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ETHICS FOR LAWYERS WHO REPRESENT GOVERNMENTAL ENTITIES AS PART OF THEIR PRIVATE PRACTICES

*John M. Burman**

The Wyoming Rules of Professional Conduct (the Rules), which are based¹ on the American Bar Association's Model Rules of Professional Conduct (the Model Rules), apply to all lawyers.² They do, however, distinguish between lawyers in private practice and government lawyers.³ As a result, current and former

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¹ While the Wyoming Rules are based on the ABA's Model Rules, the Wyoming Rules contain important differences. For a discussion of the Wyoming Rules, which were adopted in 2006, see John M. Burman, *Supreme Court Adopts Changes to the Wyoming Rules of Professional Conduct*, WYO. LAW., June 2006, at 36.

² See WYO. RULES OF PROF'L CONDUCT R. 8.5(a) (2009) ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction . . ."); see also DISCIPLINARY CODE FOR THE WYOMING STATE BAR pmbl. § 1(a) (LexisNexis 2009) ("Any attorney is subject to the exclusive disciplinary jurisdiction of this Court and the Board of Professional Responsibility."); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342 (1975) ("[T]he Disciplinary Rules [the predecessor to the Rules of Professional Conduct] should be uniformly applied to all lawyers, regardless of the nature of their professional activities.").

³ See, e.g., WYO. RULES OF PROF'L CONDUCT R. 1.11 (addressing the "[s]pecial conflicts of interest for former and current government officers and employees").

government lawyers are held to different ethical standards in some respects, especially with regard to conflicts of interest. That same distinction applies to lawyers' legal duties as well.⁴

When describing current government lawyers, the Rules and the Model Rules refer to "a lawyer currently serving as a public officer or employee."⁵ Similarly, when discussing former government lawyers, the Rules and the Model Rules describe a lawyer who was a "public officer or employee of the government."⁶ This terminology appears to refer to lawyers who work or worked full-time for a governmental entity. While many lawyers do work full-time for the government, many work in a part-time capacity. Many of these lawyers who represent or have represented the government do so as part of their private practices. In a rural area, such as Wyoming, the number of lawyers in private practice who represent governmental entities is probably larger than the number of full-time government lawyers.

Consider, for example, the plethora of governmental boards or agencies at the state or local level, which have legal representation, often from private firms. School boards, hospital boards, Irrigation District boards, Weed and Pest District boards—to name but a few types—usually are represented by private firms. Private lawyers represent many towns or cities in Wyoming and other rural bodies. It is even fairly common in Wyoming for a county attorney to be a lawyer who also maintains a private practice. To allow that to happen, the Wyoming statutes distinguish between "[f]ull-time county attorneys"⁷ and "county attorneys," implying that county attorneys need not be "full-time." This implication is reinforced by the statute that permits county attorneys to also maintain a private practice, although "[t]he board of county commissioners, . . . *may* prohibit county and prosecuting attorneys or their deputies from engaging in the private practice of law."⁸ Accordingly, if a board of county commissioners does not prohibit private practice, a county attorney or his or her deputies may engage in private practice, as well as represent the county.

Two counties in Wyoming—Laramie and Natrona—have district attorneys, and the Wyoming statutes allow for the creation of more district attorneys in order to replace county attorneys as the primary prosecutor.⁹ District attorneys

⁴ See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 133 (2000).

⁵ WYO. RULES OF PROF'L CONDUCT R. 1.11(d); see also MODEL RULES OF PROF'L CONDUCT R. 1.11(d) (2010).

⁶ WYO. RULES OF PROF'L CONDUCT R. 1.11(a); see also MODEL RULES OF PROF'L CONDUCT R. 1.11(a).

⁷ WYO. STAT. ANN. § 18-3-107(a)(ii) (2009).

⁸ *Id.* § 18-3-303(b) (emphasis added).

⁹ WYO. STAT. ANN. § 9-1-801 (2009).

are allowed to hire “part-time” assistant district attorneys in those counties that do not have enough people to justify a full-time assistant district attorney.¹⁰

Given the prevalence of private lawyers that represent governmental entities, the question which arises is what ethical (and legal) standards apply to such lawyers: those that apply to private lawyers, those for government lawyers, or something different? Unfortunately, neither the Rules nor the Model Rules provide much guidance. Both sets of Rules appear to assume, for the most part,¹¹ that a lawyer is either a full-time government lawyer or a full-time private lawyer, leaving a significant gap that results in many unanswered questions.

This article addresses the gap in the Rules—both Wyoming’s Rules and the Model Rules—when it comes to private lawyers who represent governmental entities. Part I outlines the general ethical differences between government and private lawyers. Part II discusses the part-time¹² nature of private lawyers who represent governmental entities. Part III suggests ethical standards for part-time government lawyers. Finally, Part IV suggests a change to the Wyoming Rules to eliminate an inconsistency between the Rules and the law on imputing conflicts of interest, as set forth by the Wyoming Supreme Court.

I. GOVERNMENT LAWYERS ARE DIFFERENT¹³

Any discussion of how the Rules apply to government lawyers¹⁴ begins with the cardinal concept that all lawyers are subject to the Rules, even when they act at the

¹⁰ *Id.* § 9-1-804(b).

¹¹ The commentary to Rule 1.11 acknowledges that a lawyer may represent both a governmental entity and a private party. It is not clear, however, whether the comment anticipates a full-time government lawyer also representing a private party, or whether the comment anticipates a lawyer in private practice representing a governmental entity as part of that practice. In either event, the comment says that Rule 1.11 “do[es] not prohibit a lawyer from jointly representing a private party and a government agency.” WYO. RULES OF PROF’L CONDUCT R. 1.11 cmt. 10; *see also* MODEL RULES OF PROF’L CONDUCT R. 1.11 cmt. 9 (“[Rule 1.11] do[es] not prohibit a lawyer from jointly representing a private party and a government agency.”).

¹² The term “part-time” government lawyer is used to refer to lawyers who represent governmental entities as part of their full-time employment with a private firm. The term “part-time” does not describe the amount of time a lawyer spends representing the government. It is not uncommon, for example, for a lawyer who is a full-time employee of a private firm to spend most, if not all, of his or her time representing a governmental entity. In the parlance of this article, that lawyer is still a “part-time” government lawyer, as he or she is a full-time private lawyer.

¹³ This part is based, in part, on John M. Burman, *Ethical Considerations when Representing Health Care Organizations*, 8 WYO. L. REV. 373, 374–86 (2008).

¹⁴ As explored and explained more fully in this article, there are two types of “government lawyers.” First, there are those lawyers who are employed by and work directly for a governmental entity on a full-time basis, such as the Wyoming Attorney General and the Assistant Attorneys General who work for that office. Second, there are lawyers who work for private firms that represent governmental entities as part of the firm’s practice. Those lawyers are described as “part-time” lawyers in this article. It is common in Wyoming, for example, for lawyers in private practice to represent

direction of other persons.¹⁵ The Rules do, however, anticipate that government lawyers, especially full-time government lawyers, will play a somewhat different role than lawyers in private practice, and their ethical obligations, therefore, shift accordingly.

An analysis of a lawyer's ethical obligations begins with the Preamble and Scope of the Rules. Together, they "provide general orientation [to the Rules]."¹⁶ In addition, the Rules do not exist in a vacuum; the Rules "presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general."¹⁷ The note on Scope continues on to make it clear that sources other than the Rules may affect government lawyers' ethical obligations (although the Rules distinguish between government and private lawyers, they do not generally distinguish between full-time and part-time government lawyers). "Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships."¹⁸

The Scope illustrates how a government lawyer's role may differ:

For example, a lawyer for a government agency may have authority . . . to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general . . . in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies

school boards, hospital boards, or smaller cities or towns. Being a part-time government lawyer is, at least in Wyoming, common. "Many communities rely on part-time government lawyers who concurrently maintain a private practice, possibly with a law firm. . . . [A] majority of prosecutors in the United States are not full-time government lawyers." Donald L. Jackson, *Developments in Professional Responsibility*, 21 IND. L. REV. 291, 304 (1988) (citations omitted).

In this article, lawyers who work full-time for the government, and who maintain no private practice, are referred to as "full-time government lawyers," and those who represent a governmental entity as part of a private practice are referred to as "part-time government lawyers."

¹⁵ WYO. RULES OF PROF'L CONDUCT RR. 5.2(a), 8.5(a); *see also* DISCIPLINARY CODE FOR THE WYOMING STATE BAR pmb. § 1(a) (2009).

¹⁶ WYO. RULES OF PROF'L CONDUCT Scope 20.

¹⁷ *Id.* at Scope 15.

¹⁸ *Id.* at Scope 17.

in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.¹⁹

The reference to “a lawyer for a government agency” does not indicate whether it refers to full-time government lawyers, part-time government lawyers, or both. Given the general structure of the Rules and applicable substantive law, however, it appears that the question should not be simply whether one is a full-time government lawyer or a part-time government lawyer. Rather, the key is whether ceasing to represent the governmental entity will create the kinds of problems Rule 1.9(a) and (b) (which apply to private lawyers) is aimed at reducing, or the kinds of problems Rule 1.11 (which applies to government lawyers) is designed to resolve. If the answer is that the problems are more like Rule 1.9(a) and (b) problems, those paragraphs should apply. If, by contrast, the problems are more like Rule 1.11 problems, then that rule should apply.

A. Who Is the Client?

One difficulty faced by government lawyers (and many private lawyers too) is “who is the client?” While it seems, at first blush, that this would be a question that is easily answered, sometimes it is not. Especially when representing a governmental entity, “[d]efining precisely the identity of the client . . . may be more difficult in the government context and is a matter beyond the scope of these Rules [of Professional Conduct].”²⁰ The reason for the difficulty is that lawyers who represent governmental entities may represent large entities. While lawyers in private practice who represent governmental entities often have small, well-defined clients, such as a school board, full-time government lawyers may have more difficulty identifying the client. “[I]n some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole.”²¹

Consider, for example, two lawyers who represent governmental entities. One is a member of the Wyoming Attorney General’s Office. The other is the lawyer for a small town. The question arising with respect to both is, “who is the client?” The Wyoming Attorney General is appointed by the Governor²² and has broad statutory authority. Among other things, the Wyoming Attorney General is to “[p]rosecute and defend all suits instituted by or against the state of Wyoming”;²³

¹⁹ *Id.*

²⁰ *Id.* at R. 1.13 cmt. 7.

²¹ *Id.*

²² WYO. STAT. ANN. § 9-1-601(a) (2009).

²³ *Id.* § 9-1-603(a)(i).

“[d]efend suits brought against state officers”;²⁴ “[r]epresent the state in suits, actions or claims in which the state is interested”;²⁵ and “[b]e the legal adviser of all elective and appointive state officers and of the county and district attorneys of the state.”²⁶ It is arguable, therefore, that the attorneys general represent all of state government, not just the portion they are generally assigned to represent (such as a particular agency or board). There are two problems with such analysis.

First, the identity of a client may shift. The commentary to Rule 1.13 (the Rule on representing organizations, including government ones) gives an example: “[I]f the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule”; the Rule includes a lawyer’s obligation to “blow the whistle” when certain persons in the organization do certain things.²⁷

Second, there is the practical reality that the lawyers in the Attorney General’s Office cannot telephone or meet with the Governor whenever they need to get direction about how to handle a matter. Rather, they meet with agency heads or other bureaucrats, who provide them with guidance about how to proceed. So a lawyer assigned to represent the Department of Transportation would not, for example, consult with the head of that agency regarding a lawsuit involving the Department of Health (which is also represented by the Wyoming Attorney General). As a practical matter, therefore, the bigger the agency or governmental entity, the more likely it is that a lawyer represents a portion of that entity and not the whole entity. It is important to remember, however, that the identity of the “client” may be different for different purposes. For example, “client” may mean one thing for purposes of conflicts of interest and another for purposes of applying the attorney–client privilege.

