

## **Final**

### **Rhode Island Supreme Court Ethics Advisory Panel Op. 2025-10 Issued August 14, 2025**

#### **FACTS**

Before joining the Rhode Island Bar, the inquiring attorney served as an experienced real estate development practitioner who frequently testified as an expert witness before differing adjudicative bodies regarding various real estate development topics, including special use permits, variances, design review, and subdivisions. He or she wishes to continue to serve as such an expert witness in the same real estate development matters in which he or she now represents clients as an advocate. He or she has set up separate limited liability companies to effectuate these dual roles.

#### **ISSUE PRESENTED**

The inquiring attorney asks whether the Rules of Professional Conduct permit him or her to serve as an expert witness in the same real estate development matters in which he or she represents clients as an advocate?

#### **OPINION**

It is the Panel's opinion that the inquiring attorney may not serve as an expert witness in the same real estate development matters in which he or she represents clients as an advocate, nor may he or she represent clients as an advocate in the same real estate development matters in which he or she serves as an expert witness.

#### **REASONING**

Rule 3.7 pertains to the lawyer as witness:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
  - (1) the testimony relates to an uncontested issue;
  - (2) the testimony relates to the nature and value of legal services rendered in the case; or
  - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.



“Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.” Rule 3.7, Comment 1. This is because “[a] witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others,” such that “[i]t may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.” Rule 3.7, Comment 2. Accordingly, the tribunal “has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness,” while the opposing party “has proper objection where the combination of roles may prejudice that party’s rights in the litigation.” *Id.*

In this case, the inquiring attorney attempts to distinguish between assorted factual scenarios and among the differing bodies before which he or she may appear as an advocate/expert witness, asking whether it is proper for him or her, “on matters for which [he or she is] an expert witness, to serve as an advocate (I) in matters without opposing parties or (II) with opposing parties on (1) pre-tribunal matters, (2) during a tribunal before (a) professional staff or (b) volunteer officials, and (3) during appeals before (a) a judge, (b) professional subject-matter staff person, or (c) volunteer officials . . . .” The Panel finds that regardless of the distinctions drawn by the inquiring attorney, all the various bodies before which he or she may appear are “tribunals” within the meaning of Rule 1.0(m) of the Rules of Professional Conduct because they adjudicate, or participate in the adjudication of, a party’s or parties’ rights with regard to real estate development. *See, e.g., Town of Coventry Zoning Board of Review v. Omni Development Corp.*, 814 A.2d 889, 896 (R.I. 2003) (quoting *Hassell v. Zoning Board of Review of East Providence*, 108 R.I. 349, 351, 275 A.2d 646, 648 (1971) and noting that “[b]asically and fundamentally a zoning board is an administrative body whose duties are quasi-judicial”). Thus, the Panel concludes that based on the facts provided by the inquiring attorney, he or she cannot appear before such bodies as both witness and advocate without running afoul of Rule 3.7(a).<sup>1</sup> *See* Rhode Island Supreme Court Ethics Advisory Panel Op. 91-31.

Furthermore, even if Rule 3.7 did not apply to this matter, the Panel finds that the inquiring attorney is independently prohibited from serving as an expert witness in matters in which he or

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<sup>1</sup> Because the inquiring attorney only provided the Panel with facts generally applicable to his or her potential dual role as advocate and expert witness and not any particular facts pertaining to a specific case or situation, the Panel is unable to ascertain whether any of the exceptions to Rule 3.7’s prohibition apply here. Notwithstanding, to the extent the inquiring attorney contemplates providing expert testimony as to uncontroverted or uncontested facts in a matter in which he or she also serves as an advocate pursuant to Rule 3.7(a)(1), the Panel finds that he or she would be precluded from doing so under the conflict of interest provisions of Rule 1.7. *See* Rule 3.7, Comment [6] (observing that “[i]n determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9”). In such a situation, the inquiring attorney’s representation of the client would be materially limited by his or her personal and/or pecuniary interest as expert witness in the matter—and vice versa. *See* Rule 1.7(b). Such a limitation is nonconsentable because it makes it impossible for the inquiring attorney to discharge his or her professional responsibilities to his or her client. *See* Rule 1.7, Comment [14]. Therefore, the inquiring attorney could not serve as both witness and advocate even in a matter in which the facts are uncontested. *See* Rule 3.7, Comment [6].



she also serves as an advocate pursuant to Rule 5.7 of the Rules of Professional Conduct.<sup>2</sup> Rule 5.7 pertains to a lawyer's responsibilities when providing or engaging in law-related services:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

"When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems . . . [such as] the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship." Rule 5.7, Comment [1]. Rule 5.7 "identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services." Rule 5.7, Comment [2].

