NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1257 (05/26/2023)

Topic: Conflicts of Interest; Former District Attorney in Public Defender's Office

Digest: A former district attorney may be employed by a public defender's office in the same county. The former district attorney shall not personally represent a public defender client in a matter in which he was personally and substantially involved as district attorney or in which he is conflicted because he acquired "confidential government information" within the meaning of Rule 1.11(c). Where a conflict exits, it is not imputed to all lawyers in the public defender's office, and the public defender can assign another attorney in the office to represent the affected client, if appropriate measures are taken to effectively screen the former district attorney from the matter in accordance with Rule 1.11(b).

Rules: 1.0(*l*), 1.9(c), 1.11(a)-(c)

FACTS:

1. An attorney from a county public defender's office has asked if the office can hire the former district attorney of the same county as a full-time assistant public defender. The public defender is authorized to have three full-time attorneys who defend criminal cases, as well as a full-time and a part-time attorney who handle matters in Family Court. The former district attorney would work solely in Family Court, with an office in a building separate from that of the public defender and the assistant public defenders who handle criminal cases outside of Family Court.

QUESTIONS:

2. May a county public defender's office hire a former district attorney to serve as an assistant public defender in the same county?

3. If so, how should the public defender's office identify and address potential conflicts of interest?

OPINION:

Rule 1.11 establishes a special conflicts rule regarding former government attorneys.

4. Conflicts regarding former government lawyers are governed by Rule 1.11 of the New York Rules of Professional Conduct (the "Rules"), which is entitled "Special Conflicts of Interest for Former and Current Government Officers and Employees." As its title indicates, Rule 1.11 is a special rule for government lawyers that establishes special standards for (a) determining whether a former client conflict of interest exist; (b) enumerating notice and screening requirements that obviate the imputed disqualification of attorneys associated in the same firm with the former government lawyer, and (c) protecting confidential information acquired during

government service.

The Standard for Disqualification Under Rule 1.11(a).

5. We begin with Rule 1.11(a). which imposes two distinct restrictions on former government lawyers and provides, in pertinent part:

> (a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:
>
> (1) shall comply with Rule 1.9(c); and
> (2) shall not represent a 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 gives its informed consent, confirmed in writing, to the representation. ***

(Emphasis added)

6. Subparagraph (a)(1) incorporates the general provision set forth in Rule 1.9(c), including its exceptions, which governs whether a lawyer may use or reveal protected confidential information of a former client. Rule 1.9(c) pertains to all lawyers, not just former government lawyers. Subparagraph (a)(2), in contrast, is unique to former government lawyers and provides in pertinent part that a former government attorney:

> shall not represent a 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 gives its informed consent, confirmed in writing, to the representation.

7. "Matter" is defined in Rule 1.0(l) to include any "representation involving a specific party or parties." All criminal cases and family court cases meet this definition.

8. Accordingly, under Rule 1.11(a)(2), unless the district attorney's office and the client give their informed consent, confirmed in writing, the former district attorney would be precluded in his capacity as an assistant public defender from participating in a particular Family Court matter in which he "participated substantially and personally" when he was the district attorney. See N.Y. State 776 (2004) (a former prosecutor may not defend an accused if the lawyer participated personally and substantially in prosecuting the defendant on the same charges while serving as a prosecutor).

9. As we said in N.Y. State 748 (2001), which construed DR 9-101 (the predecessor to Rule 1.11):

> The fact that a former government lawyer was counsel for the government in unrelated matters at the same time that the defendant's case was investigated or prosecuted is not enough to demonstrate personal and substantial participation under DR 9-101 or to require disqualification under that rule. See N.Y. State 638

> (1992). At the same time, a former prosecutor must still carefully assess the circumstances of his or her service in the prosecutor's office to determine whether he or she may be deemed to have participated "personally and substantially" in the investigation or prosecution of a criminal defendant. Relevant facts include, but are not limited to, (1) the extent to which the former prosecutor served in a more than nominal supervisory role; (2) the extent to which the former prosecutor had knowledge of government confidences and secrets relevant to the proposed representation of the same defendants; (3) the extent to which the former prosecutor provided coverage for other ADAs; (4) the extent to which the former prosecutor was kept apprised of cases in the office; and (5) the extent of the former prosecutor's access to the case files and other information regarding cases in the prosecutor's office.