By contrast, when the governmental entity is small, the odds are that the lawyer represents all parts of that entity, such as a small town or a school district.

Regardless of the size of the governmental entity, government lawyers—whether full-time or part-time—may have different ethical obligations. As the commentary to Rule 1.13, the rule on representing organizations, notes: “Thus, when the client is a governmental organization, a different balance may be

²⁴ *Id.* § 9-1-603(a)(iii).

²⁵ *Id.* § 9-1-603(a)(iv).

²⁶ *Id.* § 9-1-603(a)(v).

²⁷ WYO. RULES OF PROF’L CONDUCT R. 1.13 cmt. 7 (2009). For a discussion of a lawyer’s whistle-blowing obligations, see JOHN M. BURMAN, PROFESSIONAL RESPONSIBILITY IN WYOMING § 17.3 (2008).

appropriate between maintaining confidentiality and assuring that the wrongful act [of a government employee or officer] is prevented or rectified, for public business is involved.”²⁸

B. Differences in the Rules

All Wyoming lawyers are bound by the Rules, with one important exception—neither the Rules nor the Model Rules distinguish²⁹ between private and government lawyers. This exception and some other minor differences are discussed in this section.

Generally, conflicts of interest fall under Rules 1.7 and 1.8 (both Rules apply to current clients), Rule 1.9 (former clients), Rule 1.10 (imputing conflicts of interest regarding both current and former clients), and Rule 1.18 (former prospective clients). All of these Rules impose upon lawyers duties of loyalty to current, former, and former prospective clients. Those duties include duties that exist when a lawyer switches firms³⁰ and a duty of confidentiality to current clients,³¹ former clients and former clients of the lawyer’s former or current firm,³² and former prospective clients.³³ The duty of loyalty when a lawyer switches employment is more flexible for former full-time government lawyers who move to private practice than for lawyers in private practice who switch private firms.³⁴ The Rules on imputing conflicts of interest involving current clients (Rules 1.8(k) and 1.10(a)) do not apply to government lawyers, and the standard which does apply is also more flexible for current full-time government lawyers (Rule 1.11(d)).

1. Rule 1.11—Special conflicts of interest for former and current government officers and employees

Rule 1.11 is entitled “Special conflicts of interest for former and current government officers and employees.” As the title suggests, Rule 1.11 contains different conflict of interest standards for former and current full-time government

²⁸ WYO. RULES OF PROF’L CONDUCT R. 1.13 cmt. 7.

²⁹ While language in the Scope and the Commentary to various rules distinguishes between government and private lawyers, the rules—not the Preamble, the note on Scope, or the Comments—are “authoritative.” *Id.* at Scope 20; *see also* MODEL RULES OF PROF’L CONDUCT Scope 21 (2010).

³⁰ WYO. RULES OF PROF’L CONDUCT R. 1.9(b).

³¹ *Id.* at R. 1.6(a).

³² *Id.* at R. 1.9(c).

³³ *Id.* at R. 1.18(b).

³⁴ The Rules also contain special conflict of interest provisions for a “[f]ormer judge, arbitrator, mediator, or other third-party neutral.” *Id.* at R. 1.12. Those standards are not discussed in this article.

lawyers than the Rules that generally apply (Rules 1.7 through 1.10) to conflicts of interest.

First, the majority of Rule 1.11 (paragraphs (a), (b), and (c)) makes it clear that this Rule applies to a lawyer who “has formerly served as a public officer or employee of the government.”³⁵ Most of Rule 1.11 applies, in other words, to former full-time government lawyers.³⁶ As Rule 1.9 does with respect to private lawyers, Rule 1.11 creates duties of confidentiality and loyalty to the former clients (government entities) of former government lawyers. The duty of confidentiality is the same. Lawyers who were formerly “public officer[s] or employee[s] of the government [are] subject to Rule 1.9(c) [which prohibits lawyers from using or revealing information about former clients in most circumstances].”³⁷

Second, Rule 1.11 creates, and limits, full-time government lawyers’ duties of loyalty to former clients. The general rule is that “[a] lawyer who has formerly served as a public officer or employee . . . shall not . . . represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee.”³⁸ This Rule creates the typical provision for waiver of a conflict when a lawyer was involved in a matter “personally and substantially.” A lawyer may represent a client even though the lawyer was involved “personally and substantially” in the matter if the “appropriate government agency makes an informed decision³⁹ [to allow the representation], confirmed⁴⁰ in writing.”⁴¹

³⁵ *Id.* at R. 1.11(a).

³⁶ Though Rule 1.11 and the comments do not use the term “full-time,” it seems clear from the use of the words “public officer or employee” that the Rule applies to full-time government lawyers, not employees of a private firm that represent government entities. *See id.* at R. 1.11 cmt. 2.

³⁷ *Id.* at R. 1.11(a)(1).

³⁸ *Id.* at R. 1.11(a)(2). “Matter” means, for purposes of Rule 1.11, “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.” *Id.* at R. 1.11(e)(1). It includes “any other matter covered by the conflict of interest rules of the appropriate government agency.” *Id.* at R. 1.11(e)(2).

³⁹ “Informed decision” means “the decision by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” *Id.* at R. 1.0(f).

⁴⁰ “Confirmed in writing” means:

[A]n informed decision that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming the oral informed decision. . . . If it is not feasible to obtain or transmit the writing at the time the person makes an informed decision, then the lawyer must obtain or transmit it within a reasonable time thereafter.

Id. at R. 1.0(c).

⁴¹ *Id.* at R. 1.11(a)(2).

There are two significant differences between the Rules' treatment of full-time government lawyers and other lawyers with respect to conflicts of interest. The first involves the treatment of former clients. The general standard for former clients of private sector lawyers is that a lawyer shall not represent a new client "in the *same or a substantially related matter* in which that person's interests are *materially adverse* to the interests of the former client."⁴² The language just quoted applies when a lawyer switches sides and represents a new client against a former client. When the lawyer switches firms, the standard is different:

- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are *materially adverse* to that person; and
 - (2) about whom the lawyer had *acquired information* protected by Rules 1.6 and 1.9(c) ["confidential information" relating to the representation] that is *material* to the matter⁴³

By contrast, a former full-time government lawyer "shall not otherwise represent a client in connection with a *matter*⁴⁴ in which the lawyer *participated personally and substantially*."⁴⁵ This prohibition will normally apply when a former government lawyer has joined the private sector.

The foregoing language in italics indicates that the ethical standard for disqualifying a private sector lawyer who switches sides (Rule 1.9(a)) involves two questions.⁴⁶ First, does the representation of the new client involve "the same or a substantially related matter [as the representation of the former client]?" If the answer to that question is "yes," the second question is whether the position of the new client in the same or substantially related matter is "materially adverse" to the former client? If the answer to the second question is also "yes," the representation

⁴² *Id.* at R. 1.9(a) (emphasis added).

⁴³ *Id.* at R. 1.9(b) (emphasis added). "Confidential information" is "information provided by the client or relating to the client which is not otherwise available to the public." *Id.* at R. 1.0(b).

⁴⁴ The term "matter" is defined in paragraph (e) of Rule 1.11. As discussed below, that definition is an integral part of the standard for both former and current government lawyers.

⁴⁵ *Id.* at R. 1.11(a)(2) (emphasis added).

⁴⁶ The Wyoming Supreme Court relied on the principles expressed in Rule 1.9 in disqualifying a private lawyer who had previously represented a person who had become the defendant in a lawsuit in which the lawyer represented the plaintiff. *Carlson v. Langdon*, 751 P.2d 344, 348 (Wyo. 1988).

of the new client is ethically impermissible. In addition, a conflict arising under Rule 1.9(a) is imputed to other lawyers in the disqualified lawyer's firm.⁴⁷

If the private sector lawyer switches firms, the language emphasized from Rule 1.9(b) indicates that two more questions must be asked, assuming the representation of the new firm involves a "substantially related matter" in which the interests of the new firm's client are "materially adverse" to the interests of the former firm's client. The first additional question is whether the lawyer who switched firms "had acquired information protected by Rules 1.6 and 1.9(c) ['confidential information' relating to the representation]."⁴⁸ If so, the second additional question is whether such information "is material to the matter" involving the clients of the former and new firms.⁴⁹ Once again, the disqualification of an individual lawyer will be imputed to all lawyers in the new firm.⁵⁰

The standard for disqualifying a former full-time government lawyer is very different than the standard that applies to private lawyers. The lawyer is disqualified only if he or she "participated personally and substantially" in the "matter" as a government lawyer. If so, the lawyer is disqualified, regardless of whether the position of the new client is "materially adverse" to that of the government agency. The most important difference, which is discussed in detail later in this article, is that the conflicts of interest of the disqualified former government lawyer are not imputed to the new, private sector firm.⁵¹

Even though the Rules have a terminology section (Rule 1.0), and the word "matter" is used throughout the Rules,⁵² that term is not defined; however, Rule 1.11 contains a special definition of the term just for that Rule. "Matter," for purposes of Rule 1.11, means "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 any other matter covered by the conflict of interest rules of the appropriate government agency."⁵³

⁴⁷ WYO. RULES OF PROF'L CONDUCT R. 1.10(a). In 2009, the Model Rules were amended to permit a firm to continue with the representation if the disqualified lawyer is "screened" from the matter. See MODEL RULES OF PROF'L CONDUCT R. 1.10(a)(ii) (2010). This change has not been adopted in Wyoming.

⁴⁸ WYO. RULES OF PROF'L CONDUCT R. 1.9(b)(2).

⁴⁹ *Id.*

⁵⁰ *Id.* at R. 1.10(a).

⁵¹ See *id.* at R. 1.10(a) (referring only to Rules 1.7 or 1.9); see also *id.* at R. 1.11 cmt. 3 ("Rule 1.10 [the Rule imputing conflicts] is not applicable to the conflicts of interest addressed by this Rule [1.11].").

⁵² See, e.g., WYO. RULES OF PROF'L CONDUCT RR. 1.2(a), 1.4(b), 1.7, 1.10(b)(1).

⁵³ *Id.* at R. 1.11(e) (emphasis added). "Matter" is also defined in the commentary to Rule 1.9, the rule that generally creates duties to former clients for lawyers in the private sector. That definition, however, focuses on adversariness. The "underlying question" under that definition,

The inclusion of the language “involving a specific party” seems intended to circumscribe the Rule 1.11 definition, and to allow former and current government lawyers to be involved in situations that might appear, initially, to be too closely related to the lawyer’s previous involvement.

