

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Opinion No. 2010-08
Issued November 16, 2010**

FACTS

The inquiring attorney is a former lawyer for the Rhode Island Department of Environmental Management (“DEM”). While employed by the DEM, he/she participated in the DEM’s investigation of and enforcement and legal proceedings against the parties who owned and the parties who operated a gasoline station on certain land that was contaminated by underground storage tanks. The inquiring attorney left the DEM in 2007 and is now in private practice. He/she is asking the Panel whether he/she may now represent a buyer of the same land.

The inquiring attorney represented the DEM in administrative enforcement proceedings, in a Superior Court action, and in bankruptcy actions. The matters related to the DEM’s efforts to identify the source of and persons responsible for gasoline contamination on the property, to compel the owners and operators to clean up the contamination on and emanating from the property, and to reimburse the DEM for clean-up costs that it incurred as part of its emergency response to the contamination.

During the pendency of the proceedings, the owners of the contaminated property abandoned the property in bankruptcy. The property was subsequently sold at a tax sale. The DEM has not pursued clean-up on the property with the current owner. The inquiring attorney’s prospective client will buy the property from the new owner.

The inquiring attorney informs the Panel that the prospective buyer of the land will be required by Rhode Island’s brownfield statute to present the DEM with a planned project for the property and will work with DEM on a plan for clean-up of residual contamination to the extent necessary for the project. The inquiring attorney proposes to represent the buyer in the purchase of the property as well as in negotiating and securing agreements with the DEM relating to the buyer’s project and remediation. The inquiring attorney provided the Panel with additional facts which are set forth in the Panel’s discussion that follows.

ISSUE PRESENTED

Having participated in the DEM’s investigation of and enforcement and legal proceedings against the parties who owned and the parties who operated a gasoline station on certain contaminated land, the inquiring attorney asks whether he/she may now represent a prospective buyer of the same land.

OPINION

It is not a conflict of interest under Rule 1.11 for a former DEM lawyer who participated in the DEM's investigation of and enforcement and legal proceedings against the parties who owned and the parties who operated a gasoline station on certain contaminated land to now represent a prospective buyer of the same property.

REASONING

The rule applicable to this inquiry is Rule 1.11 entitled "Special Conflicts of Interest for Former and Current Government Officers and Employees." Rule 1.9 entitled "Duties to Former Clients" does not apply, except to the extent required by Rule 1.11. Paragraph (a) of Rule 1.11 states as follows:

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

- (1) is subject to Rule 1.9(c); and
- (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

The Panel's opinion in this inquiry will turn on whether the matter that the inquiring attorney worked on while employed by the DEM (former matter) is the same matter as his/her proposed representation of the prospective buyer.

What is a Matter?

Paragraph (e) of Rule 1.11 states:

- (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.

The Comment to Rule 1.11 explains:

Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

Comment [10] to Rule 1.11 further explains:

[10] For purposes of paragraph (e) of this Rule, a “matter” may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.”

ABA Formal Ethics Op. 342 (1975) discussed the word “matter” as it was used in the former Code of Responsibility. The ABA Standing Committee on Ethics and Professional Responsibility stated that “matter” refers to “a discrete, identifiable transaction or conduct involving a particular situation and specific parties.”

Analysis

The ultimate inquiry before the Panel is whether the investigation and enforcement matters against the parties who owned and operated the contaminated property, and the related Superior Court and bankruptcy matters are the same as the purchase of the property by a subsequent buyer, and the buyer’s pre-purchase negotiations with the DEM. The Panel is of the opinion that the matters are not the same.

A determination of whether matters are the same for purposes of Rule 1.11 is fact-sensitive. Aside from the obvious fact that the subject property is common to both the former matter and the proposed representation, there are differences in the parties and in the basic facts and issues. The parties in the former matter are not the same parties in the prospective matter. The parties in the former matter were the DEM, the Rhode Island

Attorney General, the owners of the property, and the operators of the gasoline station. The parties involved in the proposed representation are the prospective buyer and the current owner of the property with respect to the purchase and sale of the property; and the DEM with respect to pre-purchase negotiations with the buyer under the brownfield statute.

