Rules of Professional Responsibility
vs.
Rules of Ethics

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Office of the City Attorney
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A. Former Assistant City Attorney Smith Finds Employment in the Private Sector

Attorney Smith has served as an assistant city attorney for the City of New Antonio for many years. Over the years, he has gained considerable knowledge in municipal law and a deep understanding of how to navigate through the vagaries of city processes. He has earned a reputation in the legal community for excellent and honorable public service. Because of his reputation, Smith was recruited for a senior associate position at the law firm of Gotham & Associates.

Shortly after accepting his new position, Smith was asked to assist a client, Recreation, Inc. in negotiating a contract with the city to provide playground equipment for a Park Department project. The attorney had no prior involvement with this client or with this contract during his tenure with the city. The president of Recreation, Inc. specifically requested Smith because of his background with the city.

Smith quickly realized that this assignment would put him in conflict with New Antonio's Municipal Ethics Code "revolving door" regulation. That regulation prohibits any former New Antonio employee from representing a private interest for compensation before city officials or city staff for a period of two years after leaving city service. Smith advised the managing partner of this regulation and asked that the matter be assigned to another attorney.

The partner responded that he believed that the state's bar rules would govern Smith's representation of clients before the city. The partner reviewed the state's Rules of Professional Responsibility, which were modeled directly from the American Bar Association's Model Rules. Rule 1.11 of the Rules of Professional Responsibility states:

> **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) 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 in writing, to the representation**.

The partner advised Smith that in his view, the Rules of Professional Conduct governed and since Smith had no prior involvement with Recreation, Inc. while serving the city, there was no bar to the assignment. The partner further asserted that the city's "revolving door" regulation was an impermissible regulation of the practice of law, an authority reserved solely to the state's supreme court and bar association.

Attorney Smith felt conflicted and unsure how to proceed. The partner also reminded him of Rule 5.6, which prohibits agreements restricting the right to practice law after termination of employment. Rule 5.6 of the Rules of Professional Responsibility states:

> **A lawyer shall not participate in offering or making:**
>
> **(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.**

The partner noted that the reason underlying Rule 5.6 was to ensure that former employers could not deprive clients of their choice of counsel and pointed out that Recreation, Inc. definitely wanted Smith as their counsel. In the partner's view, the city's revolving door regulation constituted an employment agreement putting the regulation further in conflict with the bar's authority in that it functioned to deprive Recreation, Inc of its choice of counsel.

The partner concluded that because the state's supreme court had reserved the sole authority to regulate the practice of law to itself, the city's ethics regulations could not be applied to its former attorneys and that Smith should proceed with the assignment.

Before proceeding, Smith decided to further explore the issue of ethics codes versus the rules of professional responsibility.

B. Texas

The Supreme Court of Texas has determined that it has the inherent power to regulate the practice of law in the state. In re Nolo Press/Folk Law, Inc., 991 S.W.2d 768, 669 (Tex. 1999). This authority comes from, in part, Article II, Section 1 of the Texas Constitution, which divided the state government into the executive, legislative and

judicial branches. Id; Eichelberger v. Eichelberger, 582 S.W. 2d 395, 398-99 (Tex. 1979).

Pursuant to its authority, the Supreme Court adopted the Texas Disciplinary Rules of Professional Conduct. Two of those rules, Rule 5.06 and Rule 1.10, concern restrictions on an attorney's subsequent employment.

Rule 5.06 Restrictions on Right to Practice states in part:

> A lawyer shall not participate in offering or making:
>
> > (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
> >
> > (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a suit or controversy, except that as part of the settlement of disciplinary proceedings against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.

Rule 1.10 Successive Government and Private Employment, states:

> (a) 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.

Rule 5.06 precludes attorneys from entering into anti-competition agreements that prevent departing attorneys from litigating adversely or in competition with their former employers. The rationale for the rule is the protection of the public's right to select the attorney of their choice. Whiteside v. Griffis & Griffis, P.C., 902 S.W. 2d 739, 744 (Tex. App. – Austin 1995).

The Texas legislature enacted Government Code §572.054, which restricts former state officials and chiefs of executive agencies from representing private interests before their state bodies and agencies for two years. Several larger municipalities in this state have also passed "revolving door" ordinances, e.g. San Antonio City Code, Section 2-56 (officials and employees cannot represent clients before the city for compensation for two years after leaving public service); Dallas City Code Section 12A-14 (officials and employees restricted for one year); Houston City Code Section 18-88 (officials limited for one year).

The Professional Ethics Committee of the State Bar of Texas concluded in Opinion No.

