Formal Ethics Opinion
KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-453
Issued: March 19, 2021

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at http://www.kybar.org/237), before relying on this opinion.

Confidentiality of Information for Former Government Officers or Employees

Question No. 1: May a former government officer or employee, in connection with a matter in which the lawyer substantially and personally participated, disclose information about that matter to third parties?[1]

Answer: Yes, but only with the informed written consent of the appropriate government entity and in the absence thereof the lawyer may not do so. See Discussion.

Question No. 2: May a former government officer or employee, in connection with a matter in which the lawyer substantially and personally participated, be a fact witness in proceedings about that matter?

Answer: Yes, but only with the informed written consent of the appropriate government entity and in the absence thereof the lawyer may not do so. See Discussion.

Question No. 3: May a former government officer or employee, in connection with a matter in which the lawyer substantially and personally participated, serve as an expert witness in proceedings about that matter?

Answer: Yes, but only with the informed written consent of the appropriate government entity and in the absence thereof the lawyer may not do so. See Discussion.

Question No. 4: May a former government officer or employee serve as an expert witness in proceedings about a matter in which the lawyer did not substantially and personally participate, but which took place while he/she was a government officer or employee?

Answer: Yes. See Discussion.

References: STATUTE**:** 18 U.S. Code §207(i)(2); and (3);

[1] "Disclosing information to third parties" as used in this Opinion does not negate, if applicable, an attorney's responsibility to report professional misconduct in accordance with SCR 3.130(8.3) and/or (8.4).

RULES OF SUPREME COURT OF KENTUCKY: SCR 3.130(1.7); SCR 3.130(1.9(c)); SCR 3.130(1.11); SCR 1.130(1.12(b)); and SCR 3.130(8.3) and SCR 3.130(8.4);
CASES: *Whitaker v. Commonwealth*, 895 S.W.2d 953 (Ky. 1995); *Bullock v. City of Covington*, 698 Fed.Appx. 305, (6th Cir. 2017);
ETHICS OPINION: ABA Formal Opinion 479 (December 15, 2017); and
SECONDARY SOURCES: ABA's Annotated Model Rules of Professional Conduct (Eighth Edition – 2015);Wolfram, Former Client Conflicts, 10 Geo. J. Legal Ethics 677 (Summer 1997).

Discussion

Before this Committee responds to the preceding questions we call the reader's attention to the fact that this Committee is not authorized to provide legal advice and must restrict itself to responding to questions of professional conduct. However, we caution our readers that the presented questions do raise issues of law, for example, work product privilege, etc.; therefore, we suggest that the former government lawyer consider the implications of federal and Kentucky law on such issues. This Committee will now proceed to address those issues arising under Kentucky's Rules of Professional Conduct.

We start our review of the ethics issues with a consideration of SCR 3.130(1.11), Special conflicts of interest for former and current government officers and employees, as follows.

> (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) . . . .
> (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 attorney 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.

Rule 1.11(a)(1) incorporates by reference the provisions of Rule 1.9(c) and this Rule amplifies the former government lawyer's ethical responsibilities to protect his prior employer's confidential information. Further, Rule 1.9(c) also adds specific prohibitions on a former government lawyer not to disclose her prior employer's confidential information. Rule 1.9(c) is as follows.

(c) 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 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.

As to the issue of what constitutes a "matter" for purposes of Rule 1.9 and then Rule 1.11 the American Bar Association's text *Annotated Model Rules of Professional Conduct* (Eighth Edition – 2015) offers the following advice that we consider helpful.

