Public Lawyering

Higher Standards

Private lawyers have an obligation to protect their client's confidences even when the client has engaged in wrongdoing whereas

"government lawyers have a higher, competing duty to act in the public interest."

In re Witness Before the Special Grand Jury 2000-2, 288 F.3d 289, 293 (7th Cir. 2002)

The case concluded that a government lawyer could not assert attorney client privilege in communications with a state government official in a criminal investigation of the official's activities.

A cautionary tale

Must attorneys suggest that their clients or prospective clients seek legal advice to review the attorney's contract?

City attorney sought to modify employment terms with city.

- Drafted performance review
- Drafted new terms to be adopted by resolution
- Had a member of city council offer both to council for review and adoption

City attorney subsequently fired for allegedly cheating on expense accounts and pleading nolo contendere to those charges.

Can city attorney recover contractual severance payments included in amended terms of employment?

Attorney did not explain that while severance in the original employment resolution was discretionary that severance in new resolution was not, nor the effect of that change.

From the majority opinion in *Fernandez v. City of Miami*, 147 So. 3d 553 (2014):

“ As a public officer in a local government, Mr. Fernandez was subject to Florida’s statutory declaration of policy that such officers are “agents of the people and hold their positions for the benefit of the public.”

“As the City Attorney responsible for advising and protecting the City of Miami in legal matters, Mr. Fernandez was required to “represent his client and handle his affairs with the utmost degree of honesty, forthrightness, loyalty and fidelity.” *Gerlach*, 98 So. 2d at 498

“Mr. Fernandez’s attempt to reap the benefit of his own breaches of those duties should not be countenanced, as the trial court found. The final judgment and orders on attorney’s fees and costs are affirmed.”

In dissent Chief Judge Shepherd noted that the attorney was not acting as an attorney, rather he was acting as an employee, thus no fiduciary responsibility:

“During negotiations on the employment contract, the relationship between Fernandez and the Commission was employer/employee and not attorney/client.”

The 7th Circuit noted that distinction in a criminal case:

> “In the related area of an attorney's fiduciary duties to clients, we have cautioned that the broader scope of fiduciary duty quoted above does not apply with full force when the attorney's compensation is the issue: "Fiduciary law does not send the dark cloud of presumptive impropriety over the contract that establishes the fiduciary relationship in the first place and fixes the terms of compensation for it." *Maksym*, 937 F.2d at 1242.”

United States v. Weimert, 819 F.3d 351, 369 (7th Cir. 2016)

Rule 1.8

(a) An attorney shall not enter into a business transaction with a client unless:

(1) the transaction and terms on which the attorney acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek independent legal advice on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the attorney's role in the transaction, including whether the attorney is representing the client in the transaction.

The better choice?

Lawyer Speech and the First Amendment

Regulating Lawyer Speech under the First Amendment

As they are government regulations, the Rules of Professional Conduct implicate the First Amendment.

> "The extent to which lawyer speech is protected by the First Amendment has troubled courts, scholars, and regulators for decades. Indeed, if we attempt to build a First Amendment data set in which the constant feature across cases is the challenger's bar membership, there seems to be an erratic quality to the results of these contests, making it difficult if not impossible to develop a coherent paradigm for assessing when the bar can restrict or prohibit lawyer speech."

ARTICLE: Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech, 31 Geo. J. Legal Ethics 31, 32

A some rules regulating speech:

Rule 1.6 Client confidences

Rule 4.2 Communication with person represented by attorneys

Rule 3.6 Trial Publicity

Rules 7.1, 7.2 and 7.3 Advertising

Rule 8.4 Administration of Justice and integrity of judicial system

Professor Smolla's view

Bar rules can be functional or aspirational.

There's a First Amendment carve out for regulating lawyer speech.

The carve out exists on a continuum from protected to unprotected speech where the more functional the regulation the less protected to the more aspirational the greater protected.

Rodney A. Smolla, Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession, 66 Fla. L. Rev. 961

(2015).

Available at: http://scholarship.law.ufl.edu/flr/vol66/iss3/1

Smolla's functional rules

These functional interests include

- regulations that directly affect the operation of the legal system, such as
- regulations that are calculated to deter actual interference with the administration of justice,
- to preserve the lawyer's obligations to maintain client confidences, or
- to prevent misleading lawyer advertising or marketing.

Smolla's aspirational rules

- values such as promoting respect for the rule of law,
- maintaining public confidence in the legal system,
- Maintaining professionalism (a concept different from adherence to hard-law legal ethical rules), and
- safeguarding the dignity of the profession.

AGC vs. Markey and Hancock

First Amendment protections not raised.

Each served a quasi-judicial function either as an ALJ or advisor to an administrative hearing board.

Conduct and speech implicated fairness of tribunals they served and administration of justice.

Could not have expected emails to remain private since they were subject to FOIA and government computers and resources used.

Heightened Sanctions

Public Lawyers can expect to be treated more harshly in disciplinary cases.

Attorney Grievance Comm'n of Md. v. McDonald, 85 A.3d 117, 144 (Md. 2014) ("Furthermore, "[d]isbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another." ABA, Standards for Imposing Lawyer Sanctions 5.21 (1992).")

Special Conflicts of Interest for Former and Current Government Employees

RULE 1.11

PUBLIC TO PRIVATE EMPLOYMENT

Rule 1.11(a)(b)(c)

Rule 1.11

(a) Except as law may otherwise expressly permit, an attorney 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 attorney 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.

Rule 1.9c

(c) An attorney who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) **use information relating** to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, **or when the information has become generally known;** or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Note: See Rule 1.11c regarding use of "confidential government information."

Rule 1.11c confidential government information

. . . 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. . . .