While specific parties seem to be a vital part of “matter,” they are not always critical. In upholding an informal admonition to a lawyer for violating Rule 1.11, the Court of Appeals for the District of Columbia had to consider whether the lawyer in question had been involved in the same “matter” while serving as a member of the U.S. Department of Justice. The attorney left the Department of Justice, entered private practice, and began representing the Libyan government in actions involving the bombing of Pan American flight 103 over Lockerbie, Scotland. The court rejected the lawyer’s argument that his involvement in the investigation had been routine and that he had not, therefore, been involved in the “matter” for purposes of Rule 1.11.⁵⁴ A “matter,” said the court, included all aspects of the bombing, as it was “a distinct historical event involving specific parties whether or not all had been identified.”⁵⁵ Quoting the District of Columbia Board of Professional Responsibility, the court said: “The ‘matter’ is not terrorism, or even Libyan terrorism; rather, [t]he core of fact at the heart of each piece of legal activity is . . . why and how Pan Am 103 blew up over Lockerbie.”⁵⁶ Further, while a government lawyer, the lawyer in question had been involved “in confidential . . . briefings which periodically included information about the progress of the criminal investigation and related diplomatic actions.”⁵⁷ For the court, the ultimate answer was whether the lawyer had “active participation in the Pan Am 103 matter.”⁵⁸ That standard of “active participation” seems to create useable and useful guidelines to use when interpreting Rule 1.11

The standard of “personally and substantially” involved in the “matter” further connotes a higher degree of involvement that is required to disqualify a private sector lawyer, and, by imputation of the conflict, his or her firm. In applying the “personally and substantially” standard, “[t]he inquiry is a practical one asking whether the two matters substantially overlap.”⁵⁹ The “substantially overlap” language seems very similar to the “substantially related” standard of Rule 1.9 (the Rule which applies to private sector lawyers).

therefore, is “whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.” *Id.* at R. 1.9 cmt. 2. Since Rule 1.11 does not consider whether the lawyer’s new client’s position is adverse to his or her former client, the definition of “matter” for Rule 1.11 is different.

⁵⁴ *In re Sofaer*, 728 A.2d 625, 627 (D.C. 1999).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 628.

⁵⁹ *Id.*

Nevertheless, the very existence of a separate rule for former and current government lawyers suggests that the “personally and substantially” involved standard of Rule 1.11 is different than the Rule 1.9 standard. That difference is two-fold. First, Rule 1.11 is to be both more stringent (no requirement of adverseness) and more liberal (requiring “personal and substantial” involvement). Second, when this standard is placed in the context of imputing conflicts, the standard for disqualifying a private sector lawyer who switches firms (Rule 1.9(b)), is more stringent than the standard for disqualification under Rule 1.11 (Rule 1.11 applies to former and current full-time government lawyers).⁶⁰ Finally, one must remember that this discussion involves two issues, issues that are not always treated the same. First, the Rules establish ethical standards, the violation of which may lead to a grievance, a finding of misconduct,⁶¹ and a sanction.⁶² Second, one party to a lawsuit may file a motion to disqualify the lawyer, the firm, or both, who represents one of the other parties. While there is considerable overlap between the two standards, they are not, as discussed below, always the same.⁶³

Generally, if one member of a firm is disqualified from representing a client, all members of the firm are too.⁶⁴ The reason for imputing disqualification to the rest of the firm is to “give[] effect to the principle of loyalty to the client.”⁶⁵ One of the basic tenets of that principle is that “a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client.”⁶⁶ When it comes to former and current government lawyers, however, the imputed disqualification principle applied to private sector lawyers does not apply with equal force and other principles override it.

Rule 1.10(a) on imputing conflicts of interest for private sector lawyers refers only to Rules 1.7 or 1.9, which apply to private sector lawyers, and not to Rule 1.11, which applies to current or former full-time government lawyers. Furthermore, paragraph (d) of Rule 1.10 expressly states: “[t]he disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.”⁶⁷

⁶⁰ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-409 (1997) (“Conflicts of Interest: Successive Government and Private Employment.”).

⁶¹ See WYO. RULES OF PROF'L CONDUCT R. 8.4 (2009) (defining “misconduct”).

⁶² A sanction may range from a private reprimand to disbarment. DISCIPLINARY CODE FOR THE WYOMING STATE BAR § 4 (2009).

⁶³ See *infra* notes 64–106 and accompanying text; see also WYO. RULES OF PROF'L CONDUCT Scope 19 (“Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.”).

⁶⁴ See WYO. RULES OF PROF'L CONDUCT RR. 1.8(k), 1.10(a), 1.18(c).

⁶⁵ *Id.* at R. 1.10 cmt. 2.

⁶⁶ *Id.*

⁶⁷ *Id.* at R. 1.10(d).

The omission of Rule 1.11 from Rule 1.10(a), the express reference in paragraph (d) to Rule 1.11, the different standards of Rule 1.11, and the commentary to Rule 1.11⁶⁸ “make it clear that the Rules treat full-time government lawyers differently when it comes to imputing conflicts of interest. In sum, when it comes to private sector lawyers, the doctrine of imputed disqualification is intended to “give[] effect to the principle of loyalty to the client.”⁶⁹ Other principles take priority, however, when it comes to government lawyers.

The critical difference is that even when a former full-time government lawyer is disqualified under Rule 1.11 because he or she “participated personally and substantially,” in a “matter,”⁷⁰ the lawyer’s new private firm (or new government firm)⁷¹ is not precluded from involvement in the matter, as it would be under Rule 1.9(b), if certain conditions are met. First, the disqualified lawyer must be “timely screened from any participation in the matter and [may not] be apportioned [any] part of the fee therefrom.”⁷² Screening is not permitted under Wyoming’s Rule 1.9(b) with respect to lawyers who switch between private firms. Under Rule 1.9(b), the new firm, not just the particular lawyer, will be disqualified if the lawyer switching firms “acquired information” protected by Rule 1.6 [the Rule which generally prohibits a lawyer from revealing “confidential information”⁷³ about a client] that is “material to the matter.”⁷⁴ Although Model Rule 1.10(a) was amended in 2009 to permit screening with respect to private sector lawyers, that amendment has not been adopted in Wyoming.

In addition to screening, “written notice [must be] promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.”⁷⁵ The phrase “to enable it [the government agency]

⁶⁸ *Id.* at R. 1.11 cmt. 3. (“Rule 1.10 [the Rule imputing conflicts] is not applicable to the conflicts of interest addressed by this Rule [1.11].”).

⁶⁹ *Id.* at R. 1.10 cmt. 2.

⁷⁰ WYO. RULES OF PROF’L CONDUCT R. 1.11(a)(2).

⁷¹ As discussed below, the Wyoming Supreme Court applies the same rule to current government lawyers who were previously in private practice, and to current government lawyers who previously worked for another government entity. *See infra* notes 77–79 and accompanying text.

⁷² WYO. RULES OF PROF’L CONDUCT R. 1.11(b)(1). “Screened” means “the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.” *Id.* at R. 1.0(j). “The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected.” *Id.* at R. 1.0 cmt. 8. Screening may include “denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.” *Id.*

⁷³ “Confidential information” means “information provided by the client or relating to the client which is not otherwise available to the public.” *Id.* at R. 1.0(b).

⁷⁴ *Id.* at R. 1.9(b)(2).

⁷⁵ *Id.* at R. 1.11(b)(2).

to ascertain compliance with the provisions of [Rule 1.11],” is to allow “the government agency [to] have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 [i.e., to determine whether the new firm has implemented and is following ‘timely screening’] and to take appropriate action if it believes the lawyer is not complying.”⁷⁶ “Appropriate action” will likely be either the filing of a grievance alleging misconduct by the former full-time government lawyer, a motion to disqualify the new firm, or both.

Although Rule 1.11(a) treats former full-time government lawyers differently than private sector lawyers with respect to most conflicts of interest, it treats all lawyers who switch firms the same in one regard: that is, regarding information. Rule 1.9(c) prohibits a lawyer from revealing or using information about a former client, except as the Rules of Professional Conduct “would permit or require.”⁷⁷ The Rule 1.9(c) standard is expressly incorporated in Rule 1.11(a),⁷⁸ so there may be times that a former full-time government lawyer may not represent a client because of the information previously obtained, even though the lawyer would not be prohibited by the “personally and substantially” involved standard of Rule 1.11(a). As with other conflicts involving former full-time government employees, this type of conflict is not imputed to the rest of the lawyers in the new firm. The firm may represent the client, against the former client who disclosed information, if the former government lawyer is “timely screened,” and “written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.”⁷⁹

Paragraph (c) of Rule 1.11 addresses another conflict of interest issue regarding government lawyers and, once again, treats them differently than lawyers in private practice. The issue involves a former government lawyer who obtained “confidential government information” while representing the government (“‘confidential government information’ means information that has been obtained under governmental authority and which . . . 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.”⁸⁰).

If a government lawyer obtained “confidential government information” while “the lawyer was a public officer or [government] employee” and “knows”⁸¹ it, the lawyer “may not represent a private client whose interests are adverse to

⁷⁶ *Id.* at R. 1.11 cmt. 8.

⁷⁷ *Id.* at R. 1.9(c).

⁷⁸ *Id.* at R. 1.11(a)(1).

⁷⁹ *Id.* at R. 1.11(b)(1), (b)(2).

⁸⁰ *Id.* at R. 1.11(c).

⁸¹ “Knows” means “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” *Id.* at R. 1.0(g).

that person in a matter⁸² in which the information could be used to the material disadvantage of that person.”⁸³ Once again, however, the disqualification of an individual lawyer is not necessarily imputed to the new firm. “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.”⁸⁴ There is no requirement that the government agency for which the lawyer formerly worked be given notice of the situation and have the opportunity to take appropriate action.

The restriction on using “confidential government information” to the “material disadvantage” of the person identified in the information is particularly important when records that identify specific individuals are involved. It will be common for both part-time and full-time government lawyers who represent organizations, such as public hospitals or schools, to have access to such information. Such access is particularly likely in Wyoming as the definition of “public records” excludes those records “privileged or confidential by law.”⁸⁵ Among those “privileged or confidential” records to which the custodian “shall deny the right of inspection”⁸⁶ are “[m]edical, psychological and sociological data on individual persons.”⁸⁷ In short, a government lawyer, either full-time or part-time, who obtains records that identify an individual or individuals (confidential government information) may not subsequently use that information after he or she is no longer a government lawyer to the “material disadvantage” of a person so identified.⁸⁸

Paragraph (d) of Rule 1.11 addresses the conflicts that may arise when a lawyer moves from private practice to work as a “public officer or employee.” Conflicts, that is, for current government lawyers. The lawyer may also have moved from one government employer to another, such as moving from a prosecutor’s office to the Public Defender’s Office, or vice versa. Once again, Rule 1.11 does not specify whether it applies to full-time or part-time government employees. Given the use of the term “public officer or employee,” it could be argued that the provision applies to full-time government employees only, as lawyers in private practice are not “employees” of a governmental entity. The real issue, however, is whether the danger to be prevented—placing too many restrictions on public employers while

⁸² The Rule 1.11 definition of matter is discussed above. *See supra* notes 38, 44, 53 and accompanying text.

⁸³ WYO. RULES OF PROF’L CONDUCT R. 1.11(c).

⁸⁴ *Id.*

⁸⁵ WYO. STAT. ANN. § 16-4-201(a)(v) (2009).

⁸⁶ *Id.* § 16-4-203(d).

⁸⁷ *Id.* § 16-4-203(d)(i).

⁸⁸ WYO. RULES OF PROF’L CONDUCT R. 1.11(c).

avoiding harming former clients of the now government lawyer—exists only with respect to full-time government lawyers, or with respect to part-time ones too.