In this case, the inquiring attorney wishes to serve as an expert witness in the same matters in which he or she represents clients as an advocate. His or her expert witness testimony would address topics such as special use permits, variances, design review, and subdivisions. The Panel finds that the provision of such expert testimony would constitute a law-related service as contemplated by Rule 5.7(b) because such testimony is often provided in conjunction with and is related in substance to the real estate development proceedings in which the inquiring attorney seeks to represent clients as an advocate. See Rule 5.7, Comment [9] (defining "law-related service" to encompass "providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting"). The Panel therefore finds that because the expert witness testimony is so intimately related to the inquiring attorney's real estate development legal practice, the inquiring attorney would be subject to the Rules of Professional Conduct when so testifying pursuant to Rule 5.7(a)(1). See Rule 5.7, Comment [3] (recognizing that "[w]hen law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1)"); see also Rule 5.7, Comment [8] (noting

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<sup>2</sup> The Panel observes that the following analysis applies equally with respect to Rule 1.8 of the Rules of Professional Conduct, pertaining to business transactions with clients.



that the Rules of Professional Conduct apply in “circumstances [where] the legal and law-related services [are] so closely entwined that they cannot be distinguished from each other . . .”).

Comment [10] to Rule 5.7 identifies those Rules of Professional Conduct most implicated by a lawyer’s provision of law-related services to clients:

[T]he lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation.

See also Rhode Island Supreme Court Ethics Advisory Panel Op. 96-26 (observing, in matters involving business transactions between lawyers and clients regulated by Rule 1.8(a), that “the Rules of Professional Conduct relating to transacting business with clients, advertising, soliciting legal employment, conflicts of interest, and confidentiality must be observed”). Of particular relevance here is Rule 1.7, pertaining to conflicts of interest:

(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.

“Rule 1.7 is grounded primarily upon the attorney’s duty of loyalty to his or her client.” Markham Concepts, Inc. v. Hasbro, Inc., 196 F. Supp. 3d 345, 349 (D.R.I. 2016) (interpreting Rhode Island



Rule of Professional Conduct 1.7). “Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing.” Rule 1.7, Comment [2].

Under Rule 1.7(a)(2), a lawyer is prohibited from representing a client if there is a significant risk the representation will be materially limited by the lawyer’s responsibilities to another client or third person, or by a personal interest of the lawyer. It follows that a lawyer should not allow his or her representation of a client to be materially limited by his or her provision of law-related services to that client. Nor should a lawyer providing law-related services that are subject to the Rules of Professional Conduct allow the provision of those services to be materially limited by his or her responsibilities as a lawyer. See Rhode Island Supreme Court Ethics Advisory Panel Op. 96-26 (determining that an attorney who also sold insurance was not permitted under the Rule 1.7 to sell insurance to his or her legal clients or to provide legal services to his or her insurance customers).

Here, it is possible that aspects of the inquiring attorney’s representation of clients as an advocate in real estate development matters, such as the fee charged, the advice and/or candor given, and/or the decisions made on how to proceed, could be influenced by the inquiring attorney’s personal and/or pecuniary interest in serving as an expert witness in the same matters—particularly because the provision of legal representation services often hinges on the expert witness testimony to be given. It is concomitantly possible that the inquiring attorney’s service as an expert witness could be affected by his or her professional responsibilities in representing clients as an advocate in the same manner. Such apparent conflicts are nonconsentable, even in the face of a client’s approval, written or otherwise, because it would be impossible for the inquiring attorney to provide competent and diligent representation to the client under either scenario. See Rhode Island Supreme Court Ethics Advisory Panel Op. 2025-08. The Panel thus concludes that under Rule 5.7 the inquiring attorney cannot serve as an expert witness in any matter in which he or she represents a client as an advocate, nor can he or she represent a client as an advocate in any matter in which he or she serves as an expert witness. See id.; see also Rhode Island Supreme Court Ethics Advisory Panel Op. 96-26.