

NYSBA Proposed Rules of Professional Conduct – Part II

BY ROY SIMON

(Editor's note: This is the second in a series of articles by Roy Simon describing and explaining the proposed New York Rules of Professional Conduct. The Rules have been approved by the New York State Bar Association's House of Delegates and are now being reviewed by the Presiding Justices of the Appellate Divisions.)

Proposed Rules 1.11 and 1.12: Government Lawyers, Former Government Lawyers, Judges, and Former Judges

For more than a century, New York has been a magnet for lawyers moving from public service to the private sector. The names of many elite Wall Street law firms, past and present, are reminders of our great history. Consider these:

Cadwalader, Wickersham & Taft: George Wickersham served as Attorney General of the United States under President Taft (brother of Cadwalader name partner Henry Taft). The firm was renamed Cadwalader, Wickersham & Taft when Wicker-sham returned to the firm in 1914.

Winthrop Stimson (now Pillsbury Winthrop Shaw Pittman): Henry Stimson, a founding partner of Winthrop & Stimson in 1911, served as Secretary of War under President Taft, as Secretary of State under President Hoover, and as Secretary of War again under President Franklin Delano Roosevelt.

Davis, Polk & Wardwell: John W. Davis represented W. Virginia in the U.S. House of Representative from 1911 to 1913 and as Solicitor General of the United States, and later as Ambassador to Great Britain, under President Woodrow Wilson.

Dewey Ballantine (now Dewey & LeBoeuf): Thomas Dewey, a former Manhattan District Attorney and three term governor of New York, became the lead name in Dewey Ballantine when he joined the firm in 1955.

Nixon, Mudge, Rose, Guthrie & Alexander, RIP.: Former Vice President Richard Nixon joined the firm and became the first named partner in 1963 after his defeat in the California governor's race (after which Nixon famously told the press, You won't have Richard Nixon to kick around anymore).

Paul, Weiss, Rifkind, Wharton & Garrison: Simon Rifkind was a distinguished federal judge in the Southern District of New York.

And since we are in the thick of the presidential primary season, I have to add that John W. Davis ran for President against Calvin Coolidge in 1924; Thomas Dewey ran against Harry Truman in 1948; Richard Nixon was elected and re-elected President in 1968 and 1972 (then resigned in disgrace and was soon disbarred in New York); and the remarkable Wendell Willkie, who had never before run for any public office, ran for President against Franklin Roosevelt in 1940 and then joined the law firm today known today as Willkie Fan & Gallagher. But all of that is a mere footnote to this article because only service in

government, not a run for high office, implicates the special conflict of interest rules for government lawyers, to which we now turn.

Special Treatment for Government Lawyers

The conflict of interest rules give special treatment to lawyers serving in government and to lawyers moving back to the private sector from government service. At least since *Armstrong v. McLain*, 625 E2d 433 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981), the Second Circuit has recognized that conflicts created by lawyers returning from government service should not be imputed to other lawyers in the firm if effective screening measures are in place. In the current New York Lawyers Code of Professional Responsibilities these screening rules as well as special rules governing lawyers who have moved from private practice into government service are enshrined in DR 9-101, which is cryptically entitled Avoiding Even the Appearance of Impropriety.

If the Appellate Divisions adopt the rules recommended by the New York State Bar Association (which are now formally before the courts), lawyers and judges moving between the private sector and public service will be governed by Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees) and Rule 1.12 (Special Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals), excerpts of which are set out in a shaded box accompanying this article (see, pages 9-10). This article discusses the similarities and differences between DR 9-101 and proposed Rules 1.11 and 1.12.

Proposed Rule 1.11: Government Lawyers and Former Government Lawyers

Proposed Rule 1.11 contains special conflict of interest rules for current and former government lawyers. In the same way as the special rules in DR 9-101(B), these rules regulate and facilitate the movement of lawyers between government service and private practice.

Rule 1.11(a) probably the most important of these rules regulates lawyers who formerly served in government, whether in a legal capacity (e.g., in the Department of Justice) or a non-legal capacity (e.g., as Under Secretary of State).

Rule 1.11(a)(1) reminds those lawyers that they must abide by the confidentiality restrictions in Rule 1.9(c), the same rule that governs all other lawyers regarding a former client's confidential information. This reminder is consistent with DR 5-108(A) (2), but DR 5-108 does not expressly mention former government lawyers.

Rule 1.11(a) (2) is substantially similar to the first part of DR 9-101(B) (1), but with one difference. The proposed rule continues to disqualify lawyers from matters in which they participated personally and substantially while in government service, but the proposed rule also creates an exception that permits the former government lawyer to participate if the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This change may not be significant because DR 9-101(B) begins with the phrase [e]xcept as otherwise permitted by law, and a government agency presumably can consent to a conflict only if the law permits it to do so, thus falling within the lead-in exception to DR 9-101(B).