The general standard in Rule 1.11 is that a lawyer who has moved from private practice to government practice is subject to the conflict of interest provisions of Rule 1.7 (concurrent conflicts of interest) and Rule 1.9 (conflicts involving former clients).⁸⁹ In addition to complying with Rules 1.7 and 1.9, the current government lawyer “shall not participate in a matter in which the lawyer participated personally and substantially while in private practice . . . unless the appropriate government agency makes an informed decision to allow the representation, confirmed in writing.”⁹⁰

It appears counterintuitive that a “government agency,” presumably the agency for which the lawyer now works or represents, and which is, therefore, the current client and not the lawyer’s former client, should be allowed to waive a conflict of interest. The interests of the former client are protected by Rule 1.11’s earlier inclusion of Rule 1.9, which sets out lawyers’ duties to former clients.⁹¹ Rule 1.9 would require the former client’s consent (“informed decision” is the term used in Wyoming’s Rules).⁹²

As with other parts of Rule 1.11, the disqualification of an individual lawyer because of prior involvement with private sector clients is not imputed to the rest of the firm, as it would be if the lawyer had switched private firms.⁹³ Not imputing the disqualification to the rest of the firm is consistent with the Wyoming Supreme Court’s holding that a prosecutor’s office should not be entirely disqualified from a case when a former Assistant Public Defender joined the prosecutor’s office after having represented a criminal defendant who was being prosecuted by the office his former attorney had joined.⁹⁴ The court applied the standard for

⁸⁹ *Id.* at R. 1.11(d)(1).

⁹⁰ *Id.* at R. 1.11(d)(2)(i).

⁹¹ CTR. FOR PROF’L RESPONSIBILITY, AM. BAR ASS’N, ABA ANNOTATED MODEL RULES OF PROF’L CONDUCT 1.11(d)(1) (5th ed. 2003).

⁹² *See, e.g.*, WYO. RULES OF PROF’L CONDUCT R. 1.9(a), (b)(2). “Informed decision” means “the decision by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” *Id.* at R. 1.0(f).

⁹³ Although the disqualification is imputed to the rest of a private firm under Rule 1.9(b), that disqualification may be rebutted by the new firm. *Id.* at R. 1.9 cmt. 5. Disqualifying a firm because a lawyer has joined it “depends on a situation’s particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. . . . In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.” *Id.*

⁹⁴ *Hart v. State*, 62 P.3d 566, 571 (Wyo. 2003); *see also Johnson v. State*, 61 P.3d 1234, 1243 (Wyo. 2003); *Blumhagen v. State*, 11 P.3d 889, 896–97 (Wyo. 2000).

current government lawyers who were previously in private practice, to a current government lawyer who had previously worked for another governmental firm (an issue that is not addressed by the Rules).⁹⁵ Citing then comment 4 to Rule 1.11, the court held that the same standard applied to a lawyer who switched between government employers as applied to a lawyer who switches from private to government practice.⁹⁶ Though the entire prosecutor's office was not disqualified, the court held that the individual lawyer who had switched from criminal defense to prosecution was disqualified. "There is no doubt that an attorney who has represented a defendant may not serve as his prosecutor."⁹⁷ While the Wyoming Supreme Court declined to disqualify the entire prosecutor's office, it did outline the steps that should be taken in the future to effectively screen the personally disqualified lawyer from the matter.⁹⁸

⁹⁵ *Hart*, 62 P.3d at 571. The court expressly mentioned Rule 1.11, and referred to former comment 4:

Other attorneys associated with the disqualified attorney's new employer may, however, undertake or continue representation in a matter that the transferring attorney is prohibited from being involved with, provided that "the disqualified lawyer is screened from any participation in the matter" and notice is given to the former employer.

Id. (quoting *Blumhagen*, 11 P.3d at 896 (citing WYO. RULES OF PROF'L CONDUCT R. 1.11(a))).

⁹⁶ *Id.* at 571 ("For example, when an attorney who works for a governmental agency leaves his employment and enters private practice *or takes a position with another governmental agency*, he cannot be involved in a matter that he participated in with his first employer.") (emphasis added).

⁹⁷ *Id.* (quoting *State v. Cline*, 405 A.2d 1192, 1207 (R.I. 1979)).

⁹⁸ *Id.* The Wyoming Supreme Court also said:

[W]e have distilled the following guidelines which must be followed in future cases:

1. Oral and written directions must be given to all staff members that the attorney will not participate in any matter in which the attorney participated as a public defender or criminal defense attorney. A written screening policy must be put in place to ensure this requirement is met.
2. A letter should be directed to every former client of the attorney announcing the new employment relationship. This letter may be sent to the client, care of the client's current attorney. Ideally, this letter should appear in the court record of an affected criminal case.
3. The prosecuting attorney's screening policy should be sent to every judge in the district, circuit, and/or county affected.
4. A copy of the screening policy should be placed in every active case file in which the attorney participated.
5. All office employees should be advised both orally and in writing that any violation of the screening process must be reported immediately and that inattention to the screening policy will result in discipline.
6. In a prominent location near case files, post a list of all cases from which the attorney is to be screened.

These, or comparable procedures, should remain in place until the need for them has passed.

Id. at 572.

Declining to disqualify the entire prosecutor's office is in accord with the majority view around the country. "[M]ost courts have adopted a less stringent rule [than per se disqualification of the entire office], pursuant to which the trial court evaluates the circumstances of a particular case and then determines whether disqualification of the entire office is appropriate."⁹⁹ This outlook is also in accord with the Wyoming Supreme Court's view that "a case-by-case inquiry, rather than per se disqualification, [is] appropriate for cases alleging a conflict of interest based on representation of co-defendants by separate attorneys from the State Public Defender's Office."¹⁰⁰

Rule 1.11 also limits the ability of a lawyer "currently serving as a public officer or employee"¹⁰¹ to "negotiate for private employment."¹⁰² Such a lawyer "shall not . . . 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."¹⁰³ (There is an exception for lawyers working as law clerks.)¹⁰⁴ Once again, Rule 1.11 does not specify whether it applies to full-time government lawyers, part-time government lawyers, or both. As Rule 1.11 refers expressly, however, to those lawyers seeking private employment, it seems to be designed to prevent a lawyer from taking advantage of his or her government position to gain a personal benefit. Further, a part-time government lawyer, by definition, already has private employment so there does not appear to be a reason to apply Rule 1.11 to part-time government lawyer as they are, as discussed below, already subject to regulation when seeking different employment.

A private sector lawyer who is seeking other employment is bound by the concurrent conflict provisions of Rule 1.7.¹⁰⁵ The act of seriously seeking employment could "materially limit[]"¹⁰⁶ a lawyer's representation of a client through a concurrent conflict of interest, to which a client would have to agree before the representation could continue. The restrictions in Rule 1.7 should provide ample protection for all concerned.

2. Rule 1.13—*Organization as client*

One of the more troublesome realities faced by all forms of government practice, and most forms of private practice, is that many clients today are

⁹⁹ State v. Kinkennon, 747 N.W.2d 437, 443 (Neb. 2008).

¹⁰⁰ Asch v. State, 62 P.3d 945, 953 (Wyo. 2003).

¹⁰¹ WYO. RULES OF PROF'L CONDUCT R. 1.11(d) (2009).

¹⁰² *Id.* at R. 1.11(d)(2)(ii).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ For a complete discussion of the ethical and legal issues created by private sector lawyers seeking other employment, see BURMAN, *supra* note 27, § 10.11.

¹⁰⁶ WYO. RULES OF PROF'L CONDUCT R. 1.7(a)(2).

organizations of some sort, not individuals. The difficulty is that the Wyoming Rules, and the Model Rules on which the Wyoming Rules are based, were developed, for the most part, to accommodate an individual lawyer, or a member of a small firm who represented individuals. The reality today is that many lawyers are part of large firms, whether private or governmental, and many of their clients are organizations—either private or governmental, large or small, or for profit or not-for-profit. A lawyer's duties do not change when the lawyer's client is an organization, but applying ethical norms to organizations, including the government, can be a challenge. Just identifying the client can be difficult when it is a collection of individuals, as in an organization. Applying confidentiality concepts and conflict of interest standards to organizations can be equally difficult.

By definition, every government agency is an organization (an entity) of some sort. Accordingly, the lawyers, whether full-time or part-time government lawyers, representing those entities must be aware of how their duties are applied in an organizational setting. The long and short of it is that representing governmental organizations, or any organizations for that matter, presents some additional ethical and other challenges.

Rule 1.13 is the only Rule that expressly addresses organizations as clients. It generally applies to all organizations, but does indicate that government lawyers may play a slightly different role than private sector lawyers. While the language of Rule 1.13 does not distinguish between governmental and private organizations, the commentary does.¹⁰⁷

Comment 7 is entitled "Government Agency." This comment makes several important points. First, "[t]he duty defined in [Rule 1.13] applies to governmental organizations."¹⁰⁸ Second, the comment warns that "[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules."¹⁰⁹

Third, when it comes to identifying the governmental client, "in some circumstances the client may be a specific agency, [but] it may also be a branch of government, such as the executive branch, or the government as a whole." Perhaps the best way to determine "who is the client," is for a lawyer to consider from whom he or she takes directions. An assistant attorney general for the State of Wyoming is unlikely, for example, to take directions from the Governor. Rather, an agency

¹⁰⁷ The commentary to each Rule "explains and illustrates the meaning and purpose of the Rule." *Id.* at Scope 20.

¹⁰⁸ *Id.* at R. 1.13 cmt. 7.

¹⁰⁹ *Id.*; see also *id.* at Scope 16 ("[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists.").

head or even a lower ranking official, is likely the person giving direction. That agency, therefore, and not the entire state government, is the client.¹¹⁰ By contrast, a city attorney for a small city—any city in Wyoming—generally takes direction from the City Council. The client, therefore, is the entire city.

Finally, comment 7 notes that:

[I]n a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.¹¹¹

Comment 7 appears to apply to both full-time and part-time government lawyers, as both may face the issues raised. Furthermore, misconduct by a government official can occur at any level and the evil to be avoided is the same, regardless of whether the lawyer for the government organization is a full-time or part-time government lawyer.

The Rules “presuppose a larger legal context shaping the lawyer’s role.”¹¹² Accordingly, “[u]nder various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client.”¹¹³ It is important, therefore, for government lawyers to know, and to so advise their clients when appropriate, if statutes impose additional obligations on them.¹¹⁴

C. The Purpose of Rule 1.11—Special conflicts of interest for former and current government officers and employees

The conflict of interest standards that apply to former and current government lawyers are different than those that apply to private lawyers. These different standards have been in effect for many years.

¹¹⁰ See, e.g., Ann B. Stevens, *Can the State Attorney General Represent Two Agencies Opposed in Litigation?*, 2 GEO. J. LEGAL ETHICS 757 (1989).

¹¹¹ WYO. RULES OF PROF’L CONDUCT R. 1.13 cmt. 7.

¹¹² *Id.* at Scope 15.

¹¹³ *Id.* at Scope 17.

¹¹⁴ For example, in Wyoming a county attorney “shall . . . [a]ct . . . as legal counsel for his county or counties and its officers acting in their official capacity.” WYO. STAT. ANN. § 18-3-302(a) (2009). The Board of County Commissioners is not free to hire another lawyer, even if the board wishes to do so. See *id.* § 18-3-302(c). Rather, the board may hire a different lawyer only to represent the county in a criminal or civil case or to “assist” the county attorney. *Id.*

Thirty-five years ago, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued a Formal Opinion which addressed, *inter alia*, the duties of former government lawyers.¹¹⁵ The ABA's committee concluded that "[t]here are . . . weighty policy considerations in support of the view that a special disciplinary rule relating only to former government lawyers should not broadly limit the lawyer's employment after he leaves government service."¹¹⁶ While the Disciplinary Rules have been replaced by the Rules of Professional Conduct, both in Wyoming (1986) and with the ABA (1983), the new Wyoming and ABA Model Rules are similar.¹¹⁷ Likewise, those "weighty considerations" remain (although they may be more practical than weighty) and are now contained in the commentary to Rule 1.11.

