ETHICS

MOVING BETWEEN PRIVATE PRACTICE AND GOVERNMENT SERVICE

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SUPREME COURT RULE 4-1.11 IS DESIGNED TO LIMIT POTENTIAL ETHICAL PROBLEMS WHEN LAWYERS MOVE FROM GOVERNMENT SERVICE TO PRIVATE PRACTICE AND VICE VERSA.

For example, the rule seeks to prohibit a lawyer who formerly worked for the government from improperly using confidential government information, say for the advantage of a future private client. The rule attempts to limit potential problems without unduly hampering the government's ability to recruit good lawyers, primarily by loosening the strict imputation rule.

The Rule

It may be helpful to categorize Rule 4-1.11's lettered subsections. Subsections (a), (b), and (c) are directed to lawyers who formerly served as government officers or employees. Subsection (d) addresses lawyers currently serving as government officers or employees. Subsection (e) applies to lawyers holding public office. Subsection (f) defines "matter" as it is used in Rule 4-1.11.

Subsection (a) prohibits a former employee of the government from representing a client in a matter in which the lawyer personally and substantially[2] participated when the lawyer worked for the government, unless the government gives informed consent,[3] confirmed in writing,[4] to the representation. Additionally, the former government lawyer is subject to Rule 4-1.9(c), which prohibits use or revelation of information relating to a matter in which the lawyer formerly represented a client.

An example of a scenario contemplated by subparagraph (a) follows. Unless the Missouri Department of Natural Resources gives written, informed consent, a former staff lawyer for the department who, while a department lawyer, worked on a case alleging a company released pollutants into the waterways in violation of state regulations is prohibited, or should be disqualified, from defending the company against those allegations after going to work for a law firm.

In accordance with subparagraph (b), the law firm, which had been defending the company before it hired the lawyer from DNR's ranks, may continue representing the company if it promptly notifies DNR that the lawyer has become associated with the firm and timely screens the lawyer from any participation in the matter.[5] The notice is intended to allow the government agency the opportunity to assure itself that proper screening has occurred. Further, the disqualified lawyer is prohibited from receiving any part of the fee directly relating to the representation.[6] Continued representation by other lawyers in the firm, with notice and screening, is allowed here while it is not in a private practice to private practice scenario, where disqualification is imputed to all the lawyers in the new firm.[7] The rationale for not imposing strict imputation in the government to private practice scenario is discussed in Comment 4. One factor is the fear that the stricter rule would inhibit government recruiting of qualified lawyers, who might shy away from government service if their future job prospects in the private sector are constrained by the prospect of a firm's loss of clients due to strict imputation.

Subsection (c) prohibits a lawyer who previously worked for the government, and who acquired "confidential government information"[8] about a "person" while so employed, from representing a client whose interests are adverse to that person in a matter in which the confidential government information could be used to the material disadvantage of that person. The firm with which the disqualified lawyer is now associated is permitted the continued representation if the disqualified lawyer is screened and is apportioned no part of the fee directly related to the representation.

As an example, if a lawyer learns, while working as an assistant attorney general, that the individual is about to be indicted for tax fraud, the now former assistant attorney general could not use that confidential information, say in settlement negotiations, to the material disadvantage of the individual in the course of litigation while practicing in his or her new firm. Again, the restriction is not imputed to other members of the firm, who may litigate against the individual so long as the former assistant attorney general is screened and apportioned no fee directly from the litigation.

Subsection (d) applies to lawyers currently serving as public officers or employees and addresses conflicts the lawyers may have with former client matters. The lawyers now working for the government are subject to Rule 4-1.7, the concurrent conflict of interest rule. The lawyer is also subject to all the provisions of Rule 4-1.9. Subsection (d) thus counsels a lawyer moving from private practice into government service from handling matters the lawyer participated in "personally

and substantially" while in private practice. For example, a private practice lawyer who was defending a client in a criminal case should not continue the representation after taking a position as an assistant prosecuting attorney in the county where the charges were pending.[9]

A more complicated scenario occurs when a lawyer leaves a position as a government employee and moves to another government job, specifically when a public defender moves to a prosecuting attorney's office. The Supreme Court of Missouri, in *State v. Lemasters,*[10] discussed Rule 4-1.11 in the context of a lawyer who left the public defender's office and went to work as an assistant prosecutor in the same county where she had been defending a client against criminal charges. The former client, Lemasters, moved to disqualify all of the lawyers in the prosecuting attorney's office on the grounds that his former lawyer's conflict disqualified all of the lawyers in the office.