551 (May 2004) that a revolving door provision of a municipality's ethics code does not constitute a partnership or employment agreement restricting representation of clients. Such a regulation is, instead, "part of a set of rules applicable to all employees of the City." The Committee also found that the stricter municipal revolving door provision barring representation before the city for two years after leaving public service did not conflict with the rules of professional conduct governing former government lawyers.

The Committee concluded:

> It is permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer who was formerly employed as a lawyer by a city to be required to comply with a provision of a city's ethics code that prohibits all former city employees from representing before the city for compensation any unrelated person for a period of two years after termination of employment.

Accordingly, attorneys leaving public service are bound as attorneys by the rules of professional responsibility. However, as former public servants, they may also be bound to stricter rules that govern conduct of a governmental body's former employees where those restrictions are applied across the board.

C. Louisiana

In Midboe v. Commission on Ethics for Public Employees, 646 So.2d 351, 360 (La. 1994), the Louisiana Supreme Court held that the state's legislatively enacted "revolving door" law regarding former government attorneys did not impermissibly infringe on its, the Supreme Court's, authority to regulate the practice of law.

The Louisiana Code of Governmental Ethics LSA-R.S. 42.1121(C) prohibits any **firm** for two years following a lawyer's public service from representing any client in connection with a matter in which the former government attorney participated during his or her public service.[1] Id. at 356-57. The former Secretary of the Louisiana Department of Environmental Quality (DEQ) argued in Midboe that LSA-R.S. 42.1121(C) was unconstitutional because it conflicted with the Louisiana Rules of Professional Responsibility's provision concerning successive government and private employment. The Louisiana Professional Rule 1.11 is similar to that of Texas and states that a lawyer cannot represent a private client in connection with a matter in which the lawyer personally and substantially participated while in public service. Midboe, 646 So.2d at 356-57.

[1] LSA-R.S. 42.1121 also provides that no former agency head may assist another person for compensation in any transaction involving that former public servant's agency for two years. Former government employees cannot assist another person for compensation for two years in a transaction in which the former public employee participated at any time during his public employment and involving the agency for which he worked. Midboe, 646 So.2d at 357-58 n. 2.

In Louisiana, as in Texas, the Supreme Court is deemed to have "exclusive and plenary power to define and regulate all facets of the practice of law." Id. at 357, citing to Succession of Wallace, 574 So.2d 348, 350 (La. 1991). The Midboe court added that it was beyond any doubt that it had a "duty and responsibility to assert its authority to regulate the practice of law." Midboe, 646 So.2d at 358. The Supreme Court's authority also enabled it to impose disciplinary action for failure to conform to these minimal standards. Id. It further stated that the attorney disciplinary rules would override any legislative acts that would "impede or frustrate that authority." Id.

The Louisiana constitution directs the legislature to enact a code of ethics for its public servants, to promote high standards of conduct for current and former public employees. Id. at 359. The Midboe court concluded that the establishment of these higher standards did not conflict with the court's regulatory authority over the practice of law:

> [A]ttorneys are subject to laws other than the Rules of Professional Conduct, and sometimes those laws relate to their actions as attorneys. A person who receives a license to practice law and adheres to the Rules of Professional Conduct is not insulated from other regulations and conditions under which the license may be used.

Id. As an example, the court noted that an attorney who converted his client's money would be subject to discipline under the rules as well as to prosecution under the state's criminal laws. Id. The court concluded that the state's code of ethics did not impermissibly infringe upon the Supreme Court's authority over the practice of law since the code supplemented rather than "impeded or frustrated" the court's authority.

D. Florida

In Howard v. State of Florida Commission on Ethics, 421 So.2d 37 (Fla. App. 1982), an attorney also raised the argument that the legislatively enacted conflict-of-interest laws impermissibly intruded upon the state supreme court's jurisdiction over the practice of law. The attorney held dual employment as both a school board attorney and as a partner in a law firm that provided legal services to the school board. The state ethics statute prohibited such dual employment. With little discussion, the court found that the state ethics law did not interfere with its authority to regulate the practice of law. It concluded, instead, that the statutes "merely supplement[ed]" the rules of professional responsibility. Id. at 39. In summary, the court stated, "When an attorney decides to accept public employment, he does so subject to the legislative proscription of his conduct." Id.

