

Final

**Rhode Island Supreme Court Ethics Advisory Panel
Opinion No. 2004-05 Request No. 880
Issued June 16, 2004**

Facts:

The inquiring attorney (Attorney A) recently formed a partnership with another attorney (Attorney B.) Before forming the partnership, Attorney A represented Client A, and Attorney B represented Client B in a criminal investigation involving multiple parties. At the time, both attorneys were unaffiliated and maintained separate law offices. Client B was identified as a target of the investigation. Client A was not identified by the prosecution as a target but had knowledge of relevant facts.

All the parties affected by the criminal investigation, including Client A and Client B, entered into a written joint-defense agreement through which they shared and authorized their attorneys to share information, confidential and otherwise. Client A and Client B were extensively debriefed by the various counsel representing signatories to the joint-defense agreement.

The inquiring attorney states that at all times the defense to the allegations was essentially consistent among the participants in the joint-defense agreement. There had been little direct personal interaction between Client A and Client B throughout the historical events at issue, and what little interaction there was, was described in consistent terms by both Client A and Client B. Neither Client A nor Client B accused the other of wrongdoing.

Client A testified at the grand jury, and was debriefed by Attorney A and other counsel representing signatories to the joint-defense agreement. This debriefing revealed that Client A's testimony before the grand jury was consistent with the information which he had previously given under the joint-defense agreement. Client B did not testify before the grand jury.

Client A was not indicted; Client B was, together with several other parties. Attorney B continues to represent Client B in the pending criminal proceedings. Following the indictment, Attorney A met with Client A to discuss the indictment and its ramifications. Part of that discussion focused on the fact that all signatories to the joint-defense agreement, including Client A, wished Attorney A to continue to work on the case in his role as a legal specialist. Following that conversation, Attorney A's representation of Client A terminated. Attorney A, now Attorney B's law partner, seeks to represent Client B as co-counsel with Attorney B in the pending criminal matter.

Client A and Client B after consultation, have signed waivers of any actual, potential or apparent conflict between Attorney A's previous representation of Client A and his representation of Client B. In particular, both Client A and Client B acknowledge

that neither one had any inculpatory information regarding the other beyond the general facts already in the public record. Client A specifically agreed that Attorney A could make use of whatever confidential information he/she might possess to assist Client B. In the likely event that the prosecution will call Client A as a witness in the trial of Client B and other co-defendants in the case, Client A has retained another attorney to represent him/her should legal assistance become necessary when and if he/she testifies. Attorney A states that Client A's testimony will not implicate Client B.

Issue presented

May Attorney A jointly represent Client B as co-counsel with Attorney B where Attorney A formerly represented Client A during the grand jury investigation relating to Client B's criminal matter; Client A, Client B and others were parties to a joint-defense agreement; and Client A and Client B have consented to the representation?

Opinion

Yes. Rule 1.9 does not prohibit Attorney A from representing Client B in the pending criminal matter, as the interests of Client A and Client B are not materially adverse, and both clients have consented in writing to the representation.

Reasoning

The pertinent Rules of Professional Conduct are Rule 1.9 "Conflict of Interest: Former Client", and Rule 1.6 "Confidentiality of information." Both rules permit waiver. Rule 1.9 states:

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.

In the instant inquiry the matter is substantially related, but the inquiring attorney states that the interests of Client A and Client B are not materially adverse. Even though Client A may be called as a witness for the prosecution in Client B's criminal trial,

Attorney A believes that nothing his/her former client will say will be detrimental to Client B, or will require impeachment of Client A by Client B's trial counsel, Attorney B.

Regarding Rule 1.9(b) which bars the "use [of] information relating to the representation to the disadvantage of the former client", and Rule 1.6 which prohibits disclosure of confidential information, Attorney A believes he has no such information from Client A's representation which has not already been shared through the joint-defense agreement. Further, Client A has agreed in writing that whatever information Attorney A may possess relating to Client A's representation may be used in Client B's representation.

Under the facts as presented the Panel concludes that Attorney A does not have a conflict of interest under Rule 1.9 in the representation of Client B. As stated by Attorney A the interests of Client A and Client B are not materially adverse. Further, in satisfaction of Rule 1.6 and Rule 1.9(b), Client A has consented to disclosure of information relating to his/her representation. As an added measure, both Client A and Client B, after the requisite consultations, have each consented in writing to Attorney A's representation of Client B as co-counsel with Attorney B. The Panel concludes that under these facts, the Rules of Professional Conduct do not prohibit Attorney A from representing Client B as co-counsel with Attorney B.