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As the Revolving Door Turns: Government Lawyers Entering or Returning to Private Practice and Conflicts of Interest

Douglas R. Richmond
doug.richmond@aon.com

AS THE REVOLVING DOOR TURNS: GOVERNMENT LAWYERS ENTERING OR RETURNING TO PRIVATE PRACTICE AND CONFLICTS OF INTEREST

DOUGLAS R. RICHMOND*

ABSTRACT

Government lawyers regularly leave public service for private law practice—often through the same revolving door that launched their public careers. The law firms they join or to which they return welcome them because of the experience they gained, and the expertise they developed, while in the government. The challenge for former government lawyers and their law firms is recognizing and managing conflicts of interest that sometimes arise out of lawyers' government service. To address the special conflict of interest concerns that emerge from the revolving door of government service, the ABA formulated Model Rule 1.11. With a single exception, Model Rule 1.11 displaces other ethics rules that generally govern conflicts of interest in lawyers' successive representations. In so doing, Model Rule 1.11 attempts to balance the competing interests in play when a matter spans a lawyer's government service and private practice.

Most conflict of interest controversies involving former government lawyers pivot on the scope of the matter that is alleged to be the source of the conflict, and the degree of the lawyer's participation in the matter. To a lesser but nonetheless critical extent, former government lawyers' alleged acquisition of confidential government information also spawns disputes. Whether former government lawyers should be disciplined or disqualified for conflicts of interest tied to their public service always requires case-specific inquiry. Avoiding discipline and disqualification, and further avoiding imputed disqualification of the lawyer's law firm, requires former government lawyers and their law firms to understand and to be able to navigate the uniqueness of Model Rule 1.11. This article provides a practical guide for doing so.

* Managing Director, Professional Services, Aon Commercial Risk Solutions, Kansas City, Mo. J.D., University of Kansas. Opinions expressed here are the author's alone.

I. INTRODUCTION

Government lawyers regularly leave public service for private employment.[1] They may consider entering or returning to the private practice of law because of the higher compensation law firms typically offer, or because their time in government service has run its course. Perhaps their public careers have reached plateaus, or they simply desire new professional challenges. Regardless of their individual situations, these lawyers may have developed significant expertise and specialized knowledge while in government service that they anticipate capitalizing on by attracting, and ultimately representing, clients in private practice.

On the other side of the coin, law firms commonly value Assistant U.S. Attorneys, U.S. Securities and Exchange Commission lawyers, U.S. Commodity Futures Trading Commission lawyers, and state prosecutors when building white collar crime and government enforcement and investigations practices. Firms with cybersecurity and privacy practices may hope to lure legal talent from any number of federal agencies, as well as the military. Firms with education and higher education law practices may hope to hire lawyers from the U.S. Department of Education's Office for Civil Rights. Drawing from the alphabet soup of federal agencies, law firms with employment and labor law practices may plot strategy to attract senior OSHA, MSHA, and NLRB lawyers; firms with environmental law practices may want to recruit select EPA lawyers; firms that practice antitrust and competition law may look favorably at hiring FTC lawyers; while firms with tax practices may value certain IRS lawyers.[2] The list of federal and state government agencies and branches that employ capable lawyers with expertise in a wide range of substantive areas and private employment potential goes on.

Government lawyers moving into private practice and the law firms they join share a common concern: conflicts of interest.[3] Although conflicts of

1. *See generally* Michael Ellenhorn, *What Firms Should Ask Before Hiring Lawyers from Gov't*, LAW360 (Aug. 5, 2020), https://www.law360.com/legalethics [https://perma.cc/LC49-A9KR] ("Every day seems to bring more stories of government lawyers leaving their posts for the private sector."); GREGORY C. SISK ET AL., LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION 421 (2018) (noting that many lawyers spend some time in public service and that some rotate back and forth between private practice and government service).

2. OSHA is the acronym for the Occupational Safety and Health Administration, which is part of the U.S. Department of Labor. MSHA is the acronym for the Mine Safety and Health Administration, also part of the Department of Labor. NLRB is the acronym for the National Labor Relations Board. EPA is the well-known acronym for the Environmental Protection Agency. FTC is the acronym for the Federal Trade Commission. IRS is, of course, the acronym for the Internal Revenue Service.

3. *See generally* Douglas R. Richmond, *Understanding Conflicts of Interest in Environmental Law,* 68 KAN. L. REV. 69, 69 (2019) (reporting that law firm general counsels rate conflicts of interest as a major risk management concern); David D. Dodge, *Moving Between*

interest challenge all lawyers regardless of their backgrounds,[4] government lawyers moving into private practice are subject to special conflict of interest rules. Under Rule 1.11(a)(2) of the Model Rules of Professional Conduct, a lawyer who formerly served as a public officer or employee cannot "represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee," absent the appropriate government agency's informed consent.[5] If a former government lawyer is disqualified from a representation under Model Rule 1.11(a)(2), then the lawyer's law firm is disqualified by imputation unless it implements screening, fee apportionment, and client notification measures as specified in Model Rule 1.11(b).[6] Finally, for now, a former government lawyer who possesses information that he or she knows to be "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" unless otherwise expressly permitted.[7] "Confidential government information" as used in Model Rule 1.11(c) describes "information that has been obtained under governmental authority and which, at the time [Model Rule 1.11(c)] is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public."[8] If a former government lawyer is disqualified under Model Rule 1.11(c), the lawyer's firm will likewise be disqualified by imputation unless it timely screens the lawyer from any participation in the matter and allocates the lawyer none of the related fee.[9]

The ABA adopted Model Rule 1.11 to address conflicts of interest spinning out of the ever-turning "revolving door" of lawyers moving between government service and private sector employment.[10] The term "revolving door"

Government and Private Practice, ARIZ. ATT'Y, Oct. 2017, at 10, 10 (discussing government lawyers' need to understand conflicts of interest when leaving public service for private practice).

4. *See* SISK et al., *supra* note 1, at 357 (stating that conflicts of interest are the most common ethics issue that average lawyers encounter).

5. MODEL RULES OF PRO. CONDUCT r. 1.11(a)(2) (AM. BAR ASS'N 2020). Model Rule 1.11(a)(1), which incorporates Model Rule 1.9(c) by reference, will be discussed later. See *infra* Part IV.B.

6. *See* MODEL RULES OF PRO. CONDUCT r. 1.11(b) (AM. BAR ASS'N 2020) (imputing a former government lawyer's disqualification to his or her law firm unless the firm (1) timely screens the lawyer from participating in the matter and apportions the lawyer no part of the related fee; and (2) gives prompt written notice "to the appropriate government agency to enable it to ascertain compliance" with Model Rule 1.11(b)(1)'s provisions).

7. *Id.* r. 1.11(c).

8. *Id.*

9. *Id.*

10. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 1982–2013 279 (Art Garwin, ed. 2013).

is not necessarily pejorative, however. Government agencies have diverse and significant legal needs and are thus legitimately interested in recruiting talented lawyers.[11] Qualified lawyers who might be attracted to government service are often employed in law firms or in-house legal departments. Yet, those lawyers might be reluctant to go to work for the government if they thought strict conflict of interest rules would someday preclude—or at least severely limit—their ability to leave the government for other professional opportunities.[12]

Concurrently, private parties with legal matters involving governmental entities often benefit from representation by former government lawyers with deep knowledge of relevant government policies, procedures, or rules.[13] In some cases, representation by former government lawyers may improve parties' compliance with the law.[14] In these ways, the revolving door benefits both the government and private parties.[15] Model Rule 1.11 accordingly reflects a balancing of interests:

> On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules . . . 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.[16]

11. *See* MODEL RULES OF PRO. CONDUCT r. 1.11 cmt. 4 (AM. BAR ASS'N 2020) (commenting on the government's "legitimate need to attract qualified lawyers.").

12. *See* Barnes *ex rel.* Est. of Barnes v. Dist. of Columbia, 266 F. Supp. 2d 138, 141 (D.D.C. 2003) ("Governments need and want good young lawyers to devote some time to public service without depriving themselves of the ability to obtain employment thereafter."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 133 cmt. b (AM. L. INST. 2000) ("[G]overnment agencies must be able to recruit able lawyers. If the experience gained could not be used after lawyers left government service, recruiting lawyers would be more difficult.").

13. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 133 cmt. b (AM. L. INST. 2000).

14. *Id.*

15. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 2018–2019, § 1.11-1, at 613 (2018) ("There is a public interest in encouraging private lawyers to engage in public service and in having public lawyers enter the private sector.").

16. MODEL RULES OF PRO. CONDUCT r. 1.11 cmt. 4 (AM. BAR ASS'N 2020).

This article examines conflicts of interest when government lawyers leave public service for private law practice.[17] Part II begins the examination with a discussion of essential conflict of interest issues under Model Rule 1.11, including the scope of a matter; former government lawyers' personal and substantial participation in a matter as required for their disqualification or discipline; and obtaining a government agency's informed consent to a former government lawyer's participation in a matter, which must then be confirmed in writing.

Part III analyzes a law firm's ability to avoid disqualification in a matter based on the imputation of a former government lawyer's conflict of interest. This generally requires a law firm to screen the former government lawyer from participation in the matter, apportion the lawyer no part of the associated fee, and notify the appropriate government agency of the firm's actions.

Finally, Part IV examines the limits on former government lawyers' disclosure or use of certain government information in private practice. This issue primarily arises in two situations: first, where the lawyers want to represent clients in matters adverse to the lawyers' former government agencies; and, second, where the lawyers might use confidential government information about a third party to obtain an unfair advantage over that party on behalf of a private client.

II. ESSENTIAL CONFLICT OF INTEREST ISSUES FOR FORMER GOVERNMENT LAWYERS

A. Overview

The basic conflict of interest rule covering government lawyers who leave public service to enter or return to private practice is Model Rule 1.11(a)(2), which states:

> Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government: . . . (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.[18]

Four general principles regarding this rule require recognition at the outset. First, where former government lawyers are concerned, Model Rule 1.11(a)(2)

17. "Government lawyers" as used in this article includes public employees, officers, or officials with law degrees who may have administrative, managerial, or policy-making responsibilities apart from, or in addition to, legal responsibilities.

18. MODEL RULES OF PRO. CONDUCT r. 1.11(a)(2) (AM. BAR ASS'N 2020).

replaces Model Rule 1.9(a),[19] which generally governs conflicts of interest in successive representations.[20] Indeed, Model Rule 1.9(a) plays no role in deciding whether former government lawyers have conflicts of interest linked to their public service;[21] Model Rule 1.11 "occupies the field."[22] To hold otherwise would render Rule 1.11(a)(2) superfluous.[23] Such a result would be unreasonable, because courts interpret rules of professional conduct according to the same principles that govern statutory interpretation,[24] and courts generally construe statutes so that no provision is rendered superfluous or reduced to surplusage.[25] Furthermore, the differences between Model Rules 1.9(a) and 1.11(a)(2) regarding the standards for disqualifying allegedly conflicted lawyers, the scope of the situations to which the rules apply, the imputation of conflicts to other members of an offending lawyer's firm, and the availability of ethical screens to avoid imputed disqualification generally make overlapping application of the rules impractical.[26]

19. *Id.* r. 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.").