The starting point for the special conflict of interest provisions for government lawyers is the reality that "federal, state, and local governments employ significant numbers of lawyers at all levels of responsibility."¹¹⁸ Not surprisingly, those lawyers "wield significant powers that can be unfairly misused to the detriment of individual citizens."¹¹⁹ Because of that potential for misuse "there is an enhanced public interest in regulating lawyers who serve or have served, in government."¹²⁰ These competing interests, attracting and retaining good lawyers, and regulating government lawyers, give rise to the "weighty" considerations to which the ABA referred in its Formal Opinion discussed above.

On one hand, the government needs to be able to attract and retain, at least for a time, good lawyers to assist in governing; doing so is in the public interest.

The statutory restriction on a Board of County Commissioners' authority to hire a lawyer other than the County Attorney is very different than the general rule that a client may hire or fire a lawyer at any time, for any reason or for no reason. *See* *Enos v. Keating*, 271 P. 6, 11 (Wyo. 1928) ("The authorities unreservedly concede the right to the client to terminate the relation between himself and his attorney arbitrarily, at his election, with or without cause and with or without reason."); *see also* WYO. RULES OF PROF'L CONDUCT R. 1.16 cmt. 4 ("A client has a right to discharge a lawyer at any time, with or without cause . . .").

¹¹⁵ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342 (1975).

¹¹⁶ *Id.*

¹¹⁷ The applicable Disciplinary Rule (DR) 9-101(b) said: "A lawyer shall not accept private employment in a matter upon which he had substantial responsibility while he was a public employee." STEPHEN GILLERS, ROY D. SIMON, JR. & ANDREW M. PERLMAN, REGULATION OF LAWYERS: STATUTES AND STANDARDS 621 (2010). A form of the Disciplinary Rules was in effect in Wyoming until 1986.

Rule 1.11(a) as currently in effect in Wyoming and in the Model Rules says: "[A] lawyer who has formerly served as a public officer or employee of the government . . . shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially." WYO. RULES OF PROF'L CONDUCT R. 1.11(a)(2); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.11(a) (2010).

¹¹⁸ GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 15.2 (2005-I Supp.).

¹¹⁹ *Id.*

¹²⁰ *Id.*

And as the Wyoming Supreme Court has noted, “the rules recognize that attorneys change employment and, consequently, include a number of safeguards to protect the clients’ interests under such circumstances.”¹²¹

On the other hand, governmental clients, as well as nongovernmental clients who were represented by former government lawyers, are just as entitled to protection from inappropriate conflicts of interest, the revelation of confidential information, or both, as are any private clients. As currently in effect, Rule 1.11 “represents a balancing of [those] interests.”¹²² The conflict of interest standards for current and former government lawyers are, at the same time, more restrictive and less restrictive than those that apply to private lawyers.¹²³ The standards are more restrictive with respect to the disqualification of individual lawyers. They are less restrictive, however, with respect to the disqualification of the private firm that a former government lawyer joins, or the government law office that a lawyer formerly in private practice joins. This is because the imputation of otherwise disqualifying conflicts of interest is more flexible for current and former government lawyers than for lawyers in the private sector.

The rationale for the different, and ultimately more flexible, ethical standards for current and former government lawyers is that “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.”¹²⁴ While that rationale is, to an extent, rather self-serving (at least for the lawyers who wrote the Rules and those who are part of the revolving door of lawyers who go back and forth between government and private practice with changes in the party that controls government, at any level), there is at least one element of the argument that is not just self-serving. That is, since government relies so heavily on good legal representation, it is in the public interest for government to be able to attract good lawyers. The gap between the financial rewards that come with private practice and the rewards for government employment is significant and growing every day.¹²⁵ Limiting a government

¹²¹ *Hart v. State*, 62 P.3d 566, 571 (Wyo. 2003).

¹²² WYO. RULES OF PROF'L CONDUCT R. 1.11 cmt. 5.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ For example, Chief Justice John Roberts went from earning \$725,000.00 a year representing parties before the United States Supreme Court, to making less than one-third of that amount (\$212,000.00) as the Chief of the Court before which he used to practice. Ben Winograd, *Roberts's Salary: Where Does It Stack Up?*, Wall St. J. L. Blog (Mar. 17, 2007, 13:24 EST), <http://blogs.wsj.com/law/2007/03/27/robertss-salary-where-does-it-stack-up/tab/article/>.

Closer to home, the Chief Justice of the Wyoming Supreme Court receives an annual salary of \$131,500.00. WYO. STAT. ANN. § 5-1-110(a)(i) (2009). In Wyoming, as in Washington D.C., a lawyer in private practice can make substantially more than a lawyer in government practice, even as

lawyer's post-government employability by imposing imputed, stringent conflict of interest disqualification standards on firms which would otherwise hire former government lawyers may be counterproductive. Talented lawyers who might wish to spend part of their careers working for the government will be less likely to do so if their post-government employment prospects are diminished by firms' reluctance to hire them if doing so will result in the firm having to forgo significant representation opportunities.¹²⁶ The compromise provided in Rule 1.11 is to disqualify the former government lawyer, but not the lawyer's new firm, so long as that disqualified lawyer is "timely screened" from the matter in which the lawyer participated "personally and substantially" while serving as a government lawyer.

The argument that screening will work when the lawyer involved is or was a government lawyer, and that screening will not work when the lawyer is in private practice, is debatable at best, and nothing more than a self-serving excuse at worst. Whatever the merits of the argument, the reality may mandate a different, more flexible rule. To "woodenly apply[] the automatic imputation rule," according to one authority, "would be impractical and against the public interest."¹²⁷ This is likely true for two reasons. First, "[a] government law department . . . cannot simply forgo litigating certain cases."¹²⁸ Second, "adopting private sector rules without modification would entail public costs [such as hiring special counsel] that cannot be ignored."¹²⁹

D. Statutory Duties

Not surprisingly, different statutes apply to different governmental entities. Accordingly, the duties of the lawyers who represent them vary too. While it would not be practicable to address all governmental entities and the duties of their lawyers who represent them, this article addresses some of the more common situations involving the representation of governmental entities.

1. The Wyoming Attorney General

By statute, the Wyoming Attorney General has several responsibilities. First, he or she is to "[p]rosecute and defend all suits instituted by or against the state of Wyoming, the prosecution and defense of which is not otherwise provided for by

the Chief Justice of the Supreme Court. The starting salary for a few Wyoming lawyers is reportedly \$100,000.00 or more. *See* 2009 Bar Member Survey, Question 17, WYO. LAW., June 2009, insert at 7. It is a safe bet that the partners at these firms make significantly more.

¹²⁶ *See, e.g.*, HAZARD & HODES, *supra* note 118, § 15.6 ("A firm seeking to hire a former government lawyer will . . . pay some price [the disqualification of the individual former government lawyer] in that it will not be able to utilize the lawyer's talents in *every* matter that it might desire to, but the price will not be so steep as to make the hire untenable.").

¹²⁷ *Id.* § 15.3.

¹²⁸ *Id.*

¹²⁹ *Id.*

law.”¹³⁰ Second, the Attorney General is to “[d]efend suits brought against state officers in their official relations.”¹³¹ Third, the Attorney General is to “[b]e the legal adviser of all elective and appointive state officers and of the county and district attorneys of the state.”¹³² Fourth, “[w]hen requested, [the Attorney General shall] give written opinions upon questions submitted to him by elective and appointive state officers.”¹³³ Fifth, the Attorney General is to “[a]pprove or disapprove any contract submitted to him for review.”¹³⁴ Finally, the Attorney General is to be involved in rulemaking by state agencies. As part of that involvement, notice of proposed rulemaking is to be given to the Attorney General.¹³⁵ In addition to receiving notice of proposed rulemaking, the Attorney General “shall furnish advice and assistance to all state agencies in the preparation of their regulations and in revising, codifying, and editing existing or new regulations.”¹³⁶

2. *District and County Attorneys*

In Wyoming, the Office of the District Attorney may exist in judicial districts where one county in the district has a population of over sixty thousand.¹³⁷ In the remaining districts, the county commissioners may decide to create the Office of the District Attorney.¹³⁸ District attorneys are elected for four year terms.¹³⁹

Before taking office, a district attorney “shall have been a licensed attorney for at least four (4) years and a member in good standing of the Wyoming state bar.”¹⁴⁰ As a member of the Wyoming State Bar, he or she must abide by the Wyoming Rules of Professional Conduct.¹⁴¹

A Wyoming district attorney is required to devote “full time” to the job.¹⁴² He or she may not, therefore, be a part-time government lawyer, as may a county attorney. A district attorney also falls within the plain meaning of Rule 1.11 if he or she ever ceases to be a full-time government lawyer. A district attorney may hire assistant district attorneys or, in circumstances that do not currently

¹³⁰ WYO. STAT. ANN. § 9-1-603(a)(i) (2009).

¹³¹ *Id.* § 9-1-603(a)(iii).

¹³² *Id.* § 9-1-603(a)(v).

¹³³ *Id.* § 9-1-603(a)(vi).

¹³⁴ *Id.* § 9-1-603(a)(viii).

¹³⁵ WYO. STAT. ANN. § 16-3-103(a)(i) (2009).

¹³⁶ *Id.* § 16-3-104(d).

¹³⁷ WYO. STAT. ANN. § 9-1-801.

¹³⁸ *Id.*

¹³⁹ *Id.* § 9-1-802(a).

¹⁴⁰ *Id.* § 9-1-802(b).

¹⁴¹ See WYO. RULES OF PROF'L CONDUCT R. 8.5 (2009).

¹⁴² WYO. STAT. ANN. § 9-1-802(c).

exist in Wyoming, “part-time” assistant district attorneys to assist in his or her duties.¹⁴³ Naturally, part-time district attorneys would be the quintessential part-time governmental lawyers—combining representation of the government as prosecutors with private practice.

The authority and responsibilities of district attorneys are set out by statute. The district attorney has “exclusive jurisdiction”¹⁴⁴ to: (1) serve as “prosecutor for the state in all felony, misdemeanor and juvenile court proceedings”;¹⁴⁵ (2) “[d]efend against all petitions for writs of habeas corpus filed in his district by any person”;¹⁴⁶ (3) upon request, assist the Attorney General with appeals;¹⁴⁷ (4) handle “preliminary examination[s]” of persons charged with crimes;¹⁴⁸ (5) appear at inquests called by the coroner;¹⁴⁹ and (6) appear at “all sessions of any grand jury.”¹⁵⁰

If a judicial district does not have a district attorney, each county will elect a “county and prosecuting attorney.”¹⁵¹ That person will serve both as the prosecutor for the county and the attorney for civil matters involving the county. As noted earlier, the county attorney may be full-time or part-time.¹⁵²

The authority and responsibilities of county attorneys are set forth in Article 3 of Title 18 of the Wyoming Statutes. Not surprisingly, the county attorney “at the time of his nomination and election and during his term of office, shall be a member of the bar of this state.”¹⁵³ He or she is, therefore, subject to the Wyoming Rules of Professional Conduct.¹⁵⁴ And while the county attorney is an independently elected official, “[t]he county commissioners may remove the county attorney for cause.”¹⁵⁵

Once in office, the county attorney has myriad responsibilities, including, to: (1) “[a]ct in all courts in the state as legal counsel for his county . . . and its officers acting in their official capacity and prosecute or defend all suits instituted

¹⁴³ *Id.* § 9-1-804(b).

¹⁴⁴ *Id.* § 9-1-804(a).

¹⁴⁵ *Id.* § 9-1-804(a)(i).

¹⁴⁶ *Id.* § 9-1-804(a)(ii).

¹⁴⁷ *Id.* § 9-1-804(a)(iii).

¹⁴⁸ *Id.* § 9-1-804(a)(iv).

¹⁴⁹ *Id.* § 9-1-804(a)(v).

