Recent Developments in Professional Responsibility

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I. Government Lawyer Seeking New Employment – NYS Bar Ass'n Ethics Opinion 1158 (12/11/18)

A. Committee concluded that, subject to confidentiality and personal conflicts of interest, an IRS lawyer who has recently worked on drafting certain regulatory provisions is not precluded from seeking employment in a position seeking to change the current tax code after he leaves the agency.

B. Although Rule 1.11(d)(2) prohibits current government attorneys from negotiating for private employment with any person who is a party or lawyer for a party in a matter in which the lawyer is participating personally and substantially, subsection (e) exempts agency rulemaking functions from the definition of matter.

C. While Rule 1.1(c)(2) prevents a lawyer from intentionally prejudicing or damaging a client during the course of representation…, for government lawyers, it does not preclude conduct prejudicial to the a client unrelated to legal services being rendered.

II. Prosecutor's Post Convictions Duties Regarding Potential Wrongful Convictions – NYS Bar Ass'n. Formal Op. 2018-2.

A. This opinion discusses the minimum standard of conduct required by Rule 3.8(c) "when a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant has been convicted.

B. In addition, it discusses the additional duties Rule 1.1's duty of competence establishes in the post-conviction context.

III. Conflict of Interest: County Attorney's Service on the Board of a County-Sponsored Community College – NYS Bar Ass'n Ethics Op. 1153 (5/24/18)

A. Committee concluded that if no law or regulation prohibits the dual roles, an attorney may serve as both county attorney and chair of a county-sponsored community college to which the county attorney's office provides legal services if, in each circumstance when the interests of the county and the community college overlap, a reasonable lawyer would not conclude that the dual roles involve a significant risk that the lawyer cannot be independent.

B. If this standard cannot be met, the lawyer must seek a waiver, assuming the lawyer reasonably concludes that she can provide competent and diligent representation to both. .

IV. A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error – ABA Formal Opinion 481 (4/17/18)

A. The Committee concluded that: "the Model Rules require a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. The lawyer must inform the client promptly under the circumstances.

B. But "[n]o similar duty of disclosure exists under the Model Rules where the lawyer discovers after the termination of the attorney-client relationship that the lawyer made a material error in the former client's representation."

V. The "Generally Known" Exception to Former-Client Confidentiality – Formal Opinion 479, American Bar Association, December 15, 2017.

A. The "generally known" exception.

1. When something is generally known is not defined in the Rules.

2. ABA Committee concluded: "information is generally known within the meaning of Model Rule 1.9(c)(1) if:

a) it is widely recognized by members of the public in the relevant geographic area;

- Information may become widely recognized and thus generally known as a result of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media.

b) or it is widely recognized in the former client's industry, profession, or trade.

- Information should be treated as generally known if it is announced, discussed, or identified in what reasonable members of the industry, profession, or trade would consider a leading print or online publication or other resource in the particular field.
- Information may be widely recognized within a former client's industry, profession, or trade without being widely recognized by the public.

3. Information is NOT generally known merely because it is publicly available or in the public record. Ill. State Bar Ass'n. Advisory Op. 05-01, 2006 WL 4584283, at *3 (2006); N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 991, at ¶ 20 (2013).

a) Information that has been discussed in open court, or is available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes.

b) Publicly available information that requires specialized knowledge or expertise to locate is not generally known within the meaning of Model Rule 1.9(c)(1). See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (2000).

VI. NYSBA Ethics Op. 1105 (Oct. 2016) – Imputation of Conflicts of Interest for Part-Time Government Lawyers.

A. Part-time attorney was associated with the firm for purposes of the conflicts rule and where two law firms share a common lawyer, "a conflict of interest is imputed to both firms."

B. So lawyer working part time as a public defender could not represent a client in private practice where another lawyer in the public defender's office is disqualified from undertaking the representation, unless the conflict can be and is waived.

C. The conflict would also be imputed to all of the lawyers in the firm, including the lawyer who received court appointments.

D. Informed consent required, if conflict is waivable. Opinion cautions that when the lawyer seeks consent from a client who is receiving free legal services, the lawyer must consider whether such consent would be freely given.

DECEPTION OR PRETEXTING BY LAWYERS OR THEIR AGENTS

I. A number of ethical rules are implicated by pretexting activities.

A. The Model Rules prohibit deception, without exception - Mode Rule 8.4(c) expressly prohibits a lawyer or law firm from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

B. Model Rule 4.1 states that "[i]n the course of representing a client, a lawyer shall not knowingly… make a false statement of material fact or law to a third party."

1. Unlike the Model Rule, NY's Rule 4.1 is not expressly limited to "material" facts or law.

II. Additional ethical rules that may be implicated by deception or pretexting.

A. No-contact rule – communicating with a person represented by counsel (Model Rule 4.2(a)).

B. The limitations on communicating with a juror or prospective juror after discharge of the jury (Model Rule 3.5(a)(5)).