20. *See, e.g.*, Martley v. City of Basehor, Kan., No. 19-02138-DDC-GEB, 2019 WL 6340132, at *13 (D. Kan. Nov. 27, 2019) (concluding that Rule 1.9(a) cannot apply when Rule 1.11 applies); Babineaux v. Foster, No. CIV.A. 04–1679, 2005 WL 711604, at *2 (E.D. La. Mar. 21, 2005) (explaining that a former assistant city attorney's potential disqualification was governed by Rule 1.11, not Rule 1.9); N.Y. Eth. Op. 1148, 2018 WL 1863105, at *3 (N.Y. State Bar Ass'n, Comm. on Pro. Ethics 2018) ("Rule 1.11(a) ousts the application of Rule 1.9(a) in the context of government lawyers.").

21. ABA Comm. on Ethics & Pro. Resp., Formal Op. 97-409, at 2, 9–10 (1997) (hereinafter ABA Formal Op. 97-409).

22. *Id.* at 10.

23. *Babineaux*, 2005 WL 711604, at *4.

24. Ferris, Thompson & Zweig, Ltd. v. Esposito, 90 N.E.3d 400, 405 (Ill. 2017); Law Offices of Jeffrey Sherbow, PC v. Fieger & Fieger, PC, 930 N.W.2d 416, 424 (Mich. Ct. App. 2019) (quoting Morris & Doherty, P.C. v. Lockwood, 672 N.W.2d 884, 888 (Mich. Ct. App. 2003)); Comm'n for Lawyer Discipline v. Hanna, 513 S.W.3d 175, 178 (Tex. App. 2016).

25. *See, e.g.*, Cascabell Cattle Co., L.L.C. v. United States, 955 F.3d 445, 451 (5th Cir. 2020) ("[S]tatutes should ordinarily be construed so that no words constitute surplusage."); Agnew v. Gov't of the Dist. of Columbia, 920 F.3d 49, 57 (D.C. Cir. 2019) (recognizing that a statute should not be interpreted in a way that renders part of it superfluous); Johnson v. State, 225 A.3d 44, 50 (Md. 2020) ("We read 'the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory.'" (quoting Philips v. State, 152 A.3d 712, 721–22 (Md. 2017))); Brown v. State, 939 N.W.2d 354, 361 (Neb. 2020) ("[A] court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless." (footnote omitted)).

26. ABA Formal Op. 97-409, *supra* note 21, at 8–9; *see, e.g.*, Martley v. City of Basehor, Kan., No. 19-02138-DDC-GEB, 2019 WL 6340132, at *12 (D. Kan. Nov. 27, 2019) (applying Rule 1.11(a)(2) rather than 1.9(a) while observing that "the standard[s] of disqualification under the two rules are not the same").

Second, while Model Rule 1.11(a)(2) certainly applies where a former government lawyer within the rule's purview represents a client adverse to the government, the rule also applies where the interests of both the lawyer's current client and the government's interests are aligned.[27] As the District of Columbia Court of Appeals observed in *In re White*,[28] "[t]he prohibitions of Rule 1.11 are not limited to side-switching; they apply even if the former public employee espouses the same position in private practice as she did as a public official."[29] There are three policy reasons for this approach:

> First, prohibiting representation in a matter, even where consistent with the government's interest, diminishes the risk of subsequent misuse of information obtained by the government. If a former government lawyer could make use of confidential reports to an agency, for example, even in a cause that was consistent with the government position, it would go beyond the original purpose for making the reports and make it more difficult for the government to obtain voluntary disclosures from members of the public. Second, the rule removes an incentive to gain later advantages through methods of gathering information that are available only to the government, such as a grand jury investigation. Third, the rule removes an incentive to begin proceedings as a government agent with a view to obtaining a subsequent advantage in private practice, such as by filing a complementary action for a subsequent private client.[30]

Thus, and by way of example, Rule 1.11(a)(2) applies where a government lawyer "enters private practice and takes the same position against the same party" that the lawyer formerly advocated on the government's behalf.[31]

Third, Rule 1.11(a)(2) applies where the former government lawyer participated personally and substantially in a matter as a public officer or employee, regardless of whether the lawyer was functioning as a lawyer at the time.[32] On the other hand, a lawyer in private practice who represents a

27. *See* MODEL RULES OF PRO. CONDUCT r. 1.11 cmt. 3 (AM. BAR ASS'N 2020) (stating that Model Rule 1.11(a)(2) applies "regardless of whether a lawyer is adverse to a former client.").

28. 11 A.3d 1226 (D.C. 2011).

29. *Id.* at 1249.

30. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 133 cmt. d (AM. L. INST. 2000).

31. City of Chi. v. Purdue Pharma L.P., No. 14 C 4361, 2014 WL 7146362, at *6 (N.D. Ill. Dec. 15, 2014).

32. *See, e.g.*, Great Divide Wind Farm 2 LLC v. Aguilar, 426 F. Supp. 3d 949, 976 (D.N.M. 2019) (stating that the lawyer's prior involvement in the matter as a Commissioner on the New Mexico Public Regulation Commission rather than as a lawyer did not alter the court's analysis under New Mexico's version of Rule 1.11(a)(2)); Filippi v. Elmont Union Free Sch. Dist. Bd. of Educ., 722 F. Supp. 2d 295, 313 (E.D.N.Y. 2010) (disqualifying an associate and her law firm from representing the defendant in an employment discrimination case where the associate was serving as the school board's vice president when the plaintiff filed written complaints and an EEOC charge, the board discussed employment issues during the same time, and the associate in her role as board vice president personally received two letters from the plaintiff's lawyer regarding her

government agency or entity does not thereby become a public employee within the meaning of Rule 1.11.[33] The government's payment of a private lawyer's legal fees does not convert the lawyer into a public employee.[34]

Fourth, a former government lawyer's disqualification under Rule 1.11(a)(2) does not depend on the movant having standing to seek such relief, so a party does not have to be the lawyer's client or former client to seek the lawyer's disqualification.[35] This position is consistent with the view outlined above that former government lawyers' conduct implicates public interests in ways that other lawyers' conduct does not.

B. The Scope of a Matter

Moving beyond general principles and distilling Model Rule 1.11(a)(2) to its key elements, the rule states that a former government lawyer generally cannot represent a client "in connection with a matter in which the lawyer participated personally and substantially" while in public service.[36] Under the rule, discipline or disqualification is appropriate only if the matter the lawyer participated in while with the government is the *same* matter that the lawyer is handling in private practice.[37] It is not sufficient that the matters are substantially related.[38] Accordingly, the initial issue when analyzing an alleged Rule 1.11(a)(2) violation is bounding or defining the "matters" in question. [39] This is a case and fact-specific inquiry.[40]

claims); Pa. Eth. Op. 2012-2, 2012 WL 7148213, at *1 (Phila. Bar Ass'n, Prof'l Guidance Comm. 2012) ("Rule 1.11 does not contemplate whether the specific duties of the public officer or employee are categorized as attorney/non-attorney."); Utah Eth. Op. 15-01, 2015 WL 3513297, at *3 (Utah State Bar, Ethics Advisory Op. Comm. 2015) (opining that Rule 1.11(a)(2) applied to a lawyer who formerly served as a member of the Utah Board of Pardons and Parole).

33. ROTUNDA & DZIENKOWSKI, *supra* note 15, §1.11-3(a), at 614.

34. *Id.*

35. *See, e.g.*, United States v. Villaspring Health Care Ctr., Inc., No. 3:11-43-DCR, 2011 WL 5330790, at *3–6 (E.D. Ky. Nov. 7, 2011) (noting the lack of a standing requirement in Rule 1.11 and granting the federal government's motion to disqualify a defense lawyer in a qui tam case; the lawyer, while a Kentucky Assistant Attorney General, participated in a state investigation into alleged criminal abuse and neglect by caregivers in the defendants' facility).

36. MODEL RULES OF PRO. CONDUCT r. 1.11(a)(2) (AM. BAR ASS'N 2020).

37. Pennington v. Metro. Gov't of Nashville and Davidson Cnty., Tenn., No. 3:05-1075, 2006 WL 8445756, at *3 (M.D. Tenn. May 2, 2006); *In re* Hailey C., No. M2016-00818-COA-R3-PT, 2017 WL 4331039, at *3 (Tenn. Ct. App. Sept. 28, 2017); ABA Formal Op. 97-409, *supra* note 21, at 6–7.

38. *Compare* MODEL RULES OF PRO. CONDUCT r. 1.9(a) (AM. BAR ASS'N 2020) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same *or a substantially related matter*. . . .") (emphasis added)).

39. *See Pennington*, 2006 WL 8445756, at *3.

40. *See* Green v. City of N.Y., No. 10 CIV. 8214(PKC), 2011 WL 2419864, at *2 (S.D.N.Y. June 7, 2011) ("The scope of a matter is an intensely fact-specific inquiry.").

Model Rule 1.11(e) provides guidance for courts and lawyers who are comparing matters to determine their relation.[41] First, Model Rule 1.11(e)(1) defines the term "matter" to include "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[.]"[42] In determining whether matters are the same, a comment to Rule 1.11 explains that courts and lawyers should consider whether the matters "involve the same basic facts, the same or related parties, and the time elapsed."[43] If two cases or proceedings involve the same facts or the same or affiliated parties, they likely constitute the same matter.[44] In contrast, a lawyer's work on a case of the same type while in government service but not involving the same parties as the one in which the lawyer plans to participate in private practice does not make the matters the same.[45] Temporally, the longer the time between the relevant cases, events, or representations, the less likely it is that the matters are the same.[46] In some cases, it may be necessary for the court to conduct an evidentiary hearing to determine whether matters are the same.[47]

Some measure of prudence also must factor into defining a "matter." For instance, in *Jefferson County Board of Zoning Appeals v. Wilkes*,[48] the West Virginia Supreme Court properly concluded that the various stages in the administrative review of an application for a conditional use permit (CUP) to develop residential real estate were not separate matters for Rule 1.11(a) purposes.[49] Indeed, the *Wilkes* court observed, the applicant's argument that each stage in the evaluation of a CUP application was a discrete matter failed as a matter of common sense.[50]

Second, Model Rule 1.11(e)(2) provides that a matter also includes "any other matter" falling within a government agency's conflict of interest rules.[51] For example, the federal Ethics in Government Act specifically restricts the

41. MODEL RULES OF PRO. CONDUCT r. 1.11(e) (AM. BAR ASS'N 2020).

42. *Id.* r. 1.11(e)(1).

