

Final

**ETHICS ADVISORY PANEL
OPINION NO. 96-32, REQUEST NO. 697
Issued November 14, 1996**

FACTS:

Attorney A, who is the inquiring attorney, and Attorney B are lawyers in the same law firm. Attorney A has been retained by a municipality to conduct an independent review of the activities of one of its departments relative to a particular matter. The retainer agreement between Attorney A and the municipality provides that Attorney B may assist Attorney A. The scope of Attorney A's review has expanded to include the review of an investigation by the department in which Attorney B had some involvement while he/she was previously employed by the attorney general. Specifically, Attorney B had met with investigators from the municipal department who, as part of their investigation, were seeking legal definitions of certain terms which were material to the investigation. Although they did not disclose the identities of any persons being investigated the investigators had advised Attorney B of the nature of the investigation. Attorney B had provided the investigators with the statutory definitions they sought and also discussed with them a hypothetical example relating to the definitions. After the meeting, Attorney B had sent a letter to one of the investigators to memorialize the substance of the meeting and to offer future assistance. There was no further communication between Attorney B and the investigators.

ISSUE PRESENTED:

The inquiring attorney asks whether Attorney A or Attorney B or both will violate Rule 1.11 of the Rhode Island Supreme Court Rules of Professional Conduct if Attorney A continues to represent the municipality in reviewing the activities of its department.

OPINION:

Attorney A may continue to represent the municipality provided that he/she complies with the screening and notice requirements of Rule 1.11(a) as they pertain to Attorney B. Pursuant to Rule 1.11(A), Attorney B may neither represent the municipality in the review nor participate in the review.

REASONING:

The Panel generally will decline to render an advisory opinion where the request seeks an opinion about the conduct of an attorney other than the inquirer. However, in this request an opinion about whether and the circumstances under which Attorney A may continue to represent the municipality requires the Panel to consider whether Attorney B is prohibited from

representing the municipality under Rule 1.11(a). The Panel concludes that Attorney B may not represent the municipality in the review.

Rule 1.11(a) is a "revolving door" provision which contains a broad prohibition that bars former government employees from representing private clients in matters related to their government service. Rule 1.11(a) provides:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated as a public officer or employee. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

Private employment in the context of the Rule includes representation of a public entity by an attorney. Annotated Model Rules of Professional Conduct, at 183 (3rd ed. 1996).

The term "matter" as defined in the Rule is broad. Rule 1.11(e) 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 a conflict of interest rules of the appropriate government agency.

The Panel believes that the investigation in which Attorney B became involved while in government service is a "matter" contemplated under the Rule.

Under the predecessor Rhode Island Code of Professional Responsibility, a former government employee could not represent a private client in a "matter in which he had substantial responsibility while he was a public employee." R.I. Code of Professional Responsibility DR 9-101. The substantial-responsibility standard required personal involvement to an important, material degree. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975). Rule 1.11(a) does not contain that standard but rather "adopts, in part, the language of the relevant federal conflict-of-interest statute [18 U.S.C. § 207 (a)(3)] extending disqualification to matters in which the lawyer 'participated personally and substantially . . . through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise. . .'" See Annotated Model Rules of Professional Conduct, at 184 (3rd ed. 1996) quoting Model Rules of Professional Conduct, Rule 1.11, legal Background at 78 (Proposed Final Draft, May 30, 1981).

The Panel is of the opinion that Attorney B's meeting with and rendering legal advice to municipal investigators constitutes personal and substantial participation in the matter. That matter along with other activities of the department are now under independent review by his/her partner, Attorney A, on behalf of the municipality. Because the scope of Attorney A's review of the activities of the municipal department also includes the investigation in which Attorney B was involved, the Panel concludes that Rule 1.11(a) prohibits Attorney B from representing the municipality and from participating in all aspects of the review being conducted by Attorney A.

The Panel further concludes that Attorney A may continue to represent the municipality in the review of its department provided that, pursuant to Rule 1.11(a)(1) and (2), Attorney B is screened from any participation, Attorney B receives no part of the fee related to the representation, and the attorney general is notified.

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 issue raised by this inquiry.