

Final

Rhode Island Supreme Court
Ethics Advisory Panel Opinion No. 2000-02, Req. No. 800
Issued March 16, 2000

Facts:

The inquiring attorney, counsel for a state agency, represents the agency in a pending litigation. At a recent deposition, it became apparent to the inquiring attorney that two other attorneys for the agency are material witnesses in the case. The inquiring attorney also believes that he/she may be a witness in the case.

Issues Presented:

The attorney asks whether he/she may continue to represent the agency in the litigation.

Opinion:

Pursuant to Rule 3.7 of the Rules of Professional Conduct, the inquiring attorney may not continue to represent the agency if he/she will be a witness in the case. If he/she will not be a witness in the case, the inquiring attorney may continue to represent the agency in the matter where other lawyers for the agency are witnesses, provided that the inquiring attorney is not otherwise precluded from the representation by reason of a conflict of interest under Rule 1.7 or Rule 1.9.

Reasoning:

Rule 3.7 of the Rules of Professional Conduct prohibits an attorney from acting in the dual capacities of advocate and witness in a proceeding, except in limited circumstances. Unlike the predecessor Code of Professional Responsibility, Rule 3.7 does not extend the prohibition to the partners or associates of an attorney who will testify. R.I. Sup. Ct. Ethics Advisory Panel Op. 97-11. The rule states:

Rule 3.7. 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 except where:

- (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 a 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.

The Panel concludes that Rule 3.7(a) prohibits the inquiring attorney from acting as the advocate for the agency in the litigation if he/she is likely to be called as a witness and none of the exceptions applies. The Rule does not bar the inquiring attorney from performing pre-trial work on the matter as long as he/she does not act as "advocate" during the proceedings. R.I. Sup. Ct. Ethics Advisory Panel Op. 95-44; see Minnesota Comm. On Prof. Judicial Ethics, Op. CI-1118 (1985) (advocate is person who "participates as a spokesperson for the client in open court.")

The Panel further concludes that if the inquiring attorney is not himself/herself a witness in the case, Rule 3.7(b) permits him/her to represent the agency in the pending litigation in which other lawyers for the agency will be called as witnesses, unless the inquiring attorney is precluded from doing so by Rule 1.7 or Rule 1.9. The Panel is without sufficient factual information to make an independent determination about whether any such conflicts of interest exist.