43. *Id.* r. 1.11 cmt. 10.

44. ROTUNDA & DZIENKOWSKI, *supra* note 15, § 1.11-3(b), at 616.

45. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 133 cmt. e (AM. L. INST. 2000).

46. *See, e.g.*, Commonwealth v. Sherlock, No. 2069, 2014 WL 10790103, at *4 (Pa. Super. Ct. Oct. 3, 2014) (finding that two matters were not the same where they were separated by eight years).

47. *See, e.g.*, Royer v. Dillow, No. 13 CA 71, 2014 WL 98601, at *3 (Ohio Ct. App. Jan. 9, 2014) (noting the lack of documentation in the record and remanding the case to the trial court to conduct an evidentiary hearing).

48. 655 S.E.2d 178 (W. Va. 2007).

49. *Id.* at 184–85.

50. *Id.* at 185.

51. MODEL RULES OF PRO. CONDUCT r. 1.11(e)(2) (AM. BAR ASS'N 2020).

advocacy activities of former officers and employees of the executive branch of the U.S. government and the District of Columbia that may trigger Rule 1.11(a)(2) as well as providing independent grounds for disqualifying a former government lawyer.[52] Some government agencies' conflict-of-interest rules may be more stringent than Model Rule 1.11.[53]

Matters need not take the same form to be considered the same for Model Rule 1.11(a)(2) purposes.[54] For example, a criminal investigation and subsequent civil litigation may constitute the same matter when evaluating a former government lawyer's alleged conflict of interest.[55] A "matter" does not, however, include general legislative, policy-making, rule-making, or regulatory activity by a government agency.[56]

Green v. City of New York[57] and *In re National Prescription Opiate Litigation*[58] offer contrasting perspectives on whether two matters are the same.

In *Green*, Tkai Green sued the City of New York Department of Corrections (DOC), some DOC employees, and the City under 42 U.S.C. § 1983 for her allegedly illegal strip-search in her jail cell.[59] She was represented by Gabriel Harvis and Afsaan Saleem.[60] Harvis and Saleem previously worked as lawyers in the New York City Law Department, where they "substantially and personally

52. 18 U.S.C. § 207(a) (2018); *see, e.g.*, United States v. Clark, 333 F. Supp. 2d 789, 793–97 (E.D. Wis. 2004) (relying on 18 U.S.C. § 207(a) to disqualify a former AUSA in a federal criminal case).

53. *See* ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 220 (9th ed. 2019); *see, e.g.*, Yocum v. Commonwealth Gaming Control Bd., 161 A.3d 228, 245–48 (Pa. 2017) (upholding Pennsylvania Gaming Act post-employment restrictions that applied to a Gaming Board lawyer and which were broader than limitations imposed by Rule 1.11).

54. *See* MODEL RULES OF PRO. CONDUCT r. 1.11 cmt. 10 (AM. BAR ASS'N 2020) (stating that a matter "may continue in another form.").

55. *See, e.g.*, Heyliger v. Collins, No. 3:11-CV-1293 (NAM/DEP), 2014 WL 910324, at *3–6 (N.D.N.Y. Mar. 10, 2014) (disqualifying a lawyer who was defending several parties in a defamation case connected to the lawyer's criminal prosecution of the plaintiff while the lawyer was an assistant district attorney); United States v. Villaspring Health Care Ctr., Inc., No. 3:11-43-DCR, 2011 WL 5330790, at *3–6 (E.D. Ky. Nov. 7, 2011) (disqualifying a former Kentucky Assistant Attorney General in a qui tam case. The lawyer, who was representing the defendants, had previously participated in a state criminal investigation into abuse and neglect of patients in the defendants' facility); *But see In re* Hailey C., No. M2016-00818-COA-R3-PT, 2017 WL 4331039, at *3 (Tenn. Ct. App. Sept. 28, 2017) (holding that a man's criminal prosecution for sexually abusing his children and a subsequent civil action to terminate his parental rights as a result of the abuse were separate matters).

56. Laker Airways, Ltd. v. Pan Am. World Airways, 103 F.R.D. 22, 34 (D.D.C. 1984); Nat'l Bonded Warehouse Ass'n, Inc. v. United States, 718 F. Supp. 967, 972 (Ct. Int'l Trade 1989); ABA Formal Op. 97-409, *supra* note 21, at 6 n.5.

57. No. 10 CIV. 8214(PKC), 2011 WL 2419864 (S.D.N.Y. June 7, 2011).

58. No. 1:17-md-2804, 2019 WL 1274555 (N.D. Ohio Mar. 20, 2019).

59. *Green*, 2011 WL 2419864, at *1.

60. *Id.*

represented the City of New York and certain DOC employees in class action litigation concerning the lawfulness of strip-searches conducted of pretrial detainees in DOC facilities."[61] In her complaint, which Harvis and Saleem prepared, Green alleged "that '[f]or decades, . . . [the] DOC has been aware of the routine, unconstitutional use of strip-searches by staff at individual facilities in the large multi-jail New York City Department of Correction.'"[62] The *Green* court described this allegation as "a *Monell*-type claim against the City,"[63] meaning that the City could face potential liability "for constitutional deprivations visited pursuant to governmental 'custom' even though [the] custom ha[d] not received formal approval through the [City's] official decisionmaking channels."[64]

The defendants moved to disqualify Harvis and Saleem.[65] In response, Green sought to amend her complaint to drop her *Monell* claim, but that effort only highlighted Harvis's and Saleem's apparent conflict of interest.[66] The *Green* court thus analyzed whether the two lawyers should be disqualified under Rule 1.11.[67]

An essential question for the *Green* court was whether Harvis's and Saleem's prior representations of the City and DOC employees in the defense of strip-search class actions and their current representation of Green were the same matter for Rule 1.11 purposes.[68] In answering this question, the court observed that determining "[t]he scope of a matter is an intensely fact-specific inquiry."[69] Although matters are not the same merely because they involve a common legal theory, they may be the same despite pertaining "to different lawsuits with different parties."[70] Ultimately, in deciding whether matters are the same, it is essential to analyze the lawyer's activities in the first matter.[71] "It is relevant whether the lawyer merely gathered and produced documents, responded to pleadings and attended court conferences or, rather, served as counselor and advisor on the broad subject at hand."[72]

In this case, while lawyers for the City, Harvis and Saleem acquired confidential information on DOC's strip-search practices, and reviewed related training materials and policies that could be essential to Green's case.[73]

61. *Id.*
62. *Id.* (quoting Green's complaint).
63. *Id.*
64. Monell v. Dep't of Soc. Servs. of the City of N.Y., 436 U.S. 658, 690–91 (1978).
65. *Green*, 2011 WL 2419864, at *1.
66. *Id.*
67. *Id.* at *2.
68. *Id.*
69. *Id.*
70. *Green*, 2011 WL 2419864, at *2.
71. *Id.*
72. *Id.*
73. *Id.*

Although they were relatively junior lawyers at the time, they participated in risk management discussions with senior DOC executives.[74] They also prepared DOC employees for meetings with, and depositions by, opposing lawyers in strip-search cases.[75] For these reasons, the court concluded that their prior representations of the City and DOC employees included guidance on subjects important to Green's representation.[76] The matters were therefore the same under Rule 1.11.[77]

After distinguishing another Southern District of New York case that Harvis and Saleem had apparently cited in their defense, the *Green* court granted the defendants' motion to disqualify the two lawyers.[78]

The lawyer in *In re National Prescription Opiate Litigation*, Carole Rendon, had a stellar career as a federal prosecutor.[79] She joined the U.S. Attorney's Office for the Northern District of Ohio (USAO) as the Executive Assistant U.S. Attorney in 2009, was promoted to First Assistant U.S. Attorney in 2010, and was appointed as the U.S. Attorney for the Northern District of Ohio in 2016.[80] After being forced to resign by President Trump in March 2017, she joined the Cleveland office of BakerHostetler in June 2017.[81]

Upon joining BakerHostetler, Rendon began defending the pharmaceutical company Endo in litigation in the Northern District of Ohio in which several Ohio cities and counties sued Endo and other opioid manufacturers and distributors.[82] When a Multi-District Litigation (MDL) case was created in December 2017, she became the defendants' co-liaison counsel.[83]

Unfortunately for Rendon, trouble lurked in her time in the USAO, which had "recognized the opioid epidemic as 'an unprecedented health care and law enforcement crisis in Northern Ohio,'" and in 2013—while she was First Assistant U.S. Attorney—formed "the Heroin and Opioid Task Force" (Task Force).[84] The Task Force was comprised of courts, law enforcement agencies, prosecutors' offices, members of the media, hospitals, health care agencies and providers, and others, all focused on tackling the perceived opioid crisis from

74. *Id.*

75. *See Green*, 2011 WL 2419864, at *1 (observing that in the process of meeting with DOC employees, the lawyers "presumably guid[ed] and remind[ed] them about what to say and do.").

76. *Id.*

77. *Id.*

78. *Id.* at *3 (distinguishing McBean v. City of N.Y., 02 CIV. 5426(GEL), 2003 WL 21277115 (S.D.N.Y. June 3, 2003)).

79. No. 1:17-md-2804, 2019 WL 1274555 (N.D. Ohio Mar. 20, 2019), at *1.

80. *Id.*

81. *Id.*

82. *Id.*

83. *In re Nat'l Prescription,* 2019 WL 1274555, at *1.