¹⁵⁰ *Id.* § 9-1-804(a)(vi).

¹⁵¹ WYO. STAT. ANN. § 18-3-301(a) (2009).

¹⁵² See *supra* notes 7–8 and accompanying text.

¹⁵³ WYO. STAT. ANN. § 18-3-301(a).

¹⁵⁴ See WYO. RULES OF PROF'L CONDUCT R. 8.5(a) (2009).

¹⁵⁵ WYO. STAT. ANN. § 18-3-301(a).

by or against his county or counties or its officers”;¹⁵⁶ (2) “[g]ive his opinion in writing upon the request of any county officer of his county”;¹⁵⁷ (3) “[e]xamine the bonds offered by every county officer”;¹⁵⁸ and (4) “have the jurisdiction, responsibilities, and duties of the district attorney [those responsibilities are described above; essentially a county attorney is the prosecutor for when there is no district attorney].”¹⁵⁹

3. *City and Town Attorneys*¹⁶⁰

Unlike district or county attorneys, whose duties are spelled out in statute, attorneys for cities or towns have little statutory guidance about how to play their roles. While municipal judges are authorized by statute,¹⁶¹ the statutes do not authorize city or town attorneys to appear before them or to advise the governing body of the city or town.

Not only do municipalities need lawyers to represent them in municipal courts, municipalities face their own legal issues. Typically, municipalities are employers, real and personal property owners, financiers, landlords, or tenants, and they may operate utilities, furnish water, and collect taxes, fees, or both. In short, it is hard to imagine a legal issue that a municipality will not encounter at some time.

Since the statutes are silent, but lawyers for municipalities will nevertheless have many legal tasks to perform for their clients, it becomes incumbent on the lawyers to specify their duties and responsibilities in their employment agreements with municipalities, just as lawyers do with other clients.¹⁶²

The only Rule that will be of much help to a lawyer for a municipality is Rule 1.13, the Rule that applies to organizations as clients. In particular, comment 7

¹⁵⁶ *Id.* § 18-3-302(a)(i) (emphasis added).

¹⁵⁷ *Id.* § 18-3-302(a)(ii).

¹⁵⁸ *Id.* § 18-3-302(a)(iii).

¹⁵⁹ *Id.* § 18-3-302(b).

¹⁶⁰ The author thanks Peggy Trent for visiting with him about the duties and responsibilities of city attorneys. Ms. Trent is currently in private practice at Trent & Wilkerson Law Office, L.L.C., and her practice includes working as the City Attorney for Douglas, Wyoming. She is, therefore, a part-time government lawyer. She was previously a part-time government lawyer for the City of Laramie, Wyoming and, later, a full-time government lawyer for the City of Laramie.

¹⁶¹ WYO. STAT. ANN. §§ 5-6-101 to -304 (2009).

¹⁶² A lawyer is required to communicate to the client about the scope of the representation, the fee to be charged the client, and the expenses for which the client will be held responsible. WYO. RULES OF PROF'L CONDUCT R. 1.5(b) (2009). That communication should “preferably” be in writing, and should be made before or within a “reasonable time” after the representation begins. *Id.* Only contingent fee agreements are required to be in writing. *Id.* at R. 1.5(c); see also RULES GOVERNING CONTINGENT FEES FOR MEMBERS OF THE WYOMING STATE BAR R. 4 (2009).

to Rule 1.13 discusses governmental organizations and is worth reviewing. In addition, the general issues that apply to representing organizations will apply with respect to the ethical duty of confidentiality, the applicability of the attorney–client privilege, attorneys’ whistle-blowing obligations, and unique conflict of interest issues.¹⁶³

4. *School Board Attorneys*¹⁶⁴

Lawyers for school boards in Wyoming have little statutory guidance. While the statutes provide considerable detail about the powers of school boards,¹⁶⁵ the only “guidance” given to lawyers is that school boards are authorized to “[e]mploy legal counsel and bear the cost of litigation.”¹⁶⁶

School districts, of course, face many legal issues, ranging from construction contracts, to personnel issues, to student issues, to being sued. All require legal representation and most school boards hire private firms to represent them. While those lawyers are “part-time” government lawyers, they often have access to “confidential government information,” as that term is defined in Rule 1.11. In particular, knowing confidential information involving specific employees or students will often be a necessary part of representing a school district.

Given the broad authority conferred on school boards to “employ counsel,” and the general lack of statutory guidance for the lawyers who represent them, it becomes incumbent on the lawyers to specify their duties and responsibilities in their employment agreements with school boards, just as lawyers do with other clients¹⁶⁷ (the agreement with a school board, or any governmental entity, may be a Request for Proposals (RFP) and the firm’s response to the RFP).

The only Rule that will be of much help to school board attorneys is Rule 1.13, the rule that applies to organizations as clients. In particular, comment 7 to

¹⁶³ For a complete discussion of representing organizations, see BURMAN, *supra* note 27, at ch. 17.

¹⁶⁴ The author thanks Scott Kolpitcke, a partner with the firm of Copenhaver, Kath, Kitchen & Kolpitcke, L.L.C. in Powell, Wyoming for visiting with him about the duties and responsibilities of lawyers who represent school boards. Copenhaver, Kath, Kitchen & Kolpitcke, L.L.C. represents many school districts throughout Wyoming. The lawyers in the firm are, therefore, part-time government lawyers.

¹⁶⁵ WYO. STAT. ANN. § 21-3-111 (listing the powers of school boards).

¹⁶⁶ *Id.* § 21-3-111(a)(iv).

¹⁶⁷ A lawyer is required to communicate to the client about the scope of the representation, the fee to be charged the client, and the expenses for which the client will be held responsible. WYO. RULES OF PROF’L CONDUCT R. 1.5(b). That communication should “preferably” be in writing, and should be made before or within a “reasonable time” after the representation begins. *Id.* Only contingent fee agreements are required to be in writing. *Id.* at R. 1.5(c); see also RULES GOVERNING CONTINGENT FEES FOR MEMBERS OF THE WYOMING STATE BAR R. 4.

Rule 1.13 discusses governmental organizations, and is worth reviewing. In addition, the general issues that apply to representing organizations will apply with respect to the ethical duty of confidentiality, the applicability of the attorney–client privilege, attorneys’ whistle-blowing obligations, and unique conflict of interest issues.¹⁶⁸

5. *County Hospital, County Memorial Hospital, or Special Hospital District Attorneys*¹⁶⁹

Most hospitals in Wyoming are public—either county hospitals, county memorial hospitals, or hospitals in special hospital districts (a “rural health care district” may also be established). The lawyers who represent such hospitals are generally part-time government lawyers—lawyers in private practice for whom the hospital or hospital district is one of the firm’s clients. Since county hospitals, county memorial hospitals, and hospitals in special hospital districts exist by virtue of statutes, it is important to know what those statutes say.

County hospitals and county memorial hospitals are governed by Chapter 8 of Title 18 of the Wyoming statutes (Title 18 is entitled “Counties” and sets forth provisions regarding counties).

The statute defines a “county hospital” and a “county memorial hospital” as “any institution, place, building or agency in which any accommodation is maintained, furnished or offered for the hospitalization of the sick, injured.”¹⁷⁰ It is to be governed by a “board of trustees” appointed by the county commissioners.¹⁷¹ Upon appointment and compliance with the statute, the board of trustees will be “a body corporate with power to sue and be sued.”¹⁷² Among the board’s powers are the “erection, management and control” of a hospital.¹⁷³

As a “body corporate” governed by a “board of trustees,” a county hospital or county memorial hospital qualifies as a governmental organization. The duties of a lawyer who represents an organization, whether public or private, are, in some respects, very different than the duties of a lawyer who represents individuals.¹⁷⁴

¹⁶⁸ For a complete discussion of representing organizations, see BURMAN, *supra* note 27, at ch. 17.

¹⁶⁹ This section is based on Burman, *supra* note 13.

¹⁷⁰ WYO. STAT. ANN. § 18-8-101(a)(i).

¹⁷¹ *Id.* § 18-8-104(a).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ For a complete discussion of representing organizations, see BURMAN, *supra* note 27, at ch. 17.

Chapter 2 of Title 35 allows for the creation of “special hospital districts”¹⁷⁵ and “special rural health care districts.”¹⁷⁶ Either a “special hospital district”¹⁷⁷ or a “special rural health care district”¹⁷⁸ is a “body corporate,” governed by an elected “board of trustees.”¹⁷⁹ Once again, either a “special hospital district” or a “special rural health care district” is a governmental organization, and the lawyers who represent them need to be familiar with the standards for representing organizations.¹⁸⁰

E. Wyoming Supreme Court

Like the Wyoming Rules, the Wyoming Supreme Court has generally held government and private sector lawyers to the same standards. However, there are some important differences. When it comes to conflicts of interest, in particular, the court has applied different standards when determining whether to disqualify a government lawyer or a private lawyer (focusing on whether to impute conflicts of a disqualified lawyer to the “firm”). Thus, it is important for lawyers, whether full-time government lawyers, part-time government lawyers, or lawyers who work exclusively with private clients, to be aware of the differences, as effectively two standards exist in Wyoming due to these differences. One standard is for disqualifying government lawyers. The other is for disqualifying private lawyers. And neither is completely consistent with the position of the Rules.

1. The Ethical Standards Regarding Conflicts of Interest

This article has discussed in detail the ethical standards that apply to conflicts of interest involving private sector and government lawyers. In a nutshell, the conflicts of interest of private lawyers are governed by Rules 1.7 and 1.8 (current clients), Rule 1.9 (former clients), Rules 1.8(k) and 1.10 (imputing both current and former client conflicts of interest), and Rule 1.18(c) (former prospective clients, including imputed conflicts).

Rule 1.9 codifies a lawyer’s ethical duties to former clients. Paragraph (a) prohibits a lawyer from switching sides. A lawyer may not, under Rule 1.9, represent a new client who has “materially adverse” interests to one of the lawyer’s

¹⁷⁵ WYO. STAT. ANN. § 35-2-401(d) (2009).

¹⁷⁶ *Id.* § 35-2-701(e).

¹⁷⁷ *Id.* § 35-2-401(d).

¹⁷⁸ *Id.* § 35-2-701(e).

¹⁷⁹ *See id.* § 35-2-404 (regarding election of trustees to govern “special hospital districts”); *id.* § 35-2-703 (regarding election of and powers given to governing boards of “special rural health care districts”).

¹⁸⁰ For a complete discussion of representing organizations, see BURMAN, *supra* note 27, at ch. 17.

former clients in “the same or a substantially related matter” in which the lawyer previously represented the former client.¹⁸¹ By virtue of Rule 1.10(a), the individual lawyer’s disqualification is imputed to all other lawyers in the lawyer’s firm.¹⁸² The Rules do not permit that imputed conflict to be rebutted through “screening,” only through the “informed consent” of the former client.¹⁸³ In short, the Rules presume that the lawyer would obtain confidential information from the former client, and that he or she would use that information to the disadvantage of the former client, and neither presumption may be rebutted.

