

Minutes of the Meeting
Rules Committee
December 18, 2017

On Monday, December 18, 2017, the Rules Committee met in the Supreme Court courtroom from 2:02 p.m. to 3:51 p.m.

Members in attendance were:

HON. RICHARD A. ROBINSON, CHAIR
HON. JOAN K. ALEXANDER
HON. MELANIE L. CRADLE
HON. KEVIN G. DUBAY
HON. ROBERT L. GENUARIO
HON. DONNA NELSON HELLER
HON. SHEILA A. OZALIS
HON. DAVID M. SHERIDAN
HON. BARRY K. STEVENS

Also in attendance were Joseph J. Del Ciampo, Counsel to the Rules Committee, and Attorney Denise K. Poncini of the Judicial Branch's Legal Services Unit.

1. The Committee unanimously approved the minutes of the meeting held on November 20, 2017.
2. The Committee considered a proposal by Martin R. Libbin, Director of Legal Services on behalf of Judge Patrick L. Carroll III, Chief Court Administrator, to amend Rule 1.11 of the Rules of Professional Conduct regarding special conflicts of interest for government officials and employees and comments on the proposal from the Connecticut Bar Association's (CBA) Professional Discipline Section, Attorney Suzanne Sutton, and Attorney Patricia King. Attorney Libbin was present and addressed the Committee.

After discussion, the Committee voted to amend the proposal as set forth in Appendix A attached to these minutes. Judge Ozalis opposed the motion to amend the proposal.

Following this vote, the Committee discussed further proposed amendments which Attorney Libbin was asked to draft and the Committee voted to table further consideration of this matter to its January meeting.

3. The Committee considered a proposal by Attorney Martin R. Libbin, Director of Legal Services, on behalf of Judge Patrick L. Carroll III, Chief Court Administrator, to amend the Practice Book concerning disqualification of judicial officials and comments from the Connecticut Bar Association (CBA), the Connecticut Criminal Defense Lawyers Association (CCDLA), the Office of the Chief Public Defender, and the Connecticut Trial Lawyers Association (CTLA). Attorney Libbin was present and addressed the Committee.

After discussion, the Committee asked Counsel to redraft the proposal and to submit it for consideration at its January meeting.

4. Justice Robinson noted that the logistics of holding Rules Committee meetings in New Haven will be considered.

Respectfully submitted,

Joseph J. Del Ciampo
Counsel to the Rules Committee

Appendix A (121817)

Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees

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

(1) is subject to 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 subsection (a), 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 timely screened from any participation in the matter and is 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.

(c) Except as law may otherwise expressly permit, 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 which, 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 which 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 screened from any participation in the matter and is apportioned no part of the fee therefrom.

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

(1) Is subject to Rules 1.7 and 1.9; 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) Grievance counsel, disciplinary counsel and bar counsel as well as members of the statewide grievance committee and grievance panels shall not represent any party other than the State with respect to an unauthorized practice of law complaint or attorney grievance matter, while serving as such and for a period of one year following such counsel's or member's termination of employment or service as such grievance counsel, disciplinary counsel, bar counsel or member of the statewide grievance committee or a grievance panel. In addition, such counsel and members shall not represent an individual or entity investigated or prosecuted for the unauthorized practice of law or an attorney investigated or prosecuted with respect to an attorney grievance matter if such unauthorized practice of law complaint or attorney grievance matter was pending in their office or with their committee or panel at the time of such counsel's or member's termination of employment or service as such grievance counsel, disciplinary counsel, bar counsel or member of the statewide grievance committee or a grievance panel.~~

~~[(e)]~~ (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.

COMMENTARY: A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0 (f) for the definition of informed consent.

Subsections (a) (1), (a) (2) and (d) (1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, subsection (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by

imputation within a government agency, subsection (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

Subsections (a) (2) and (d) (2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under subsection (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by subsection (d). As with subsections (a) (1) and (d) (1), Rule 1.10 is not applicable to the conflicts of interest addressed by these subsections.

This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary, obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus, a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in subsection (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in subsections (a) (2) and (d) (2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by subsection (d), the latter agency is not required to screen the lawyer as subsection (b) requires a law firm to do.

The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Commentary to Rule 1.13.

Subsections (b) and (c) contemplate a screening arrangement. See Rule 1.0 (f) (requirements for screening procedures). These subsections do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Subsection (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Subsections (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

For purposes of subsection (e), an "unauthorized practice of law complaint" means a complaint alleging conduct covered by Connecticut General Statutes §51-88. "Attorney grievance matter" means any grievance complaint, investigation, presentment, interim suspension, disability, resignation, reinstatement, reciprocal discipline, discipline following a finding of guilt of a serious crime or inactive status matter.

For purposes of subsection [(e)] (f) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

AMENDMENT NOTE: The reason for the amendment to this provision is to establish rules to avoid conflicts of interest and appearances of such conflicts by those engaged in the disciplinary process. The proposal is similar to the post-employment limitations imposed under the Code of Ethics for Public Officials as set forth in General Statutes § 1-84b, including the limitation in subsection (b). For example, subsection (b) prohibits a former Executive Branch public official or state employee or quasi-public agency public official or state employee from representing anyone other than the state before the agency that he or she worked at for one year following his or her termination of service. The subsection does not prohibit a grievance

counsel from appearing before the local grievance panel that he or she advised the day after the grievance panel terminates his service as a grievance counsel.

It should be noted that the Office of State Ethics has previously ruled that the Judicial Branch is a single entity with respect to the application of the Code's provisions. In addition, since the Statewide Grievance Committee, local grievance panels and disciplinary counsel all work together with respect to the attorney discipline system, in order to ensure the integrity of the system, the rules should be clear and prohibit a former employee from representing the grievance system in investigating and disciplining attorneys one day and representing attorneys before the disciplinary authorities the next day simply because they have left their state employment.

The provisions of subsection (e) should be prospective to the extent that it would only apply to those who held a position subject to its terms on the date the amendment became effective. As a result, if a current member of the statewide grievance committee wished to be exempt from this provision, he or she could resign prior to the effective date of the amendment to Rule 1.11 taking effect. The prospective effect of this provision would be analogous to the prospective effect of Rule 2-47B adopted in 2015, which imposed restrictions on the activities of deactivated attorneys, but only applied to attorneys who were deactivated on or after January 1, 2016, the effective date of the rule.