84. *Id.*

different angles.[85] Rendon became the Task Force Chair when she was appointed U.S. Attorney for the Northern District of Ohio.[86]

In 2019, one of the MDL plaintiffs, the City of Cleveland, moved to disqualify Rendon from representing Endo based on Rule 1.11(a).[87] It was clear that Rendon had "participated personally and substantially as a public officer on the Task Force."[88] The parties disputed whether the Task Force qualified as a "matter" under Rule 1.11(a), and if so, whether it was the same matter as the MDL litigation involving Endo.[89]

The district court reasoned that Rendon's conduct did not implicate Rule 1.11(a).[90] The court explained that because Rule 1.11(a) basically "prevents 'side-switching'" when a government lawyer enters private practice, the matter the former government lawyer worked on must be the same as the matter at hand, rather than being "substantially related" as Rule 1.9 requires for private lawyers' former client conflicts.[91] With that background, the plaintiffs' urged interpretation of Rule 1.11 was overly ambitious.[92] The Task Force was a collection of agencies, organizations, and individuals that jointly aspired to solve the opioid crisis in Ohio communities.[93] The MDL cases were civil actions brought against manufacturers, distributors, and dispensers of prescription opiates to recover the cost of addressing Ohio's opioid crisis.[94] The MDL plaintiffs alleged that the defendants—Endo among them—falsely marketed their drugs and deficiently monitored suspicious order reports.[95] Given these differences, the court concluded, the Task Force and the MDL litigation could not be considered the "same matter" under a fair reading of Rule 1.11.[96] Nor had Rendon switched sides in the MDL litigation.[97] While in the USAO, she never investigated Endo, nor did she ever litigate against the company.[98]

To the extent it was interpreting the term "matter" narrowly, the *In re National Prescription* court explained, that approach was justified by the examples provided in Ohio's version of Rule 1.11 and by Sixth Circuit authority reciting that disqualification motions are disfavored and should be granted

85. *Id.* at *1–2.
86. *Id.* at *2.
87. *Id.* at *2–3.
88. *In re Nat'l Prescription,* 2019 WL 1274555, at *3.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *In re Nat'l Prescription,* 2019 WL 1274555, at *3.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *In re Nat'l Prescription,* 2019 WL 1274555, at *3.

sparingly.[99] The court closed its discussion by reiterating that the Task Force and MDL litigation were different matters.[100]

While Rendon and her law firm won the battle over this issue, they soon lost a major campaign in the disqualification war. Two of the MDL plaintiffs further argued that they had shared "confidential non-public information" with the Task Force that had reached Rendon and which, if exploited by Endo, could "materially prejudice" them.[101] The court consequently found it necessary to disqualify Rendon and her law firm from representing Endo in the MDL cases involving those plaintiffs.[102]

C. Personal and Substantial Participation

If a court applying Model Rule 1.11(a)(2) concludes that two or more matters are the same, it must then determine whether the former government lawyer "participated personally and substantially" in the matter while in public service.[103] The rule's use of the conjunction "and" is critical; a former government lawyer's participation in the matter while in public service must have been both personal *and* substantial to warrant disqualification.[104]

For a lawyer to have participated personally in a matter for Rule 1.11(a) purposes, the lawyer must have been directly involved in it; the lawyer's employment in the same office or agency as the lawyers who actually handled the matter does not count.[105] The substantial participation requirement means that a lawyer's involvement in a matter on a cursory, ministerial, or superficial basis will not support discipline or disqualification.[106] For example, a lawyer who simply signs and files a form pleading, such as an answer generally denying a plaintiff's allegations, does not thereby substantially participate in the related matter.[107] A lawyer's participation in a single meeting while a public employee

99. *Id.* at *4 (quoting *In re* Valley-Vulcan Mold Co., 237 B.R. 322, 337 (B.A.P. 6th Cir. 1999), *aff'd*, 5 F. App'x 396 (6th Cir. 2001)).

100. *Id.*

101. *Id.* at *5.

102. *Id.*

103. MODEL RULES OF PRO. CONDUCT r. 1.11(a)(2) (AM. BAR ASS'N 2020).

104. Great Divide Wind Farm 2 LLC v. Aguilar, 426 F. Supp. 3d 949, 975–76 (D.N.M. 2019); Sec. Gen. Life Ins. Co. v. Super. Ct., 718 P.2d 985, 987 (Ariz. 1986); *see, e.g.*, Arroyo v. City of Buffalo, No. 15-CV-753A(F), 2017 WL 3085835, at *12 (W.D.N.Y. July 20, 2017) (refusing to disqualify a former assistant district attorney who was personally involved in the matter but not substantially so; there was no evidence that the lawyer participated in an official investigation, deliberations regarding possible criminal charges, or the like); United States v. Dancy, No. 3:08CR189, 2008 WL 4329414, at *1 (E.D. Va. Sept. 16, 2008) (reversing a defense lawyer's disqualification where additional evidence revealed that while she was personally involved in the matter while a prosecutor, her involvement was insubstantial).

105. SISK et al., *supra* note 1, at 422.

106. *Great Divide*, 426 F. Supp. 3d at 976.

107. Richards v. Lewis, No. CIV.A.05-0069, 2005 WL 2645001, at *4 (D.V.I. Oct. 14, 2005).

or official is not normally considered "substantial."[108] A lawyer who held a supervisory position with a government agency and simply received updates or reports on a matter, or signed off on a matter as a function of her office, should not be held to have substantially participated in the matter.[109] Likewise, a former government lawyer who merely heard other lawyers in her office debating or discussing a matter cannot be said to have personally and substantially participated in the matter.[110]

The personal and substantial participation requirement was imported into the Model Rules from the federal Ethics in Government Act of 1978.[111] Logically looking to the Act for guidance in applying these terms:

> To participate "personally" means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. "Substantially," means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation

108. *Ex Parte* Utils. Bd. of the City of Tuskegee, 274 So. 3d 229, 234–35 (Ala. 2018).

109. *See, e.g.*, *Sec. Gen. Life Ins. Co.*, 718 P.2d at 987 ("Matters involving Security General were before Low's department during his term as director, but there is no evidence that he ever 'participated personally and substantially' in them. . . . On the contrary, . . . Low did no more than sign orders put before him by his staff."); *In re* Coleman, 895 N.Y.S.2d 122, 124 (App. Div. 2010) (explaining that a government lawyer did not participate personally and substantially in every case referred to his department simply because he was responsible for reviewing all incoming cases and assigning them to subordinate lawyers); State *ex rel.* Clifford v. W. Va. Office of Disciplinary Couns., 745 S.E.2d 225, 235–37 (W. Va. 2013) (discussing a former county prosecuting attorney who merely received updates on the matter and participated in related press conferences while in office); AK Eth. Op. 95-2, 1995 WL 928996, at *3 (Alaska Bar Ass'n, Ethics Comm. 1995) (concluding that a lawyer's personal and substantial participation in a matter requires "more than general supervisory duties or perfunctory approval or disapproval of an employee's actions."). Alternatively,

> even where the former solicitor's involvement in a particular case was minor because the matter was primarily handled by an assistant solicitor, the prosecution was still handled under his supervision, because each of the assistant solicitors serve at the pleasure of the solicitor and, inferentially, under his supervision and control. . . . That could be construed to qualify as "personal and substantial" involvement sufficient to cause a conflict to arise under Rule 1.11.

S.C. Adv. Op. 97-12, 1997 WL 582914, at *2 (S.C. Bar, Ethics Advisory Comm. 1997) (citation omitted).

110. Dugar v. Bd. of Educ. of City of Chi., Dist. 299, No. 92 C 1621, 1992 WL 142302, at *6 (N.D. Ill. June 18, 1992).

111. 18 U.S.C. § 207(a)(1)(B) (2018).

> in a critical step may be substantial. It is essential that the participation be related to a "particular matter involving a specific party."[112]

Helpful though this language may be, it does not change the fact that whether a former government lawyer participated personally and substantially in a matter is a case-specific call. *Babineaux v. Foster*[113] and *Registe v. State*[114] demonstrate the variability of case outcomes when deciding the level of a former government lawyer's involvement in a matter.

In *Babineaux*, Tysonia Babineaux sued the City of Hammond, Louisiana and its mayor (collectively the City) for employment discrimination after she was fired from her City job in July 2003.[115] She was represented by Douglas Brown.[116] He had served as an Assistant City Attorney through the end of 2002, when the mayor took office.[117] He then entered private practice and began representing plaintiffs in lawsuits against the City.[118]

The City moved to disqualify Brown based on an employment grievance that Babineaux filed in 2001, while Brown was still an Assistant City Attorney.[119] In so moving, the City alleged that Babineaux's current lawsuit was substantively similar in all material respects to her 2001 grievance.[120] Babineaux countered that disqualification was inappropriate because all the acts giving rise to her lawsuit occurred after Brown left the City for private practice.[121] Brown also argued that the disqualification motion was naked retaliation for his repeated representation of plaintiffs suing the City.[122]

In seeking Brown's disqualification, the City relied in part on Louisiana's version of Model Rule 1.11(a) and argued that Brown had to be removed from Babineaux's case because he "was 'personally and arguably substantially involved as counsel'" for the prior mayor in connection with Babineaux's 2001 grievance.[123] The *Babineaux* court noted that neither the Fifth Circuit nor the Louisiana Supreme Court had "clearly defined what constitutes 'personal and substantial' participation" in a matter.[124] At best, the Fifth Circuit had indicated that a lawyer's tenuous and nominal ties to a matter did not amount to personal

112. United States v. Clark, 333 F. Supp. 2d 789, 794 (E.D. Wis. 2004) (quoting 5 C.F.R. § 2637.201(d)) (internal quotation marks omitted).

113. No. CIV.A. 04-1679, 2005 WL 711604, at *8 (E.D. La. Mar. 21, 2005).

114. 697 S.E.2d 804, 811 (Ga. 2010).

115. *Babineaux*, 2005 WL 711604, at *1.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Babineaux*, 2005 WL 711604, at *1.

121. *Id.*

122. *Id.*

123. *Id.* at *5.

124. *Id.*

and substantial involvement.[125] In terms of other authority, another district court had stated that a former government lawyer may be found to have substantially participated in a matter where the lawyer's "involvement was of significance to the matter, or sufficient to create a 'reasonable appearance of such significance.'"[126] In addition, an old ABA ethics opinion applying a predecessor ethics rule had explained that the similar term "substantial responsibility" required "a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question."[127] Rather, the term "contemplate[d] a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question."[128]

With those authorities in mind, the *Babineaux* court found no evidence that Brown investigated Babineaux's 2001 grievance while he was an Assistant City Attorney, or even that he spent material time on the matter.[129] While Brown acknowledged that as an Assistant City Attorney he apparently had received copies of two letters concerning Babineaux's grievance, he swore in a filed declaration that he did not recall anything about the letters—including receiving them.[130] He further swore that any involvement he might have had in Babineaux's 2001 grievance was confined to receiving the two letters.[131] Brown denied participating in any probe of Babineaux's 2001 grievance, and he further denied providing associated legal advice to the former mayor.[132] Conspicuously, the City offered no evidence to refute Brown's exculpatory statements.[133]

Professional responsibility is self-enforcing, the *Babineaux* court reminded the parties, and lawyers are presumed to be ethical until proven otherwise.[134] At bottom, Brown's "cursory involvement" in his client's 2001 grievance did "not rise to the level of 'personal and substantial' participation in a matter which would require his disqualification pursuant to Rule 1.11."[135]

Registe v. State[136] arose out of a murder case in which the accused slayer, Michael Registe, was defended by a former assistant district attorney (ADA),

125. *Babineaux*, 2005 WL 711604, at *5 (citing Hernandez v. Johnson, 108 F.3d 554, 560 (5th Cir. 1997)).

126. *Id.* (quoting United States v. Clark, 333 F. Supp. 2d 789, 794 (E.D. Wis. 2004)).

127. *Id.* at *5–6 (quoting ABA Formal Ethics Op. 342 (1975)) (internal quotation marks omitted).

128. *Id.* at *6 (quoting ABA Formal Ethics Op. 342 (1975)) (internal quotation marks omitted).

