New York State Bar Association
Committee on Professional Ethics

Opinion 1148 (4/2/2018)

Topic: Conflicts of Interest: Former government lawyer in private practice in matters involving former government employer

Digest: A lawyer formerly employed by a county department to handle child support enforcement proceedings may, after termination of such employment, represent respondents in such proceedings, provided that the lawyer was not personally and substantially involved in the same matter while a government employee.

Rules: 1.0(j), 1.6, 1.9(a) & (c), 1.11(a) & (c).

FACTS

1. The inquirer is a New York lawyer formerly employed by a county social services agency (the "Department") within New York State. Among the duties of a county social services department are to assist "the state in the location of absent parents, establishment of paternity and enforcement and collection of support" obligations of legally responsible relatives to contribute for the support of their dependents. N.Y. Social Services Law §111-c(1) (outlining Departmental duties). The Department employs an enforcement unit staffed, in part, by four or five attorneys, who seek to enforce alleged obligations to support dependents. We assume for our purposes that, in doing so, the attorneys represent the Department rather than individuals to whom the support payments may be owed.

2. The inquirer recently retired as one of the Department's enforcement unit attorneys, and has started a solo law firm in the same region. In this practice, the inquirer wishes to represent clients adverse to the Department, including opposing the Department's enforcement actions.

QUESTION

3. May an attorney, formerly employed by a county department of social services, represent clients opposing the efforts of the attorney's erstwhile government employer, including representing clients challenging support enforcement proceedings brought by that employer?

OPINION

4. This Committee's charter is limited to interpretation of the New York Rules of Professional Conduct (the "Rules") and does not extend to opining on issues of law, statutes, county ethics codes, or other regulations that may govern the duties of current or former government employees in their relations with their current or former government employers. Accordingly, here, we proceed without deciding that the inquirer's proposed representation conforms to any such limitation on the inquirer's proposed conduct.

5. Nothing in the Rules creates an absolute bar to a former government attorney's representation of a client in opposition to the attorney's former employer. Rule 1.11(a)(2) is the principal Rule governing conflicts that may be faced by a former government attorney. N.Y. State 1029 ¶ 9 (2014). Rule 1.11(a) provides in pertinent part that "a lawyer who has formerly served as a public officer or employee of the government . . . shall not 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." Hence, Rule 1.11(a)(2) allows a former government attorney to represent private clients on matters in which the attorney did not participate "personally and substantially" while in

government service.

6. The history of Rule 1.11(a)(2) makes "clear that the disqualification must be based on the lawyer's "personal participation to a significant extent." N.Y. State 748 (2001). "[T]hat a former government lawyer was counsel for the government in unrelated matters at the same time that the defendant's case was investigated or prosecuted is not enough to demonstrate personal and substantial participation under DR 9-101," the precursor to Rule 1.11(a)(2) in the N.Y. Code of Professional Responsibility (the "Code"), "or to require disqualification under that rule." *Id.* "Neither the Code, nor its goal of promoting public confidence require so limiting the practice of former government lawyers that they may not, following their return to private practice undertake work involving the types of matters in which they have gained particular expertise while in public service." N.Y. State 453 (1976).

7. The aims of Rule 1.11(a), a rule specific to onetime government lawyers, are akin to, but significantly differ from, those of Rule 1.9(a), a rule more generally regulating a lawyer's duty to former clients. The goals of Rule 1.9(a) include preventing a lawyer from "switching sides" and "improperly using confidential information of the former client," Rule 1.9, Cmts. [3] &[4], whereas Rule 1.11(a) is designed not only to protect the former government client but also to "prevent a lawyer from exploiting public office for the advantage of another client," Rule 1.11, Cmt. [3]. An additional and important concern of Rule 1.11(a), however, is to avoid an undue deterrent on lawyers serving in a public position without forever forgoing private practice in the legal area in which the lawyer served the government. Rule 1.11, Cmt. [3]; N.Y. State 1029 ¶ 10. For this reason, the test applicable to Rule 1.9 is qualitatively different from the test applicable to Rule 1.11.

8. To be sure, underlying each Rule is a protection of the former client's confidential information. A government lawyer, like any lawyer, owes an ongoing duty to a former client to preserve the confidential information the lawyer garnered in the representation unless the former client releases the lawyer from that duty. Rule 1.11(a)(1) requires a lawyer who formerly served as a public officer or government employee to comply with Rule 1.9(c), which in turn provides that "a lawyer who has formerly represented a client in a matter" [in this case, a government or governmental agency] "shall not thereafter use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client" or reveal such information, in each case "except as these Rules would permit or require with respect to a current client." Among the exceptions in each Rule is the former client's "informed consent" within the meaning of Rule 1.0(j). Consistent with this proscription, Rule 1.11(a)(2) says that the government agency may consent if a former government attorney seeks to represent another party "in a matter in which the lawyer participated personally and substantially" while a government employee, subject always to the proscription in Rule 1.11(c) against the use of confidential government information against third persons, a ban that consent may not waive (and that is not an issue we address in this opinion).

