

Conflicts for Recently Hired Government Attorneys

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Recent requests for Advisory Opinions suggest some uncertainty among the practicing bar with respect to the application of the various conflict rules in the Minnesota Rules of Professional Conduct (MRPC) to attorneys working in government positions.

What matters will be off limits to the newly hired government attorney, for how long, and how will any conflicts affect the ability of the other attorneys working for that same government entity to work on the matter? These questions take on specific significance when criminal cases are involved, and can provide significant practical obstacles when the governmental entity at issue employs only a few attorneys.

Fortunately, the rules contemplate these realities, and have allowed for them. Confusion may arise because most attorneys understandably first turn to Rules 1.7, 1.9 and 1.10 of the MRPC for initial guidance, when, in fact, Rule 1.11 addresses most governmental lawyers' conflict of interest issues and is therefore a better starting point.

Rule 1.9 addresses an attorney's responsibilities to former clients, and subsection (a) prohibits an attorney from "switching sides" in the same or a substantially related matter, and opposing a former client, absent informed consent, confirmed in writing. Rule 1.9(c) prohibits an attorney from using information relating to the prior representation to the former client's disadvantage and also prohibits revealing information relating to the prior representation. These prohibitions are relatively straight-forward and self-explanatory.

Questions arise when addressing the "imputed disqualification" issues addressed in Rule 1.9(b) and Rule 1.10. Rule 1.9(b) states that an attorney cannot take on representation opposing a client or former client of the lawyer's former firm in a "same or a substantially related matter" when the attorney possesses confidential and/or privileged information from that prior representation.[Ftn 1](#) Rule 1.10(a) then "imputes" the conflict of one attorney to the attorney's entire firm in certain situations, and permits screening mechanisms in certain other situations.

These rule provisions create questions and concerns for attorneys newly hired to government positions and the governmental entities themselves. Consider the not uncommon scenario wherein an attorney who has been working as a public defender with a particular county is hired to prosecute cases for that same county (or vice-versa). Obviously, concerns regarding this attorney having potential conflicts in the new position exist. No attorney would reasonably expect to be permitted to "switch sides" within a specific criminal prosecution, and directly oppose the entity she had been representing on the precise matter. But is her disqualification to be imputed to the entire office of the county attorney or public defender? And if so, doesn't that effectively render this individual "not hireable" by the "opposing" governmental office? Or must the governmental entity institute the "screening measures" set forth in Rule 1.10(b) on the new hire?

What appears to be complicated under Rules 1.9 and 1.10 becomes much less so when the final subsection – 1.10(e) – is read. This provision states that imputed disqualification of government attorneys is governed by Rule 1.11, not by Rule

1.10. The problem is that Rule 1.11(d)(1) states that governmental lawyers are “subject to Rules 1.7 and 1.9.” This, then, appears to bring us circularly back to the Rule 1.9(b) quandary.

Most legal scholars and the Director’s Office have determined that the conditions set forth in Rule 1.11, as more specifically designed to cover governmental lawyers, control these situations. [Ftn 2](#)

The key language in Rule 1.11 is that it applies to matters “in which the lawyer participated personally and substantially.” [Ftn 3](#) When the lawyer participated personally and substantially in a particular matter while in his prior employment, that lawyer is then disqualified from that matter, absent informed consent of the affected government agency, confirmed in writing. When the disqualified lawyer is disqualified pursuant to subsection (a) of Rule 1.11 (i.e. because of prior work in a governmental capacity), the lawyer’s associates may undertake the representation if the conditions – timely screening of the disqualified lawyer and written notice to the prior governmental employer of the disqualified lawyer – set forth in Rule 1.11(b) are met.

Rule 1.11 does not specifically require the screening for a disqualified lawyer when the lawyer has moved from the private sector to governmental employment. See Rule 1.11(d). As the American Bar Association report on the rule recognizes, in some government offices screening mechanisms are not practical. Rule 1.11 does prohibit the lawyer from sharing any confidential or privileged information, or any other information that would be detrimental to the former client, obtained during the prior representation. Additionally, Comment 2 to Rule 11 states that the screening mechanisms in these situations should be put in place, as an additional safeguard, when possible.

Rule 1.11 represents a reasonable effort to acknowledge the practical obstacles facing governmental entities dealing with conflict of interest issues, while still requiring government lawyers to honor the sanctity of client confidences and privileged information. As always, the Director’s Office stands ready and willing to assist attorneys dealing with these situations via the Advisory Opinion service.

¹ Absent informed consent, confirmed in writing and assuming the conflict is one which may be waived. See Rule 1.7(b).

² See G. Hazard and W. Hodes, Restatement Third, The Law Governing Lawyers secs. 14.5 (including footnote 2) and 15.9.

³ Subsection (a)(2) covers situations where the lawyer’s previous employment was with a government entity, and the current employer is either a private or government entity. Subsection (d)(2) covers situations where the lawyer was previously in the private sector, and is currently employed in a government position.