129. *Id.*

130. *Babineaux*, 2005 WL 711604, at *6.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* (quoting Wallace *ex rel.* Ne. Utils. v. Fox, 7 F. Supp. 2d 132, 137 (D. Conn. 1998)).

135. *Babineaux*, 2005 WL 711604, at *6.

136. 697 S.E.2d 804 (Ga. 2010).

Stacey Jackson.[137] Jackson began his career as an ADA in 2000.[138] In 2005, Registe, a career criminal, committed multiple crimes, including car theft and aggravated assault.[139] By 2007, Jackson had been promoted to Senior ADA and supervised a small trial team of ADAs.[140] In July 2007, a robber killed two people in separate incidents; the police suspected that Registe was the perpetrator.[141] Registe evaded arrest by fleeing the country with his sister's suspected assistance.[142] That was the situation in January 2008 when Jackson, who was not involved in Registe's car theft and aggravated assault cases, enlisted the U.S. Marshals Service in the hunt for Registe in connection with the two murders.[143] To aid the marshals' pursuit, Jackson signed three search warrant applications to obtain telephone records for Registe and his sister.[144] In signing the warrant applications, Jackson certified to the court that the phone records were "relevant and material to an ongoing criminal investigation" to locate Registe, and that the records would provide leads that would enable his apprehension.[145]

In July 2008, Jackson resigned as an ADA and entered private practice.[146] In late August 2008, a grand jury indicted Registe for the 2007 murders.[147] Registe was arrested in the Caribbean the next day and was soon indicted in the aggravated assault case.[148]

ADAs from Jackson's former trial team handled both indictments.[149] After the aggravated assault indictment, Chris Samra, an investigator in the DA's office who had worked with Jackson, asked Jackson if he would be defending Registe.[150] According to Samra, Jackson said that he could not represent Registe because he had worked on the murder case as an ADA.[151]

In July 2009, Registe was finally repatriated to stand trial for murder, auto theft, and aggravated assault.[152] Surprisingly, in August 2009, Jackson entered his appearance as Registe's defense counsel.[153] Predictably, the State moved to

137. *Id.* at 805.
138. *Id.* at 806.
139. *Id.*
140. *Id.*
141. *Registe,* 697 S.E.2d at 806.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Registe,* 697 S.E.2d at 806.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Registe,* 697 S.E.2d at 806.
152. *Id.*
153. *Id.*

disqualify Jackson from representing Registe in the murder case "because of his work on the case while in the DA's office."[154] The State subsequently moved to disqualify Jackson in the car theft and aggravated assault cases because it planned to introduce them as "similar transaction evidence" at Registe's murder trial.[155]

After conducting an evidentiary hearing, the trial court disqualified Jackson in all three cases.[156] Registe appealed the trial court's order to the Georgia Supreme Court.[157]

One of the issues on appeal was whether Jackson had personally and substantially participated in Registe's murder case while serving as an ADA, thereby justifying his disqualification under Rule 1.11(a).[158] Registe contended that the personal and substantial participation standard is "difficult to apply where the lawyer in question was 'the chief official in some vast office or organization,' because that status 'does not ipso facto give that government official or employee the "substantial responsibility" contemplated by the rule in regard to all the minutiae of facts lodged within that office.'"[159]

Registe's argument did not persuade the court, which had no difficulty applying the personal and substantial participation test to the facts presented.[160] Rather than being a remote supervisor or office head:

> [Jackson] personally applied on behalf of the State for three criminal search warrants and certified as an officer of the court that the warrants were justified because they were "relevant and material" to the State's "ongoing criminal investigation" to locate a fugitive wanted for murder and that the requested information would "provide leads which will aid in locating and apprehending the fugitive."[161]

Registe apparently argued in the alternative that Jackson was not personally and substantially involved in the murder case while employed as an ADA because he signed the warrant applications without reading or understanding them, or because he lacked a factual basis for his representations to the court in the applications.[162] The *Registe* court gave no credence to these arguments, and, in dismissing them, cautioned that Jackson's purported misrepresentation of the bases for the warrants would raise serious questions about his professional

154. *Id.* at 806–07.

155. *Id.* at 807.

156. *Registe,* 697 S.E.2d at 807.

157. *Id.*

158. *Id.* at 811.

159. *Id.* (quoting Outdoor Advert. Ass'n of Ga., Inc. v. Garden Club of Ga., Inc., 527 S.E.2d 856, 860 (Ga. 2000)) (internal quotation marks omitted).

160. *Id.*

161. *Registe,* 697 S.E.2d at 811.

162. *Id.*

ethics.[163] Finally, Jackson was doomed by Samra's testimony at the disqualification hearing that Jackson had said that he could not represent Registe because he had worked on his murder case.[164]

In conclusion, Rule 1.11, among others, prohibited Jackson's representation of Registe.[165] Consequently, the trial court properly exercised its discretion in disqualifying Jackson in all three cases.[166]

D. Informed Consent by the Government Agency, Confirmed in Writing

Of course, even if a former government lawyer is apparently disqualified from a client's representation because of a conflict of interest under Model Rule 1.11(a)(2), the lawyer may nonetheless represent the client if "the appropriate government agency gives its informed consent, confirmed in writing, to the representation."[167] A government agency's mere knowledge of a conflict is not sufficient for informed consent.[168] Rather, informed consent requires the agency's agreement "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."[169] A lawyer who withholds or glosses over information pertinent to the government agency's decision whether to consent to a conflict of interest assumes the risk that any consent obtained will prove to be invalid, that she will face discipline for violating Rule 1.11(a)(2), or both.[170] *An Unnamed Attorney v. Kentucky Bar Ass'n* is illustrative of this.[171]

An Unnamed Attorney involved the Kentucky Supreme Court's approval of a lawyer's private reprimand for professional misconduct; however, the court and parties believed that the decision had educational value for other lawyers if published in redacted form, hence the unusual case caption.[172] In a nutshell, the lawyer in *An Unnamed Attorney* once worked as an in-house lawyer for an unidentified Kentucky city (the City) handling civil matters.[173] At some point prior to 2015, he left the City for private practice.[174] In 2015, a client retained him to represent her in a zoning permit dispute that potentially implicated the

163. *Id.*
164. *Id.*
165. *Id.*
166. *Registe,* 697 S.E.2d at 811.
167. MODEL RULES OF PRO. CONDUCT r. 1.11(a)(2) (AM. BAR ASS'N 2020).
168. *See id.* r. 1.0(e) (defining "informed consent").
169. *Id.*
170. *See, e.g.*, An Unnamed Att'y v. Ky. Bar Ass'n, 568 S.W.3d 347, 348–49 (Ky. 2019) (reprimanding the lawyer privately after the trial court disqualified him).
171. 568 S.W.3d 347 (Ky. 2019).
172. *Id.* at 347.
173. *Id.*
174. *Id.* at 347–48.

City.[175] The lawyer then approached his former employer to seek consent to represent the woman in the zoning permit dispute, recognizing that the City could potentially be a party to the dispute.[176] The City initially consented to the lawyer's representation of the woman, but revoked its consent and moved to disqualify the lawyer "when he filed a lengthy complaint against [the] City with issues extending well beyond the original zoning permit dispute."[177]

The trial court conducted an evidentiary hearing and disqualified the lawyer.[178] Kentucky disciplinary authorities then charged him with violating Rules 1.9(c) and 1.11(a), which led to this decision.[179]

According to the Kentucky Supreme Court, the lawyer did not achieve informed consent when, after the City agreed to allow him to represent his client "in a simple zoning permit dispute with the potential for a lawsuit, he filed a thirty-seven-page complaint alleging [that the] City violated the Americans with Disabilities Act, the Fair Housing Act and other non-zoning issues."[180] The court explained that before filing the offending complaint, the lawyer should have gone back to the City to seek its consent to his representation of his new client with respect to the claims actually asserted.[181] Although it is unlikely that the City would have consented to the representation on those terms and the lawyer would have lost a client as a result, he at least would have complied with the applicable ethics rules and avoided professional discipline.[182]

The lawyer in *An Unnamed Lawyer* plainly did not share enough information with the City for it to fairly consent to his adverse representation. Analyzing informed consent more broadly, the amount of information necessary for a client to grant informed consent to a conflict under Model Rules 1.7(b) or 1.9(a) varies, but often pivots on the client's level of sophistication, education, and experience, and whether the client has independent counsel.[183] The more experienced a client is in legal matters, and in making decisions of the type involved in the case in which consent is sought in particular, the less information and explanation needed for a client's consent to be informed.[184] Generally, a client who is represented by independent counsel is presumed to have given informed consent to the proposed course of conduct.[185] This is true regardless of

175. *Id.* at 348.
176. *An Unnamed Att'y,* 568 S.W.3d at 348.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 348–49.
181. *An Unnamed Att'y,* 568 S.W.3d at 349.
182. *Id.*
183. Galderma Labs., L.P. v. Actavis Mid Atl. LLC, 927 F. Supp. 2d 390, 401–03 (N.D. Tex. 2013); MODEL RULES OF PRO. CONDUCT r. 1.0 cmt. 6 (AM. BAR ASS'N 2020).
184. *See* MODEL RULES OF PRO. CONDUCT r. 1.0 cmt. 6 (AM. BAR ASS'N 2020).
185. *Id.*

whether the other lawyer is the client's in-house counsel or an outside lawyer.[186] The same principles that apply to a lawyer obtaining informed consent to a conflict of interest in other contexts should apply equally to a former government lawyer seeking a government agency's consent to a conflict under Model Rule 1.11(a)(2).[187]

As for the writing requirement, it is important to note that Model Rule 1.11(a)(2) does not mandate a government agency's written consent to a representation; it requires that the agency's consent be confirmed in writing.[188] Thus, a lawyer may obtain the agency's consent in a meeting or over the telephone, for example, and comply with the rule through a confirming letter, or e-mail or text message. E-mail and text messages are "writings" in this context.[189] State rules of professional conduct, however, may vary.[190]

III. AVOIDING IMPUTED DISQUALIFICATION

Under Model Rule 1.11(b), when a former government lawyer is disqualified from a representation under Rule 1.11(a), all other lawyers in the law firm are also disqualified from the representation unless (1) the former government lawyer "is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate government agency to allow it to ascertain compliance with the provisions of [Rule 1.11(b)]."[191] A law firm must satisfy both prongs of Model Rule 1.11(b) to prevent a former government lawyer's conflict of interest from being imputed to all lawyers in the firm and thereby disqualifying the firm as a whole.[192]

A. Screening

To start, lawyers are considered to be "screened" where they are isolated "from any participation in a matter through the timely imposition of procedures

186. *Galderma Labs.*, 927 F. Supp. 2d at 403.

187. In *An Unnamed Attorney*, the City was either the lawyer's current or former private client at the time he sued it on behalf of his new client. *See* An Unnamed Att'y v. Ky. Bar Ass'n, 568 S.W.3d 347, 347–48 (Ky. 2019) ("When Unnamed Attorney left the full-time employment of City for private practice, he still contractually represented City in some matters.").

