

ETHICS ADVISORY PANEL
Opinion #92-70, Request #292
Issued January 13, 1993

The inquiring attorney is the Solicitor for a municipality and is also a member of a law firm engaged in private practice. On occasion, clients of his law firm become involved in litigation with the municipality. In such instances, the inquiring attorney and his private law firm have withdrawn from representation of the private client, and the municipality has engaged other private counsel to represent the municipality. The inquiring attorney asks whether an assistant solicitor, who is employed by the municipality and is under the inquiring attorney's direct supervision, can represent the municipality in these situations.

This inquiry raises issues as to the interplay of Rules 1.10 (Imputed Disqualification: General Rule) and Rule 1.11 (Successive Government and Private Employment). Rule 1.10 covers the circumstances under which member of the same "firm" may not represent opposing parties where any member of the firm could not individually represent that party by reason of a "conflict" under specified Rules of Professional Conduct. For purposes of our response, we assume that the inquiring attorney's involvement with the private client is such that neither he nor his firm could represent an opposing party against the private client consistent with Rules 1.7 and 1.10. The issue, then, is whether a similar rule of imputed disqualification is applicable to the municipal solicitor's office.

The comments to Rule 1.10 indicate that, in addition to traditional law firms, the rule is also intended to cover "lawyers employed in the legal department of a corporation or other organization, or in a legal services organization." In this context we understand the term "legal services organization" to mean a legal aid or public defender office and the term "other organization" to mean a non-governmental organization.

Rule 1.11 sets forth principles applicable to successive private and governmental employment. The comments confirm that these principles are not as broad in their proscriptions as is Rule 1.10. For example, Rule 1.11 would allow a lawyer leaving a public agency to be associated with a firm that represents a party adverse to the public agency if the lawyer is appropriately "screened" from the matter. The comments explain:

"[T]he rules governing lawyers presently or formerly employed by a governmental 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. The provisions for screening and waiver are necessary to prevent the disqualification from imposing too severe a deterrent against entering public service."

Rule 1.11(b) prohibits a lawyer who has been employed by a government agency from representing a client before that agency for one year after the lawyer leaves that agency. The comments explain that this rule "is intended to prevent the appearance of impropriety." Under Rule 1.11(d), if the inquiring attorney had left private practice to become a full-time employee of the municipal solicitor's office, he could not "participate in a matter in which the lawyer participated personally and substantially while in private practice...unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter." The comments further state that this rule "does not disqualify other lawyers in the agency with which the lawyer in question has become associated."

While Rule 1.11 does not expressly contemplate simultaneous government and private practice, the rules applicable to such simultaneous practice should not be less restrictive than those expressly applicable to successive private and governmental practice. Rule 1.10 is applicable to the part-time government lawyer because for so long as the part-time government employee remains associated with a private law firm, the private clients of the part-time government lawyer's firm will be imputed to him under Rule 1.10.

The Panel believes that by analogy to Rule 1.11 there may be situations in which one "part-time" member of a government law office may be so screened or removed from involvement with a matter between the government and his private client so that the entire government law office is not disqualified from exercising its customary duties. However, the Panel is unable to conclude that the instant case is such a situation. In the instant case, the matter could be referred by the inquiring attorney only to a subordinate who is under the supervision of the inquiring attorney.

The Panel is unable to conclude in this situation that the inquiring attorney can be effectively screened or removed from the matter so as to avoid the imputed disqualification under Rules 1.10 and 1.11 and the appearance of impropriety that these rules were intended to avoid.

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, regulation or laws that may have bearing on the issues raised by this inquiry.