

OPINION 2006-7

SYNOPSIS:

Lawyer may represent private clients in matters before Lawyer's former governmental agency, provided that Lawyer had not participated personally and substantially in such matters during government service, absent consent of the governmental agency; and provided that in the new representation Lawyer would not use or reveal confidences of Lawyer's former government client.

FACTS:

For over 6 years Lawyer held several high-ranking administrative positions with State government, in which the duties involved some administrative tasks, some purely perfunctory and ministerial functions, as well as some quasi-judicial responsibilities. Lawyer participated "personally and substantially" in relatively few matters, and most of those matters have since resolved. After a nearly eight-month hiatus from State government, Lawyer accepted a position with a private Law Firm. Law Firm represents clients before the governmental agency at which Lawyer was previously employed.

So as to err on the side of caution, Lawyer plans to refrain from work on any case in which Lawyer previously had any direct involvement in any disputed matter. Lawyer has so advised the State agency as to how Lawyer intends to proceed.

QUESTION PRESENTED:

Whether, and in what circumstances, may Lawyer represent private clients in matters before Lawyer's former governmental agency.

DISCUSSION:

The Section has been asked to advise on the applicability of the Vermont Rules of Professional Conduct where a lawyer formerly employed by a governmental agency wishes to represent private clients before that agency. The relevant provisions of the Vermont Rules of Professional Conduct that are applicable to the question presented are Rule 1.11 and Rule 1.9(c).

Rule 1.11 deals with successive government and private employment and provides as follows:

Rule 1.11. Successive Government and Private Employment

- (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 personally and substantially as a public officer or employee, unless the

appropriate government agency consents after consultation. 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.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer 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; or
- (2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) 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 the conflict of interest rules of the appropriate government agency.

(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

VERMONT RULES OF PROFESSIONAL CONDUCT Rule 1.11.

Rule 1.9, pertaining to a conflict of interest involving a former client, provides as follows:

Rule 1.9. Conflict of Interest: Former Client

(a) 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 that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

VERMONT RULES OF PROFESSIONAL CONDUCT Rule 1.9.

The Section is called upon to review the applicability of the Vermont Rules of Professional Conduct in the context of the instant facts as presented.¹ Rule 1.11 of the Rules of

¹ While the Section has not previously had the opportunity to address the precise question related to the present inquiry under the Vermont Rules of Professional Conduct, the Section has dealt with similar questions in the past when applying the former Code of Professional Responsibility. See, e.g., *Opinion No. 1989-5* (lawyer may accept private employment as attorney in a matter in which lawyer did not have substantial responsibility as a member of State government and when the work as government employee was in reviewing and interpreting government or agency procedures, regulations or abstract principles, discussing *ABA Formal Opinion 342* (1975); *Opinion No. 1987-4* (lawyer may not accept private employment as lobbyist in a matter in which lawyer had substantial responsibility as a member of State government); *Opinion No. 1986-2* (restriction on private employment following government service applies to those matters in which lawyer had actual significant involvement as a public employee); and

Professional Conduct, pertaining to successive government and private employment, while plainly applicable to Lawyer's inquiry, does not resolve *in toto* Lawyer's ethical responsibility. Rule 1.9 (c) is also relevant to the issue. Accord, *ABA Formal Opinion 97-409* (1997) (in similar fact pattern, the American Bar Association's Standing Committee on Ethics and Professional Responsibility concluded that the conflict of interest obligations of former government lawyer are governed by Rule 1.11 and Rule 1.9(c), but not by Rule 1.9(a) and (b)).

The critical inquiry under the present facts is whether Lawyer's private employment will require Lawyer to represent a private client in connection with a "matter" in which Lawyer "participated *personally and substantially* as a public officer or employee." Rule 1.11 (a) (emphasis added).

The definition of "matter" as set forth in Rule 1.11(d) was intended to codify the discussion of that term in *ABA Formal Opinion 342* (1975). See *ABA Formal Opinion 97-409* (1997), fn. 5; see also Model Rule 1.11, Legal Background Note at 78 (Proposed Final Draft, May 30, 1981); *Securities Investor Protection Corp. v. Vigman*, 587 F. Supp. 1358, 1365 (C.D. Cal. 1984). *ABA Formal Opinion 342* described the disqualification provisions of Rule 1.11's predecessor Code provision, DR 9-101(B), as limited to the "same" matter, defining the term "matter" as follows:

The term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. . . The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter. By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulations, procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties.

ABA Formal Opinion 342 (1975).

The ABA Committee more fully elucidated the concept of "matter" as that term is used in Rule 1.11 of the Model Rules of Professional Conduct in *ABA Formal Opinion 97-409* in the following manner:

To say that a "matter" under Rule 1.11(a) must involve "a discrete and isolatable transaction or set of transactions between identifiable parties" does not, however, fully answer the question of when one matter will be deemed to be the "same" as another

Opinion No. 1982-1 (person who first was law clerk and subsequently a lawyer for State agency and in such capacities negotiated a compliance order between the State and a private corporation may not represent civil litigants in an action against that same corporation arising either under the compliance order or from the same facts which gave rise to the compliance order).

for purposes of triggering the disqualification provisions of Rule 1.11(a). In this regard, the courts have generally looked to see whether two or more arguably related matters involve the same parties and the same facts.

ABA Formal Opinion 97-409 (1997).

In addition to compliance with the dictates of Rule 1.11, a former government lawyer must also conform his/her conduct to the precepts set forth in Rule 1.9(c). Where a former government lawyer wishes to represent private clients against the lawyer's old government agency in connection with the same kind of cases the lawyer handled while in government service, Rule 1.9(c) may pose an additional impediment to the lawyer doing so. While a lawyer is automatically barred only from those particular matters in which the lawyer personally participated, the lawyer may also be subject to disqualification under Rule 1.9(c) if in the new representation the lawyer would be required to use or reveal confidences of the lawyer's former government client. See *ABA Formal Opinion 97-409 (1997)*.

Rule 1.9(c)(1) prohibits lawyers from using "information relating to the representation" to the disadvantage of a former client, except as permitted or required by Rule 1.6 or Rule 3.3, unless the information "has become generally known." Rule 1.9(c)(2) prohibits a lawyer from revealing such information, again except as permitted or required by Rule 1.6 and Rule 3.3. Thus, Rule 1.9(c) applies to lawyers leaving government employment so as to prohibit their unconsented use or disclosure of any nonpublic information relating to their representation of the government to the disadvantage of their former government client. See *ABA Formal Opinion 79-409 (1997)*². Hence, the requesting Lawyer should be mindful of the ethical obligations presented by Rule 1.9 (c), as well as by the applicable provisions of Rule 1.11.

In summary, Lawyer may represent private clients in matters before Lawyer's former governmental agency, provided that the requirements of Rule 1.11 and Rule 1.9(c) are fulfilled – that is, provided that Lawyer may not represent private clients in matters in which Lawyer had participated personally and substantially during government service, absent State agency consent; and provided that in the new representation Lawyer would not use or reveal confidences of Lawyer's former government client.³

² See also Rule 1.10 Comment ("The government is entitled to protection of its client confidences and, therefore, to the protections provided in Rules 1.6, 1.9 and 1.11.")

³ Lawyer must likewise be attentive to the prohibitions of Rule 8.4 (e), barring a lawyer from stating or implying "an ability to influence improperly a government agency or official." See, e.g., *Opinion No. 2002-03*.