

Final

**Rhode Island Supreme Court
Ethics Advisory Panel
Opinion No. 99-04, Request No. 776
Issued February 11, 1999**

Facts:

The inquiring attorney, formerly an attorney in the Department of the Attorney General, is currently in private law practice in a law firm. The attorney has been asked to represent an individual at the ACI at an upcoming parole hearing. When he/she was working at the Attorney General's office, the inquiring attorney represented the state at the individual's arraignment and at his/her pre-trial conference.

Issue Presented:

The inquiring attorney asks (A) whether he/she may represent the individual at the parole hearing, and (B) if not, whether he/she may receive a referral fee from another attorney to whom he/she refers the matter.

Opinion:

(A) Rule 1.11(a) prohibits the representation by the inquiring attorney. Other lawyers in the law firm may undertake the representation provided they comply with Rule 1.11(a)(1) and (2). (B) If he/she refers the matter to a lawyer outside of the law firm, the inquiring attorney may not share the legal fees connected with the referred matter.

Reasoning:

The inquiring attorney will oppose his/her former client, i.e. the state, in the proposed representation. Therefore, Rule 1.9 entitled "Conflict of interest: Former client" must be considered. See Kansas Bar Assoc. Ethics Advisory Comm. Op. 96-07(1996)(former government lawyer in private practice must treat government as former client and must comply with Rule 1.9 on former client conflicts); Geoffrey C. Hazard, Jr. And W. William Hodes, The Law of Lawyering, S1.11:201, at 354.1 and 354.2 (2d ed. Supp. 1998)(normal confidentiality and conflict of interest rules apply to former government lawyer when subsequent representation is adverse to government). In addition, because the inquiring attorney is a former prosecutor, Rule 1.11 is also applicable.

Rule 1.9 states in pertinent part:

Rule 1.9. Conflict of Interest: Former Client. - A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) 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; or

(b) 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.

Rule 1.11 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 as a public officer or employee. 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.

(c) Except as lawyer 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.

In this inquiry, the inquiring attorney participated personally and substantially as a former prosecutor in the individual's criminal prosecution. Both Rule 1.9 and Rule 1.11 would prohibit the proposed representation, with one significant difference. Rule 1.9(a) permits a former client to consent to an adverse representation after consultation. On the other hand, Rule 1.11(a), unlike Rule 1.11(a) of the ABA Model Rules of Professional Conduct and the counterpart rules in most other jurisdictions, contains no express provision for the consent by a government entity. The fact that the two rules conflict with one another leads the Panel to conclude that both rules were not intended to apply to this situation. See ABA Standing Comm. On Ethics and Professional Responsibility, Formal Op. 97-409 (1997). The Panel further concludes that Rule 1.11(a) more appropriately defines the obligations of former government lawyers, and absent a law which otherwise permits the representation, operates as an absolute bar to the proposed representation by the inquiring attorney.

Rule 1.11 is the result of compromises intended to address the potentially burdensome effect on the government if the conflicts of interest of a former government attorney were imputed to other lawyers in his/her law firm pursuant to Rule 1.10. See Comments to Rule 1.10.

The compromise achieved in Rule 1.11 is both more and less stringent than the comparable provisions of Rules 1.9 and 1.10. It is more stringent in that the former government lawyer may be barred from participation in certain matters *even when the representation does not involve opposing the government or "switching sides."* It is less stringent in that, even when the former government lawyer is himself barred, a private firm to which he moves is not barred, *so long as the lawyer is screened from participation in the matter.* [footnote omitted] Hazard and Hodes, at 351.

Under Rule 1.11(a), participation in a matter as a government lawyer is a complete bar to subsequent representation of a private client in connection with that matter. A bar to representation under the rule is applied even if the lawyer will not oppose the government in the subsequent representation of a private client. The Panel is of the opinion that if a former government lawyer who is not opposing the government in a subsequent representation would be absolutely barred from the representation under Rule 1.11(a), then it follows that a former government attorney who proposes to change sides and oppose the government in a subsequent representation must also be barred from the representation, notwithstanding the waiver provisions contained in Rule 1.9. This supports the Panel's conclusion that Rule 1.11, and not Rule 1.9(a) or (b), is the controlling provision in this inquiry. See ABA Standing Comm. On Ethics and Professional Responsibility, Formal Op. 97-409 (1997) (Rule 1.11 occupies the field to exclusion of Rule 1.9(a) and (b) for former government lawyer conflicts of interest

obligations.) Accordingly, except as law may otherwise permit, the inquiring attorney is disqualified from representing the individual at the parole hearing.

Members of the inquiring attorney's new law firm are not disqualified from the representation as long as the notice and screening requirements of Rule 1.11(a)(1) and (2) are followed, including the requirement that the inquiring attorney not receive any part of the fees connected with the representation.

The inquiring attorney would not be permitted to receive a portion of the legal fee in the matter if he/she refers the matter to an attorney outside his/her law firm. The Panel is of the opinion that such a prohibition is implied by the requirement stated in Rule 1.11(a) that an attorney who is disqualified thereunder could not be apportioned any part of the fee were a lawyer in his/her firm to undertake the representation.

The Panel's guidance is restricted to interpretations of the Rules and does not extend to issues of the State Ethics Code or any other rules, regulations or laws that may have a bearing on the issues raised by this inquiry.