The basic facts and issues differ. The former matter involved the government's allegations of administrative and statutory violations against the owners of the property and the operators of the gasoline station. In the former matter, critical facts were the identification of the source of the contamination; the identity of parties responsible for the contamination; the type of contamination; whether the contamination impacted the waters of the state and land within the state; whether the contamination migrated off the property; whether the contamination was related to the contamination of a municipal well; the type and adequacy of response actions taken by the persons responsible; the response actions taken by the state and the attendant costs to the state. A notice of violations against the owners was filed by the DEM in the municipality's land evidence records. A lawsuit for reimbursement of DEM's costs of clean-up was filed by DEM in Superior Court. At every step, the owners and operators were adversaries to the DEM. That is not the case in the proposed representation.

In the proposed matter, the prospective buyer comes to the DEM aligned with the DEM, as well as with state law, in the critical objective of brownfield laws, that is, the clean-up of contamination on identified properties, and the reuse and redevelopment of those properties, all in furtherance of the best interest of the state's economy and the state's environment. G.L. 23-19.14-1 and 2. Reuse and redevelopment of these properties are encouraged.

In the proposed matter, the inquiring attorney will negotiate the purchase of the property with the new owner on behalf of the buyer, and will represent the buyer at the closing. The inquiring attorney will negotiate with DEM on behalf of the buyer and will secure the necessary agreements with the DEM regarding further remediation and redevelopment on the property. The clean-up requirements for the new buyer to be negotiated with the DEM will depend on the buyer's proposed reuse of the property. Some projects require more clean up than others. Additional facts pertinent to the proposed matter which differ from the former matter include the current environmental conditions of the property; actions needed to manage, monitor or remediate the current conditions; entities or persons who will bear the responsibility for those future actions; limitations on the prospective buyer's future use of the property due to the contamination.

Except that the buyer will purchase the same property that was the subject of the former DEM matter, there are more differences than sameness in the two matters. Based on the totality of the facts, and in light of the references in Rule 1.11, in the comments, and in ABA Formal Ethics Op. 342, to "particular matter involving specific parties," and "discrete, identifiable transaction or conduct involving a particular situation and specific

parties,” and “the same basic facts, the same or related parties,” the Panel concludes that the former matter and the proposed matter are not the same.

The inquiring attorney has stated that he/she does not have confidential information that would be relevant to the proposed representation. When DEM identifies a contaminated property, the process is open to the public. Site investigation data is a matter of public record. Even if the inquiring attorney were to have confidential information, Rule 1.11(a)(1) makes him/her subject to Rule 1.9(c) which prohibits disclosure of confidential information. General “playbook” concerns cannot be the basis of a determination of conflict of interest.

Rule 1.11 is more and less restrictive than Rule 1.9. It is more restrictive in that a former government lawyer has a conflict of interest under Rule 1.11 whether or not he or she participated on a matter as a lawyer. He or she is disqualified if as a former government employee, he or she participated personally and substantially in the same matter in a non-lawyer capacity. The conflict of interest arises whether or not there was a previous legal representation while in government.

At the same time, Rule 1.11 is less restrictive than Rule 1.9 in that the lawyer is disqualified only if the former matter and the subsequent matter are the same. This is unlike Rule 1.9 which prohibits a subsequent representation in the same matter *or a substantially related matter* in which the interests of the proposed client are materially adverse to the interests of the former client.

Rule 1.11 represents a balancing of interests of the government and of the former government lawyer. In the Panel’s view, Rule 1.11 is more restrictive in favor of the government on the issue of participation, and it is less restrictive in favor of the former government lawyer on the issue of “matter.” The Panel notes that only paragraph (c) of Rule 1.9 applies to the former government lawyer.

The Panel concludes that the prior DEM matter and the proposed representation are not the same matter. Accordingly, it is not a conflict of interest under Rule 1.11 for the inquiring attorney, a former DEM lawyer who participated in the DEM’s investigation of and enforcement and legal proceedings against the parties who owned and the parties who operated a gasoline station on certain contaminated land, to now represent a prospective buyer of the same property.