conduct prohibit the inquiring attorney from representing the chief of police given his/her former representation of the fraternal order of police lodge?

Opinion:

There is no conflict of interest which precludes the inquiring attorney from representing the police chief. However, the inquiring attorney is prohibited from using information he/she acquired in his prior representation of either the union or its members to their disadvantage.

Reasoning:

Rule 1.9 governs this inquiry. It 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 inquiring attorney described as part of his/her inquiry the alleged misconduct on which the governmental entity relied in removing the police chief from office. For each allegation of misconduct the inquiring attorney stated whether union members are listed to testify as witnesses in the upcoming proceedings, and whether the alleged incident was the subject of the inquiring attorney's prior representation of the union or of the members he/she represented in grievances. The inquiring attorney further stated that the grievance matters in which he/she represented union members are not part of the specific allegations of the chief's misconduct.

The Panel has reviewed the allegations which constitute the subject matter of the inquiring attorney's representation of the police chief. The Panel is of the opinion that the lack of similarity in the facts and the issues involved in the prior and current representations distinguishes the matters. See Annotated Model Rules of Professional Conduct, at 154 (3rd ed. 1996); Tisby v. Buffalo Gen. Hosp., 157 F.R.D. 157 (W.D.N.Y. 1994) (no disqualification of attorney for nurses's unions in action by nurse against unions for failing to represent her in grievances, even though attorney previously represented her in disciplinary action; issues separate.) None of the fifteen incidents of alleged misconduct is the same or substantially related to the matters in which the inquiring attorney previously represented the union or its members.

The facts also reveal that no union members will testify in relation to nine of the fifteen incidents of alleged misconduct. Of the remaining six incidents in which various union members will testify on behalf of the governmental entity, only one witness is a former client of the inquiring attorney. However, the matter in which he/she is expected to testify is not the same or substantially related to the matter in which the attorney previously represented him/her.

The Panel concludes that the inquiring attorney may continue to represent the police chief because the matters are not the same or substantially related. See R.I. Sup. Ct. Ethics Advisory Panel Op. 93-87 (1993) (representation against former clients permitted where matters are not the same or substantially related); R.I. Sup. Ct. Ethics Advisory Panel Op. 91-33 (1991) (lawyer may represent client in matter in which former client may testify against current client as the matters are unrelated). However, the inquiring attorney is prohibited from using information relating to the prior representation to the disadvantage of the union or of the union members he/she represented. See Rule 1.9(b).