

Ethics Opinion

001028

Ethics opinions are issued by the State Bar of Montana's Ethics Committee in answer to prospective situations sent in by Montana lawyers. The opinions are advisory only.

FACTS:

Information is requested as to the constraints an attorney who is a successful candidate for a constitutionally mandated public office will confront with respect to the business of the attorney's former firm under the Rules of Professional Conduct. The candidate's firm emphasizes an area of practice where the firm expects to routinely oppose the former firm member's political office before the courts. The public office sought in this request is decreed in the Montana Constitution. Both the constitution and statutes addressing the office presuppose the position is full time. Both also presuppose that the public officer will act in the name of the public interest. It is mandated that the office holder be an attorney.

QUESTIONS PRESENTED:

1. Must an attorney elected to a full time public constitutionally mandated (*see note 1*) office dissolve a law partnership or otherwise fully divest himself of any financial interest that the attorney has in the law firm?
2. What is the proper and ethical method of dealing with accounts receivable for work done or fees earned by such an attorney prior to an election to such office, but which fees may not be collected or realized until after being sworn in? In other words, may the attorney receive earned fees from the firm for work done before taking such a public office?
3. Must such an attorney elected to such public office divest himself of an interest in an office building, where the building is owned by a business entity different from the law firm partnership, but involving the same individuals? If so, could the attorney elected to public office solve the problem by use of a "blind" trust which would hold the real estate interest on the attorney's behalf?
4. What obligations or ethical requirements are the firm, or remaining attorneys, under, where the firm has, or likely will have, an ongoing practice that routinely opposes the former firm member's political office before the courts?

SHORT ANSWERS:

1. Yes, with the caveats discussed under Questions 2 and 3.
2. The attorney is entitled to his or her share of agreed upon receivables earned prior to the attorney's departure from the firm and paid to the firm after the attorney has moved into the

political office. Upon leaving the firm, any collection action brought on those receivables must be between the former firm and the client - not between the former firm attorney/public officer and the client. As to contingent fee work, the attorney/public officer must clearly disentangle. This will confine the attorney to ultimately receiving present value interest in those contingent fee cases, with present value calculated upon accession to the office. It is for the attorney and the firm to reach an agreement on that amount.

3. An attorney who attains such a public office is not required by the Rules of Professional Conduct to divest himself or herself in the physical assets of a separate but related business entity. This issue is subject however to the statutory standards of conduct for public officials found in the Montana Code.

4. Generally, this requires the creation of a "wall". The former firm attorney/public officer would be required to cede decisions involving the former firm to the primary deputy in the office. The primary deputy must be provided a list of all cases this might involve as well as be responsible for creation and maintenance of the wall.

DISCUSSION:

An attorney elected to constitutionally mandated full-time state wide public office must dissolve an existing law partnership (*see note 2*). Upon accession to office, a lawyer representing the public is subject to Rule 1.7 (*see note 3*) (concerning general conflicts of interests); Rule 1.9 (*see note 4*) (concerning conflicts of interests with former clients); Rule 1.11 (*see note 5*) (concerning successive government and private employment); and statutes and government regulations regarding conflict of interest. (The statutes and regulations may circumscribe the extent to which the Rules apply; however, we concern ourselves with the Rules only and leave interpretation of the law to others.)

Generally, the conflicts confronting elected public officials are subject to two avenues of inquiry: Is there an actual conflict of interest or is there an appearance of impropriety? Typically, the broader appearance of impropriety standard is applied in circumstances where public officers are the legal representatives of the general public. *Turbin v. Arizona Superior Court*, 797 P.2d 734 (Ariz. Ct. App. 1990). The standard is intended to instill public confidence in the integrity of the legal profession. *In re Opinion* 415, 407A2d 1197 (NJ 1979).

When representation of the general public interest is involved, the appearance of impropriety assumes an added dimension. Positions of public trust call for even more circumspect conduct. Public exposure of attorneys holding public positions accentuates this need. The public has become alert and sensitive to the impropriety of conflicts of interest. Preservation of public confidence in the bar calls for no less.

Applying the appearance of impropriety standard, the partnership (or other practice entity) must be dissolved. To continue the partnership (or other entity) offers the easy suggestion to the public mind that in dealing with matters between the firm and the public officer there might not be the same objectivity on the part of the office holder as would be the case where there is no association. The public may infer that, because of a continued partnership (or other practice

entity), the public officer/partner may be less vigorous in advocating the public's position. In addition, because an attorney owes a duty of absolute loyalty to his client, it follows that once the attorney becomes a full-time elected official, he or she has a duty of absolute loyalty to the public. Thus, by definition he or she can no longer provide absolute loyalty to private clients.

Further, in the facts presented there is acknowledged potential for actual conflict of interest. It is not an answer to say that where the interests of their respective clients are in conflict, each will withdraw - that not only increases the cost of legal services to the public, but also deprives the public client of representation by the attorney elected to that office.