Lawyers formerly employed by the government—whether or not in a "lawyer" capacity—are not subject to the general rule on former-client conflicts. Under Rule 1.11(a) the trigger for disqualifying a lawyer formerly employed by the government is *personal and substantial participation* in the *same* matter, as opposed to actual *representation* in the same *or a substantially related* matter. And if a former government lawyer is disqualified based upon personal and substantial participation in the same matter, his new colleagues can use screening and notice to avoid imputation. In the private sector, nonconsensual screening would not prevent imputation.
…
In addition, Rule 1.11(c) prohibits a lawyer … formerly employed by the government from representing a private client if the lawyer possesses "confidential government information"—narrowly defined in paragraph (c)—that is damaging to someone with adverse interests. This prohibition supplements the lawyer's duties of confidentiality under Rules 1.6 and 1.9(c), which are fully applicable to government lawyers. (See Annotation – Overview at the beginning of annotation text material.)

In considering what constitutes personal and substantial participation we adopt the common definition for these words. Specifically, personal and substantial participation means the direct participation by a government employee through a process of decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise.[2] Personal and substantial participation includes the actions of a subordinate when that subordinate was directed by the former government officer or employee in the matter. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of that effort because one's involvement on a peripheral issue may not be enough.

In *Whitaker v. Commonwealth*, 895 S.W.2d 953 (Ky. 1995) the Kentucky Supreme Court opined that "substantial and personal participation" would include an exchange of confidential information in the form of planning and strategy, or discussions of potential witnesses to be called on the defendant's behalf, or avenues of investigation to be taken. In *Bullock v. City of Covington*, 698 Fed.Appx. 305, (6th Cir. 2017) the Court of Appeals for the Sixth Circuit sustained a district court's order disqualifying a former City lawyer based on Rule 1.11. In Bullock the City's lawyer worked on nuisance complaints and various issues related to the City's streets. This former City lawyer argued that because none of his work for the City involved his current client personally he should not be disqualified. The court, however, noted that the client's own complaint included facts that were drawn from the various matters on which the former City lawyer had represented the City. Therefore, the Court of Appeals found that the district court did not abuse its discretion when it disqualified the City's former lawyer.

As to Rule 1.9(c)'s requirement prohibiting a lawyer from subsequently using a client's information nor revealing it to the disadvantage of his former client, the Supreme Court's Comment to the Rule provides an exception when it states: "However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client." (Emphasis added.) As to what constitutes "generally known information" it should be understood that these words may be misconstrued from what one might think is generally known in an age where there are many forms of instant communication.. Here the reader is advised to consider ABA Formal Opinion 479 (December 15, 2017) where the ABA offered the following guidance as to what constitutes generally known information.

> Consistent with the foregoing, the Committee's view is that 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; or (b) it is widely recognized in the former client's industry, profession, or trade. 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. With respect to category (b), 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. For example, if a former client is in the insurance industry, information about the former client that is widely recognized by others in the insurance industry should be

[2] For example, see 18 U.S. Code §207(i)(2) and (3).

considered generally known within the meaning of Model Rule 1.9(c)(1) even if the public at large is unaware of the information.

As to questions one through three, we conclude by advising that the former government lawyer who has substantially and personally participated in a matter that is the subject of inquiry may not disclose nor use any such information unless the government employer gives the requesting former government lawyer its informed consent which must be confirmed in writing. Further, we believe, as does the American Bar Association, that the lawyer's ethical obligation exists whether the lawyer government officer or employee is serving in what may or may not be considered a lawyer's normal role. Specifically, a lawyer who is subject to Kentucky's Rules of Professional Conduct cannot leave his ethical responsibilities as a lawyer hanging outside his employer's offices.

As to question four, because the question makes clear that the former government lawyer did not substantially and personally participate in the matter that is the subject of the inquiry, the former government lawyer may make effective use of and disclose information that we consider to being no more than "playbook information."[3]

Note To Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.

[3] Ethics scholar Prof. Charles W. Wolfram, in *Former Client Conflicts*, 10 Geo. J. Legal Ethics 677 (Summer 1997) described "playbook information" as a type of general company information that an attorney may possess concerning an adversary's general business practices or litigation philosophy acquired during the attorney's previous relationship with the adversary.