Rule 1.11(a) omits the requirement in DR 9-101(B) (1) (ii) that there be no other circumstances in the particular representation that create an appearance of impropriety. COSAC deleted that standard out of fear that it may unfairly subject a lawyer or law firm to professional discipline based on highly subjective and undefined criteria on which reasonable people may disagree. However, judges remain as free as always to consider the appearance of impropriety and to use their inherent supervisory powers to disqualify a law firm if a particular representation would erode public confidence in the integrity of the judicial system.

Rule 1.11(b): Screening to Avoid Imputation

Rule 1.11(b) is generally comparable in substance to the second part of DR 9-101(W). However, when Rule 1.11(a) disqualifies a former government lawyer, Rule 1.11(b) permits other lawyers in the firm to undertake or continue the representation in question only if the firm acts promptly and reasonably to: (1) notify, as appropriate, lawyers and non-lawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client; (2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm; and (3) if the firm appears before or communicates with the appropriate government agency regarding the matter, promptly advise the appropriate government agency in writing of the circumstances that warranted the implementation of the screening procedures required by this Rule and of the actions that have been taken to comply with this Rule.

Thus, Rule 1.11(b) retains the concept in DR 9-101(B) that a law firm may avoid imputed disqualification by screening off the personally disqualified former government lawyer, but Rule 1.11(b) specifies the components and goals of the screening in more detail. The rationale behind allowing screens to avoid imputation is that talented lawyers would not serve in government in the first place if they would face obstacles in moving to private practice after government service, and that large firms in particular (which offer the biggest paychecks) would hesitate to hire government lawyers if hiring them would disqualify the firm from important matters against the government (which nearly all large firms have at all times, owing to our nation's highly regulated business environment). I call this the Roach Motel theory: (The company's slogan for its roach-trapping device was: They can check in, but they can't check out.

Our best and brightest lawyers might never check in to government service if they could not readily check out of government service whenever they wished to take up (or return to) private practice and its rich financial rewards. Some people are upset by this theory, arguing that the revolving door from private practice to government service and back produces many evils and that our country would be better served by career public servants or by highly experienced lawyers who move from private practice to public service in the prime of their careers and never return to private practice. Empirical evidence is not available to support or refute the Roach Motel theory, but proposed Rule 1.11(b) carries on the tradition of allowing timely and effective screening to avoid the imputation of conflicts from former public servants.

Rule 1.11(b) also adds a new requirement. Under specified conditions, a law firm implementing a screen must notify the appropriate government agency. However, the notification provision, which has no counterpart in the existing Disciplinary Rules, does not apply unless and until the law firm appears before or communicates with the government agency in question. If the notification provision applied before the law firm came out into the open by appearing or communicating, it might have a chilling

effect, causing some clients not to seek outside advice about sensitive internal matters (such as possible fraud or criminal misconduct within the organization) and causing other clients not to consult highly qualified law firms that employed former government lawyers (because hiring those firms would trigger the notification requirement whereas hiring other firms would not).

Rule 1.11(b) also drops a requirement now found in DR 9-101(B) (1) (a) and (B)(2) that the screened lawyer be apportioned no part of the fee from the matter in question. The rationale is explained in Comment [6A] to Rule 1.11 as follows:

The bookkeeping and accounting problems that may arise from prohibiting a personally disqualified lawyer from being apportioned a share of the fees from a matter make it inadvisable to impose an unqualified rule prohibiting this practice. Although this Rule does not prohibit a personally disqualified lawyer from being apportioned a share of the fees in the matter, if the disqualified lawyer's share of the fee would represent a significant increase in that lawyer's compensation over what the lawyer would otherwise earn, permitting the lawyer to be apportioned a share in the fee may create incentives that would call into question the effectiveness of the screening procedures. In such situations, a firm seeking to avoid imputed disqualification under this Rule would be well-advised to prohibit the personally disqualified lawyer from sharing in the fees in the matter.

(Almost the identical rationale is expressed in Comment [5H] to Rule 1.10, which governs imputation of conflicts resulting from private-to-private switches.)

Rule 1.11(c) preserves the disqualification and screening provisions now found in DR 9-101(B)(2) regarding lawyers who acquired confidential government information while in government, but Rule 1.11(c) adds a definition of the phrase confidential government information, a term used but not defined in the current Disciplinary Rules. The definition should help lawyers and courts to apply the rule more easily and consistently.

