By Martin Cole

Government Lawyer Conflicts

Conflicts of interest can arise for lawyers in all areas of practice. The subject is of such importance that there are essentially eight rules in the Minnesota Rules of Professional Conduct (MRPC) that deal principally with conflict issues.[1] Most of these rules can be applied over a wide range of legal areas and types of practitioners. One rule, however, uniquely applies to a specific type of legal practice and practitioner. Rule 1.11, which is entitled Special Conflicts of Interest for Former and Current Government Officers and Employees, applies only to public lawyers.

Rule 1.11

The rule deals first with former government lawyers, stating that a former government lawyer "shall not … represent a client in connection with a matter in which the lawyer participated personally and substantially as a public [lawyer] unless the appropriate government agency gives its informed consent, confirmed in writing … ." Unlike other former client conflicts (Rule 1.9, MRPC), material adversity to the interests of the former client (the government agency) is not required. This rule thus remains one of few areas of disciplinary law in which a vestige of an "appearance of impropriety" standard may still exist.

Former government lawyers are permitted to make use of the expertise gained in government service—indeed as a matter of public policy it is perceived to be a necessary tradeoff so as to encourage highly qualified lawyers to perform public service (often referred to as the "revolving door"). But use of that expertise is limited by not allowing one to "switch sides" and obtain personal financial gain for participation in the very same matter(s) that the lawyer personally handled while with the government.

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Rule 1.11(e) defines what constitutes a "matter" for purposes of former government lawyer conflicts as, essentially, any particular matter involving a specific party or parties. Thankfully, Comment [10] to the rule clarifies that "[i]n determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed." Rule 1.11(e)(2) also states that a government agency may have its own conflict-of-interest rules that may further define what "matter" means, and indeed many agencies (especially federal agencies) have regulations and strict limitations on the use of confidential information.[2]

For example, the court recently inquired of the Director's Office whether a policy exists concerning former employees of the Office of Lawyers Professional Responsibility (OLPR) representing attorneys in lawyer disciplinary proceedings. The Lawyers Professional Responsibility Board (LPRB) indeed has adopted a policy that interprets Rule 1.11 and its application to attorneys formerly employed by the OLPR. "Matter" is defined as any Minnesota Supreme Court, referee or LPRB panel proceeding, admonition, probation, investigation, charge or allegation involving a specific attorney. "Personal and substantial responsibility" means any action regarding a particular file by the attorney; signature on any dispositional document is evidence of such personal and substantial involvement. Since prior discipline is relevant in subsequent proceedings, basically if a staff attorney (and usually the director at the time) was involved in handling an attorney's file while at the OLPR, they will be disqualified from representing that same lawyer in future proceedings absent board consent. In fact, this has only extremely rarely been an issue.

The second portion of Rule 1.11 concerns current government lawyers who formerly represented clients (usually meaning private clients), who later come before the lawyer in her newer government role. Rule 1.11(d) states that current government employees who are lawyers cannot participate in a matter in which they participated personally and substantially while in private practice, absent informed consent confirmed in writing from the government agency, and also cannot negotiate for private employment with anyone involved as a party or lawyer in a matter they are currently handling.[3]

Actual Examples

Rule 1.11 has not been the subject of any allegations of misconduct that led to public discipline in Minnesota. Violations of the rule, however, have resulted in private admonitions in a tiny handful of matters over the years (generic use of the term "matter," not technical). This is to the credit of government lawyers generally and, interestingly, all the examples involve conflicts by current government lawyers in matters in which they previously represented a client in private practice—the 1.11(d) situation. At least in these examples, it was difficult for the lawyer to end zealous representation of a private client after moving to government.

In one instance, an attorney had represented private clients in a dispute with their city over the maintenance of a road. Three years later, as county attorney, the same attorney issued a written opinion to the county board concerning handling of the still ongoing dispute concerning the same roadway and the identical issue. This plainly violated Rule 1.11(d).

Another attorney represented an individual concerning the possibility of reducing the person's child-support obligation, although the attorney withdrew before a petition was filed. Again three years later, now as county attorney, the attorney tendered a stipulation to the individual in an effort to settle the child-support matter on behalf of the county. This too violated Rule 1.11(d).

Finally, an attorney represented a woman in a marital dissolution in which the judgment and decree stated that the husband would be responsible for all joint debts incurred prior to the dissolution. Two years later, the county social services attempted to collect on an AFDC claim against the individual, and consulted with the respondent attorney, now at the county attorney's office, who approved the action. The attorney claimed that she was not aware that

the case involved her former client, but admitted she had made no attempt to check for possible conflicts.

Another Aspect

One point worth noting is that Rule 1.11 applies only to attorneys who are/were public officers or employees of the government. Many lawyers in private practice also represent the government or government agencies. While Rule 1.11 does not apply to them, other conflict of interest rules nevetheless apply. The recent publicity over a private law firm's disqualification from representation of the State of Minnesota did not involve a Rule 1.11 analysis, but rather was a "classic" Rule 1.9, MRPC (former client conflict), situation,[4] in which a lawyer (or firm) cannot represent a client materially adverse to a former client in the same or a substantially related matter without informed consent of the former client confirmed in writing. That one of the clients was the State of Minnesota made the matter particularly newsworthy, but was not central to the conflict analysis.

Representation adverse to a current client can also arise for private attorneys representing governmental agencies. Part-time and contract county or city attorneys need be particularly attuned to potential conflicts with their private clients.[5] An attorney was publicly reprimanded for representing a client adverse to a governmental agency that another lawyer in his firm was simultaneously representing in a related matter, in violation of Rule 1.7, MRPC (concurrent conflict).[6] This case also highlights another special aspect of government lawyer conflicts: the lawyer was disciplined by virtue of the imputation provision of Rule 1.10, MRPC; Rule 1.11 has its own imputation and screening provisions.[7] Screening always was permitted as to government lawyers as part of the "revolving door" approach identified above, even before it was allowed in private law firm settings.

Conclusion

Lawyers hired by the government from outside practice, lawyers leaving government employment for outside practice, and private lawyers representing governmental agencies all need be keenly sensitive to conflicts that may arise between government agencies/clients and private clients. Because the public interest obviously is at stake in matters involving the government, extra care must be taken to detect and avoid conflicts early on. ▲

Notes

[1] Rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.18, and 3.7, MRPC.

[2] *See also*, Rule 1.11(c), MRPC, concerning use of confidential government information.

[3] With limited exception for law clerks pursuant to Rule 1.12(b), MRPC.

[4] *State of Minnesota , Covington & Burling LLP, et al. v. 3M Company*, A12-1856, A12-1857 (Minn. App., 07/01/2013) (unpublished). *http://mn.gov/lawlib/archive/ctapun/1307/opa121856-070113.pdf*

[5] *See* Comment [1] to Rule 1.11, which sets out guidance that formerly was contained in Lawyers Professional Responsibility Board Opinions No. 2 and No. 6 (both repealed), concerning defense of criminal cases by attorneys who act as county or municipal prosecutors.

[6] *In re Savin*, 780 N.W.2d 927 (Minn. 2010).

[7] Rule 1.11(b) and (c). *See also, Humphrey ex. rel. State v. McLaren*, 402 N.W.2d 535 (Minn. 1987), holding that a government legal department is not a firm under Rule 1.10 for imputation of conflicts of interest.