

**Rule 1.11: Special Conflicts of Interest for Former and
Current Government Officers and Employees**

1. Current Kentucky Rule with Official Comments:

SCR 3.130(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 personally and substantially as a public officer or employee, unless the appropriate public body or government agency consents after consultation. 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 public body or government agency to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law 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. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) 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.

(d) As used in this rule, the term "matter" includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, 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 which is not otherwise available to the public.

Supreme Court Commentary

[1] This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

[2] A lawyer representing a government agency, whether employed or specially 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 to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

[3] Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to

confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

[4] When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

[5] Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

[6] Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

[7] Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[8] Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[9] Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(1.11) Successive Special conflicts of interest for former and current government officers and private-employment employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent 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 ~~public body or~~ government agency ~~consents after consultation~~ gives its informed consent, confirmed in writing, to the representation.

(b) ~~No~~ When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) ~~The~~ the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) ~~Written~~ written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

~~(b)~~ (c) Except as law 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. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, 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 which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is

timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

~~(e)~~ (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

~~(1)~~ (i) ~~Participate~~ participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless ~~under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter~~ the appropriate government agency gives its informed consent, confirmed in writing; or

~~(2)~~ (ii) ~~Negotiate~~ negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

~~(d)~~ (e) As used in this ~~rule~~ Rule, the term "matter" includes:

(1) ~~Any~~ any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) ~~Any any other matter covered by the conflict of interest rules of the appropriate government agency.~~

~~(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, 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 which is not otherwise available to the public.~~

~~Supreme Court Commentary~~ Comment

~~[1] This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.~~

~~[2] [1] A lawyer representing a government agency, whether employed or specially retained by the government, who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests concurrent conflicts of interest stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is may be subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.~~

~~[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation Rule for former government lawyers that provides for screening and notice. Because of the~~

special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[3] [4] Where This Rule represents a balancing of interests. On the one hand, where the successive clients are a public government agency and a private another client, public or private, the risk exists that power or discretion vested in that agency public authority might be used for the special benefit of a private the other client. A lawyer should not be in a position where benefit to a private the other client might affect performance of the lawyer's professional functions on behalf of the government public authority. Also, unfair advantage could accrue to the private other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in

paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

~~[4]~~ [5] When the client is an agency of a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency should be treated as a private another client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].

[5] [6] Paragraphs (a)(1) and (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[6] Paragraph (a)(2) does not require that a lawyer give notice to the

~~government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.~~

~~[7]~~ [8] Paragraph ~~(b)~~ (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

~~[8]~~ [9] Paragraphs (a) and ~~(e)~~ (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[9] Paragraph ~~(e)~~ does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In 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.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) In the Rule significant changes are:

(a) Clarification of relationship to Rule 1.9(c): New text in paragraph (a) of Rule 1.11 clearly indicates that a former government lawyer is subject to the constraints of Rule 1.9(c) (prohibition on use of information obtained in the course of representing a former client), even if he or she is not otherwise disqualified from

handling a matter for a new client under Rule 1.11.

(b) Replacement of “consent after consultation” with “informed consent confirmed in writing”: Paragraph (a) is revised to provide that a former government lawyer must obtain “informed consent confirmed in writing,” and not merely “consent after consultation,” before representing a client in a matter in which he or she participated personally and substantially while in public service. See Rule 1.0(e) Terminology.

(c) Clarification of what constitutes “confidential government information”: See new language in paragraph (c), which replaces old paragraph “(e)”.

(d) Clarification that current government lawyers are subject to the constraints of Rules 1.7 and 1.9, as well as Rule 1.11(d): See paragraph (d), subparagraph (1).

(2) The Comments to proposed Rule 1.11 clarify the relationship between Rule 1.10 and Rule 1.11. Specifically, proposed Comment “[2]” provides in part that “Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation Rule for former government lawyers that provides for screening and notice.”

