

Ethics Opinion 2006-01

- Rules: 1.11 and 1.9
- Subject: Conflicts of Interest - Former Government Officers or Employees
- Summary: A law firm may represent a client in a matter where a member of the firm personally and substantially participated as a public officer or employee if the former government employee is properly screened from participation in the case. The lawyer may represent the client with the informed written consent of the government agency.

I. Facts

You were previously employed with an agency of State Government. Your employment was not in the capacity of legal counsel for the agency. During your employment with the state agency, you were involved in some initial negotiations with certain entities. You are now considering whether to accept a position with a law firm which is or may be retained by one or more of those entities with which you were involved in negotiations. Your question is whether the South Dakota Rules of Professional Conduct would prevent you or your prospective firm from representing the private entities in matters in which you were involved as a government employee.

II. Discussion

The ethical issues you have presented are primarily governed by Rule 1.11. As an initial matter we must determine whether the rule applies in your situation as you were not employed in your capacity as a lawyer with the state agency. The rule, however, states that it applies to a lawyer who has formerly served as a "public officer or employee" of the government. It appears then that the Rules of Professional Conduct do apply to your situation.

Rule 1.11(a)(1) indicates that under these circumstances the lawyer is subject to provisions of Rule 1.9(c), which prohibits the use of information gained in your former employment to the disadvantage of your former client, and prohibits revealing information relating to that representation with certain exceptions. The question whether you, personally, may represent one of the entities in a matter with the State is governed by Rule 1.11(a)(2). Such representation is generally prohibited if you participated "personally and substantially".

You have indicated that your participation was brief and limited. However, the extent of your participation is a factual question which we do not believe we can resolve. If you did not participate "personally and substantially" you are not prevented from representing the clients and consent by the agency is not required. If, however, your participation was personal and substantial, you may still be able to represent the clients if the appropriate government agency gives informed consent in writing to the representation.

Even if you are prohibited personally from representing the clients under subsection (a), subsection (b) would allow representation by the firm in which you are associating, if you are timely screened from participation and apportioned no part of the fee from that representation. "[W]ritten notice" must be promptly given to the appropriate government agency to allow it to determine the firm's compliance with this rule.

John L. Brown, Chair
Ethics Committee
State Bar of South Dakota