A client is entitled to counsel's independent professional judgment exercised objectively. So when an attorney's public or professional relationship may raise questions about his or her ability to function in that manner, the conflict should be avoided. Public confidence in the justice system is maintained by assuring that it operates in a fair and impartial manner. Dissolution of the partnership (or other practice entity) does not preclude the public officer attorney's entitlement to receivables, including those paid to the firm after the attorney has moved into the political office, for work done by the attorney prior to his or her accession to office.

Law firms are granted a great deal of freedom under the law to decide how the firm's income will be divided when a lawyer withdraws. *ABA/BNA Lawyers' Manual On Professional Conduct* 41:7 10. There is significant deference given by courts to written partnership agreements addressing the division of fees upon a lawyer's departure. *Id.* at 91:716. Lawyers are free to operate under an oral partnership agreement, but potentially this creates the type of problem lawyers are typically responsible for resolving rather than creating.

In the event the former firm brings any action to collect delinquent accounts receivable in which the departing lawyer has an interest, any such action must be between the former firm and the client - not between the public officer and the client. As to contingent fee work, the attorney/public officer must clearly disentangle. This will confine the attorney to receiving a present value interest in those contingent fee cases, with present value calculated upon accession, not upon successful election. It is for the attorney and the firm to reach an agreement on what is appropriate by way of amount and terms of payment.

An attorney who becomes a public official is not required by the Rules of Professional Conduct to divest himself in the physical assets of a separate business entity. Under the facts presented, the issue regarding the separate business is not separate employment, but rather a pre-existing passive investment that has potential to yield dividends. The Rules of Professional Conduct were not contemplated to affect ownership in separate business entities. Instead, they contemplate attorney conduct. To the extent attorney conduct is not implicated in the separate business entity, the Rules do not apply. To the extent attorney conduct and decisions are affected by the separate business, the rules as discussed in this opinion apply. This issue is subject, however, to the statutory standards of conduct for public officials found in the Montana Code.

Rule 1.11(c) provides that when a governmental lawyer has participated personally and substantially in a matter before joining government service, he or she may not then further

participate in that matter. When a lawyer moves into public office from private practice, he or she is still bound by Rules 1.6 (confidentiality) and 1.9 (conflict of interest, former client). The lawyer may not divulge any information about a former client and may not oppose the client in a matter in which the lawyer had previously represented the client, or in a matter substantially related thereto. The Rule 1.11(c) bar can be lifted only by the knowing consent of the former client.

The ban, unlike that of Rule 1.11(a), is "strictly personal to the individual lawyer." Geoffrey Hazard, JR. & W. William Hodes, *The Law of Lawyering* 351, 364 (2d ed. 1990). In limiting the ban to the individual lawyer only, Rule 1.11(c) departs from the general imputed disqualification rule, Rule 1.10. Rule 1.11(c) recognizes that there is a difference in the relationship between law partners and associates in private firms and lawyers representing the government and does not treat the government as a new firm. *United States v. Caggiano*, 660 F.2d 184 (6th Cir. 1981), cert. denied, 454 U.S. 1159 and 455 U.S. 945 (1982).

Moving from private practice to public office requires the creation of what is alternately described as a screen or a wall. An effective wall will segregate the public officer from the former firm and former clients to prevent the intentional or inadvertent spread of client confidences. An effective screen must include the adoption of specific rules to physically isolate the elected attorney from the files, prohibit discussion of the case, and bar the sharing of other information pertinent to the litigation. It is also appropriate that the new public officer give notice to the former client of the screening measures. The effectiveness of the screen must be capable of evaluation by objective and verifiable evidence. To survive judicial scrutiny, the screening mechanism must be implemented in a timely fashion and be operative immediately upon the creation of a risk that client confidences could be disclosed or inadvertently leaked to members of the public office. Montana Ethics Opinions 951026 and 960924; ABA/BNA *Lawyers' Manual On Professional Conduct* 5 1:2007; Geoffrey Hazard, JR. & W. William Hodes, *The Law of Lawyering*, §1.11:401, p. 365. Specifically, the former firm attorney/public officer would be required to cede decisions involving the former firm to the primary deputy in the public office. The primary deputy must be provided a list of all cases this might involve. Creation and maintenance of the wall must be the responsibility of the primary deputy, who is also responsible for tailoring additional components of the wall to protect the integrity of the public office.

CONCLUSION:

Public confidence in our system of justice is eroded when a public officer has a conflict or personal interest in a case the officer is handling. Public confidence in the justice system is maintained by assuring that it operates in a fair and impartial manner. To protect the public trust, it is appropriate for an attorney elected to full time public office to dissolve existing law practice partnerships or other practice entity. Dissolution does not preclude the public officer's entitlement to a share of receivables earned prior to departure. It is for the attorney and the former partnership to reach agreement on the amount of receivables to be paid the departing attorney and terms of payment. Finally, moving from private practice to public office requires the creation of a screen or wall, segregating the public officer from his or her former firm and clients to prevent the intentional or inadvertent spread of client confidences.

NOTES

1 Montana Constitution Article 6, section 1.

2 same general analysis must apply regardless of the form of the entity, including Professional Corporations and Limited Liability Corporations.

3 RULE 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

4 RULE 1.9 Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use 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.

5 RULE 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 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 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.

This ethics opinion is advisory only