(3) The ABA Reporter’s Explanation of Changes to MR 1.11 expresses the Committee’s view. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

- **ABA Reporter's Explanation of Changes -- Model Rule 1.11**

TEXT:

1. Change caption to read "Special Conflicts of Interest for Former and Current Government Officers and Employees"

The change in caption reflects the fact that the Rule has traditionally been applied not only to lawyers moving from government service to private practice (and vice versa) but also to lawyers moving from one government agency to another.

2. Paragraph (a): Clarify that individual lawyer who formerly served as public officer or government employee is subject only to this Rule and not to Rule 1.9

There has been disagreement whether individual lawyers who have served as government officials or employees are subject to Rule 1.9 regarding their obligations to former clients or whether their obligations under Rule 1.11(a) are exclusive. The question is an important one, for the individual lawyer, for the lawyer's firm, and for the government. The Commission decided that representation adverse to a former government client is better determined under Rule 1.11(a), which also addresses representation in connection with any other matter in which the lawyer previously participated personally and substantially as a public officer or employee. In order not to inhibit transfer of employment to and from the government, the Commission believes that disqualification resulting from representation adverse to the former government client should be limited to particular matters in which the lawyer participated personally and substantially, which is also the standard for determining disqualification regarding from prior participation as a public officer or employee. The meaning of the term "matter" is clarified in new Comment [10].

Paragraph (a)(1) further clarifies that former government lawyers are subject to Rule 1.9(c) regarding the confidentiality of information relating to the former representation of a government client.

3. Paragraph (a): Delete "private"

The text of current Rule 1.11(a) suggests that the disqualification under that paragraph applies only when the lawyer moves from government service to private practice. Current Comment [4], however, states that "[w]hen the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule." To avoid any possible confusion, the Commission determined that the text should be changed to conform to the Comment.4. Paragraph (a)(2): Change from "consent after consultation" to "gives its informed consent to the representation"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

5. Paragraphs (a) and (d): Consent to be "confirmed in writing"

The Commission recommends requiring that the consent here be confirmed in writing, as with other conflict of interest Rules. "Confirmed in writing" is defined in Rule 1.0(b).

6. Paragraph (b): Clarify that conflicts under paragraph (a) – including former client conflicts – are not imputed to other associated lawyers when individual lawyer is properly screened

There is no change in the basic Rule of imputation for situations governed under former Rule 1.11(a). The change is intended for situations that previously might have been governed by Rule 1.9 rather than 1.11(a). Although former client conflicts under Rule 1.9 are imputed to associated lawyers under Rule 1.10, this paragraph states clearly that when

the conflict arises from the individually disqualified lawyer's service as a public officer or employee of the government, the conflict is governed by paragraphs (a) and (b) of this Rule and is not imputed if the lawyer is screened and the appropriate government agency is notified of the representation. The Commission believes that this result is necessary in order to continue to encourage lawyers to work in the public sector without fear that their service will unduly burden their future careers in the private sector. (Conflicts are not imputed under either the current or the proposed Rule when the move is from one government agency to another.)

7. Paragraph (b): Add scienter requirement

This change conforms this Rule to Rule 1.10, in which associated lawyers are not subject to discipline unless they "know" of the disqualification of their colleague.

8. Paragraphs (b)(1) and (c): Add "timely"

The Commission is recommending a definition of "screened" that includes a requirement that the lawyer be "timely" isolated from participation in the matter. Nevertheless, the Commission believes that the timeliness requirement is so important that it should appear in the text as well. This change is being recommended for all of the Rules that address screening. See Rules 1.12 and 1.18.

9. Paragraph (c): Include definition of "confidential government information" from current paragraph (e)

The material in what is now paragraph (c) is currently in paragraph (b). The Commission is recommending that current paragraph (e) be deleted and the definition of "confidential government information" be moved to paragraph (c), where the defined term is now used. This change is for purposes of clarification only, and no change in substance is intended.