Paragraph (b) limits a lawyer’s ability to switch firms. A lawyer who joins a new firm may not represent a client if: (1) the firm with which the lawyer was formerly associated represents a client in “the same or a substantially related matter”; (2) the interests of the new client are “materially adverse” to the interests of the lawyer’s former firm’s client; (3) the lawyer obtained confidential information about the former firm’s client; and (4) the confidential information is “material” to the matter in dispute.¹⁸⁴ As with conflicts caused by switching sides, conflicts resulting from a lawyer’s switching firms are imputed to the rest of the new firm.¹⁸⁵

Essentially, the Rules presume that a lawyer who switches firms acquired confidential, material information while the lawyer was associated with the previous firm. This type of presumption, however, may be rebutted if the new firm can prove that the lawyer who switched firms did not have confidential information which was material.¹⁸⁶

If the presumption that the lawyer acquired confidential, material information arises, a second presumption arises: that is, the lawyer who switched firms and acquired confidential, material information will automatically share it with the new firm. That presumption may not be rebutted. Thus, the disqualification of the lawyer who switched firms is imputed to the rest of the new firm.¹⁸⁷

The conflicts of interest of current and former government lawyers are governed by different standards contained in a different Rule: Rule 1.11. As discussed in detail above, the main difference between private sector and government lawyer conflicts of interest is that the former are imputed to the disqualified lawyer’s firm, while the latter may not be.

¹⁸¹ WYO. RULES OF PROF’L CONDUCT R. 1.9(a) (2009).

¹⁸² *Id.* at R. 1.10(a).

¹⁸³ *Id.* at R. 1.9(a).

¹⁸⁴ *Id.* at R. 1.9(b).

¹⁸⁵ *Id.* at R. 1.10(a).

¹⁸⁶ *Id.* at R. 1.9 cmt. 6.

¹⁸⁷ *Id.* at R. 1.10(a).

Whether the lawyer is a private lawyer or a government lawyer, the effect of a violation of the Rules is, at least potentially, the filing of a grievance alleging misconduct by the lawyer. If the lawyer is found to have committed misconduct,¹⁸⁸ the lawyer may be sanctioned.¹⁸⁹

The most common result of a conflict of interest, however, is not the filing of a grievance followed by a finding of misconduct and the imposition of a sanction. Rather, one party to a lawsuit (usually a former client) moves to have a lawyer, and the lawyer's firm, disqualified from representing a party to the suit. And while the Wyoming Supreme Court has looked to the Rules, especially Rule 1.9 (former client conflicts) and Rule 1.11 (government lawyer conflicts of interest) when reviewing appeals involving motions to disqualify, the court has adopted somewhat different standards for motions to disqualify than the standards in the Rules.

2. *Disqualification of Private Sector Lawyers Because of a Conflict of Interest*

In *Carlson v. Langdon*,¹⁹⁰ the defendant, being sued by a bank, moved to disqualify the bank's lawyer on the basis that the lawyer had previously represented the defendant in a "substantially related"¹⁹¹ matter. After the trial court denied the motion, the Wyoming Supreme Court granted a writ of certiorari to hear an interlocutory appeal on the issue. The court reversed the trial court's ruling, holding that the trial court should have granted the motion.

The Wyoming Supreme Court relied heavily on Rule 1.9 (the Rule that governs conflicts of interest involving former clients of private lawyers) in its opinion. "The interest served by Rule 1.9," according to the *Carlson* court, "is the protection of confidentiality" of information conveyed from the former client to his or her lawyer.¹⁹² Accordingly, it is not necessary for the former client to show that he or she communicated confidential information to the attorney. Instead, the court said, "the correct interpretation is that the communication is presumed once a showing is made that the matter in which the attorney formerly provided representation is substantially related to matters in the pending actions."¹⁹³ Although the "cases are divided on whether that presumption . . . is

¹⁸⁸ See *id.* at R. 8.4 (defining "misconduct").

¹⁸⁹ Sanctions in Wyoming range from a private admonition to disbarment. DISCIPLINARY CODE FOR THE WYOMING STATE BAR § 4 (2009).

¹⁹⁰ 751 P.2d 344 (Wyo. 1988).

¹⁹¹ "Substantially related" is the term used in Rule 1.9 of the WYOMING RULES OF PROFESSIONAL CONDUCT.

¹⁹² *Carlson*, 751 P.2d at 348.

¹⁹³ *Id.*

rebuttable, . . . [t]he majority rule is that the presumption of disclosure is not rebuttable when the interests of the previous client are adverse to a client whom the attorney now is representing.”¹⁹⁴ Accordingly, said the court, “[w]e adopt the rule of irrebuttable presumption with respect to the individual attorney.”¹⁹⁵

The limitation to an “individual attorney” is important, as *Carlson v. Langdon* involved a lawyer in solo practice. The lawyer, described in the *Carlson* opinion as “A.B.,” was not associated with any other lawyers in the practice of law. The Wyoming Supreme Court did not, therefore, need to consider whether the disqualification of A.B. should have been imputed to the rest of the firm; there were no other lawyers associated with A.B. Although the court did not need to address what it referred to as a “second-stage” presumption (which Rule 1.9, through the imputation language of Rule 1.10(a), does), the court chose to address that issue anyway.¹⁹⁶

Departing from the Rules, the court said “we would not adopt a second-stage irrebuttable presumption in cases involving imputed knowledge.”¹⁹⁷ As a result, lawyers in Wyoming now confront two different standards—one from the Rules and the other from the Wyoming Supreme Court—to be used in determining whether to disqualify a lawyer or law firm. The somewhat bizarre result is that a lawyer may commit misconduct and be disqualified under the Rules because of a conflict of interest, and the disqualified lawyer’s actions will be imputed to the rest of the firm (and violating any of the rules is misconduct),¹⁹⁸ while acting in accordance with a court order, i.e., by remaining in a case after a court denies a motion to disqualify a firm because of the imputed disqualification language of Rule 1.10(a). While the Wyoming Supreme Court’s opinion in *Carlson v. Langdon* does not say that the disqualified lawyer should be “screened,” the court’s later decisions suggest that screening would be required.¹⁹⁹

3. *Disqualification of Government Lawyers*

The difference which is most important for government lawyers is found in the Wyoming Supreme Court’s opinion in *State v. Asch*.²⁰⁰ While *Asch* was a criminal case, its analysis of how conflicts of interest should be addressed in

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 349.

¹⁹⁶ *Id.* at 348–49.

¹⁹⁷ *Id.* at 349.

¹⁹⁸ WYO. RULES OF PROF’L CONDUCT R. 8.4(a) (2009) (“It is professional misconduct for a lawyer to . . . violate . . . the Rules of Professional Conduct.”).

¹⁹⁹ See, e.g., *Hart v. State*, 62 P.3d 566 (Wyo. 2003); *supra* notes 93–98 and accompanying text.

²⁰⁰ 62 P.3d 945 (Wyo. 2003). The Wyoming Supreme Court has also established a more flexible conflict of interest standard for full-time government lawyers who switch sides, e.g., from

the context of full-time government lawyers who work for a single entity (the Wyoming Public Defender's Office, in that case) is relevant to how conflicts might be addressed when the lawyers involved are full-time government lawyers.

The primary issue in *Asch* was whether it was permissible for two lawyers from the Casper office of the Wyoming State Public Defender to represent, even briefly, two individuals (one of whom was David Asch) who were charged with (different) crimes arising out of the same set of facts.²⁰¹ One was appointed counsel from the Casper Office of the Wyoming Public Defender. The other, Asch, was appointed a lawyer who was not part of that office, but who was on contract with the Public Defender's Office.

For whatever reason, the second lawyer was not able to appear at Asch's initial hearing, in county (now circuit) court. In her stead, another lawyer from the Casper Office of the Wyoming Public Defender appeared on behalf of Asch. Since the lawyer who appeared on behalf of Asch at the initial appearance was "associated in" the practice of law with the lawyer for the other person charged with a crime arising out of the same traffic stop, the question became whether an improper conflict of interest had arisen. The reason for the question is that the conflicts of one lawyer are generally imputed²⁰² to the rest of the firm²⁰³ and the Wyoming Supreme Court has held that allowing a lawyer to represent multiple defendants in a criminal case is reversible error.²⁰⁴

In *Asch*, the court concluded that although the Office of the Wyoming Public Defender is a "firm" within the meaning of the conflict of interest rules,²⁰⁵ those

the defense to the prosecution of a criminal defendant. See *Hart*, 62 P.3d at 573; *Johnson v. State*, 61 P.3d 1234 (Wyo. 2003).

²⁰¹ *Hart*, 62 P.3d at 571. This, and the following paragraph, are based on *Hart*, 62 P.3d at 571–74.

²⁰² WYO. RULES OF PROF'L CONDUCT R. 1.10(a) (2003). The Rule in effect now is substantially similar. The difference is that the current rule contains the following phrase: "unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." WYO. RULES OF PROF'L CONDUCT R. 1.10(a) (2009).

²⁰³ A "firm" was previously defined as "a lawyer or lawyers in a private firm, the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10." WYO. RULES OF PROF'L CONDUCT R. 1.0(c) (2003). The current definition is: "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." WYO. RULES OF PROF'L CONDUCT R. 1.0(d) (2009). Much of the comment to Rule 1.10, to which the old Terminology section referred, is now found in Comment 2 to Rule 1.0.

²⁰⁴ *Shongutsie v. State*, 827 P.2d 361, 366–67 (Wyo. 1992), *receded from on other grounds*, *Mogard v. City of Laramie*, 32 P.3d 313, 318 (Wyo. 2001).

²⁰⁵ *Asch*, 62 P.3d at 952 n.3.

rules should be applied on a case-by-case basis and should not result in per se disqualification of the State Public Defender's Office.²⁰⁶

It seems reasonably likely that the court would use the same standard with respect to other government "firms," such as the Attorney General's Office. As those firms will be involved in representing governmental entities, the more flexible standard for conflicts of interest is likely to be applicable.

4. *Constitutional Overtones to Conflicts of Interest in Criminal Cases*

In considering criminal cases, the right to counsel—guaranteed by the Sixth Amendment to the U.S. Constitution and Article One, Section Ten of the Wyoming Constitution—also become involved as both the United States Supreme Court²⁰⁷ and the Wyoming Supreme Court²⁰⁸ have held that the right to effective assistance of counsel may include the right to representation by a lawyer who does not have an inappropriate conflict of interest. And while both the United States Supreme Court and the Wyoming Supreme Court have considered the issue of joint representation, they have come to different results.

As interpreted by the United States Supreme Court, the Sixth Amendment does not necessarily include the right to representation by a lawyer who does not have a potential conflict because he or she represents more than one defendant. The Court has adopted a bifurcated test for use in evaluating Sixth Amendment challenges based on alleged conflicts of interest.

A common strategy used in criminal cases is for the prosecutor to try to turn one defendant against the other(s) when there is more than one defendant in a case. In such circumstances, it is obviously not possible for one lawyer to

²⁰⁶ *Id.* at 953.

²⁰⁷ *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). Joint representation does not necessarily violate the Sixth Amendment. "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.*; see also FED. R. CRIM. P. 44(c)(2) ("The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.").

²⁰⁸ *Shongutsie*, 827 P.2d at 368 ("[P]rejudice will be presumed in all instances of multiple representation of criminal defendants and, in the absence of an appropriate waiver, multiple representation will constitute reversible error."), *receded from by Mogard*, 32 P.3d at 318; see also WYO. R. CRIM. P. 44(c) ("Whenever two or more defendants have been charged with offenses arising from the same or related transactions and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall order separate representation.").

represent persons with such significantly divergent interests. As a result, “[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.”²⁰⁹ Avoiding joint representation is not just a good idea, it may be constitutionally required, at least in Wyoming, unless the client’s consent to the conflict is given on the record after the court has advised the client of his or her right to conflict-free counsel.²¹⁰

II. PART-TIME GOVERNMENT LAWYERS— LAWYERS IN PRIVATE PRACTICE THAT REPRESENT GOVERNMENTAL ENTITIES

As noted at the outset of this article,²¹¹ many, if not most, lawyers who represent governmental entities in a rural area, do so as part of their private practice with private firms. The governmental entity represented by the firm is just one of the firm’s clients. That governmental client may be billed by any of the methods that are permissible for lawyers and private clients.²¹²

By definition, every governmental entity is an “organization” under the Rules.²¹³ As with a lawyer for any organization, a lawyer who represents a governmental entity, either as a full-time or part-time lawyer, faces special challenges in applying confidentiality concepts (both the ethical duty of confidentiality and the applicability of the attorney–client privilege to organizations), in knowing when and how to “blow the whistle” on wrongdoing by a constituent²¹⁴ of an organization, and in detecting and resolving conflicts of interest.²¹⁵

Perhaps the biggest ethical challenge for part-time government lawyers is whether to follow the ethical standards that apply to private attorneys, those that apply to government lawyers, or some combination of those two sets of standards. As discussed in the following section, the safest course is to follow the rules that apply to private lawyers, with one exception, when the standard that applies to full-time government lawyers should apply.

