

Ethics Opinion

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FACTS: Attorney was an associate in a law firm, and did a substantial amount of work defending company X and its entities against a federal superfund liability action. This action is still pending.

Attorney recently left the law firm in order to accept a position with the state Superfund program. This position requires Attorney to represent the state's interest in enforcement actions aimed at cleaning up hazardous waste sites.

The building in which Attorney now works also houses the federal superfund program. In addition, while there currently is no state superfund action against company X, there is a likelihood of such action in the future. However, the state program has already taken steps to "wall off" relevant cases from Attorney: Attorney does not access file drawers containing information regarding company X and the site at issue in the federal action; Attorney does not participate in any discussions concerning company X's superfund site; and, the state program plans to assign any future cases involving company X to another attorney in the program.

QUESTIONS PRESENTED:

1. Is there presently a conflict of interest situation, or are the procedures used by the State program to "wall off" attorney from access to relevant cases sufficient to avoid conflict of interest?
2. Is Attorney prohibited from participating in any actions against her former client if those actions arise after the date of her termination of representation?

SHORT ANSWERS:

1. There is not at this time a conflict of interest, due in large part to the efforts of Attorney and her present employer to avoid any participation by Attorney in matters relating to her former client.
2. Attorney is prohibited from participating in any future actions against her former client, unless her former client consents after consultation.

DISCUSSION:

Question 1. Attorney's situation involves a number of the Rules of Professional Conduct. Those rules most applicable to question 1 are 1.9 and 1.11.

Rule 1.9 provides, in pertinent part:

"(a) A lawyer who has formerly represented a client in a matter shall not thereafter 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."

Thus, were Attorney to represent the state now in a superfund action against company X, she would violate Rule 1.9(a). However, as this is not presently the case (at this point, any representation of the state by Attorney in a superfund action against company X is merely potential, not actual), there is no conflict of interest according to Rule 1.9(a).

Another part of Rule 1.9 is relevant here as well. Rule 1.9(c), (1) provides:

*"(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter
(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known."*

Thus, although there is no conflict of interest in that Attorney is not now representing a party whose interests are adverse to those of company X, there is still a great potential for conflict of interest through the disclosure of privileged information, gained during Attorney's former representation of company X, which could disadvantage company X in any future State Superfund actions. It is here that the "wall off" procedures play an important role, as Attorney and her present employer attempt to avoid any appearance of impropriety and actual conflict of interest. These "wall off" procedures appear to be sufficient, especially in light of Rule 1.11.

Rule 1.11 provides, in pertinent part:

*"(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 non-governmental 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 rule also provides that when a lawyer moves from public to private practice, he shall be screened from any participation in a matter with which the lawyer worked previously. In addition, written notice must be given to the former government employer, so that the former employer can "ascertain compliance with the provisions of this rule." RPC, 1.11(a)(1), (2).

Although Attorney has moved from private to public practice, there is no reason that the screening and notice requirements of rule 1.11 should not apply. Here, Attorney has complied with the screening requirement; to be in complete compliance with 1.11, she should send a written notice to her former law firm, outlining the procedures in place to screen her from participating in any matters regarding company X.

Clearly, rule 1.11 allows a government agency, as an employer, to work around potential conflict situations such as these. Comment 3 explains:

"[T]he 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 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 the public service."

In addition, Comment 9 states that rule 1.11(c) does not "disqualify other lawyers in the agency with which the lawyer in question has become associated." Finally, rule 1.9 does not prohibit Attorney from discussing matters about company X which are generally known.

Question 2. Attorney may not participate in any future actions against her former client, pursuant to Rules 1.6 and 1.9. Rule 1.6 provides, in relevant part:

"(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation [.]"

Also, Comment 21 to Rule 1.6 states that the duty of loyalty continues after the client-lawyer relationship has terminated. Therefore, Attorney may not, as representation of the state in a superfund action would likely require, disclose information relating to her representation of company - even after that representation has terminated - unless company X consents after consultation.

Rule 1.9 strengthens the position that Attorney may not represent the State in an action against company X. Rule 1.9 states, in full:

"(a) A lawyer who has formerly represented a client in a matter shall not thereafter 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.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

- (1) whose interests are materially adverse to that person; and*
- (2) about whom the lawyer had acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter; unless the client consents after consultation.*

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

*(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client."*

Rule 1.9's fairly strict prohibitions can apparently be overcome in three ways. First, if the subject matter of the present representation is not the same or substantially related to the subject matter of the previous representation, the rule is not violated. However, because Attorney's present position requires her to represent the state in superfund actions, and her prior position required her to defend company X against federal superfund actions, the subject matter of both representations is substantially similar.

Second, Attorney may represent the state in superfund actions against company X if company X consents. However, it is important to note that in some circumstances, the nature of the subject matter of a representation bars an Attorney from asking for a former client's consent. For example, an attorney cannot reasonably ask a former client to consent to an inherent conflict. Even if there is not an inherent conflict in Attorney representing the state in a superfund action against company X, it seems unlikely that company X would consent to such representation.

Third, if the information relating to the representation of company X becomes generally known, Attorney could use the information in any State Superfund actions against company X.

CONCLUSION: Attorney is not presently involved in a conflict of interest situation. She is not involved in any superfund actions against her former client, and in fact is screened from participating in any work or discussions regarding the former client. However, a conflict would arise if Attorney were to represent the state in a superfund action against the former client. This conflict would remain even after she terminated her representation of the former client.

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