C. Seeking to influence a judge, juror, prospective juror or other official by means prohibited by law (Model Rule 3.5(a)(1)&(2)).

D. Engaging in conduct intended to disrupt a tribunal.

III. These rules apply whether the deception or pretexting activities were done by the lawyer or by another person acting under the lawyer's supervision or direction.

A. Model Rule 5.3 - A lawyer shall not order or direct another lawyer, employee, or agent to engage in specific conduct, or with knowledge of the specific conduct by such person, ratify it, where such conduct if engaged in by the lawyer would violate any ethics rules.

B. Model Rule 5.1 - Lawyers "shall be responsible" for a violation of the Rules if they direct another to engage in conduct that violates the Rules, or with knowledge ratify that conduct, or if they are a partner or supervisor of a lawyer or nonlawyer and know of the conduct and fail to take measures when such measures could have prevented the conduct or its consequences.

C. Model Rule 8.4(a) states that a lawyer shall not violate or attempt to violate the Rules through the acts of another or by knowingly assisting or inducing another to do so.

IV. The so-called "Law Enforcement Exception."

A. Notwithstanding the clear prohibition on deception, some courts and Bar Associations have held that the use of deception in some limited circumstances does not violate the Rules.

B. Despite its name, the exceptions have not been limited to law enforcement or even government attorneys. Here are a sample of some of the decisions and opinions that have addressed this issue.

1. *United States v. Parker*, 165 F.Supp.2d 431 (W.D.N.Y. 2001) - Prosecutorial use of a "sting" operation to catch police officers suspected of selling sensitive police information to drug dealers did not violate Rules.

2. *Apple Corps Ltd. v. Int'l Collectors Soc'y,* 15 F. Supp. 2d 456, 471 (D. N.J. 1998) - the leading trademark infringement case, the United States District Court for the District of New Jersey found that plaintiff's counsel and investigators' misrepresentations as to their identity and purpose were "necessary to discover defendants' violations . . . and did not constitute unethical behavior."

3. *Gidatex, S.R.I. v. Campaniello Imports, Ltd.*, 82 F.Supp.2d 119 (S.D.N.Y. 1999)(permitting introduction of secretly recorded conversations between private investigators and sales people in trademark infringement trial). *See also, Mena v. Key Food* Stores *Co-Operative, Inc.*, 195 Misc.2d 402, 758 N.Y.S.2d 246 (King's Cty. Sup. Ct. 2003)(posing as interior decorator); *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 597 F. Supp. 1186 (E.D.N.Y. 1984)(posing as manufacture of counterfeit bags) *Cartier v. Symbolix, Inc.*, 386 F. Supp. 2d 354, 362 (S.D.N.Y. 2002) (buying counterfeit bags).

4. *Office of Lawyer Regulation v. Stephen P. Hurley*, No. 2007AP478-D (Wis. Sup. Ct. 2009) – no ethical violation where attorney used investigator to obtain minor victim's computer through deceit to obtain evidence favorable to his client in child pornography prosecution.

5. D.C. Bar - Ethics Opinion 323 - Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties.

6. NYCLA Committee on Professional Ethics Formal Op. 737 (May 23, 2007) – Non-government lawyer may use investigator who employs dissemblance where:

   a) investigation concerns either civil rights or intellectual property violation which lawyer in good faith believes is occurring, OR

   b) dissemblance is authorized by law; AND

   c) evidence is not reasonably and readily available through other means; AND

   d) conduct does not otherwise violate the Rules of Professional Conduct or other applicable law; AND

   e) dissemblance does not unlawfully or unethically violate the rights of third persons.

V. Some jurisdictions have amended their Rules to expressly provide for an exception to the no deception rule.

A. **Oregon Rule 8.4(b)** – "[I]t shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. 'Cover activity,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. 'Covert activity' may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future."

B. **Florida Rule 4-8.(e)** – "A lawyer shall not … engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation; unless prohibited by law or rule." Fl. Rules of Professional Conduct, R 4-8.4(c).

C. **Virginia – Rewrote Rule 8.4(c)** to read – "it is professional misconduct to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, *which reflects adversely on the lawyer's fitness to practice law*." (Emphasis added). Va. Rules of Professional Conduct, R. 4-8.4(c).

D. Meanwhile, **Ohio included a Comment to Rule 8.4** which provides – "[Sub]division (c) does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law." Comment [2A].

VI. Examples of conduct **not** permitted under the exception.

A. Engaging in illegal conduct.

B. Pretending to be a doctor, lawyer, minister, or other person whose communications are protected by statute or common law practice.

- *In re Paulter*, 40 P.3d 1175 (Colo. 2002)(upholding discipline of prosecutor who impersonated a public defender in order to secure the surrender of a murder suspect).