Virginia Rule 1.11

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

Checklist on Post Public Employment Representation

- What was the nature of your representation of the government or duties as a public official?
- Is the matter one in which you participated personally and substantially?
- Are the issues in the matter adverse to your former client?
- Have you obtained written consent to handle the matter?
- Do City ethics laws or rules apply?

ABA Rule 1.9(a) and Rule 1.11

A Cautionary Tale

“(Reuters) - U.S. District Judge Dan Polster ruled … that former Cleveland U.S. Attorney Carole Rendon, now in private practice at Baker & Hostetler, may not represent the pharmaceutical company Endo in two cases in the multidistrict litigation accusing opioids defendants of sparking the opioid crisis by misrepresenting the addictiveness of prescription painkillers.

“. . .The ethics rule [Rule 1.11] on related matters, he said, is supposed to preclude government lawyers from switching sides in the same case. That’s not what Rendon did, according to Polster, because the opioids task force she headed did not investigate Endo or bring claims against the company. “

A Cautionary Tale

Instead, Polster disqualified Rendon and Baker Hostetler under the ethics rule [Rule 1.11(c)] barring ex-government lawyers from using confidential information obtained in their service – and the judge only did so because the Justice Department confirmed Rendon's receipt of such information.

"(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.. . ."

What does personally and substantially mean?

"Personally and substantially" is not defined in the Rules.

ABA Formal Op. 342 (1975) in defining "substantial responsibility" states that it envisages a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of a matter in question. It contemplates a responsibility requiring the official to become personally involved to an important, material degree in the investigative or deliberative process.

Also see: MD. ETHICS DOCKET NO. 2011-08

N.Y. State 748 (2001)

NY State 748 lists “relevant facts” to consider in determining whether lawyer participated personally and substantially including whether the lawyer:

- Served in more than nominal supervisory role
- Had knowledge of government confidences and secrets relevant to the proposed representation of the same defendants
- Provided coverage for other attorneys
- Was kept apprised of cases in the office
- Had access to the case files and other information regarding cases in the office.

Adversity is not a Necessity

Note that the *"personally and substantially"* prohibition applies regardless of whether the lawyer is adverse to the former government client.

Rule 1.11

(e) 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.*

When a lawyer is disqualified under Rule 1.11(a), is the firm also disqualified?

Not necessarily. There are steps a firm can take to prevent disqualification

ABA Rule 1.11(b)

Provides that no lawyer in a firm with which a lawyer disqualified under Rule 1.11(a) is associated may knowingly undertake or continue representation in such a matter unless:

the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

“Confidential Government Information” Disqualification

Rule 1.11(c) also disqualifies former government officers or employees who:

1. have information about a person
2. that the lawyer knows is confidential government information, and
3. that was acquired when the lawyer was a public officer

Confidential Government Info Disqualification cont'd.

From representing a private client:

1. whose interests are adverse to that person
2. in a matter in which the information could be used to the material disadvantage of that person.

ABA Rule 1.11(c)

Confidential Government Information Defined - Again

"Confidential government information" is defined as "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."

ABA Rule 1.11(c)

PRIVATE TO PUBLIC EMPLOYMENT
Rule 1.11(d)

Prohibitions on Current Government Lawyers

Except as law may otherwise provide, a lawyer currently serving as a public officer/employee shall not:

participate in a matter in which the lawyer participated *personally and substantially* while in nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter.

ABA Rule 1.11(d)(1)

Note: the rule applies when the attorney is acting as a government employee or official regardless of whether the position is one of a lawyer.

No Adversity Necessary

Disqualification applies even if prior representation was not adverse to government.

But conflict not imputed to government agency

Unlike paragraphs (a) [former government employee] and (c) [confidential government information disqualification], Rule 1.11 (d)(1) does not impute the conflict to the office.

Only the individual lawyer is disqualified.

Informed Consent

1.11d.2.i.

unless the appropriate government agency gives its informed consent, confirmed in writing;

And Rule 1.7 applies –

(b) Notwithstanding the existence of a conflict of interest under section (a) of this Rule, an attorney may represent a client if:

(1) the attorney reasonably believes that the attorney will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the attorney in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

So where do Rule 1.9’s Duties to Former Clients fit in the government context?

Rule 1.9 – Duties to Former Clients – the lawyer

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the *same or a substantially related matter* in which that person's interests are ***materially adverse*** to the former client's interests, absent informed consent, in writing.

ABA Rule 1.9(a)

Rule 1.9 cont'd. the firm

Absent informed consent, in writing, a lawyer shall not knowingly represent a person in the *same or substantially* related matter in which a firm with which the lawyer formerly was associated had represented a client:

(1) Whose interests are ***materially adverse*** to the person; and

(2) About whom the lawyer acquired confidential information that is material to the matter.

ABA Rule 1.9(b)

Rule 1.9 cont'd.

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) Use confidential information to the disadvantage of the former client, expect as permitted or required under the rules or when information has become generally known; or

(2) Reveal confidential information of the former client except as Rules permit or require.

Does Rule 1.11 or Rule 1.9 apply now that the lawyer works for the Government?

The Rules do not make this clear.

Comment [9B] of Rule 1.11 discussing the imputation of conflicts, states that “Where a government law office’s representation is materially adverse to a government lawyer’s former private client…the representation would, absent informed consent of the former client, also be prohibited by Rule 1.9.

The role of a prosecutor

“A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches [the] task with humility.”

“In times of fear or hysteria political, racial, religious, social and economic groups, often from the best of motives, cry for the scalps of individuals or groups because they do not like their views. Particularly do we need to be dispassionate and courageous in those cases . . . ."

Robert H. Jackson, April 1, 1940.