Rule 1.11(d): Lawyers Moving From Private Practice to Public Service

Rule 1.11(d) governs conflicts that arise when lawyers move in the other direction, from the private sector to government service. Generally, Rule 1.11(d) carries forward the prohibition in DR 9-101(B)(3) against participation by a current government lawyer in a matter in which the lawyer participated personally and substantially while in private practice or other nongovernmental employment. Rule 1.11(d) also limits the imputation of conflicts within government law offices. Currently, DR 9-101(B)(3)(I) uses a rule of necessity that permits an otherwise personally disqualified lawyer to handle a matter if applicable law provides that no one else is, or can be, authorized to act in that lawyer's place. The rule of necessity is flawed because it leaves the decision to invoke the rule to the unreviewed discretion of the affected government lawyer. Rule 1.11(d) cures this flaw by allowing the personally disqualified lawyer to avoid disqualification and imputation only if the appropriate government agency gives its informed consent, confirmed in writing. This formulation entrusts the disqualification decision to the agency rather than the individual lawyer.

Rule 1.11(d) also carries forward the ban on a lawyer's negotiating for private employment with any person involved as a party or as a lawyer for a party in a matter in which the government lawyer has participated personally and substantially. However, Rule 1.11(d) exempts a lawyer who is serving as a

law clerk to a judge, other adjudicative officer or arbitrator, provided the lawyer has notified the judge or other adjudicative office. The rationale for this special rule is two-fold: (1) law clerks are not decision-makers, and (2) many law clerks hold short-term positions and therefore have special needs for flexibility in pursuing future employment. The required notification allows judges to factor in the possibility of any bias and to respond accordingly, such as by reassigning a clerk to different matters.

Rule 1.11(e) governs the imputation of conflicts caused by lawyers in government service who have conflicts of interest under Rule 1.11(d). The rule essentially imports Rule 1.11(b)'s screening requirements and applies them to lawyers who have moved from government to private practice. But Rule 1.11(e) adds a third requirement: where a government lawyer is disqualified based on Rule 1.9 (which prohibits lawyers from opposing their former clients in substantially related matters), the government agency must advise the personally disqualified lawyer's former client in writing of the circumstances that warranted implementation of the screening procedures required by this Rule and of the actions taken to comply with this Rule, unless notice to the former client is prohibited by law or Rule 1.6.

Rule 1.11(f) defines the crucial term matter (a definition not found in the current New York Code of Professional Responsibility) so that matter refers only to a particular matter involving a specific party or parties. The effect of this limitation is to exclude the process of agency rulemaking from the scope of Rule 1.11.

Rule 1.12: Former Judges

Proposed Rule 1.12 contains special conflict of interest rules for lawyers who have previously served as judges or other adjudicative officers, including third-party neutrals.

Rule 1.12(a) elaborates on the narrow language of DR 9-101(A), which prohibits a lawyer from accepting private employment in a matter if the lawyer acted on the merits of that matter in a judicial capacity. Borrowing language from DR 9-101(B) and Rule 1.11, Rule 1.12(a) prohibits a lawyer from representing anyone in connection with a matter in which the lawyer participated personally and substantially as (i) a judge or other adjudicative officer, (ii) as a law clerk, or (iii) an arbitrator, mediator or other third-party neutral. However, unlike DR 9-101(A), which has no provision for waiver, Rule 1.12(a) allows a disqualified lawyer to overcome the prohibition if all parties to the proceeding give their informed consent, confirmed in writing.

Rule 1.12(b) mirrors Rule 1.11 by prohibiting a judge (or an adjudicative officer, arbitrator, mediator, or third-party neutral) from negotiating for employment with any party, or lawyer for a party, involved in a matter in which the judge is participating personally and substantially. The rule makes an exception for law clerks, but only after the law clerk has notified the judge. The notification provision gives the judge the opportunity to be on the alert for any signs of bias on the law clerk's part and to change the law clerk's assignments if warranted.

Rule 1.12(c) applies when a former judge or adjudicative officer is personally disqualified. It permits the former judge's law firm to avoid imputed disqualification by erecting the same kind of screen used in Rule 1.11 to avoid imputed disqualification by former government lawyers.

Conclusion

New York lawyers have a remarkably rich tradition of public service and a storied history of lawyers who return to private practice when they leave public service. Lawyers are reminded of this rich tradition each time meetings are held in the Stimson Room or the Davis Room at the New York City Bar and each time we read the names of New York's largest law firms. The screening rules and other special rules governing lawyers who move between government service and private practice in the current New York Disciplinary Rules have worked reasonably well, but proposed Rules 1.11 and 1.12 augment and fine tune the existing rules in ways that will provide greater guidance to courts and to lawyers, both in and out of government.

Roy Simon is the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University School of Law. He is the Chief Reporter and Vice-Chair of the New York State Bar Association's Committee on Standards of Attorney Conduct (COSAC), but the views expressed here are solely his own.