²⁰⁹ WYO. RULES OF PROF’L CONDUCT R. 1.7 cmt. 23 (2009) (cross-referencing WYO. R. CRIM. P. 44(c)).

²¹⁰ WYO. R. CRIM. P. 44(c).

²¹¹ See *supra* notes 6–10 and accompanying text.

²¹² For a complete discussion of billing clients, see BURMAN, *supra* note 27, at ch. 5.5.

²¹³ See WYO. RULES OF PROF’L CONDUCT R. 1.13 cmt. 7 (“The duty defined in this Rule applies to governmental organizations.”).

²¹⁴ “Constituent” is the term used in the Rules. It refers to an organization’s “officers, directors, employees, shareholders and other constituents.” *Id.* at R. 1.13 cmt. 1. “Other constituents’ as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.” *Id.* at R. 1.13 cmt. 2.

²¹⁵ For a complete discussion of a lawyer’s duties when representing an organization, see BURMAN, *supra* note 27, at ch. 17.

III. ETHICAL CONSIDERATION FOR PART-TIME GOVERNMENT LAWYERS

One of the sections of this article is a discussion of why different standards should be applied to full-time government lawyers.²¹⁶ In particular, the issue is why conflicts of interest that disqualify an individual lawyer should not be imputed to the rest of that lawyer's firm, as is done with private lawyers.

The only reasons that make sense and do not appear to be simply self-serving are that governmental entities rely heavily on lawyers and governmental entities sometimes have to participate in legal matters, even if they do not want to. Accordingly, governmental entities need to be able to attract and retain, at least for a time, good lawyers. As the financial rewards are often insufficient to attract the caliber of lawyers the government needs, there is merit in not hamstringing lawyers who are moving to or from government. There are, of course, other attractions to government work; as a young lawyer, I thoroughly enjoyed receiving a regular paycheck, having benefits, playing a role in policymaking, etc., all of which came with being a full-time government lawyer.

As noted earlier, disqualifying an individual lawyer who was previously a government lawyer but not disqualifying the lawyer's firm makes the firm pay a price, the loss of the disqualified lawyer's services for a particular case, but not too high a price, disqualification of the entire firm.²¹⁷

There is one restriction on former full-time government lawyers that should be applied to former part-time ones, as well. That is, the restriction on using "confidential government information" as that term is defined in Rule 1.11.²¹⁸

The restriction against using "confidential government information" to the "material disadvantage" of the person identified in the information is particularly important when records identifying specific individuals are involved. Such records are likely to exist and be available to the lawyers for governmental entities such as state and local health departments, school districts and any other educational institutions (most of which are public, at least in Wyoming), hospitals and hospital districts (most of which are public), and public employers, which will include municipalities, school districts, hospital districts, and just about any other governmental entity.

²¹⁶ See *supra* Part I.C, notes 117–31 and accompanying text.

²¹⁷ See *supra* note 126 and accompanying text.

²¹⁸ WYO. RULES OF PROF'L CONDUCT R. 1.11(c) ("[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.").

The reason that the restriction should apply to both full-time and part-time government lawyers is that the danger to be avoided—using “confidential government information” to the “material disadvantage” of a person or persons identified in the records—exists whenever a lawyer has access to such information, regardless of whether the lawyer is a full-time or a part-time government lawyer. And given the reality that many lawyers who represent government entities, such as hospitals or schools will encounter confidential information, it is critical that the prohibition be applied to any lawyer with access to such confidential information. The question, in other words, should be whether the lawyer had access to and acquired “confidential government information,” not whether the lawyer was a full-time government lawyer or a member of a private firm that represents or represented a governmental entity.

The more difficult question is whether a former full-time or part-time government lawyer’s individual disqualification should be imputed to the new firm where the lawyer now works. Under Rule 1.11, the disqualification of a former full-time government lawyer is not imputed to the new firm. By contrast, the disqualification of a private lawyer under Rule 1.9(c) (which generally prohibits a lawyer from using or revealing information relating to the representation) is usually imputed to the rest of the firm.²¹⁹

It is hard to imagine “confidential government information” that is not also “confidential information” as that term is defined in the Rules.²²⁰ Such information, therefore, is protected with respect to former clients by Rule 1.9(c) and may be used or revealed only under carefully circumscribed circumstances.²²¹ As noted earlier, any conflict resulting from Rule 1.9(c) is imputed to the lawyer’s new firm. That should remain true if the lawyer was a part-time government lawyer who has ceased to represent a governmental entity, either because the lawyer left the firm or the firm stopped representing the entity.

Disqualification should be imputed because the primary reason to not impute conflicts regarding former government lawyers (the government needs to be able to attract and retain talented lawyer) simply does not apply when a part-time government lawyer stops representing the government. He or she has either chosen to move to a different employer, or the firm has stopped representing the

²¹⁹ Compare *id.* at R. 1.10(d) (“The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.”), with *id.* at R. 1.10(a) (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . .”).

²²⁰ *Id.* at R. 1.0(b) (“‘Confidential information’ [is] information provided by the client or relating to the client which is not otherwise available to the public.”).

²²¹ See *id.* at R. 1.9(c).

government. In either event, there is no reason not to give the former client, the governmental entity and the persons identified in the records, the full measure of protection that comes with imputing disqualifications to the firm.²²²

IV. TIME FOR A CHANGE?

As described above, lawyers in Wyoming face two different conflict of interest standards: one under the Rules, and the other when a court is determining whether to disqualify a firm from representing a party in a case.²²³ As a result, there are situations where a lawyer who is part of a firm may continue to represent a client under the standard set down by the Wyoming Supreme Court in *Carlson v. Langdon*,²²⁴ but doing so would be unethical under the Rules. That Catch-22 should be eliminated. Fortunately, doing so would be in keeping with the ABA's new standards and would be simple.

The issue is whether the disqualification of an individual lawyer should be imputed to the rest of the firm. Under Wyoming's current Rules, conflicts under Rule 1.9, when a lawyer switches sides (Rule 1.9(a)) or switches firms (Rule 1.9(b)), are both imputed to the rest of the firm.²²⁵ Conflicts that arise under Rule 1.9(a) (when a lawyer switches sides) are imputed and may not be rebutted. Conflicts that arise under Rule 1.9(b) (when a lawyer switches firms) are also imputed but may be rebutted if the new firm can show that the lawyer who switched firms did not acquire any confidential information that is material.²²⁶

In 2009, the ABA amended Model Rule 1.10(a) to permit screening when an individual lawyer is disqualified by virtue of Rule 1.9(a) (switching sides) or Rule 1.9(b) (switching firms). This is essentially the same standard applied to full-time government lawyers in Rule 1.11. The way to "fix" Wyoming's conundrum is to adopt the ABA's amendment, with a modification. The ABA Rule says (as discussed below, Wyoming should consider one change to the ABA's rule):

²²² *Id.* at R. 1.10 cmt. 2 ("The rule of imputed disqualification . . . gives effect to the principle of loyalty to the client . . .").

²²³ *See supra* Part I.E.

²²⁴ 751 P.2d 344, 349 (Wyo. 1988). By declining to adopt a "second-stage" presumption, the court implicitly held that the conflict of an individual lawyer will not be imputed to the other lawyers in the firm. Although not expressed in the opinion, the court's later opinions suggest that a firm may continue if the "tainted" lawyer is screened. *See, e.g.*, *Hart v. State*, 62 P.3d 566, 571-74 (Wyo. 2003).

²²⁵ WYO. RULES OF PROF'L CONDUCT R. 1.10(a).

²²⁶ *Id.* at R. 1.9 cmt. 5.

Rule 1.10 Imputation of Conflicts of Interest: General Rule

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
- (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
 - (2) the prohibition is based upon *Rule 1.9(a) or (b)* and arises out of the disqualified lawyer's association with a prior firm, and
 - (i) the disqualified lawyer is *timely screened* from any participation in the matter and is apportioned no part of the fee therefrom;
 - (ii) *written notice* is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
 - (iii) *certifications of compliance* with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.²²⁷

The change that Wyoming should consider is to subparagraph 1.10(a)(2). The current Model Rule says: "(2) the prohibition is based upon [Model] Rule 1.9(a) or (b) *and arises out of the disqualified lawyer's association with a prior firm.*"²²⁸

²²⁷ MODEL RULES OF PROF'L CONDUCT R. 1.10(a) (2009) (emphasis added).

²²⁸ *Id.* at R. 1.10(a)(2) (emphasis added).

The emphasized language (“and arises out of the disqualified lawyer’s association with a prior firm”) should be omitted because the phrase effectively eliminates paragraph (a) of Model Rule 1.9 from the exception—Model Rule 1.9(a) addresses the situation of a lawyer who switches sides, while Model Rule 1.9(b) sets the standard for a lawyer who switches firms. By including the language beginning with “and arises out of,” the exception is effectively limited to lawyers who switch firms. The problem is that the Wyoming Supreme Court’s holding in *Carlson v. Langdon*²²⁹ expressly rejected a “second-stage” presumption when a lawyer switches sides (a Rule 1.9(a) issue).²³⁰ The rejection of the presumption suggests that a firm may represent a client even though one lawyer in the firm would be disqualified because of a conflict of interest. To make the Rules consistent with the court’s holding, it would be necessary to permit the exception in Model Rule 1.10(a)(2) to apply to conflicts that arise from a lawyer switching sides (Rule 1.9(a)) or a lawyer switching firms (1.9(b)). Omitting the phrase “and arises out of the disqualified lawyer’s association with a prior firm” would clarify Rule 1.10(a)(2) and make it consistent with *Carlson v. Langdon*.

The change described above would accomplish two things. First, there would be only one standard for imputing conflicts of interest involving former clients—the Rules and the Wyoming Supreme Court’s standard for imputing conflicts would be identical. Second, the standard applied, both ethically and legally, to conflicts of interest involving private sector lawyers and those involving governmental lawyers would be very similar. The difference would be that the standard for private lawyers would be a “substantial relationship” between the matters involving the former client and the new client, and the requirement that the interests of the new client be “materially adverse to the former client.”²³¹ The standard for current and former government lawyers would be solely whether the lawyer was involved “personally and substantially” in the matter.²³² The proposed amendment would effectively eliminate the need to worry about the distinction between full-time and part-time government lawyers.

²²⁹ 751 P.2d 344 (Wyo. 1988).

²³⁰ *Id.* at 349.

²³¹ WYO. RULES OF PROF’L CONDUCT R. 1.9(a). The standard is somewhat different for a private lawyer who switches sides. In addition to the “substantial relationship” and “materially adverse” standards of 1.9(a), a lawyer who switches firms must also have “acquired” confidential information relating to the representation that is “material” to the matter. *Id.* at R. 1.9(b).

²³² *Id.* at R. 1.11(a), (d).