

Final

Rhode Island Supreme Court Ethics Advisory Panel
Opinion No. 2007-04 Request No. 928
Issued March 8, 2007

Facts

Several months ago, the inquiring attorney had a consultation with an individual who was seeking legal advice on issues pertaining to the individual's real estate. The individual wanted to know whether a certain state agency and a private resident association could allow certain structures to be placed on property abutting the individual's property. The individual also sought advice about gaining access to his/her property through property owned by the resident association which directly abutted his/her property. The individual disclosed to the inquiring attorney various other information relating to these issues, including the fact that the individual and the resident association were parties to litigation in which the individual was seeking access to his/her property through the association's property.

The inquiring attorney agreed to conduct a preliminary investigation. Toward that end, the inquiring attorney made telephone calls to the appropriate state agency, and to the appropriate building official regarding information related to the individual's inquiries. Additionally, the inquiring attorney reviewed the Superior Court file on the litigation between the individual and the resident association.

The inquiring attorney states that within two weeks after the consultation with the individual, the inquiring attorney phoned the individual and told him/her that the inquiring attorney had investigated the matter and would be declining formal representation. The inquiring attorney further states that he/she did not correspond with the individual or bill him/her for the investigation.

Several months later, the inquiring attorney was sworn in as a member of the town/city council of the municipality where all of the real estate which was the subject of the consultation is located. The inquiring attorney states that the resident association has requested that the council vote to release escrowed funds for work which was also the subject of the individual's consultation with the inquiring attorney. The individual opposes the council's release of these funds. The council is poised to vote on the association's request.

Issue Presented

The inquiring attorney asks whether there was an attorney-client relationship between the individual and the inquiring attorney; and whether it would be a conflict for

the inquiring attorney to vote as a member of the council on the resident association's request for the release of escrowed funds.

Opinion

Rule 1.11(d) prohibits the inquiring attorney from participating in his/her capacity as council member in the matter before the council relating to the resident association's request for the release of escrowed funds.

Reasoning

The issues raised by this inquiry invoke Rule 1.11 of the Rules of Professional Conduct entitled "Successive Government and Private Employment." In pertinent part, the rule provides as follows:

(d) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; * * *

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

As a result of the consultation with the individual, the inquiring attorney learned specific information about the individual, including the individual's intentions and position on certain issues relating to the individual's property vis-à-vis structures on abutting property and the resident association. In follow-up to the consultation, the inquiring attorney conducted an investigation on the individual's behalf and for the individual's benefit. The inquiring attorney spoke with employees of the appropriate state agency. He/she conferred with the municipality's building official. He/she reviewed documents contained in the court file for related litigation between the individual and the resident association.

The Panel is of the opinion that the actions of the inquiring attorney constitute personal and substantial participation while in private practice in a matter which is now before the municipal council for consideration. The Panel therefore concludes that Rule 1.11(d) prohibits the inquiring attorney from participating in his/her capacity as a council member in the matter currently before the council relating to the resident association's request; and advises the inquiring attorney to recuse himself/herself from participation in the matter, including abstaining from voting.

Whether there existed an attorney-client relationship between the inquiring attorney and the individual is a question of substantive law which is outside the jurisdiction of the Panel. Even assuming that there was not an attorney-client relationship, lawyers have certain obligations under the Rules of Professional Conduct to prospective clients, including the obligation of confidentiality and an obligation to avoid conflicts of interest.

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.