

Ethics Opinion No. 95-2

Government Employee Entering the Private Practice of Law with a Firm Handling Litigation Against the Attorney's Former Agency.

The Ethics Committee has been asked whether Rule 1.11 (a) (endnote 1) Alaska Rules of Professional Conduct, prohibits a lawyer from representing a private client in a matter in which the lawyer had previously participated personally and substantially as a government officer or employee, but not in the capacity of a lawyer. We have also been asked under what circumstances would work done by a government employee's subordinates be attributable to the government employee for purposes of disqualification under Rule 1.11(a).

We conclude that ARPC 1.11(a) does not prohibit a lawyer who participated personally and substantially as a government officer or employee in making policy or in drafting or implementing regulations from representing a private client in connection with issues related to that policy or those regulations. However, ARPC 1.11(a) does prohibit a lawyer from representing a private client in connection with a discrete transaction or set of transactions between identifiable parties in which the lawyer participated personally and substantially as a public officer or employee, regardless of whether the lawyer's previous public duties were those of a government lawyer or those of a government official who did not have the duties of a lawyer.

We further conclude that work done by the lawyer's government employee subordinates does not disqualify the lawyer from representing a private client unless the lawyer participated personally and substantially in the matter in question while in public service.

1. Disqualification Due to the Lawyer's Government Work.

Alaska Bar Association Ethics Opinion 83-4 concluded that DR 9-101(B), Alaska Code of Professional Responsibility, (endnote 2) prohibited a lawyer from representing a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, regardless of whether the lawyer had participated in the matter as a lawyer or merely as a non-legal government official or employee. In Ethics Opinion 83-4, the lawyer, although working for the government in a non-legal position, had direct supervisory responsibility over lawyers defending litigation against the lawyer's agency. The lawyer then left the agency to join the law firm prosecuting the litigation.

Ethics Opinion 83-4 followed the analysis found in ABA Committee on Ethics and Professional Responsibility, Formal Op. 342 (1975): DR 9-101(B) uses the words "public employee," not the word "lawyer," a choice of words that

compels the inference that the broader construction was intended. The drafters of ABA Model Rule 1.11(a), which was adopted without change by the Alaska Supreme Court as Rule 1.11(a), Alaska Rules of Professional Conduct, were undoubtedly familiar with ABA Formal Opinion No. 342. Thus, the drafters' decision to use the words "public officer or employee" and not "lawyer" indicates an intention to give Rule 1.11(a) the same broad application previously given DR 9-101(B).

The potential for overbroad application of Rule 1.11(a) is limited by the definition of "matter" provided in Rule 1.11(d):

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

(1) Any judicial or other proceeding, application request for ruling or other determination, transaction, 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.

According to Hazard and Hodes, *The Law of Lawyering*, 368 (2d ed. 1990), Rule 1.11(d) codifies the definition of the term "matter" as found in ABA Formal Opinion No. 342:

. . . [T]he term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter. By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulations, procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties. (Footnotes omitted.)

Thus, Rule 1.11(a) does not prohibit a lawyer who participated personally and substantially as a government officer or employee in making policy or in drafting or implementing regulations from representing a private client in connection with issues related to that policy or those regulations. On the other hand, Rule 1.11(a), prohibits a lawyer from representing a private client in connection with a discrete transaction or set of transactions between identifiable parties in which the lawyer participated personally and substantially as a public officer or employee, regardless of whether the lawyer's previous public duties were those of a government lawyer or those of a government official who did not have the duties of a lawyer. (endnote 3)

2. Disqualification Due to Work of the Lawyer's Subordinates.

Rule 1.11(a) does not prohibit a lawyer from representing a private client unless the lawyer participated "personally and substantially" in the matter while employed by the government. Work done by the lawyer's government employee subordinates would not disqualify the lawyer from representing a private client unless the lawyer personally took a hand in the matter in question. Rule 1.11(a) uses the language of the federal conflict of interest statute, 18 U.S.C. § 207(a)(3), to clarify that if there was no personal involvement the lawyer is not disqualified. Rule 1.11, ABA Model Rules of Professional Conduct, Legal Background at 78 (Proposed Final Draft, May 30, 1981) (noting that Rule 1.11(a) "adopts, in part, the language of the relevant federal statute extending disqualification to matters in which the lawyer 'participates personally and substantially . . . through decision, approval, recommendation, the rendering of advice, investigation or otherwise' ").

The participation of the lawyer must be more than general supervisory duties or perfunctory approval or disapproval of an employee's actions. In discussing the scope of "substantial responsibility" under DR 9-101(B). ABA Formal Opinion No. 342 states:

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 deliberate processes regarding the transactions or facts in question.

Approved by the Alaska Bar Association Ethics Committee on November 3, 1994.

Adopted by the Board of Governors on January 13, 1995.

Endnotes:

1. **(E.Op. No. 95-2)** 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. 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 is apportioned no part of the fee there- from; and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

2. DR 9-101(B) provided: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."
3. AS 39.52.180 and 9 AAC 52.100 establish a substantially similar standard of conduct for all public officers of the state, which applies for two years following termination of state service. Attorneys are not relieved of their ethical obligation by the expiration of that time period.