

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2017-03
Issued June 8, 2017**

FACTS

The inquiring attorney was recently named to the board of a not-for-profit organization that is involved in elections law and elections law reform. The inquiring attorney states that he/she will not represent the organization in court, prepare legal documents, or otherwise provide legal services to the organization. A client of the inquiring attorney's law firm is a board of elections.

Over the last five-year period the organization has filed two administrative complaints against the law firm's board-of-elections client, one relating to access to public records, and the other relating to open meetings. The inquiring attorney has disclosed a potential conflict of interest to the organization. Should the organization's board plan to discuss at a board meeting matters involving the board-of-elections client, the organization and the inquiring attorney have agreed that the inquiring attorney would neither attend the meeting nor receive minutes of the meeting.

ISSUE PRESENTED

The inquiring attorney asks whether he/she may serve on the board of an organization involved in elections law and elections law reform where the inquiring attorney's law firm represents a board of elections.

OPINION

Rule 6.4 of the Rules of Professional Conduct permits the inquiring attorney to serve on the board of an organization involved in elections law and elections law reform where a board of elections is a client of the inquiring attorney's law firm. Rule 1.7 may apply should future claims arise between the organization and the client.

REASONING

The public service provisions of the Rules of Professional Conduct permit lawyers to participate as board members of legal services organizations and organizations whose activities relate to law reform. Rule 6.3, entitled "Membership in legal services organization," states:

Rule 6.3. Membership in legal services organization. A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

In addition and more pertinent to the inquiry attorney's inquiry is Rule 6.4, entitled "Law reform activities affecting client interests," which states:

Rule 6.4. Law reform activities affecting client interests.

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

The Comment to Rule 6.4 is instructive. It states:

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

Rule 6.4 addresses private lawyer participation in organizations that are involved in law reform activities. The rule and its comment make clear that lawyers who serve as directors, officers or members of organizations seeking law reform do not have a lawyer-client relationship with the organization. In the instant inquiry, the inquiring attorney expressly states that he/she will provide no legal services to the organization. Generally, the conflicts of interest that may arise in this context will be “positional” conflicts rather than conflicts over a specific case or matter. Hazard, Hodes, & Jarvis, The Law of Lawyering, at §56.03 (4th ed. 2015.) Actual conflicts of interest that can only be waived with client consent should rarely arise under Rule 6.4. Id.

The Panel believes that the inquiring attorney may serve as a member of the organization’s board, notwithstanding the law firm’s representation of a board of elections. Rule 6.4 expressly permits lawyers to serve as directors, officers, or members of organizations involved in law reform even if the reforms may affect the interests of a client. The only requirement of the rule is that a lawyer must disclose to the organization if the lawyer knows that a decision of the organization would benefit a client of the lawyer. Rule 6.4 does not require a lawyer to identify the client, and does not restrict participation in such a decision.

The comment to Rule 6.4, however, reminds lawyers to consider obligations to clients under other Rules, particularly Rule 1.7. Rule 1.7 provides:

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.

Under the facts presented in this inquiry, there are currently no adverse claims by the organization against the law firm's board-of-elections client. Should claims arise, the Panel believes that the inquiring attorney's position in the organization could present a limiting interest within the meaning of Rule 1.7(a)(2). See Rhode Island Supreme Court Ethics Advisory Op. 89-22 (1989) (lawyer's position on hospital's board of directors could constitute limiting interest for partner's representation of client in claim against doctor on hospital's staff). The nature of the future claims and the specific facts will determine on a case-by-case basis whether the representation of the board of elections by the law firm can proceed. See e.g. Rhode Island Supreme Court Ethics Advisory Panel Op. 89-22 (1989) (lawyer whose partner is on hospital board may represent client in claim against doctor on hospital's staff if client and hospital consent.)

The Panel concludes that the inquiring attorney may serve on the board of an organization involved in elections law and elections law reform where a board of elections is a client of the inquiring attorney's law firm. Rule 1.7 may apply should future claims arise between the organization and the client.

The Panel's guidance is restricted to interpretations of the Rules of Professional Conduct and does not extend to issues under the State Ethics Code or any other rules, regulations or laws that may have bearing on the issues raised by this inquiry.