E. New Mexico

The Court of Appeals of New Mexico reached the same conclusion in Ortiz v. Taxation and Revenue Department, 954 P.2d 109 (N.M. App 1998). In that state, the Governmental Conduct Act provides that for one year after leaving public service, former public officers or employees cannot represent a private client for compensation before the governmental agency that had employed them. N.M. Stat. Ann. § 10-16-8(C). An attorney who had been employed by the state's motor vehicle division argued that Section 10-16-8(C), as applied to attorneys, was an unconstitutional intrusion by the legislature of the judiciary's authority to regulate the practice of law. Ortiz, 954 P.2d at 680.

The court noted that the statute was directed to all former government employees, regardless of whether or not they were also attorneys. Id. at 680. It concluded that the statute was not an attempt to regulate attorneys, but rather, was a law created "to ensure a high ethical standard for all former government agency employees." Id. at 681.

The attorney in this matter also argued that the "revolving door" statute conflicted with New Mexico's Rules of Professional Conduct 16.111. This rule prohibits attorneys from representing clients regarding matters in which the attorney had personally and substantially participated while in public service. Id. at 681. The court noted that the professional rules were intended to prevent attorneys from using information gained while working for the government for the advantage of a private client. The Governmental Conduct Act, on the other hand, addressed not the use of information, but rather "the appearance of impropriety and undue influence." Id. at 681. The commentary to the New Mexico Rules of Professional Conduct also provides that attorneys are subject not only to the Rules, but also to "statutes and government regulations regarding conflicts of interest." Rule 16-111 Comment; Ortiz, 954 P.2d at 681. The court therefore held that attorneys who are public officers or employees were subject to both the Professional Rules and the Governmental Conduct Act. Id. at 681-82.

F. New York

In Forti v. New York State Ethics Commission, 554 N.E.2d 876, 884-85 (NY 1990), former state attorneys challenged the 1987 Ethics in Government Act on several grounds, including the argument that the "revolving door" provisions violated the doctrine of separation of powers. In part, the law prohibited former state employees from appearing or practicing before their former agency in any matter for two years after leaving public employment. Public Officers Law § 73[8]; Forti, 554 N.E.2d at 879. The court noted that the law had not been directed at attorneys but instead to any former executive branch employee. Id. at 885. In addressing the underlying objective of the ethics act, the court stated:

> In general, the purpose of "revolving door" provisions such as those at issue here is to prevent former government employees from unfairly profiting from or otherwise trading upon the contacts, associations and special knowledge that they acquired during their tenure as public servants.

Id. at 878. The ethics laws were designed to limit undue influence by former governmental employees, regardless of their position as an attorney or other type of employee. The court found the effect of the ethics statute on the practice of law to be "merely incidental." Id. at 885.

G. Pennsylvania

The Supreme Court of Pennsylvania has also examined the contention that public employee ethics regulations violate the doctrine of separation of powers and has reached different results depending on the application. In Maunus v. State Ethics Commission, 544 A.2d 1324 (Pa. 1988), attorneys for the state liquor board argued that they were exempt from the financial disclosure provisions of the Ethics Act on the ground that they were attorneys. The Maunus court stated:

> [N]otwithstanding our substantial authority in this area, it is ludicrous to suggest that employers be constitutionally precluded from imposing ethical and professional requirements on their employees, some or all of who[m] may be attorneys.

544 A.2d at 1326.

In the subsequent case of P.J.S. v. Pennsylvania State Ethics Commission, 723 A.2d 174, 177 (Pa. 1999), the solicitor for the City of Erie also argued that the State Ethics Commission's application of the Ethics Act to attorneys conflicted with the Supreme Court's exclusive jurisdiction to regulate attorneys. The Court characterized the solicitor's argument as an attempt to use his status as a lawyer to shield himself from investigation by the Commission. The Court explained that the solicitor's membership in the bar did not exempt him from the jurisdiction of the Ethics Commission. Rather, his status as an attorney was the condition that subjected him to the authority of the court. To clarify the issue of jurisdiction, the court stated:

> The exclusive jurisdiction of this court is infringed when another branch of government attempts to regulate the conduct of attorneys merely because of their status as attorneys. However, the jurisdiction of this court is not infringed when a regulation aimed at conduct is applied to all persons, and some of those persons happen to be attorneys.

Id. at 178. The court went on to characterize the separation of powers argument as "absurd." Id.