188. MODEL RULES OF PRO. CONDUCT r. 1.11(a)(2) (AM. BAR ASS'N 2020).

189. *Id.* r. 1.0(n).

190. *See, e.g.*, CAL. RULES PRO. CONDUCT r. 1.11(a)(2) (CAL. STATE BAR 2018) (requiring a government agency's "informed written consent" to a former government lawyer's representation of a client in a matter in which the lawyer participated personally and substantially as a public official or employee).

191. MODEL RULES OF PRO. CONDUCT r. 1.11(b) (AM. BAR ASS'N 2020).

192. *See, e.g.*, State v. Clausen, 104 So. 3d 410, 412 (La. 2012) (affirming the law firm's disqualification because the former prosecutor did not affirm that he would not receive any part of the fee for the subject representation and the law firm did not give the State prompt written notice that it had hired the former prosecutor).

within a firm that are reasonably adequate under the circumstances to protect information that [they are] obligated to protect" under rules of professional conduct or other law.[193] It should go without saying, but simply instructing former government lawyers not to discuss the matters they are prohibited from participating in with other lawyers or staff members, without more, is not a reasonable screen.[194]

As for implementing an effective screen, the basic ground rules for screening in other contexts apply equally to firms' efforts at screening former government lawyers. First, it is important for the law firm the former government lawyer is joining to identify the conflict of interest before the lawyer joins the firm or as soon as possible thereafter.[195] In any case, the firm should erect a screen as soon as reasonably possible after it identifies the conflict.[196] The longer a firm waits, the less likely that a court will consider the screen to be timely.[197]

Second, the firm should promptly notify lawyers and staff of the screen.[198] The form of the notice may depend on the firm, but written notice is preferable because (a) it is the easiest way for the firm to be able to demonstrate that it gave such notice; and (b) it best ensures the clarity, consistency, and thoroughness of the notice.[199] Again, depending on the firm, notice may go to all lawyers and

193. MODEL RULES OF PRO. CONDUCT r. 1.0(k) (AM. BAR ASS'N 2020).

194. Essex Equity Holdings USA, LLC v. Lehman Bros., Inc., 909 N.Y.S.2d 285, 300 (Sup. Ct. 2010).

195. *See* Mitchell v. Metro. Life Ins. Co., No. 01 CIV. 2112(WHP), 2002 WL 441194, at *10 (S.D.N.Y. Mar. 21, 2002) ("A screening device implemented only after a disqualified lawyer has joined the firm, in an instance where the firm knew of the problem at the time of her arrival, further diminishes the possibility that screening remedies the conflict. . . .").

196. *See* MODEL RULES OF PRO. CONDUCT r. 1.0 cmt. 10 (AM. BAR ASS'N 2020) ("In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening."); *see also Mitchell*, 2002 WL 441194, at *9 (stating that where the concern is a lawyer's acquisition of confidential information, "the screening measures must have been established from the first moment the conflicted attorney transferred to the firm or, at a minimum, when the firm first received actual notice of the conflict.").

197. *See, e.g.*, Stimson Lumber Co. v. Int'l Paper Co., No. CV-10-79-M-DWM-JC, 2011 WL 124303, at *5 (D. Mont. Jan. 14, 2011) (holding that waiting four months to screen a lawyer was too long); *Mitchell*, 2002 WL 441194, at *10 (explaining that a delay of nearly two months in erecting a screen was unreasonable).

198. MODEL RULES OF PRO. CONDUCT r. 1.0 cmt. 10 (AM. BAR ASS'N 2020).

199. *See* CDM Smith v. Mut. Redevelopment Houses, Inc., No. 653573/2016, 2017 WL 378567, at *4 (N.Y. Sup. Ct. Jan. 9, 2017) (stating that the lack of "a physical, dated notice circulated within [the firm] advising everyone there that [the lawyer] had to be screened from participation" in the matter led "to an almost complete lack of confidence in the efficacy of the proposed screen."); *Essex Equity Holdings*, 909 N.Y.S.2d at 301 ("A writing would have memorialized the terms, timing, scope and form of the notification and given an indication of which personnel received the notification, as well as offering proof that the other lawyers actually had received the notification, all of which would have helped to overcome the claim of impropriety.").

staff, or it may be sent to those lawyers and staff members working on the matter from which the former government lawyer is being screened. A firm may further wish to identify the screened matter on its intranet.

Third, the law firm should implement information technology controls to prevent the screened lawyer from gaining access to electronic files and documents related to the screened matter.

Fourth, a firm should establish physical measures to enforce the screen. For example, the firm should clearly mark paper files related to the screened matter, post notices on relevant file cabinets or shelves, or place notices or screening instructions in individual files so that the screened lawyer knows that materials located there are off-limits.[200] Depending on the facts, a firm may wish to consider other alternatives, such as locating the screened lawyer's office away from those of lawyers and staff members who are working on the screened matter.

Fifth, the law firm should take documented measures to maintain the screen. For example, the firm should periodically remind lawyers and staff of the screen's existence and scope,[201] and update information regarding the screen as necessary.[202] Similarly, the firm should reasonably monitor compliance with the screen.

B. Fee Apportionment

In addition to requiring that a former government lawyer be screened from a matter in which she participated personally and substantially, a law firm attempting to avoid imputed disqualification must further see that the lawyer is apportioned no part of the fee earned from that matter.[203] That is easier said than done. Apportioning fees in individual matters to individual lawyers in a law firm of any size is effectively impossible under most modern compensation systems.[204] Fortunately, a comment to Model Rule 1.11 recognizes this practical problem and explains that Rule 1.11(b)(1) "does not prohibit a lawyer from receiving a salary or partnership share established by prior independent

200. *See, e.g.*, Calhoun v. Commonwealth, 492 S.W.3d 142, 148 (Ky. 2016) (recommending that a copy of the office screening policy be placed in every screened file and that an appropriate screening notice be posted in a prominent place near any screened files).

201. MODEL RULES OF PRO. CONDUCT r. 1.0 cmt. 10 (AM. BAR ASS'N 2020).

202. For example, new lawyers or staff who join the firm may need to know that they cannot speak with the screened lawyer about the matter at issue.

203. MODEL RULES OF PRO. CONDUCT r. 1.11(b)(1) (AM. BAR ASS'N 2020).

204. Although so-called "eat what you kill" partner compensation systems are now rare, it would be possible under such a system to see that a former government lawyer was apportioned no part of the fee earned from a matter from which the lawyer was screened. For an explanation of eat what you kill compensation schemes, see MICHAEL DOWNEY, INTRODUCTION TO LAW FIRM PRACTICE 139–40 (2010).

agreement."[205] Thus, to use a common example, a former government lawyer who is an equity partner in a firm remains entitled to her full partnership draws and distributions even though those payments will include money from the firm's complete portfolio of matters—including the screened matter.[206] The lawyer may not, however, "receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified."[207]

C. Written Notice to the Government Agency

Finally, to avoid imputed disqualification, the former government lawyer or the lawyer's firm must promptly give the appropriate government agency written notice that the lawyer has been timely screened from participation in the matter and that he or she will receive no part of the associated fee.[208] Failure to give the required notice will result in the law firm's disqualification.[209]

To satisfy the Model Rule 1.11(b)(2) promptness requirement, the lawyer or firm should give the appropriate government agency written notice "as soon as practicable after the need for screening becomes apparent."[210] Simply informing the government agency that the lawyer is being screened from a matter is inadequate under the rule.[211] Rather, the notice must describe the matter and the law firm's screening procedures in sufficient detail to allow the government agency to object to the firm's representation and to the firm's screening procedures if necessary.[212] Critically, the agency's consent to the firm's screening methods is not required.[213] If the agency believes the firm's screening procedures are inadequate, its choices are to (1) try to persuade the firm to reasonably modify its procedures in the hope that the firm will do so to avoid any related dispute; or (2) challenge the firm's screening procedures in court.

205. MODEL RULES OF PRO. CONDUCT r. 1.11 cmt. 6 (AM. BAR ASS'N 2020).

206. ROTUNDA & DZIENKOWSKI, *supra* note 15, § 1.11-3(e)(4), at 622.

207. MODEL RULES OF PRO. CONDUCT r. 1.11 cmt. 6 (AM. BAR ASS'N 2020).

208. *Id.* r. 1.11(b)(2).

209. *See, e.g.*, State v. Clausen, 104 So. 3d 410, 412 (La. 2012) (affirming the law firm's disqualification because the former prosecutor did not affirm that he would not receive any part of the fee for the subject representation and the law firm did not give the State prompt written notice that it had hired the former prosecutor).

210. MODEL RULES OF PRO. CONDUCT r. 1.11 cmt. 7 (AM. BAR ASS'N 2020).

211. Essex Equity Holdings USA, LLC v. Lehman Bros., Inc., 909 N.Y.S.2d 285, 301 (Sup. Ct. 2010).

212. SISK et al., *supra* note 1, at 426.

213. *Id.*; ROTUNDA & DZIENKOWSKI, *supra* note 15, § 1.11-3(e)(3), at 621.

IV. THE USE OF GOVERNMENT INFORMATION IN PRIVATE PRACTICE

A. Overview

Model Rule 1.11 limits former government lawyers' use of certain government information in private practice in two ways. First, where former government lawyers want to represent private clients in matters adverse to their former agencies, Model Rule 1.9(c) may restrict their ability to do so if in their new representations they would be required to use or reveal information relating to the representation of their former government clients.[214] This is because Model Rule 1.11(a)(1) makes former government lawyers subject to Model Rule 1.9(c), which provides that:

> (c) [a] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.[215]

Because Model Rules 1.9(c)(1) and (2) have no analogs in Model Rule 1.11, this is the rare—indeed, only—circumstance in which Model Rule 1.9 reaches former government lawyers.[216]

Second, Model Rule 1.11(c) prohibits a former government lawyer from using confidential government information to the material disadvantage of a third party in a matter in which the third party and the lawyer's client are adverse.[217] Model Rule 1.11(c) states:

> Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.[218]

Under both Model Rule 1.11(a)(1) and 1.11(c), a former government lawyer's firm may avoid imputed disqualification by timely screening the lawyer from participation in the matter, but the screening requirements are different. To avoid disqualification under Model Rule 1.11(a)(1), which imports Model Rule 1.9(c), the firm must satisfy the screening requirements of Model

214. ABA Formal Op. 97-409, *supra* note 21, at 13.
215. MODEL RULES OF PRO. CONDUCT r. 1.9(c) (AM. BAR ASS'N 2020).
216. ABA Formal Op. 97-409, *supra* note 21, at 13.
217. MODEL RULES OF PRO. CONDUCT r. 1.11(c) (AM. BAR ASS'N 2020).
218. *Id.*

Rule 1.11(b).[219] Thus, a firm must give the appropriate government agency written notice of the matter and the firm's screening procedures, and apportion the lawyer no part of the associated fee.[220] In comparison, to avoid imputed disqualification under Model Rule 1.11(c), the law firm need only screen the former government lawyer and apportion the lawyer no part of the fee from the screened matter; the law firm does not have to notify the appropriate government agency of its actions.[221] This difference is explained by the fact that Model Rule 1.11(c) protects third parties that are adverse to the client of a former government lawyer—it does not prevent the former government lawyer from using confidential government information against her former government client.[222] Accordingly, the government has no arguable need to evaluate or verify the former government lawyer's law firm's compliance with Rule 1.11.