10. Paragraph (d): Clarify relationship between this Rule and Rules 1.9 and 1.10

This paragraph is intended to clarify that individual lawyers may not undertake representation adverse to former clients when to do so would violate Rule 1.9, even when the representation was not in the same matter but rather was in a substantially related matter in which it is likely that the lawyer received confidential client information. These conflicts, however, are not imputed to lawyers associated in a government agency, even when formal screening mechanisms are not instituted. The lack of imputation presently applies to disqualifications under current Rule 1.11(c) but not necessarily to disqualifications of a current government lawyer under Rule 1.9, in which Rule 1.10 otherwise would apply. Screening is not required for public agencies because it may not be practical in some situations. Nevertheless, Comment [2] states the expectation that such lawyers will in fact be screened where it is practical to do so.

11. Paragraph (d)(1): Add reference to Rule 1.7

The Commission determined that it made sense to address in Rule 1.11, not only the imputation of former client conflicts, but also the imputation of current conflicts of interest under Rule 1.7. As with former client conflicts, the Commission decided that these conflicts should not be imputed to lawyers associated in a government agency, even when formal screening mechanisms are not instituted. Screening is not required in the disciplinary

context because it may not be practical in some situations. Nevertheless, as with Rule 1.9 conflicts, Comment [2] states the expectation that such lawyers will in fact be screened where it is practicable to do so.

12. Paragraph (d)(2): Substitute "informed consent" of the client for exception where "under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter"

The interests of the former client are protected under Rule 1.9, and, under that Rule, the former client may effectively consent to a subsequent adverse representation. The interests of the government agency itself are protected under paragraph (d)(2). These interests are similar to those protected under paragraph (a)(3), where the former government agency may effectively consent to the subsequent representation. If a government agency can effectively consent under paragraph (a)(3), the Commission sees no reason why it cannot similarly consent to representation otherwise prohibited by paragraph (d)(2). This would include (but not be limited to) situations where "under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter."

13. Delete current paragraph (e)

As set forth above, the Commission proposes to delete current paragraph (e) and move its material unchanged to paragraph (c).

COMMENT:

[1] The Commission recommends deleting current Comment [1] and expanding upon the rationale for the Rule in Comment [4].

[1] The reference to Rule 1.9 has been deleted because the relationship between Rules 1.9 and 1.11 is now addressed in Comment [2]. The remainder of the changes are stylistic, and no change in substance is intended.

[2] This entirely new Comment explains the relationship between Rules 1.9, 1.10 and 1.11 as stated in the text of paragraphs (a)(1), (a)(2) and (d)(1).

[3] This new Comment provides the rationale for the obligations of the individual lawyer under paragraphs (a)(2) and (d)(2), which are the obligations of former and present government lawyers aside from those imposed by Rule 1.9. Unlike Rule 1.9, these obligations are designed to protect against abuse of public office generally, not necessarily obligations owed to former clients of the lawyer.

[4] This Comment modifies slightly the provisions of current Comment [3]. First, it avoids using the term "private," given the applicability of the Rule to successive representation between distinct government agencies. It also makes minor stylistic changes and adds a sentence at the end to explain the rationale for limiting the disqualification in paragraphs (a)(2) and (d)(2) to a narrower range of "matter" than is typically covered by conflict of interest rules. (See paragraph (e).)

[5] The changes reflect the change in text to delete the reference to "private" clients. The last sentence explains how imputation works when the successive clients are both government agencies.

[6] This Comment provides a cross reference to the screening requirements in Rule 1.0(k) and further elaborates on the prohibition on fee apportionment in language identical to that used in the Comment to the other screening Rules. See Rules 1.12 and 1.18.

[7] This entirely new Comment elaborates on the notice requirement, in language identical to that in the Comment to the other screening Rules. See Rules 1.12 and 1.18.

[6] This Comment has been deleted because its content is covered in Comment [7].

[9] The current Comment has been deleted. Its content now appears in Comment [2].

[10] This new Comment clarifies that two particular matters may constitute the same matter for purposes of paragraph (a)(2), depending on the circumstances. The language is drawn from but is not identical to the definition of "matter" as it is used in the federal conflicts of interest statute. Cf. 5 C.F.R. 2637.201(c)(4).

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

There is no variance in proposed KRPC 1.11 from MR 1.11.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.