P.J.S. should be contrasted with Gmerek v. State Ethics Commission, 807 A.2d 812 (Pa. 2002). In that case, an evenly divided Pennsylvania Supreme Court affirmed a lower court ruling that the state's Lobbying Disclosure Act did infringe upon the judiciary's exclusive jurisdiction to regulate attorneys. In applying the disclosure law to attorneys, Justice Castille anticipated that attorneys could be placed in the position of informing against their clients and implicating those clients in criminal activity. Id. at 821. Because the act created a potential direct conflict with the duty of attorneys to maintain the confidence of their clients, this justice found that the act, as applied to attorneys, did impinge upon the supreme court's authority. Id. In his opinion, Chief Justice Zappala found that the Act functioned to control the conduct of attorneys while engaged in rendering legal service to clients. Id. at 819.

In Shaulis v. Pennsylvania State Ethics Commission, 833 A.2d 123 (Penn. 2003), the court concluded that the revolving door provision of the Public Official and Employee Ethics Act was unconstitutional as applied to former government attorneys. The court stated that P.J.S. v. Pennsylvania State Ethics Commission, 723 A.2d, 174 (Pa. 1999) was limited in its application of ethics regulations to only current public employees. The Shaulis court reached its decision on two grounds: 1) reliance on Wajert v. State Ethics Commission, 429 A.2d 439 (Pa. 1980), which held that the ethics act was unconstitutional as applied to a former judge who sought to represent clients before the court because the act infringed upon the Supreme Court's exclusive power to govern attorney conduct; and 2) the provisions at issue were unconstitutional because they specifically targeted attorneys. Shaulis, 833 A.2d at 132.

Under Shaulis, former government attorneys in Pennsylvania are, therefore, governed by the rules of professional responsibility rather than by the state public employee ethics act.

H. The Federal Government

The Ethics in Government Act of 1978, 18 U.S.C. §207[2] was passed following the Watergate scandal. This ethics law includes a two-year ban on attempts to influence a governmental body concerning any matter that was pending within a year prior to the former employee's leaving public service. It also includes a one-year ban on senior personnel from communicating with or appearing before the agency that had employed them. See Grant Dawson, Conflict of Interest: Working Guidelines for Successive Conflicts of Interest Involving Government and Private Employment, 11 Geo J. Legal Ethics 329, 342 (1998). Some former government employees have been sent to jail

[2] The Office of Government Ethics Authorization Act of 1996 amended 18 U.S.C. §207 during the administration of President Clinton.

for violations of the federal ethics act. Id, citing to Susan Kavanagh & Matthew J. Merrick, OGE Compiles Survey of Conflict-of-Interest Prosecutions, Federal Ethics Reporter, at 1, 7-9 (Apr. 1996).

As with state and municipal lawyers, federal lawyers are subject to the professional rules of discipline from their licensing states. But like lawyers in jurisdictions such as Louisiana and New York, they are also subject to stricter standards in their capacities as current and former public servants.

I. Smith's Resolution

In Rachel E. Boehm's article, "Caught in the Revolving Door: A State Lawyer's Guide to Post-Employment Restrictions, 15 Rev. Litig. 525, 526 (1996), she noted that at least 30 states have passed ethics regulations that restrict a former government attorney's representation of private interests before that individual's former agency.

As discussed, attorneys have argued that legislatively enacted ethics regulations violate the separation of powers doctrine and impermissibly infringed upon the power of the courts to regulate the practice of law. Some courts have considered this argument and rejected the contention that one's status as an attorney exempts that person from other regulations or bodies of law.

As the court in P.J.S. explained, a person's status as an attorney subjects that person to regulation by the court; it does not serve as an immunity from other bodies of law that apply to that person as a citizen or as a government employee:

> The exclusive jurisdiction of this court is infringed when another branch of government attempts to regulate the conduct of attorneys merely because of their status as attorneys. However, the jurisdiction of this court is not infringed when a regulation aimed at conduct is applied to all persons, and some of those persons happen to be attorneys.

Id. at 177-78.

The Midboe court provided the compelling example of the attorney who converts a client's funds. To argue that the attorney should be subject only to discipline under the rules and immune from prosecution under the criminal theft statutes is not reasonable, nor would it further the objective of enhancing the integrity of the legal profession.

Attorney Smith, new associate of Gotham & Associates, shared his research and concerns with the partner. They decided that under both the rules of professional responsibility and the city's ethics code Smith could validly assist the client, Recreation, Inc. in drafting its response to the city's request for bids. Smith could

even assist another associate in directing the paperwork and any inquiries to the right personnel in the right departments. But for the next two years, the firm would assign anyone but Smith to represent the client in the firm's contacts, both personally and in writing, with the city's staff and officials. Smith would be in compliance with both sets of regulations and hopefully enhance the public's confidence that the city would evaluate Recreation, Inc.'s proposal on its merits, rather on the basis of Smith's personal relationships with his former colleagues.