B. Model Rule 1.9(c) via Model Rule 1.11(a)(1)

Model Rules 1.11(a)(1) and (c) are both concerned with former government lawyers' duty of confidentiality. While lawyers' duties to clients generally terminate upon conclusion of the representation, the duty of confidentiality does not.[223] Model Rule 1.9(c) extends lawyers' duty of confidentiality under Model Rule 1.6(a) to former clients.[224] By incorporating Model Rule 1.9(c), Model Rule 1.11(a)(1) then extends former government lawyers' duty of confidentiality to their former agencies.[225] Again, Model Rule 1.9(c) prohibits a lawyer who has formerly represented a client in a matter from (1) *using* information relating to the representation to the former client's disadvantage, except as permitted by the Model Rules or when the information has become generally known; and (2) *revealing* information relating to the former client's representation, except as permitted by the Model Rules.[226] "The terms 'reveal' or 'disclose' on the one hand and 'use' on the other describe different activities or types of conduct even though they may—but need not—occur at the same time."[227]

Lawyers may breach their duty of confidentiality by not only disclosing information obtained from clients, but also by revealing information available

219. *See id.* r. 1.11(b) (stating that its screening requirements apply "[w]hen a lawyer is disqualified under paragraph (a)").

220. See *supra* Part III.c.

221. MODEL RULES OF PRO. CONDUCT r. 1.11(c) (AM. BAR ASS'N 2020).

222. ROTUNDA & DZIENKOWSKI, *supra* note 15, § 1.11-3(g), at 623.

223. *Id.* § 1.6-5(a), at 284.

224. Pallon v. Roggio, Nos. 04–3625(JAP), 06–1068(FLW), 2006 WL 2466854, at *7 (D.N.J. Aug. 24, 2006); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 479, at 1–2 (2017) [hereinafter ABA Formal Op. 479]; MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 20 (AM. BAR ASS'N 2020).

225. MODEL RULES OF PRO. CONDUCT r. 1.11 cmt. 2 (AM. BAR ASS'N 2020).

226. *Id.* r. 1.9(c).

227. ABA Formal Op. 479, *supra* note 224, at 2.

from sources other than their clients—including publicly available information.[228] The fact that information about a client is available somewhere in the public domain does not mean that it is known by, or readily available to, everyone with whom the client deals.[229]

By the same token, and as Model Rule 1.9(c)(1) expressly recognizes, where the former client's information has become generally known, there is no real purpose served by requiring a lawyer to continue to protect it.[230] The "generally known exception" to former client confidentiality under Model Rule 1.9(c)(1), however, is narrow.

First, the generally known exception applies only to the use of a former client's information, and not to the disclosure or revelation of a former client's

228. *See, e.g.*, *In re* Anonymous, 654 N.E.2d 1128, 1129–30 (Ind. 1995) (holding that the lawyer violated Rule 1.6(a) by revealing information "readily available from public sources"); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Marzen, 779 N.W.2d 757, 766 (Iowa 2010) (holding that "confidentiality is breached when an attorney discloses information learned through the attorney-client relationship even if that information is otherwise publicly available."); Law. Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 861–62 (W. Va. 1995) (stating that lawyers' duty of confidentiality "is not nullified by the fact that the information is part of a public record.").

229. *See, e.g.*, *Pallon*, 2006 WL 2466854, at *7 ("'Generally known' does not only mean that the information is of public record. . . . The information must be within the basic understanding and knowledge of the public." (citation omitted)); *In re* Johnson, No. 96-O-05705, 2000 WL 1682427, at *15 (Cal. Bar Ct. Oct. 26, 2000) (concluding that the lawyer's disclosure of a client's publicly available conviction, but which was not easily discoverable, violated the duty of confidentiality); People v. Braham, No. 15PDJ095, 2017 WL 1046460, at *12 (Colo. Jan. 23, 2017) (stating that Rule 1.6 "contains no exception permitting the disclosure of previously disclosed or publicly available information."); People v. Muhr, 370 P.3d 677, 695 (Colo. 2016) (violating Rule 1.6 by revealing information that had previously been revealed and rejecting the argument that "self-evident" analysis in work product could not be protected against disclosure by Rule 1.6); *In re* Anonymous, 932 N.E.2d 671, 674 (Ind. 2010) (noting there is "no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources."); *Marzen*, 779 N.W.2d at 766 (holding that "confidentiality is breached when an attorney discloses information learned through the attorney-client relationship even if that information is otherwise publicly available."); *In re* Bryan, 61 P.3d 641, 645, 656 (Kan. 2003) (explaining that the fact that a former client's alleged "history of making false claims" had been publicly disclosed in court pleadings did not mean that the lawyer's related disclosure to a store manager and a loss prevention manager was not the disclosure of information protected by Rule 1.6); Turner v. Commonwealth, 726 S.E.2d 325, 333 (Va. 2012) (observing that there "is a significant difference between something being a public record and it also being 'generally known,' that is, within the basic understanding and knowledge of the public"); *McGraw*, 461 S.E.2d at 861–62 (stating that lawyers' duty of confidentiality "is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it"), *but see* State v. Mark, 231 P.3d 478, 511 (Haw. 2010) (treating a former client's criminal conviction as "generally known" when discussing a former client conflict); State *ex rel.* Youngblood v. Sanders, 575 S.E.2d 864, 872 (W. Va. 2002) (stating that information in police reports was "generally known" for Rule 1.9 purposes).

230. ROTUNDA & DZIENKOWSKI, *supra* note 15, § 1.9-3, at 562.

information.[231] Even if information concerning a former client has been broadly publicized, the lawyer generally should not disseminate the information further.[232] This is especially true when the former client's information is in some respect sensitive.[233]

Second, to qualify as generally known, the former client's information must be (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade.[234] For instance, information may become widely recognized and thus generally known because of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media.[235] Likewise, information should be treated as generally known if it is announced, discussed, or identified in what reasonable members of the industry, profession, or trade would consider a leading print or online publication or other resource in the field.[236] On the other hand, information that is publicly available is not necessarily generally known.[237]

Finally, Model Rule 1.9(c)(1) prohibits the use of a former client's information only to the extent it is detrimental to the former client.[238] A lawyer is not prohibited from using a former client's information to gain an advantage

231. ABA Formal Op. 479, *supra* note 224, at 2.

232. SISK et al., *supra* note 1, at 404.

233. *Id.*

234. ABA Formal Op. 479, *supra* note 224, at 5; *see also* Mich. Eth. Op. RI-377, 2018 WL 5725274, at *4 (State Bar of Mich., Comm. on Prof'l & Judicial Ethics 2018) [hereinafter Mich. Eth. Op. RI-377] ("Information is generally known within the meaning of [Rule] 1.9(c)(1) if it is widely recognized by members of the public in the relevant geographic area, or it is widely recognized in the former client's industry, profession, or trade. Furthermore, information that is publicly available is not necessarily generally known.").

235. ABA Formal Op. 479, *supra* note 224, at 5.

236. *Id.*

237. *See, e.g.*, Pallon v. Roggio, Nos. 04–3625(JAP), 06–1068(FLW), 2006 WL 2466854, at *7 (D.N.J. Aug. 24, 2006) ("'Generally known' does not only mean that the information is of public record. . . . The information must be within the basic understanding and knowledge of the public." (citation omitted)); *In re* Gordon Props., LLC, 505 B.R. 703, 707 n.6 (Bankr. E.D. Va. 2013) ("'Generally known' does not mean information that someone can find."); *In re* Tennant, 392 P.3d 143, 148 (Mont. 2017) (explaining that for information to be considered generally known, "the information must be within the basic knowledge and understanding of the public"; it does not suffice that the information is part of the public record, other available sources for such information exist, or that the lawyer otherwise received the same information from other sources); ABA Formal Op. 479, *supra* note 224, at 5 (stating that information is not generally known merely because it "has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.").

238. *See* MODEL RULES OF PRO. CONDUCT r. 1.9(c)(1) (AM. BAR ASS'N 2020) (providing that lawyers generally may not "use information relating to the representation to the disadvantage of the former client.").

for herself or a third party (such as another client) if the former client is neither harmed nor placed at risk.[239]

C. Model Rule 1.11(c): Using Confidential Government Information

Further focusing on confidentiality, Model Rule 1.11(c) provides that a former government lawyer who has "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."[240] The rule broadly defines "confidential government information" to mean "information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public."[241]

As broadly as confidential government information may be defined, however, that universe has reasonable limits, as *Franklin v. Clark*[242] demonstrates. The defendants in *Franklin* were the current commissioner and a former commissioner of the Baltimore City Police Department (BCPD).[243] They moved to disqualify the plaintiff's lawyer, Howard Hoffman, in part based on Rule 1.11(c).[244] Hoffman had formerly represented the BCPD when he served in the Baltimore City Solicitor's Office.[245] He once wrote a memorandum analyzing the BCPD's general ability to terminate a police officer serving in an exempt position, which was the issue in the case at hand.[246] The defendants contended that the memo reflected Hoffman's acquisition of confidential government information because, at the time the memo was written, it was an attorney-client privileged communication.[247] The defendants' Rule 1.11(c) argument failed for two reasons.

First, the defendants had produced Hoffman's memorandum in discovery, such that they had waived the attorney-client privilege.[248] Second, and more to the immediate point, the court believed that the defendants were interpreting

239. *See* Mich. Eth. Op. RI-377, *supra* note 234, at *2 n.1 (stating that Rule 1.9(c)(1) permits a lawyer to use information relating to a former client's representation if its use does not place the former client at a disadvantage and the information is not confidential under Rule 1.6(a)).

240. MODEL RULES OF PRO. CONDUCT r. 1.11(c) (AM. BAR ASS'N 2020).

241. *Id.*

242. 454 F. Supp. 2d 356 (D. Md. 2006).

243. *Id.* at 358.

244. *Id.* at 367.

245. *Id.* at 363.

246. *Id.* at 363–64.

247. *Franklin,* 454 F. Supp. 2d. at 367.

248. *Id.* at 367–68.