9. Absent the former client's informed consent, the differing language of the two Rules reflects their different objectives. Rule 1.9(a) bars representation adverse to a former client "in the same or a substantially related matter" to the matter in which the lawyer previously represented a client. Rule 1.11(a) bars representation by a former government employee adverse to the former client only in the same specific matter as the matter in which the lawyer participated "personally and substantially" during the lawyer's government employment. As a result, the application of each Rule may diverge in practical ways. Solely by way of illustration, some courts apply Rule 1.9(a)'s "substantial relationship" test to disqualify lawyers who represented clients in specific types of matters. *See, e.g., Panebianco* v. *First Unum Life Ins. Co.*, 2005 U.S. Dist. LEXIS 7314 (S.D.N.Y. Apr. 27, 2005) (disqualifying law firm that represented former client in disability matters); *Lott* v. *Morgan Stanley Dean Witter & Co.,* 2004 U.S. Dist. Ct. LEXIS 25682 (S.D.N.Y. Dec. 23, 2004) (disqualifying law firm that represented former client in ERISA matters); *Mitchell* v. *Metro. Life Ins.*

Co., 2002 U.S. Dist. LEXIS 4675 (S.D.N.Y. Mar. 21, 2002) (disqualifying law firm that represented former client in discrimination matters). Without endorsing these decisions – disqualification to appear in court is a question of law not ethics and governed by judicial standards outside our purview – a theme running through the opinions, sometimes labeled the "playbook" approach, is not practicable in the context of former government lawyers. Many state and sub-state legal departments represent the government only in specific types of cases. To use this "playbook" approach in interpreting Rule 1.11(a) is to disregard both its purpose of encouraging public service and the different language that Rule 1.11(a) uses to assess whether a government lawyer is able to represent a client against the lawyer's former employer.

10. Otherwise put, Rule 1.11(a) ousts the application of Rule 1.9(a) in the context of government lawyers. Rule 1.9(a)'s "substantial relationship" may extend its reach to encompass matters that Rule 1.11(a)'s requirement of "personal and substantial" involvement in the specific matters was not intended to embrace. We do not negate the possibility that the two may overlap in some instances, but neither do we believe that the two are necessarily congruent. That each Rule uses different language, that Rule 1.11(a) is specific to government lawyers in contrast to Rule 1.9(a)'s general application, and that Rule 1.11(a) serves public purposes beyond those animating Rule 1.9(a), fortify this conclusion. We note, too, that the considerations for determining whether Rule 1.11(a) applies are materially narrower than those customarily applied in analysis of a Rule 1.9(a) conflict. *Compare* Rule 1.11, Cmt. 10 (factors to be used in determining whether two matters are the same include "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") *with* Rule 1.9, Cmts. [2] & [3] (setting forth additional factors to be considered in making a decision about whether a conflict exists).

11. Consequently, we conclude that a onetime government lawyer may represent clients adverse to the lawyer's former government employer unless that lawyer had a personal and substantial involvement in the same specific matter in which the lawyer now proposes to challenge the government's position. This conclusion rests on the assumptions (a) that the inquiring lawyer does not possess confidential information about the specific matter obtained during the inquirer's government service, and (b) that the inquiring lawyer does not otherwise possess confidential information about the specific matter which, owing to the lawyer's confidentiality obligations, the lawyer could not competently represent the client in resisting the government's action without violating the lawyer's ongoing duty of confidentiality, *see* N.Y. State 901 ¶ 10 (2011) (a lawyer possessing non-disclosable confidential information relating to existing representation must assess whether the lawyer reasonably believes that the lawyer may competently represent client). But merely knowing how the government agency usually handles such matters, untethered to personal and substantial involvement in or confidential information about the specific matter, is alone insufficient to prevent the former government lawyer from representing a private client against the lawyer's former government employer.

CONCLUSION

12. A lawyer formerly employed by a county department to handle child support enforcement proceedings may, after termination of such employment, represent respondents in such proceedings, provided that the lawyer was not personally and substantially involved in, and possesses no confidential information acquired about, the same specific matter while a government employee.

(32-17)