New York State Bar Association
Committee on Professional Ethics

Opinion 1029 (10/23/2014)

Topic: Conflicts of interest for government lawyers with prior private clients

Digest: A government agency lawyer who previously represented a nongovernmental client in litigation against the agency is prohibited from representing the agency in a particular matter if that matter is the same as or substantially related to the litigation and the interests of the former client and the agency are materially adverse, although such conflict may be cured by informed consent of the prior client. If the lawyer participated personally and substantially in the prior litigation, then, notwithstanding any consent of the prior client, the lawyer is also prohibited from representing the agency in a particular matter that is the same as the prior litigation, such as advising the agency on compliance with the settlement agreement that ended the litigation. Advice on programs that were not involved in the litigation likely would not be the same matter as, nor substantially related to, the litigated matter unless the parties and the underlying facts were the same. Advice on programs that were involved in the litigation would require closer scrutiny to determine if the matter were the same or substantially related. The fact that legal issues involved in a new matter may be the same as ones in the litigation does not automatically make the matters substantially related.

Rules: 1.0(l); 1.9(a); 1.11(d)

FACTS

1. The inquirer is employed as an attorney for a municipal agency. The inquirer was previously employed by an advocacy organization that conducted class action litigation (the "Litigation") against the agency. In that capacity the inquiring lawyer participated personally and substantially in the Litigation, which was eventually settled.

2. The lawyer's responsibilities with the agency include setting policy for programs provided to the agency's constituents. The lawyer does not provide legal advice to the agency on compliance with the settlement agreement that resolved the Litigation. While much of lawyer's advice to the agency involves new programs for the agency's constituents, the lawyer may be called upon to advise on programs involving the same settings that gave rise to the Litigation.

3. The inquirer asks whether his prior involvement in the Litigation presents any ethical issues for his ongoing work for the agency on any programs or issues that were involved in the Litigation.

QUESTION

4. May the lawyer advise the agency on issues involved in the Litigation, including issues relating to the provision of services to the agency's constituents with respect to (i) programs that were not involved in the Litigation, and (ii) programs that were involved in the Litigation?

OPINION

5. Two separate conflicts rules in the New York Rules of Professional Conduct (the "Rules") apply to this situation: Rule 1.9 and Rule 1.11.

6. Rule 1.9(a) is the general rule applicable to conflicts with former clients. It provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter" in which the new client's interests "are materially adverse to the interests of the former client" unless the former client gives informed consent, confirmed in writing.

7. The goals of Rule 1.9 include (1) preventing a lawyer from switching sides (e.g., from participating in the litigation and settlement of a matter and then attacking the settlement), and (2) preventing a lawyer from improperly using confidential information of the former client. See Rule 1.9, Cmts. [2] & [3]. To achieve these goals, Rule 1.9(a) applies not only to representation in the very matter in which the lawyer represented the former client, but also to representation in matters that are "substantially related."

8. Rule 1.11, as its name denotes, is the special conflicts rule applicable to current and former government employees. Rule 1.11(a) applies to a lawyer in the private sector who formerly served as a public officer or employee of the government. Rule 1.11(d) applies to the reverse situation – the one presented here – providing in part:

> (d) Except as law may otherwise expressly provide, a lawyer currently 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 …

9. Rule 1.11(a) applies instead of Rule 1.9(a) with respect to lawyers who leave the government and join the private sector, but Rule 1.11(d), which applies to lawyers who leave private practice to join the government, applies in addition to Rule 1.9(a). Compare Rule 1.11, Cmt. [4] (explaining that a former government lawyer is disqualified "only from particular matters in which the lawyer participated personally and substantially") with Rule 1.11, Cmt. [9B] ("Where a government law office's representation is materially adverse to a government lawyer's former private client, … the representation would, absent informed consent of the former client, also be prohibited by Rule 1.9.").

10. The goal of Rule 1.11 is not to prevent switching sides. In particular, Rule 1.11(d) applies "regardless of whether a lawyer is adverse to a former client." Rule 1.11, Cmt. [3] (noting that rule is designed not only to protect former clients "but also to prevent a lawyer from exploiting public office for the advantage of another client," so that in general, "a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government"). The goals of Rule 1.11 are discussed in a Comment which goes on to state:

> On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. … [Certain provisions in Rule 1.11(b)] are necessary to prevent the disqualification rule from imposing too severe a deterrent to entering public service. The limitation on disqualification in paragraphs (a)(2) and (d) to matters involving a specific party or specific parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

Rule 1.11, Cmt. [4] (noting that the Rule "represents a balancing of interests").

Are the Litigation and the Current Representation the Same Matter?