C. Soliciting, listening to, or reading information protected by the attorney-client privilege.

D. Deceiving a court or court personnel.

- *In re Crossan*, 880 N.E. 2d 352 (Mass. 2008) (disbarring two attorneys who conducted false employment interviews with judge's former law clerk in attempt to gain evidence of judicial bias).

E. Violating the no-contract rule.

1. *Midwest Motor Sports Inc. v. Arctic Cat Sales Inc.*, 347 F.3d 693 (8th Cir. 2003) – defense counsel sanctioned for directing paid investigator to contact high-level managerial employees and attempt to elicit damaging admissions from the dealers' employees "to secure an advantage at trial."

2. *Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876 (N.D. Ill. 2002) – Civil rights, not trademark case. Court stated "Lawyers (and investigators) cannot trick protected employees into doing or saying things they otherwise would not say." But finding that they can employ persons to play the role of customers seeking services on the same basis as general public and videotape these employees in their normal course. However, the court reserved for trial the admissibility of the substantive conversations, held outside normal business transaction.

F. Colorado continues to prohibit any deception by lawyers or their employees or agents.

- "Until a sufficiently compelling scenario presents itself and convinces us our interpretation of Colo. RPC 8.4(c) is too rigid, we stand resolute against any suggestion that licensed attorneys in our state may deceive or

lie or misrepresent, regardless of their reasons for doing so." *In Re Pautler*, 47 P.3d 1175 (2002).

VII. Additional Reading

A. David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional* Conduct, 8 Geo. J. Legal Ethics 791 (1995).

B. Lloyd B. Snyder, Lawyer Deception to Uncover Wrongdoing, 78 Cleveland Bar Journal 10 (October 2007).

C. Robert W. Sacoff, The Ethics of Deception, Pretext Investigations In Trademark Cases, Colorado Bar Association, April 1, 2010.

D. D.C. Bar Association, Ethics Op. 323, Misrepresentation by and Attorney Employed by a Government Agency as Part of Official Duties (March 2004).

E. Hope C. Todd, *Speaking of Ethics: Lies, Damn Lies: Pretexting and D.C. Rule 8.4(c)*, Washington Lawyer (January 2015).

F. Don't Be Deceived? It's Not a Simple Matter: The Use of Deception by Law Enforcement Attorneys and Rule 8.4(c), NAAG, Volume 2, Number 3.

THE DOS AND DON'TS OF RULE 1.11

II. Special Conflicts of Interest for Former and Current Government Employees

A. **Model Rule 1.11** addresses the special conflicts of interest that apply to current and former government attorneys.

B. **Public to Private Employment (Former Government Attorneys)** - Model Rule 1.11(a)(b)(c).

1. Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government

a) shall not represent a client in connection with a matter in which the lawyer ***participated personally and substantially*** as a government attorney, unless the appropriate government agency gives its informed consent, confirmed in writing. Model Rule 1.11(a)

b) Personally and substantially is not defined in the Rules.

(1) N.Y. State 748 (2001) – NYS Bar Association listed the following as relevant to a personally and substantially determination. Whether the lawyer:

(a) served in more than nominal supervisory role;

(b) had knowledge of government confidences and secrets relevant to the proposed representation of the same defendants;

(c) provided coverage for other attorneys;

(d) was kept apprised of cases in the office;

(e) had access to the case files and other information regarding cases in the office.

2. Conflict is Imputed to the Firm Unless the Firm Takes Prompt Action – Model Rule 1.11(b) provides: 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***:

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

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

3. New York's Rule 1.11(b) also requires that "there are no other circumstances in the particular representation that creates an appearance of impropriety." N.Y. Rule 1.11(b)(2).

4. **"Confidential Government Information"** –

a) Model Rule 1.11(c) prohibits "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, from representing 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."

b) "Confidential government information" is defined as "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." Model Rule 1.11(c).

c) A "confidential government information" conflict is not imputed to the firm so long as the "disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom. Model Rule 1.11(c).

C. **Private to public employment (Former Private Attorneys).**

1. Model Rule 1.11(d) – "Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:"

a) is subject to Rules 1.7(conflicts) and 1.9 (duties to former clients) and shall not:

(1) 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;

(a) New York Rule 1.11(d) differs from the Model Rule in that it does not require consent of appropriate government agency, but instead states "unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter."

(2) or 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).

2. Unlike for former government employees, Model Rule 1.11(d) does not impute the conflict to the office.

III. What constitutes a "matter" for purposes this rule?

A. For purposes of the Model Rule, "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.

B. Unlike the Model Rule, New York's Rule 1.11(e) does not separately define matter for purposes of Rule 1.11. Instead, it incorporates the definition found in Rule 1.0(f) but states that for purposes of Rule 1.11, matter does not include or apply to agency rulemaking functions.