Vermont Rules of Professional Conduct
Rule 1.11 – Special Conflicts of Interest for Former and Current Government Officers and Employees

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Kennedy's Highlights

(NOT a substitute for full research of the rule & opinions/decisions on it)

- *Rule 1.11 has not been amended since 2009*
- *Conflicts: in some cases, appearances matter*

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 paragraph (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) 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.

Comment

[1] 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(e) for the definition of informed consent.

[2] Paragraphs (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, paragraph (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, paragraph (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.

[3] Paragraphs (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 paragraph (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 paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] 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 paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (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.

[5] 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 paragraph (d), the latter agency is not required to screen the

lawyer as paragraph (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 Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs 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.

[7] 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.

[8] Paragraph (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.

[9] Paragraphs (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.

[10] For purposes of paragraph (e) 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.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.11 is amended to conform to the changes in Model Rule 1.11. The ABA Reporter's Explanation of the changes is as follows in pertinent part:

TEXT:

1. Change caption to read ''Special Conflicts of Interest for Former and Current Government Officers and Employees''

The change in caption reflects the fact that the Rule has traditionally been applied not only to lawyers moving from government service to private practice (and vice versa) but also to lawyers moving from one government agency to another.

2. Paragraph (a): Clarify that individual lawyer who formerly served as public officer or government employee is subject only to this Rule and not to Rule 1.9

There has been disagreement whether individual lawyers who have served as government officials or employees are subject to Rule 1.9 regarding their obligations to former clients or whether their obligations under Rule 1.11(a) are exclusive. The question is an important one, for the individual lawyer, for the lawyer's firm, and for the government. The Commission decided that representation adverse to a former government client is better determined under Rule 1.11(a), which also addresses representation in connection with any other matter in which the lawyer previously participated personally and substantially as a public officer or employee. In order not to inhibit transfer of employment to and from the government, the Commission believes that disqualification resulting from representation adverse to the former government client should be limited to particular matters in which the lawyer participated personally and substantially, which is also the standard for determining disqualification regarding from prior participation as a public officer or employee. The meaning of the term
''matter'' is clarified in new Comment [10].

Paragraph (a)(1) further clarifies that former government lawyers are subject to Rule 1.9(c) regarding the confidentiality of information relating to the former representation of a government client.

3. Paragraph (a): Delete ''private''

The text of [former] Rule 1.11(a) suggests that the disqualification under that paragraph applies only when the lawyer moves from government service to private practice. [Former] Comment [4], however, states that

''[w]hen the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule.'' To avoid any possible confusion, the Commission determined that the text should be changed to conform to the Comment.

4. Paragraph (a)(2): Change from ''consent after consultation'' to ''gives its informed consent to the representation''

The Commission is recommending that throughout the Rules the phrase ''consent after consultation'' be replaced with ''gives informed consent,'' as defined in Rule 1.0(e). No change in substance is intended.

5. Paragraphs (a) and (d): Consent to be ''confirmed in writing''

The Commission recommends requiring that the consent here be confirmed in writing, as with other conflict-of-interest Rules. ''Confirmed in writing'' is defined in Rule 1.0(b).

6. Paragraph (b): Clarify that conflicts under paragraph (a) —including former client conflicts -are not imputed to other associated lawyers when individual lawyer is properly screened

There is no change in the basic rule of imputation for situations governed under former Rule 1.11(a). The change is intended for situations that previously might have been governed by Rule 1.9 rather than 1.1 l(a). Although former client conflicts under Rule 1.9 are imputed to associated lawyers under Rule 1.10, this paragraph states clearly that when the conflict arises from the individually disqualified lawyer's service as a public officer or employee of the government, the conflict is governed by paragraphs (a) and (b) of this Rule and is not imputed if the lawyer is screened and the appropriate government agency is notified of representation. The Commission believes that this result is necessary in order to continue to encourage lawyers to work in the public sector without fear that their service will unduly burden their future careers in the private sector. (Conflicts are not imputed under either the current or the proposed Rule when the move is from one government agency to another.)

....

8. Paragraphs (b)(1) and (c): Add ''timely''

The Commission is recommending a definition of ''screened'' that includes a requirement that the lawyer be ''timely'' isolated from participation in the matter. Nevertheless, the Commission believes that the timeliness requirement is so important that it should appear in the text as well. This change is being recommended for all of the Rules that address screening. See Rules 1.12 and 1.18.

9. Paragraph (c): Include definition of ''confidential government information'' from [former] paragraph (e)

The material in what is now paragraph (c) [was formerly] in paragraph (b). The Commission is recommending that [former] paragraph (e) be deleted and the definition of ''confidential government information'' be moved to paragraph (c), where the defined term is now used. This change is for purposes of clarification only, and no change in substance is intended.

