

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2022-3
Issued November 17, 2022**

FACTS

The inquiring attorney is the Town Solicitor for a municipality. In that capacity, he/she represents the Zoning Board, Town Council, and various Boards and Committees. Although he/she has not previously represented it, the Recreation Committee is one such committee that the attorney is tasked with representing. He/she states that the Recreation Committee requested that the Town Council seek a dimensional variance from the Zoning Board. However, the Town Council directed the Recreation Committee to seek the variance itself. The variance is to allow for a sign that exceeds the municipality's square feet allowance as set forth in its Zoning Ordinance.

ISSUE PRESENTED

The inquiring attorney asks whether it is permissible for him/her to represent the Town Council, Recreation Committee, and Zoning Board in connection with the dimensional variance application.

OPINION

It is not permissible under the Rules of Professional Conduct for the inquiring attorney to represent all three of the municipality's entities in connection with the dimensional variance application.

REASONING

Rule 1.7 of the Rules of Professional Conduct entitled "Conflict of Interest: Current Clients" applies. It states:

(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.

“Rule 1.7 is grounded primarily upon the attorney’s duty of loyalty to his or her client.” See Markham Concepts, Inc. v. Hasbro, Inc., 196 F. Supp. 3d 345, 349 (D.R.I. 2016) (interpreting Rhode Island Rule of Professional Conduct 7.1). That “[l]oyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed consent.” Rule 1.7 Comment [6]. Where the parties’ interests are adverse, “one attorney cannot ethically represent both parties.” DeCurtis v. Visconti, Boren & Campbell, Ltd., 152 A.3d 413, 425 (R.I. 2017).

The inquiring attorney asks whether he/she may represent all three municipality entities in connection with the dimensional variance application. It is the opinion of the Panel that such representation would be inconsistent with the Rules of Professional Conduct.

Rule 1.7(a)(1) provides that a concurrent conflict of interest exists if “the representation of one client will be directly adverse to another client.” Here, the Recreation Committee is seeking relief that is prohibited by the municipality’s Zoning Ordinance and, therefore, its interest is directly adverse to those of the Town Council and Zoning Board. See Ethics Advisory Panel Op. 90-36 (1990) (party to city’s zoning board action occupies position adverse to city). As a result, a concurrent conflict of interest exists.

Further, although in some instances a concurrent conflict of interest can be waived if the requirements of Rule 7.1(b) are met, the Panel is of the opinion that the conflict of interest at issue cannot be waived. This is because the inquiring attorney cannot provide legal advice to the municipal entities as to the issue of waiver given their adverse interests.

The Panel concludes that the proposed representation presents a non-waivable conflict under Rule 1.7(a) and (b) and is ethically prohibited. As the inquiring attorney has routinely represented the Town Council and Zoning Board, the Recreation Committee must be represented by independent counsel.