"confidential government information" too broadly.[249] The *Franklin* court exposed the weakness in the defendants' argument through an analogy:

> Take, for example, an assistant U.S. attorney who prosecutes cases pursuant to a criminal statute, and . . . writes a memorandum to his supervisor questioning the constitutionality of that statute. Under the defendants' reasoning, if the lawyer left the government, he would be foreclosed from raising the constitutionality of the statute in his representation of a private client, because he would have access to confidential information, i.e., the memorandum. Such a broad view of . . . confidential information pursuant to Rule 1.11(c) would unnecessarily preclude many former government lawyers from representing clients in the private sector, even when doing so would pose no harm to government interests.[250]

The court therefore declined to disqualify Hoffman under Rule 1.11(c).[251]

As we saw earlier in *In re National Prescription Opiate Litigation*,[252] Model Rule 1.11(c) provides an independent basis to disqualify a former government lawyer who is representing a private client in litigation.[253] Even if a former government lawyer does not have a conflict of interest under Model Rule 1.11(a)(2), he or she may still be disqualified under Model Rule 1.11(c) if the requirements of the latter rule are met.[254]

For Model Rule 1.11(c) to apply, the former government lawyer must know that the information in question constitutes confidential government information; in other words, the lawyer must have actual knowledge of the nature of the information.[255] A lawyer's knowledge may be inferred from circumstances.[256] A former government lawyer's claim not to recall the substance of confidential government information that the lawyer once possessed will not prevent disqualification based on the lawyer's actual knowledge of the information.[257] The rule does not apply, however, "to information that merely could be imputed to the lawyer."[258]

249. *Id.* at 368.

250. *Id.*

251. *Id.*

252. No. 1:17-md-2804, 2019 WL 1274555 (N.D. Ohio Mar. 20, 2019).

253. *Id.* at *4–5; *Franklin*, 454 F. Supp. 2d at 367.

254. *See, e.g.*, *In re Nat'l Prescription*, 2019 WL 1274555, at *5 (disqualifying the lawyer).

255. *See* MODEL RULES OF PRO. CONDUCT r. 1.11 cmt. 8 (AM. BAR ASS'N 2020) (requiring actual knowledge for Model Rule 1.11(c) to apply); *id.* r. 1.0(f) ("'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question.").

256. *Id.* r. 1.0(f).

257. *See, e.g.*, Kronberg v. LaRouche, No. 1:09cv947(AJT/TRJ), 2010 WL 1443934, at *3, 5 (E.D. Va. Apr. 9, 2010) (disqualifying a former government lawyer who claimed to recall very little of the confidential government information to which he once had access).

258. MODEL RULES OF PRO. CONDUCT r. 1.11 cmt. 8 (AM. BAR ASS'N 2020); *see, e.g.*, Lebamoff Enters., Inc. v. O'Connell, No. 16-cv-08607, 2020 WL 2098050, at *3 (N.D. Ill. Apr. 30, 2020) (refusing to disqualify a lawyer as an expert witness because Rule 1.11(c) did not apply

Walker v. State[259] is an interesting case. There, Danial Vidrine spent ten years as an Assistant Attorney General in the Road Hazard Section of the Louisiana Attorney General's Office, where he represented the Department of Transportation and Development (DOTD) in civil litigation.[260] In June 1999, he resigned and entered private law practice.[261] Around one month later, he wrote to a number of Louisiana lawyers to inform them that he had a decade of experience defending road hazard claims for DOTD and was "'very informed in the inner operations of the Department of Transportation and Development as well as the location of valuable written documents which are essential in proving a case against the DOTD.'"[262]

In August 1999, Vidrine sued DOTD on behalf of Willie Mae Mixon.[263] In October 1999, Vidrine began representing Robert Walker as co-counsel in a case against DOTD that had been filed while Vidrine was still an Assistant Attorney General.[264] DOTD successfully moved to disqualify Vidrine as plaintiffs' counsel in both cases.[265] Different outcomes on appeal to a lower appellate court led both Vidrine and DOTD to appeal to the Louisiana Supreme Court, where the cases were consolidated.[266]

On appeal, DOTD contended that Rule 1.11(c) prevented Vidrine from using its confidential information against it in litigation.[267] As evidence that Vidrine possessed confidential government information, DOTD pointed to Vidrine's July 1999 letter in which he wrote that he was intimately familiar with DOTD's inner workings and knew where to find "valuable written documents which [were] essential in proving a case against the DOTD."[268] According to DOTD, the key documents that Vidrine mentioned were highway safety documents that were immune from discovery and inadmissible in evidence under 23 U.S.C. § 409.[269] DOTD's general counsel, Larry Durant, had testified below "that Vidrine did have, or would have had," access to 23 U.S.C. § 409 documents while in the Attorney General's office.[270] "Durant testified that he

to confidential government information that merely could be imputed to him because of his former government position); Babineaux v. Foster, No. CIV.A. 04-1679, 2005 WL 711604, at *7 (E.D. La. Mar. 21, 2005) (rejecting the city's argument that the lawyer could be presumed to have acquired confidential information while working for the city).

259. 817 So. 2d. 57 (La. 2002).
260. *Id.* at 59.
261. *Id.*
262. *Id.* (quoting Vidrine's letter).
263. *Id.*
264. *Walker,* 817 So. 2d. at 59.
265. *Id.*
266. *Id.*
267. *Id.* at 62.
268. *Id.* (internal quotation marks omitted).
269. *Walker,* 817 So. 2d. at 62.
270. *Id.* at 62–63.

recalled certain instances in which Vidrine had been given 'abnormal accident listing information.'"[271]

When deposed in the trial court, Vidrine denied having confidential government information related to the Mixon or Walker cases.[272] On appeal, he conceded that his July 1999 letter "was poorly worded and inartfully drafted," but nothing more.[273]

The *Walker* court did not believe that Vidrine should be disqualified in the Mixon and Walker cases.[274] Vidrine's ill-advised July 1999 letter did not prove that he had access to documents shielded from discovery and evidentiary use by 23 U.S.C. § 409.[275] Durant's testimony that Vidrine "at some point had access to 23 U.S.C. § 409 information" did not establish that Vidrine "ever had access to confidential information regarding the Mixon or Walker matters."[276] In contrast, Vidrine had specifically denied under oath that he ever had such information.[277]

The *Walker* court was careful to explain that its refusal to disqualify Vidrine did not mean that government agencies are powerless to disqualify their former lawyers who reverse field on them.[278] But the agency must show that the lawyer acquired confidential information that is relevant to a case the lawyer is currently pursuing "and which can be used against, and to the prejudice of," the agency.[279] Here, DOTD simply did not carry its burden of proof.[280] While Vidrine may have once had access to confidential DOTD documents regarding unsafe Louisiana roads, it did not necessarily follow that those materials were relevant to the roads in the Mixon and Walker cases.[281] In the end, the court concluded that because DOTD had not proved that Vidrine had relevant confidential information that could be used against it, he should not be disqualified in either the Mixon or Walker cases.[282]

Although the *Walker* court may have reached the correct conclusion, it appears to have applied the wrong rule in the process. The court should have decided the case under Rule 1.11(a)(1). This is because Rule 1.11(c) applies where a lawyer has "information that the lawyer knows is confidential government information about a *person* acquired when the lawyer was a public

271. *Id.* at 63.
272. *Id.*
273. *Id.* at 63–64.
274. *Walker,* 817 So. 2d. at 63.
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Walker,* 817 So. 2d. at 63.
280. *Id.* at 64.
281. *Id.* at 63.
282. *Id.* at 64.

officer or employee."[283] In such a case, the former government lawyer "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*."[284] The term "person" as used in Model Rule 1.11(c)—which is identical to Louisiana Rule 1.11(c)—"refers to third parties, not the government."[285] Model Rule 1.11(c) thus prevents a former government lawyer from using confidential government information concerning a third party to achieve an unfair advantage over that party on behalf of a private client.[286] In other words, Model Rule 1.11(c) protects third parties that are adverse to the client of a former government lawyer—it does not prevent the former government lawyer from using confidential government information against her one time government client.[287] Other rules do that.[288]

Now, in fairness to the *Walker* court and as noted above, the outcome likely would have been the same had the court correctly applied Rule 1.11(a)(1) and thus Rule 1.9(c). Even if Vidrine's prior representation of DOTD, the Mixon case, and the Walker case constituted the same matter, nothing in the opinion indicates that Vidrine used DOTD information to the agency's disadvantage in the Mixon or Walker cases in violation of Rule 1.9(c)(1).[289] Assuming that Vidrine's statements about his DOTD experience in his July 1999 letter to Louisiana lawyers revealed information relating to his representation of DOTD,[290] there is likewise nothing in the opinion to indicate that his violation of Rule 1.9(c)(2) was sufficiently serious to justify his disqualification.

V. CONCLUSION

Government lawyers regularly leave public service for private employment. The law firms they join or to which they return welcome them because of the experience they gained, and the expertise they developed, while in the government. The challenge for former government lawyers and their law firms is recognizing and managing conflicts of interest that sometimes arise out of lawyers' government service. To address the special conflict of interest concerns that emerge from the revolving door of government service, the ABA formulated Model Rule 1.11. With a single exception, Model Rule 1.11 displaces Model Rule 1.9, which generally governs conflicts of interest in lawyers' successive

283. MODEL RULES OF PRO. CONDUCT r. 1.11(c) (AM. BAR ASS'N 2020) (emphasis added).

284. *Id.* (emphasis added).

285. ROTUNDA & DZIENKOWSKI, *supra* note 15, § 1.11-3(g), at 623.

286. MODEL RULES OF PRO. CONDUCT r. 1.11 cmt. 4 (AM. BAR ASS'N 2020).

287. ROTUNDA & DZIENKOWSKI, *supra* note 15, § 1.11-3(g), at 623.

288. *See* MODEL RULES OF PRO. CONDUCT r. 1.11(a)(1) (AM. BAR ASS'N 2020) (extending Model Rule 1.9(c) to former government lawyers).

289. *See id.* r. 1.9(c)(1) (prohibiting a lawyer who has formerly represented a client in a matter from using information relating to the representation to the former client's disadvantage).

290. *Id.* r. 1.9(c)(2).

representations. In so doing, Model Rule 1.11 attempts to balance the competing interests in play when a matter spans a lawyer's government service and private practice.

Most conflict of interest controversies involving former government lawyers pivot on the scope of the matter that is alleged to be the source of the conflict, and whether the lawyer participated in the matter personally and substantially. To a lesser extent, former government lawyers' alleged acquisition of confidential government information also spawns disqualification disputes. Whether former government lawyers should be disciplined or disqualified for alleged conflicts of interest tied to their public service always requires case- and fact-specific inquiry. Avoiding discipline and disqualification, and further avoiding imputed disqualification of the lawyer's law firm, requires former government lawyers and their law firms to capably navigate Model Rule 1.11. This article provides a practical guide for doing so.