10. We believe that the "relevant facts" (or factors) under former DR 9-101 remain relevant to an analysis under Rule 1.11(a), which uses the same standard ("participated personally and substantially") that appeared in DR. 9-101.

11. Here, because the inquiry concerns the former district attorney himself and not an assistant district attorney in that office, the former government lawyer's name appeared on all charging instruments and other papers filed against defendants in the county. This does not, however, in and of itself establish that the former district attorney "participated personally and substantially" within the meaning of Rule 1.11(a)(2)). Rather, the emphasis is on whether and to what extent the former district attorney's general supervisory role regarding all prosecutions brought in his name within his jurisdiction could tip the balance in favor of disqualification in a particular matter on behalf of a client of the public defender office. The tipping point is the personal and substantial participation standard, measured by the relevant factors set forth in N.Y. State 748 (quoted above). The former district attorney will need to examine these factors with respect to each matter in which he is asked to represent a client in the public defender's office.

Subject to enumerated conditions, Rule 1.11(b) allows other lawyers in the public defender's office to accept representations from which the former district attorney is disqualified.

12. Rule 1.11(b) sets forth an exception to Rule 1.11(a). If Rule 1.11(a) disqualifies a former government lawyer from a matter, then Rule 1.11(b) allows other lawyers in a firm with which the disqualified former government lawyer is "associated" to "undertake or continue representation in such a matter" if "the firm acts reasonably and promptly" to take certain specified actions specified in subparagraph (b)(1) and "there are no other circumstances in the particular representation that create an appearance of impropriety" within the meaning of subparagraph (b)(2)). The actions specified in subparagraph (b)(1) are to:

> (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
>
> (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule;

13. Here, provided the public defender and the other assistant public defenders employed in that office operate in conformance with the conditions specified in subparagraph (b)(1) and the "circumstances in the particular representation" do not "create an appearance of impropriety" under subparagraph (b)(2), then the other attorneys in the public defender office may represent the county or individual clients of the public defender office in Family Court matters from which the former district attorney himself is ethically barred under Rule 1.11(a).

Under Rule 1.11(c), other attorneys in the firm who accept the representation of a client whom the former government attorney is disqualified from representing must be screened from acquiring confidential government information.

14. Paragraph (c) of Rule1.11 restricts the use of "confidential government information" that a former government attorney "acquired when the lawyer was a public officer or employee." "Confidential government information" is defined in Rule 1.11(c) as "information that has been obtained under government authority and that, 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 that is not otherwise available to the public." The former government attorney "may not represent a private client whose interests are adverse to that person in a matter in which the [confidential government] information could be used to the material disadvantage of that person."

15. However, even where a former government lawyer is personally disqualified from representation under Rule 1.11(c), other lawyers in the same firm with which the former government lawyer is associated may undertake or continue that representation "if the disqualified lawyer is timely and effectively screened from any participation in the matter" in accordance with the same four conditions established in paragraph (b) of Rule 1.11.

CONCLUSION:

16. A former district attorney may be employed by a public defender's office in the same county. The former district attorney shall not personally represent a public defender client in a matter in which he was personally and substantially involved as district attorney or in which he is conflicted because he acquired "confidential government information" within the meaning of Rule 1.11(c). Where a conflict exits, it is not imputed to all lawyers in the public defender's office, and the public defender can assign another attorney in the office to represent the affected client, if appropriate measures are taken to effectively screen the former district attorney from the matter in accordance with Rule 1.11(b).

(23-22)