

Opinion No. 2007-4

Synopsis:

1. A newly hired deputy state's attorney must not disclose any confidential information learned by him or her concerning clients of the law firm for which the deputy had formerly worked.
2. A newly hired deputy state's attorney must not participate in the prosecution of any case in which he or she had taken part "personally and substantially" while the deputy was engaged in private practice.
3. The office of the state's attorney is not disqualified from continuing to prosecute cases where the defendants have been and still are represented by the law firm at which the new deputy state's attorney formerly had been employed.

Facts:

A state's attorney has hired a new deputy state's attorney who was previously employed by a law firm engaged in criminal defense work. The office of the state's attorney has pending prosecutions against persons represented by the new deputy's former law firm.

The state's attorney has asked what steps need to be taken in order to avoid (1) conflicts of interest and (2) appearances of impropriety. Specifically, the state's attorney queries (1) whether the entire office will have to be recused from prosecuting clients having an existing attorney-client relationship with the new deputy's former law firm, and (2) whether a "Chinese wall" shielding the new deputy from all dealings with clients of the former law firm would suffice.

Analysis:

Rules 1.7 and 1.9 of the Rules of Professional Conduct set out the basis precepts for avoiding conflicts of interest. Thus, the new deputy state's attorney may not take part on behalf of the state in a prosecution against a former client of the new deputy. Nor may the new deputy state's attorney take part on behalf of the state in a prosecution against a client of the new deputy's former law firm if the new deputy had obtained any information about the client during his work at his former law firm.

Rules 1.6 and 1.9 (c) proscribe an attorney's use of information gained while the attorney was representing the former client, to the former client's disadvantage, for the information received by the attorney must be kept confidential. Only the former client may authorize the attorney to disclose such information (except for certain situations not applicable to the questions posed). See Rule 1.6, Rules of Professional Conduct.

The questions raised by the state's attorney are effectively answered by Rules 1.11(c) and (d) and by Rule 1.10. Rule 1.11(c) and (d), in pertinent part, read as follows:

- (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 non-governmental 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;

- (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.

Thus, the new deputy state's attorney is not authorized or permitted to take part in any matter in which he or she participated "personally and substantially" while in private practice.

However, the disqualification of the new deputy state's attorney does not extend to other prosecuting attorneys in the office of the state's attorney. While at first blush Rule 1.10 would appear to require a contrary conclusion, Rule 1.10 applies only to private law firms. By its use of the word "firm" Rule 1.10 applies only to private law firms, lawyers employed in a corporation's or other organization's legal department, and lawyers employed by legal services organizations. See Rules of Professional Conduct, III. Terminology: definition of "Firm" or law firm."

This distinction is highlighted in the Comment section to Rule 1.10, wherein the following passage appears:

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences and, therefore, the protections provided in Rules 1.6, 1.9 and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations and, thus, has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections state in Rule 1.11.

Conclusion:

The office of a state's attorney which has hired a new deputy state's attorney, who had worked at a law firm that represented defendants in criminal prosecutions conducted by that office, is not disqualified from continuing to handle the criminal prosecutions. However, the new deputy state's attorney may not disclose confidential information that he or she gained while working at the law firm with respect to any ongoing criminal prosecutions of clients of the deputy's former law firm. Nor may the new deputy state's attorney take part in any way in the ongoing prosecutions of clients of the deputy's former law firm, if the deputy had participated "personally and substantially" in the defense of those clients.