FO 1992-93/13

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1992-93/13
<u>Representing a State Agency</u>
June 9, 1993
(Bar News, p.14, 11/17/93)

RULE REFERENCES:
 *Rule 1.6
 *Rule 1.7
 *Rule 1.9
 *Rule 1.9(a)
 *Rule 1.11
 *Rule 1.11(a)
 *Rule 1.11(c)(2)
 *Rule 1.11(d)(1)
 *Rule 1.11(d)(2)

SUBJECTS:
 *Confidentiality
 *Conflict of Interest
 *Government Representation

ANNOTATION:
 A lawyer, having previously represented a governmental agency can generally not represent a private client in a matter (involving a specific party or parties) in which the lawyer participated personally and substantially. (Rule 1.11(a); Rule 1.11(d)(1)

 Even if the lawyer had not been personally and substantially involved in the same or related matter, care must be taken that the new representation would not use previous information known to the attorney to the disadvantage of the former client (or governmental agency), unless such information is not protected under Rule 1.6 or has otherwise become generally known (Rule 1.9(a); Rule 1.9(b))

<u>FACTS:</u>

 The inquiring attorney represented a State governmental agency prosecuting cases on the agency's behalf. When the contract ended, the attorney began taking cases against that same agency.

<u>QUESTION:</u>

 Is it a violation of the Rules for an attorney who has been representing a State governmental agency prosecuting cases on the agency's behalf to take cases against the State agency under the following circumstances:

 a.   The contract with the agency has ended;

 b.   All work on behalf of the agency pursuant to the contract has terminated;

 c.   The agency is no longer a client; and

 d.   The cases are not the same cases that the attorney was involved with when representing the agency.

RESPONSE:

The issue presented implicates both Rules 1.11 and 1.9. The issue presented assumes that the lawyer/client relationship with the governmental agency has terminated and therefore does not implicate Rule 1.7.[1]

A. Rule 1.11

Rule 1.11 relates to successive governmental and private employment and applies to a contract attorney. The ABA Model Code comments[2] indicate that Rule 1.11 and 1.9 applies whether or not the lawyer is an employee. The Comments (Rule 1.11) state that:

> A lawyer representing the government agency, whether employed or specifically retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and statutes and government regulations regarding conflict of interest.

> Rule 1.11(a) disqualifies a lawyer from representing 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.

Furthermore, under rule 1.11(c)(2), a lawyer serving as a public officer or employee shall not . . .

> 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.

The term "matter" is defined under the rule to include a proceeding involving a "specific party or parties". Rule 1.11 (d)(1). If the former governmental lawyer is engaged by a private client in connection with prosecutions involving a specific party or parties with respect to which the lawyer did not have substantial or personal involvement while engaged by the governmental agency, then a violation of Rule 1.11 (a) has not occurred.

The rule incorporates any other matter covered by the conflict of interest rules of the appropriate government agency. Rule 1.11 (d)(2). Since the inquiry does not describe the agency, the Committee is not in a position to offer advice with respect to whether or not the subsequent engagement is covered by the conflict of interest rules of the applicable governmental agency.

Thus, the conduct described in the inquiry is permitted under Rule 1.11. The analysis then moves to Rule 1.9.

B. Rule 1.9

Rule 1.9(a) prohibits a lawyer from undertaking representation adverse to a former client "in the same or a substantially related matter" unless the former client consents after consultation and with knowledge of the consequences. Rule 1.9(b) also prohibits a lawyer from using information relating to the representation "to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known."

The first step in the inquiry with respect to a former client is whether or not the matter is the same or substantially related. The ABA Model code comment illuminates the definition of substantially related:

When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

The purpose of the substantial relationship rule is to protect the former client's confidential information. Rule 1.9 specifically permits the attorney to use "generally known information about the client when later representing another client." ABA Model Code Comments. The comments suggest that the "underlying question is whether the lawyer was so involved in the matter that subsequent representation can be justly regarded as a changing of sides in the matter in question."

A conclusion in any particular case depends principally on whether confidential information is involved. That issue depends upon the facts of the individual situation, the relationship between the former client and the attorney, the extent which the former client relied upon the attorney and confided in the attorney, and a large number of other factors. See for example, Indiana Ethics Opinion 3 of 1991 (former in-house labor lawyer may represent plaintiff in an employment discrimination case: familiarity with the personality and negotiating styles persons with whom the lawyer used to work is "generally known" information); Howard Hughes Medical Institute v. Lummis 596 Southwest 2d 171 Texas Court of Civil Appeal (1980) (Representation of a firm for 20 years and knowledge of the policies and operations would not prevent representation of an opponent in a will dispute); Michigan Ethics Opinion, RI-35 (1989) (Lawyer who represented a corporation for three decades and served on its Board may not represent a distributor's association which would probably take adverse positions to the corporation even though the lawyer would decline such representation); see also Stitz v. Bethlehem Steel Corp. 650 F.Supp. 914 (DMd.1987) (In-house labor lawyer could not take contrary position against former client given the lawyer's familiarity with personnel policies and procedures which were substantially related to the labor dispute); Ullrich v. Hearst Corporation, 1992 WL 3050747 (S.D. NH) (lawyer formerly employed by corporation may not represent three former employees against corporation as representation raises very high likelihood that lawyer would use confidential information imparted to him by his former client to disadvantage of former client).

[Ed. Note: Numerous editorial changes have been made to the form of this opinion for the sake of clarity and accuracy since its original publication without significantly affecting its tone or conclusions.]

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[1] However, if a lingering personal relationship exists or subjective feelings create any limitations upon representation, then Rule 1.7 may be implicated.

[2] "In adopting the Rules of Professional Conduct, the court is not adopting or approving the ABA Comments . . . [They] are solely for the information and guidance of the members of the bar." See Preface, New Hampshire Rules of Professional Conduct (1986).