The court found that Lemasters' former lawyer, who was a former government lawyer due to her prior position in the Missouri State Public Defender system, was disqualified by Rule 4-1.11(a) from participating in any way in Lemasters' prosecution. Rule 4-1.11(a)(1) also prohibited the lawyer from revealing any information relating to Lemasters to her new colleagues or using any information to Lemasters' disadvantage. The evidence showed the new prosecutor had complied with these obligations.[11]

Lemasters nevertheless argued that his former lawyer's conflict should be imputed to all the lawyers in the prosecutor's office. In analyzing Lemasters' claim, the court found Rule 4-1.11(b)'s conflict imputation language did not apply to the "public defender to prosecutor" scenario because that subsection applies to a job move to a "firm," a word that does not include lawyers working together as government employees, such as in a county prosecutor's office.[12] Instead, the court found Rule 4-1.11(d), "which deals with conflicts arising from prior representations by *current* public officers or employees," (emphasis in original) applied to the Lemasters scenario. The court noted there was no imputation language in Rule 4-1.11(d) and cited the language in Comment 2, which states the subsection does not impute the conflicts of a lawyer currently serving as a government employee to associated employees, while noting that screening would be prudent.[13]

Rule 4-1.11(d)(2)(ii) prohibits a lawyer currently working for the government from negotiating for a job with a party in a matter in which the lawyer is participating "personally and substantially." An exception is made for judicial law clerks, so long as the clerk notifies the judge about the job negotiation.[14]

Subsection (e) addresses lawyers who "also hold public office" and prohibits engagement in activities in which the lawyer's personal or professional interests conflict with the lawyer's "official duties or responsibilities."[15] Comment 11 notes a public official's position on policy matters may conflict with a client's interests. Nor is the lawyer holding public office permitted to "attempt to influence any agency of any political subdivision" for which the lawyer serves as a public officer, except as part of the lawyer's official duties or as authorized by §§ 105.450 RSMo to 105.496 RSMo.[16] Other lawyers in a firm in which the lawyer holding public office is associated may continue or undertake a matter the public officer would be disqualified from pursuing so long as that lawyer is screened.[17]

Subsection (f) defines "matter" for the purposes of Rule 4-1.11. Notably, matter is defined to include decisions involving a specific party or parties, which may be a narrower definition than is found in Rule 4-1.9.[18]

Conclusion

Conflicts analysis can be complicated. Supreme Court Rule 4-1.11 specifically applies to a lawyer who leaves government service to work in the private sector, who leaves a private practice to join the government, or who moves between government positions. The rule should be read, and reread, by lawyers transitioning into and away from government service.

Endnotes

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2 Rule 4-1.0(l).

3 Rule 4-1.0(e). *See also* Rule 4-1.11, Comment 1, where it is acknowledged that statutes or regulations may inhibit a government agency's authority to give consent.

4 Rule 4-1.0(b).

5 Rule 4-1.0(k), and Rule 4-1.11, Comments 9, 10, and 11.

6 Rule 4-1.11, Comment 6 clarifies that the disqualified lawyer may receive any salary or partnership share established by independent agreement.

7 Rule 4-1.10, the general rule concerning imputation of conflicts of interest. In most cases, the conflicts of an incoming lawyer are imputed to all members of the firm, without the possibility of screening. Rule 4-1.10(d) specifically carves out an exception to the strict imputation rule for former or current government lawyers and cites Rule 4-1.11.

8 Confidential government information is defined in Rule 4-1.11(c) as "information that has been obtained under governmental authority" and which, at the time the rule is being applied, the government is prohibited from disclosing and is not otherwise available to the public.

9 *In re Smith*, 29 So.3d 1232 (La. 2010).

10 *State v. Lemasters,* 456 S.W.3d 416 (Mo. banc 2015).

11 *Id.* at *420.

12 *Id.* at *421.

13 The Court confirmed its Lemasters reasoning in *State ex rel. Peters-Baker v. Round*, 561S.W.3d 380 (Mo. banc 2018), in which a defendant unsuccessfully argued for the imputed disqualification of an entire prosecutor's office due to his former public defender's move to that office.

14 Rule 4-1.11(d)(2)(ii); Rule 4-1.12(b).

15 *See* Rule 4-1.7. Subsection (e) in Missouri's Rule 4-1.11 is not found in the Model Rules of Professional Conduct.

16 Chapter 105, Public Officers and Employees, RSMo.

17 Rule 4-1.11, Comment 10, provides context for the word "matter" as it is used in this subsection.

18 *See* ABA Comm. On Ethics and Professional Responsibility Formal Op. 97-409 (1997).