Final

Rhode Island Supreme Court
Ethics Advisory Panel Op. 2019-02
Issued June 18, 2019

FACTS

The inquiring attorney served for many years as "general outside counsel" to a corporation for most but not all of its legal matters. The representation ceased several years ago after which the inquiring attorney was retained by an out-of-state division of the corporation to represent the division in various matters. The representation of the division ceased in 2018 and shortly thereafter, the corporation sold the division pursuant to an asset purchase agreement. The corporation and the buyer of the division (the buyer) were each represented by counsel in the acquisition.

In early 2019, the inquiring attorney commenced representation of the buyer for matters unrelated to the sale of the division. The representation is ongoing. A dispute recently has arisen between the corporation and the buyer. The buyer claims that the corporation breached its representations and warranties in the asset purchase agreement as they pertain to a specific contract that was assumed by the buyer in its purchase of the division. The buyer seeks indemnification from the corporation.

The inquiring attorney states that he/she did not acquire any confidential information concerning the contract that is the subject of the dispute during his/her prior representations of the corporation and of the division. The inquiring attorney states that he/she had no knowledge of the existence of the contract during those previous representations. He/she further states that he/she did not represent the corporation or the division in the preparation of the asset purchase agreement.

ISSUE PRESENTED

The inquiring attorney asks whether he/she has a conflict of interest in the representation of the buyer in its claim against his/her former client, the corporation.

OPINION

It is not a conflict of interest under Rule 1.9 for the inquiring attorney to represent the buyer in its claim against the inquiring attorney's former client, the corporation. The present and former matters are not the same or substantially related.

REASONING

The corporation is a former client of the inquiring attorney. Therefore, Rule 1.9 entitled "Duties to former client" applies. In pertinent part, the rule states as follows:

> **Rule 1.9. Duties to former client.** (a) A lawyer who has formerly represented a client in a matter shall not thereafter
>
> 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 gives informed consent, confirmed in writing.
>
> ***
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client,

The interests of the inquiring attorney's client, the buyer, and of his/her former client, the corporation, are adverse. A conflict of interest would exist if the buyer's claim of breach by the corporation is the same or substantially related to a matter in which he/she represented the corporation.

For purposes of Rule 1.9, a "matter" depends on the facts of a particular situation or transaction. Rule 1.9 Comment [2]. Matters are "substantially related" if they involve the same transaction or legal dispute, or if there exists a substantial risk that confidential facts obtained in a prior representation could materially advance the position of a client in a subsequent matter. Rule 1.9 Comment [3]. "[T]he test for determining whether matters are substantially related has been 'honed in its practical application to grant disqualification only upon a showing that the relationship between the issues in the prior and present cases is 'patently clear' or when the issues are 'identical' or 'essentially the same.' ' " Brito v. Capone, 819 A.2d 663, 665 (R.I. 2003) (quoting American Heritage Agency, Inc. v. Gelinas, 774 A.2d 220, 230 (2001) (quoting Government of India v. Cook Industries, Inc. 569 F.2d 737, 739-40 (2d Cin. 1978).)

In Brito v. Capone, 819 A2d 663 (R.I. 2003) the Rhode Island Supreme Court, interpreting Rule 1.9, held that an attorney who had previously represented the plaintiff and one of the defendants in the formation of a limited liability company was not prohibited from thereafter representing the plaintiff in an action alleging that the defendant had defaulted on a promissory note. Id. At 664-65. The Court stated that there was no evidence that the attorney's former representation of the defendant and the current representation of the plaintiff were substantially related. Id. at 665. The Court stated that the defendants did not show that any information counsel received during the formation of the corporation would inure to the disadvantage of the defendant. Id.

A lawyer's former representation of an organizational client over an extended period of time and with respect to most, if not all, of the client's legal matters may raise the concern that any matter in the representation of another client against the former organizational client is "substantially related" to the former representation. Whether "playbook" information - that is, general knowledge and familiarity with an organizational client's policies and procedures – constitutes a substantial relationship between current and prior matters is addressed in Comment [3] to Rule 1.9.

> In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

In ABA Formal Op. 99-415 (1999), the ABA Standing Committee on Ethics and Professional Responsibility discussed the representation by a former in-house counsel which is adverse to the organizational client. The ABA Committee concluded:

> The fact that the lawyer had represented his former employer in similar types of matters or that the lawyer had gained a general knowledge of the strategies, policies, or personnel of the former employer is not sufficient by itself to establish a substantial relationship between the current matter and matters in the legal department at the organization for purposes of Rule 1.9(a).

In the instant inquiry, the inquiring attorney's current client, the buyer, claims that the corporation breached the representations and warranties in the asset purchase agreement as they relate to a particular contract that the buyer assumed under the agreement. The inquiring attorney has stated that he/she did not acquire any confidential information relating to the subject contract during the prior representations; he/she had no knowledge of the existence of the contract during those prior representations; and he/she did not participate in the preparation of the asset purchase agreement.

The facts of this inquiry sufficiently demonstrate to the Panel that the inquiring attorney gained no knowledge of specific facts in the prior representation of the corporation which are relevant to the buyer's claim. The Panel concludes that the buyer's claim of breach of the corporation's warranties and representations under the asset purchase agreement is not substantially related to matters in which the inquiring attorney represented the corporation.

Accordingly, the Panel concludes that it is not a conflict of interest under Rule 1.9 for the inquiring attorney to represent the buyer in its claim against the inquiring attorney's former client, the corporation. The present and former matters are not the same or substantially related.