10. Paragraph (d): Clarify relationship between this Rule and Rules 1.9 and 1.10

This paragraph is intended to clarify that individual lawyers may not undertake representation adverse to former clients when to do so would violate Rule 1.9, even when the representation was not in the same matter but rather was in a substantially related matter in which it is likely that the lawyer received confidential client information. These conflicts, however, are not imputed to lawyers associated in a government agency, even when formal screening mechanisms are not instituted. The lack of imputation presently applies to disqualifications under [former] Rule 1.11(c) but not necessarily to disqualifications of a current government lawyer under Rule 1.9, in which Rule 1.10 otherwise would apply. Screening is not required for public agencies because it may not be practical in some situations. Nevertheless, Comment [2] states the expectation that such lawyers will in fact be screened where it is practical to do so.

11. Paragraph (d)(1): Add reference to Rule 1.7

The Commission determined that it made sense to address in Rule 1.11, not only the imputation of former client conflicts, but also the imputation of current conflicts of interest under Rule 1.7. As with former-client conflicts, the Commission decided that these conflicts should not be imputed to lawyers associated in a government agency, even when formal screening mechanisms are not instituted. Screening is not required in the disciplinary context because it may not be practical in some situations. Nevertheless, as with Rule 1.9 conflicts, Comment [2] states the expectation that such lawyers will in fact be screened where it is practicable to do so.

12. Paragraph (d)(2): Substitute ''informed consent'' of the client for exception where ''under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter''

The interests of the former client are protected under Rule 1.9, and, under that Rule, the former client may effectively consent to a subsequent adverse representation. The interests of the government agency itself are protected under paragraph (d)(2). These interests are similar to those protected under paragraph (a)([2]), where the former government agency may effectively consent to the subsequent representation. If a government agency can effectively consent under paragraph (a)([2]), the Commission sees no reason why it cannot similarly consent to representation otherwise prohibited by paragraph (d)(2). This would include (but not be limited to) situations where ''under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter.''

13. Delete [former] paragraph (e)

As set forth above, the Commission proposes to delete [former] paragraph (e) and move its material unchanged to paragraph (c).

COMMENT:

The Commission recommends deleting [former] Comment [1] and expanding upon the rationale for the Rule in Comment [4].

[1] The reference to Rule 1.9 has been deleted because the relationship between Rules 1.9 and 1.11 is now addressed in Comment [2]. The remainder of the changes are stylistic, and no change in substance is intended.

[2] This entirely new Comment explains the relationship between Rules 1.9, 1.10 and 1.11 as stated in the text of paragraphs (a)(1), (a)(2) and (d)(1).

[3] This new Comment provides the rationale for the obligations of the individual lawyer under paragraphs (a)([2]) and (d)(2), which are the obligations of former and present government lawyers aside from those imposed by Rule 1.9. Unlike Rule 1.9, these obligations are designed to protect against abuse of public office generally, not necessarily obligations owed to former clients of the lawyer.

[4] This Comment modifies slightly the provisions of [former] Comment [3]. First, it avoids using the term ''private,'' given the applicability of the Rule to successive representation between distinct government agencies. It also makes minor stylistic changes and adds a sentence at the end to explain the rationale for limiting the disqualification in paragraphs (a)([2]) and (d)(2) to a narrower range of ''matter'' than is typically covered by conflict-of interest rules. (See paragraph (e).)

[5] The changes reflect the change in text to delete the reference to ''private'' clients. The last sentence explains how imputation works when the successive clients are both government agencies.

[6] This Comment provides a cross-reference to the screening requirements in Rule 1.0(k) and further elaborates on the prohibition on fee apportionment in language identical to that used in the Comment to the other screening Rules. See Rules 1.12 and 1.18.

[7] This entirely new Comment elaborates on the notice requirement, in language identical to that in the Comment to the other screening Rules. See Rules 1.12 and 1.18. [Former] Comment [6] has been deleted because its content is covered in Comment [7]. The current Comment has been deleted. Its content now appears in Comment [2].

[10] This new Comment clarifies that two particular matters may constitute the same matter for purposes of paragraph (a)(2), depending on the circumstances. The language is drawn from but is not identical to the definition of ''matter'' as it is used in the federal conflicts of interest statute. Cf. 5 C.F.R. 2637.201(c)(4).

Reporter's Notes

This rule is similar to its Code counterpart in prohibiting lawyers from representing private clients in connection with matters in which the lawyer participated personally and substantially, unless the government consents after consultation. However, the rule goes substantially further than the Vermont Code in several respects.

First, the rule permits associates of a disqualified lawyer to avoid imputed disqualification if the lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom. If the

disqualification concerns a former government lawyer, the government agency must also be given notice so that it may ascertain compliance with the rule.

Second, the rule provides for disqualification and screening of a former government lawyer from private representation where the lawyer acquired relevant confidential government information from prior employment, even though the lawyer did not participate personally and substantially in the matter.

Third, the rule provides for the disqualification of a government lawyer from matters in which the lawyer participated personally and substantially while in nongovernmental employment. The rule also prohibits such a lawyer from negotiating for private employment with a person who is a party to a matter in which the lawyer is representing the government.