11. The term "matter," which appears in both Rule 1.9 and Rule 1.11, appears in the definition section of the Rules: "'Matter' includes "any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties." Rule 1.0(l); see Rule 1.9, Cmt. [2] ("The scope of a 'matter' for purposes of this Rule depends on the facts of a particular situation or transaction."). And, at least for purposes of Rule 1.11:

> [A] "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which (i) the matters involve the same basic facts, (ii) the matters involve the same or related parties, and (iii) time has elapsed between the matters.

Rule 1.11, Cmt. [10].[1]

12. The inquiry specifies that the lawyer does not provide legal advice to the agency on compliance with the settlement agreement that resolved the Litigation. We note that for the lawyer to give such advice would seemingly be prohibited under Rule 1.9(a) and Rule 1.11(d). The lawyer participated personally and substantially in the Litigation settled by that agreement, and advising on compliance with the agreement with respect to the very parties involved in the Litigation would implicate concerns of switching sides, improperly using the former client's confidential information, and exploiting public office for the advantage of the former client.

13. Since the lawyer does not in fact advise the agency on compliance with the settlement agreement, the lawyer's representation of the agency does not necessarily constitute representation in the same "matter" as the Litigation. We turn to an analysis of the factors mentioned in Comment [10] to Rule 1.11 – the facts, the passage of time, and the parties.

14. As to whether the matters involve the same basic facts, we distinguish between (i) programs that were not involved in the Litigation and (ii) programs that were involved in the Litigation. If the lawyer's advice to the agency does not involve the same programs that were the subject of the Litigation, it may be easy to conclude that the current representation and the Litigation do not involve the same basic facts. But if the lawyer were to advise the agency regarding the same programs, especially if the advice were given in connection with an adversarial proceeding brought on behalf of the agency's constituents, then a more detailed analysis would be required to determine whether the new advice involves the same basic facts as the Litigation.

15. As to the passage of time, the Litigation was commenced years ago and has already been settled. Although the settlement agreement was finalized only within the past year, the inquiry nonetheless involves matters separated by time.

16. Finally, as to whether the matters involve the same or related parties, the current clients of the agency were not named plaintiffs in the Litigation. We have found no case law or ethics opinions attempting to define "a specific party or parties" as that phrase is used in Rule 1.0(l), but our prior opinions citing that Rule involve the same party or parties. See, e.g., N.Y. State 904 ¶ 8 (2012) (concluding that criminal investigation and civil claim for restitution, though related, were not same matter, in part because prosecutor was party only to the former and claimant was party only to the latter).

17. We believe the term "a specific party or parties" in Rule 1.0(l), at least for purposes of Rule 1.11, should be interpreted narrowly. See Rule 1.11, Cmt. [4] (quoted above). In a class action, only named plaintiffs should be considered a "specific party or parties," and that term should generally not be deemed to include all members of the class even though they may benefit from relief

resulting from the lawsuit. Cf. N.Y. City 2004-1 (2004) ("If a class member has not individually retained the class lawyer or consulted with that lawyer and the lawyer has not acquired confidential information about that class member, the lawyer should be free to accept an unrelated matter against the class member while the class action is pending."). This factor thus counts against a conclusion that the matters are the same.

18. Taking these various factors into account, it seems unlikely that the current representation and the Litigation would be deemed the same matter if the advice does not involve the programs that were the subject of the Litigation. We do not foreclose the possibility that they could be deemed the same matter in some circumstances, such as if the lawyer were to advise the agency regarding the litigated programs and the advice were given in connection with an adversarial proceeding brought on behalf of the agency's constituents, especially if that adversarial proceeding were similar or related to the prior Litigation.

Are the Litigation and the Current Representation Substantially Related Matters?

19. If a matter on which the inquirer would advise the agency were not the same as the one in which the inquirer "participated personally and substantially while in private practice or nongovernmental employment," then Rule 1.11(d) would not preclude the inquirer's participation in giving such advice. However, giving such advice could still implicate Rule 1.9(a), which applies to representation not only in the same matter, but also in matters that are "substantially related." It is therefore relevant to determine whether issues involving the constituents of the agency should be viewed as substantially related to the Litigation.

20. Comment [3] to Rule 1.9 explains that matters are "substantially related" if "they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Ultimately, the determination of substantial relationship is a factual one. See N.Y. State 1008 ¶ 21(2014) ("the 'materially advances' inquiry is fact-intensive").

21. The test of substantial relation between two matters is more easily met than the test of whether two matters will be deemed the same, but the factors discussed above are again relevant to the analysis. If the lawyer's advice to the agency does not involve the same programs that were the subject of the Litigation, then the current representation and the Litigation probably are not substantially related. But if the advice involves the same programs, and especially if the advice is given in connection with litigation (such as an adversarial proceeding brought on behalf of the agency's constituents), then a more detailed analysis would be required to determine whether a reasonable lawyer would perceive a substantial risk that "confidential factual information that would normally have been obtained in the prior representation" would materially advance the agency's position in the new representation.

