



ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

ACPE OPINION 733

Former Client Conflict of Interest; Lawyer at Law Firm That Represented Planning Board in Litigation Joining Firm that Represented Adverse Party

The Advisory Committee on Professional Ethics received an inquiry from a lawyer who works for a law firm that represented a municipal planning board in lengthy and contentious litigation, a portion of which is still pending. A partner at the firm served as legal counsel for the planning board and Inquirer assisted the partner in various aspects of the litigation. The partner retired and the firm no longer serves as counsel for the planning board. Inquirer asked whether, if she leaves her current firm and joins the law firm that represents the adverse party in this litigation, there would be any restrictions on her practice or that of her new firm.

Inquirer presented an analysis under *Rule of Professional Conduct* 1.11, which provides that “a lawyer who formerly has served as a government lawyer or public officer or employee of the government shall not represent a private client in connection with a matter: (1) in which the lawyer participated personally and substantially as a public officer or employee” Paragraph (c) of this *Rule* provides that if a lawyer is disqualified, the law firm may undertake or continue

representation if the disqualified lawyer is screened from participation in the matter and the government agency is provided written notice.

The Committee finds that this *Rule* applies to lawyers employed by the government itself, not to lawyers employed by an outside law firm that represents the government. “The purpose of allowing screening in the former-government-lawyer context is to eliminate the disincentive to public service that would arise if a lawyer’s subsequent employer were broadly disqualified from matters involving the government entity.” Michels, *New Jersey Attorney Ethics*, § 22:3-1, p. 584 (Gann 2017). “The government has a legitimate need to attract qualified lawyers The provisions for screening and waiver . . . are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.” *ABA Model Rules of Professional Conduct* 1.11, Comment [4].

Inquirer did not enter public service; she works at a private law firm that was retained to represent the planning board. Therefore, *Rule of Professional Conduct* 1.11 does not apply. Rather, the proper analysis for this inquiry is under *Rules of Professional Conduct* 1.9 (former client conflicts) and 1.10 (imputing conflicts of one lawyer to the firm).

Rule of Professional Conduct 1.9 provides:

- (a) A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.

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Notwithstanding the other provisions of this paragraph, neither consent shall be sought from the client nor screening pursuant to RPC 1.10 permitted in any matter in which the attorney had sole or primary responsibility for the matter in the previous firm.

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- (d) A public entity cannot consent to a representation otherwise prohibited by this Rule.

Rule of Professional Conduct 1.10 provides:

- (a) When lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPC 1.7 or RPC 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

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- (c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under RPC 1.9 unless:
- (1) the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility;
 - (2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

Inquirer is personally disqualified from representing the party that is adverse to her former client but she states that she did not have sole or primary responsibility for the litigation involving the planning board; the partner at her firm had such responsibility. Therefore, the strict prohibition against side-switching does not apply to Inquirer's new law firm.

Hence, when Inquirer joins the new firm, she is disqualified from representing its client, the adverse party to her former client the planning board, in any remaining vestiges of the litigation. *RPC* 1.9(a). Further, *Rule of Professional Conduct* 1.10(c) permits the firm she joins to continue to represent the adverse party against the planning board provided Inquirer is screened, is apportioned no fee, and the planning board is provided written notice.