

Ethics Opinion

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QUESTION PRESENTED: May a former deputy county attorney represent a county employee in a suit against attorney represented the county at the time prior grievances were pursued by the the county where the county?

ANSWER: Yes, qualified. A former deputy county attorney may represent employee? a who brought two prior claims against the county provided the attorney had no access to county employee confidential information which he may now use to the material disadvantage of the county, and provided either the current representation involves a matter distinctly different from the prior claims or the attorney did not participate personally and substantially in the prior claims.

ANALYSIS: Evaluation of the propriety of the proposed representation in this situation requires application of Rule of Professional Conduct 1.11 on Successive Government and Private Employment. The relevant portion of Rule 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."

For Rule 1.11(a) to trigger disqualification of the former deputy county attorney in the instant situation, the requested representation must be "in connection with a matter" in which he "participated personally and substantially" as a public employee." This portion of Rule 1.11(a) establishes the following two elements necessary for disqualification: 1) the requested representation must be "in connection with a matter" in which the former deputy county attorney was previously involved, and; 2) the attorney must have "participated personally and substantially" in the matter as a public employee.

The first element necessary for disqualification under Rule 1.11(a) is absent in the instant fact situation because the requested representation is not "in connection with a matter" in which the former deputy county attorney was previously involved. Under DR 9-101(B), the predecessor to Rule 1.11(a), an attorney could not "accept private employment in a matter in which he had substantial responsibility while he was a public employee." Rule 1.11(a) appears to place more restrictions on private representation undertaken by a former government attorney than did DR 9-101(B) because it prohibits representation not only in the "same matter", but also "in connection with a matter" in which the attorney participated substantially. Several jurisdictions have defined the "same matter" as a matter involving the same issue of fact, the same parties, and the same situation or conduct. N.Y. Eth. Op. 506 (1979); ABA Formal Opinion 342 (1975). Additionally, the same lawsuit or litigation is the same matter. ABA Formal Opinion 342.

Research indicates that other jurisdictions have interpreted the "same matter" and "in connection with a matter" as essentially similar standards. See M.I. Eth. Op. RI-4 (1989). In Opinion RI-4, the Michigan Committee on Professional and Judicial Ethics concluded that under Rule 1.11(a),

disqualification from private representation might occur only if the requested representation involved the "same matter" which arose during the city attorney's public employment. *Id.* Rule 1.11(a) does not mandate disqualification under the facts as presented in the instant situation whether interpreted as requiring disqualification where the requested private representation involves the "same matter" or more prohibitively as requiring disqualification where the representation is "in connection with a matter" in which the attorney participated as a public officer. Here, both inquiring attorneys acknowledge that the two previous claims or grievances brought by the county employee seeking representation differ from and have no apparent connection to the current dispute. Therefore, the requested representation is not "in connection with a matter" in which the former deputy county attorney was previously involved.

The second element necessary for disqualification under Rule 1.11(a) is "personal and substantial participation" on the part of the former deputy county attorney in the county employee's previous claims. DR 9-101(B), the predecessor to Rule 1.11(a), barred private employment in a matter in which a former government attorney had "substantial responsibility". In ABA Formal Opinion 342, the ABA attempted to clarify the definition of "substantial responsibility" by defining it as 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." See also, M.T. Eth. Op. 890720 (citing ABA Formal Opinion 342).

Rule 1.11 has since officially clarified this standard and explicitly mandates personal and substantial participation. See, *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 657 (Tex. 1990). In *Spears*, the Texas Court of Appeals noted that DR 9-101(B) might have permitted a presumption of "substantial responsibility" from a government attorney's title or office. See also, *Cleary v. District Court*, 704 P.2d 866, 873 (Colo. 1985) (Presuming a prosecutor has knowledge of the cases prosecuted by his coworkers under the "substantial responsibility" standard.) Under the new standard requiring "personal and substantial participation," however, such a presumption is invalid. The Court may not impute personal and substantial participation based on title, office, or statutory authority. *Spears* at 657.