22. The mere circumstance that the current representation may involve legal issues that were also involved in the Litigation does not make the matters substantially related. Interpretations of the ethical rules have long distinguished between conflicts involving the same matter and conflicts involving the same legal issue. Such "issue" (or "positional") conflicts tend to be more problematic in the case of concurrent representation than in the case of former representation. Even as to concurrent representation, a lawyer may ordinarily "take inconsistent legal positions in different tribunals at different times on behalf of different clients," although there can be circumstances in which an issue conflict arises because "there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's representation of another client in a different case."[2] As to former representation:

> When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type, even though the subsequent representation involves a position adverse to the prior client.

Rule 1.9, Cmt. [2]. That is not to say that an issues conflict could never arise as to a former client, but the Comment makes clear that such conflicts are not typical, and they are even less likely to occur when (as here) the second representation does not involve litigation.

23. If the inquirer were asked to give advice to the agency in a matter substantially related to the Litigation, then the inquirer would need to consider whether the agency's interest in that matter is "materially adverse to the interests of the former client" under Rule 1.9(a). If so, then Rule 1.9 would preclude the inquirer's representation of the agency in that matter. Of course at the time of the Litigation, there was adversity between the plaintiffs and the agency. The inquiry does not provide the facts necessary to determine whether the interests of the agency and the former client are, currently, materially adverse in any matter in which the lawyer would be advising the agency.

Consent to Conflicts

24. A conflict under Rule 1.9(a) may be cured if "the former client gives informed consent, confirmed in writing," and those terms are defined. See Rule 1.0(j) (defining "Informed consent"); Rule 1.0(e) (defining "Confirmed in writing"). If representation of the agency in a particular matter presents a conflict under Rule 1.9 but not under Rule 1.11, then the former client's informed consent, confirmed in writing, would allow the lawyer to represent the agency in that matter. Situations in which there would be a conflict under Rule 1.9 but not under Rule 1.11 could arise if the interests of the agency in the new matter were materially adverse to those of the former client, but the government lawyer had not participated "personally and substantially" in the prior matter, or if the new matter were not the same as the prior one but only substantially related.

25. On the other hand, informed consent does not cure a conflict under Rule 1.11(d). Under that Rule, a lawyer currently serving as a public officer may not participate in a matter in which the lawyer participated personally and substantially while in private practice. The only exceptions arise when "law may otherwise expressly provide" or when, "under applicable law, no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter." Rule 1.11(d).

26. Here, the lawyer did participate personally and substantially in the Litigation, so the existence of a conflict under Rule 1.11(d) turns on whether the matter of the current representation is the same matter as the Litigation. If the matters are the same, then the lawyer would be disqualified, notwithstanding any consent of the former client, because neither of the exceptions in Rule 1.11(d) would apply. The lawyer is apparently not the only one authorized to act for the agency. Nor has the inquirer mentioned any law expressly providing that the lawyer may represent the agency notwithstanding the conflict.

CONCLUSION

27. The lawyer may not advise the agency on compliance with the Litigation settlement agreement with respect to the parties in that Litigation. Otherwise, the lawyer may advise the agency on a matter involving the agency's programs unless (a) the matter is the same as the matter in the Litigation, or (b) the matter is substantially related to the matter in the Litigation and the agency's interest in that matter is materially adverse to the interests of the former client. Advice on programs that were not involved in the Litigation likely would not be in the same or a substantially related

matter unless the parties and the underlying facts were the same as those in the Litigation. Before giving advice on a program that was involved in the Litigation, the lawyer would need to determine whether such advice is in the same matter, or, if in a substantially related matter, whether there is material adversity between the interests of the agency and the former client. Even if legal issues involved in the new matter may be the same as issues in the prior Litigation, that does not automatically make the matters substantially related.

(22-14)

[1] Comment [10] addresses the relationship of two matters "[f]or purposes of paragraph (e)." Rule 1.11(e) does not define "matter" in general, but merely provides that "[a]s used in this Rule, the term 'matter' as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions." The Rule's history may shed light on why the Comment, in making a general point about the definition of "matter," refers to a paragraph that addresses only rulemaking. The ABA Model Rules do not include a definition of "matter" in the definition section, but rather define that term in Rule 1.11(e). Nor was the term defined in the definition section in the version of the Rules proposed to the Appellate Divisions by the New York State Bar Association in 2008. Rule 1.0(l) was added by the New York Administrative Board sua sponte.

[2] Rule 1.7, Cmt. [24]; accord Restatement (Third) of the Law Governing Lawyers § 128, comment (f) (2000); see N.Y. State 826 (2008) (discussing consentability of positional conflicts).