

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2023-1
Issued April 17, 2023**

FACTS

The inquiring attorney seeks an opinion on behalf of his/her law firm. Attorney A is Of Counsel at the law firm and is also the Town Solicitor for a municipality. Attorney A is not a salaried employee of the law firm and only shares in fees on matters that he/she originates and works on. Attorney A appears on the firm's letterhead where he/she is designated as "Of Counsel."

Attorney A is paid directly for his/her services as the Town Solicitor and such payment does not go through the law firm. In his/her capacity as Town Solicitor, Attorney A does not represent the municipality's planning or zoning board or its Town Council. These municipal entities are represented by independent counsel separate and apart from Attorney A.

ISSUE PRESENTED

Whether other attorneys at the law firm, excluding Attorney A, can appear before the municipality's planning board, zoning board, and Town Council without there being a conflict of interest or other ethical violation given Attorney A's dual position as Town Solicitor and of counsel at the law firm.

OPINION

Other attorneys at the law firm appearing before the municipality's planning and zoning board and Town Council would constitute a concurrent conflict of interest pursuant to Rule 1.7(a). However, this conflict of interest can be waived if the requirements of Rule 1.7(b) are met, including obtaining the informed consent of the municipality and the clients the law firm seeks to represent before the municipality.

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 1.7). 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].

Attorney A has a lawyer-client relationship with the municipality. Therefore, under Rule 1.7, he/she may not represent clients with interests adverse to the municipality. This Panel has concluded that a party to a municipality’s zoning board action occupies a position adverse to the municipality and, as a result, a part time solicitor could not represent clients before the zoning board. See Ethics Advisory Panel Op. 90-36 (1990). Similarly, the Panel found it was not permissible for an attorney who represented a municipality as special counsel to represent clients before the zoning board of review or town council. See Ethics Advisory Panel Op. 07-03 (2007). Therefore, pursuant to Rule 1.7, a concurrent conflict of interest precludes Attorney A from appearing and representing clients before the municipality’s planning and zoning board and Town Council.

Rule 1.10 governs the imputation of conflicts. It provides in pertinent part:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Pursuant to Rule 1.10(a), Attorney A's conflict of interest is imputed to the other attorneys in the law firm. See Ethics Advisory Panel Op. 97-06 (1997) ("The 'of counsel' relationship between the inquiring attorney and the solicitor for City B can constitute an affiliation sufficient to trigger application of imputed disqualification under Rule 1.10(a)").

Although an imputed concurrent conflict of interest exists that would prevent other attorneys at the law firm from appearing before the municipality's planning and zoning board and Town Council, the Panel concludes that this conflict can be waived if the requirements of Rule 1.7(b) are met, including obtaining the informed consent of the municipality and the clients the law firm seeks to represent before the municipality. Such informed consent must be obtained on a case by case basis.

In concluding that this conflict of interest is subject to waiver, the Panel found significant the fact that there is no financial benefit to the law firm from Attorney A's salary as Town Solicitor. Further, independent counsel represents the municipality's planning board, zoning board, and Town Council.