

Text of Proposed Rules 1.11 and 1.12

Editor's Note: Following is the full text of Rules 1.11 and 1.12 of the proposed New York Rules of Professional Conduct. The Rules were recommended by COSAC and approved by the NYSBA House of Delegates. They are currently being reviewed by the Presiding Justices of the four Appellate Divisions. See Roy Simon, page I, for a discussion of Rules 1.11 and 1.12.

RULE 1.11:

SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:

- (1) Shall comply with Rule 1.9(c); and
- (2) Shall not otherwise represent a 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 gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless the firm acts promptly and reasonably to:

- (1) Notify, as appropriate, lawyers and nonlawyer 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.

(c) Except as law may otherwise expressly provide, 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. As used in this Rule, the term confidential government information means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law

from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee:

(1) Shall comply with Rule 1.7 and Rule 1.9, but is not subject to Rule 1.10; and

(2) Shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) When a lawyer is disqualified from representation under paragraph (d), no lawyer serving in the same government office, agency or department may knowingly undertake or continue representation in the matter unless:

(1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation; and

(2) The office, agency or department acts promptly and reasonably to:

(i) Notify, as appropriate, lawyers and nonlawyer personnel within the office, agency or department that the personally disqualified lawyer is prohibited from participating in the matter;

(ii) Implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the office; and

(iii) Where the disqualification is based on the application of Rule 1.9, 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.

(f) As used in this Rule, the term matter includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

PROPOSED RULE 1.12: SPECIAL CONFLICTS OF INTEREST FOR FORMER JUDGES, ARBITRATORS, MEDIATORS OR OTHER THIRD-PARTY NEUTRALS

(a) Except as stated in paragraph (d), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

(1) A judge or other adjudicative officer;

(2) An arbitrator, mediator or other third-party neutral; or

(3) A law clerk to such a person.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer, arbitrator, mediator or other third-party neutral.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless the firm acts promptly and reasonably to:

(1) Notify all lawyers, and nonlawyer personnel, as appropriate, within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(2) Determine that nonlawyer representing the current client has acquired any information from the personally disqualified lawyer that is material and significant to the current matter;

(3) 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

(4) Advise the parties and any appropriate tribunal 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.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

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