"Personal and substantial participation" in a matter means "personal involvement to an important, material degree." M.I. Eth. Op. JI-34 (1990). Determination of what constitutes "personal and substantial involvement" depends on the context. *Id.* A former government attorney may accept a case that had been pending before his department but which he did not personally handle or investigate. ABA Informal Opinion 1129 (1969). See also, M.I. Eth. Op. RI-4 (1989) (Concluding former assistant city attorney's approval of complaint and warrant did not constitute personal and substantial participation). But see, *In the Matter of Clarence Thomas Belue*, 766 P.2d 206, 210 (Mont. 1988) (holding former County Attorney's responsibility to decide whether to file criminal charges and conduct investigation constitutes "a matter in which the lawyer is participating personally and substantially").

The facts as indicated by the inquiring attorneys in the instant situation fail to conclusively establish that the former deputy county attorney "personally and substantially participated" in the county employee's prior grievances. The fact that the former deputy county attorney was employed by the county attorney's office when the county employee pursued her previous grievances is insufficient to establish personal and substantial participation. See generally,

Spears 797 S.W.2d 654 (Tex. 1990). The former deputy county attorney participated personally and substantially in the previous grievances if he obtained actual knowledge of the prior grievances through his official duties. Such official duties might include, but are not limited to, conducting investigations, reviewing files and making material decisions, and attending hearings. See, MI Eth. Op. RI-4 (holding if not involved with investigation, no "personal and substantial participation"); *In the Matter of Clarence Thomas Belue*, 766 P.2d at 210 (deciding whether to file criminal prosecution constituted "personal and substantial participation"); Cleary 704 P.2d at 870 (no "substantial responsibility" where no contact with matter in court appearances, case review, or investigation). Provided the former deputy county attorney did not personally participate in the previous files, the second element necessary for disqualification under 1.11(a) is not present. Even if the former deputy county attorney's involvement with the previous grievances constitutes "personal and substantial participation," Rule 1.11(a) will not trigger disqualification because the requested representation involves a separate and distinct matter.

Under the foregoing analysis of Rule 1.11(a), a former deputy county attorney may represent a county employee in a dispute against the county where the requested representation is not connected to a matter in which the attorney participated personally and substantially as a public employee. However, Rule 1.11(b) provides additional considerations concerning confidentiality of former client information. Rule 1.11(b) provides:

"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."

Whether a former deputy county attorney may represent a county employee whose interests are adverse to the county depends upon whether the attorney had access to any confidential information which he may now use against the county. The attorney must have actual knowledge of confidential government information. Spears at 657. Two conflicting policy considerations underlie the disciplinary rules directed at former government attorneys. See, ABA Formal Opinion 342. While the rules must protect confidential government information, too much restraint upon former government lawyers' ability to later represent private clients will hamper the government's ability to recruit qualified attorneys. *Id.* See also, M.T. Eth. Op. 1374.

The Oregon State Bar, which operates under a Model Code amended to incorporate the substance of many of the Model Rules, addressed the application of a rule protecting confidential government information. OR Eth. Op. 1991-14. The State Bar concluded that unless the former government attorney

"possesses confidential information that is relevant to the proposed private representation and is unable to secure government consent to use of that information on behalf of the private client, a lawyer may use that information on behalf of the private client after leaving government service."

Pursuant to this interpretation, the issue in the instant situation is whether the former deputy county attorney possesses any confidential information that is relevant to the proposed private

representation. If the attorney does indeed possess confidential information gained during his government employment which he might use against the county in the county employee's current grievance, then Rule 1.11(b) prohibits the requested private representation.

CONCLUSION: A former deputy county attorney may represent a county employee who brought two prior claims against the county provided the proposed representation both meets the Rule 1.11 requirements and avoids the appearance of impropriety. Pursuant to Rule 1.11(a), the attorney will avoid disqualification if the requested representation involves a distinct matter or if he did not participate personally and substantially in the prior grievances. Pursuant to Rule 1.11(b), the attorney must have no access to confidential information which he may now use to the material disadvantage of the county. Under similar analysis, a former county attorney who has entered private practice with a former deputy county attorney will avoid disqualification if the requested representation meets the foregoing requirements.

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