

Ethics Opinion

890720

QUESTION PRESENTED: May an attorney who formerly worked for the County advising the Board of County Commissioners on legal questions related to county roads represent a client in "persuading or forcing the . . . County Government to remove obstructions from and maintain a particular county road . . . ?"

ANSWER: Yes, as long as the previous county representation was not substantially related to the present case.

ANALYSIS: Rule of Professional Conduct 1.11(a) provides:

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 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.

Rule of Professional Conduct 1.9(a) provides:

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.

For purposes of this opinion, we will assume that the Board of County Commissioners has not consented to the representation. Our evaluation must turn on the question of whether the requested representation is on "a substantially related matter." This is essentially a conflict of interest question. The traditional considerations are whether the proposed representation results in the appearance of impropriety and whether the former or present client is disadvantaged by the proposed representation. A further concern is whether the attorney claims or appears to have the ability to unfairly influence his former government client.

Various state ethics committees have considered similar questions. (See ABA/BNA, Lawyers Manual on Professional Conduct 801:1306, 801: 1202, 801: 1901, 801: 2305, 801: 3901, 801: 4311, 801: 4316, 801: 4823, 801: 4846, and 801: 7001.) See also DR 4-101(b)(2), DR 9-101(b) and (c), and EC 9-3 of the Canons of Ethics.

ABA Formal Opinion 342 provides some guidance in its analysis of DR 9-101(b) which provides:

A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

That Formal Opinion provides, *inter alia*:

As used in Dr 9-101(b), "substantial responsibility" envisages a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question. It contemplates a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions in question. . . . With a responsibility so strong and compelling that he probably became involved in the investigative or decisional processes, a lawyer upon leaving the government service should not represent another in regard to that matter.

The element of "substantial responsibility" so construed should not unduly hinder the government in recruiting lawyers to its ranks not interfere needlessly with the skilled and trained former government lawyers to represent them.

In view of this discussion, it is our opinion that none of the aforementioned concerns appear to be present here. The attorney may advise the private client with regard to the questions involving county roads as long as the attorney was not previously involved in discussions or advice substantially relating to the same matter.

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