

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



WORK SESSION: XIV: Gifts, Campaign Finance and Ethics for the
Municipal Lawyer

TITLE: Rules of Professional Responsibility vs. Rules of Ethics

By

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(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

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.

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:

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. §207² 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.

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.