Missouri Public Service Commission

POST OFFICE BOX 360
JEFFERSON CITY, MISSOURI 65102
573-751-3234
573-751-1847 (Fax Number)
http://www.psc.state.mo.us

May 2, 2002

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Case No. WR-2000-281

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of the **SUPPLEMENT TO STAFF'S RESPONSE TO MOTION TO STRIKE STAFF FILINGS AND MOTION TO DISQUALIFY COUNSEL.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Keith R. Krueger
Deputy General Counsel
(573) 751-4140
(573) 751-9285 (Fax)

KRK/lb
Enclosure
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Missouri-American Water Company's Tariff Sheets Designed to Implement General Rate Increases for Water and Sewer Service Provided to Customers in the Missouri Service Area of the Company	))))))	Case No. WR-2000-281

SUPPLEMENT TO STAFF'S RESPONSE TO MOTION TO STRIKE STAFF FILINGS AND MOTION TO DISQUALIFY COUNSEL

COMES NOW the Staff of the Missouri Public Service Commission and, for its Supplement to its Response to Motion to Strike Staff Filings and Motion to Disqualify Counsel ("Response"), respectfully states to the Missouri Public Service Commission as follows:

1. On April 15, 2002, the Staff filed its Response to Motion to Strike Staff Filings and Motion to Disqualify Counsel. The Staff attached to that Response, as Exhibit 1, a copy of a letter from Michael G. Berry to the Office of the Chief Disciplinary Counsel requesting a written informal advisory opinion concerning the propriety of Keith R. Krueger continuing to represent the Staff on remand of this case. The Staff discussed this letter on Page 7 of its Response, in Paragraph 17. The Staff there stated that it had not yet received a response from the Chief Disciplinary Counsel, but added that it would "provide a copy of such response as soon as it is received from the OCDC, and intends to guide its conduct according to the advice that the OCDC provides on this matter."

2. The Staff has today received a letter from the Chief Disciplinary Counsel in response to Mr. Berry's request. A copy of that letter is attached hereto as Attachment 1.

3. In her response, the Chief Disciplinary Counsel said: "This is a matter that should be addressed with the regulatory judge." It would therefore appear that the pending Motion to

Disqualify Counsel properly places the issue before the Commission for resolution. Staff counsel will therefore await the Commission's decision on this issue.

WHEREFORE, the Staff submits this Supplement to Response to Strike Staff Filings and to Disqualify, and prays that the Commission overrule said motions.

Respectfully submitted,

DANA K. JOYCE

General Counsel

Keith R. Krueger
Deputy General Counsel
Missouri Bar No. 23857
Robert V. Franson
Associate General Counsel
Missouri Bar No. 34643

Attorneys for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-4140 (Telephone)
(573) 751-9285 (Fax)
kkrueg01@mail.state.mo.us (e-mail)

Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 2nd day of May 2002.

Service List for
Case No. WR-2000-281
April 15, 2002 (ccl)

Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Chuck D. Brown
City Attorney Department – City of Joplin
303 East Third Street
Joplin, MO 64802

Charles Brent Stewart
Stewart & Keevil, L.L.C.
1001 Cherry Street, Suite 302
Columbia, MO 65201

Louis J. Leonatti
Leonatti & Baker, P.C.
123 E. Jackson St., P.O. Box 758
Mexico, MO 65265

Stuart Conrad/Jeremiah D. Finnegan
Finnegan, Conrad & Peterson
3100 Broadway, Suite 1209
Kansas City, MO 64111

Leland B. Curtis
Curtis, Oetting, Heinz, Garrett & Soule
130 S. Bemiston, Suite 200
St. Louis, MO 63105

Ed Downey
221 Bolivar St., Suite 101
Jefferson City, MO 65102

Martin W. Walter/Joseph W. Moreland
Blake & Uhlig, P.A.
2500 Holmes Rd.
Kansas City, MO 64108

Lisa M. Robertson/Brian Head/ Timothy Kissock
City Hall – Room 307
1100 Frederick Avenue
St. Joseph, MO 64501

Diana M. Vuylsteke, Esq.
One Metropolitan Square, Suite 3600
211 N. Broadway
St. Louis, MO 63102-2750

Karl Zobrist
Blackwell Sanders Peper Martin LLP
2300 Main Street, Suite 1100
Kansas City, MO 64108

James Deutsch/Henry Herschel
Riezman & Blitz, P.C.
308 East High Street, Suite 301
Jefferson City, MO 65101

James M. Fischer
101 Madison Street, Suite 400
Jefferson City, MO 65101

W.R. England III/Dean L. Cooper
Brydon, Swearengen & England
312 E. Capitol Avenue, P.O. Box 456
Jefferson City, MO 65102

OFFICE OF THE
CHIEF DISCIPLINARY COUNSEL
3335 AMERICAN AVENUE
JEFFERSON CITY, MO 65109-1079
(573) 635-7400 FAX (573) 635-2240

SUPREME COURT OF MISSOURI

April 30, 2002

Mr. Michael G. Berry
Hendren and Andrae, L.L.C.
PO Box 1069
Jefferson City, MO 65102

Dear Mr. Berry:

This is in response to your recent request for a written informal advisory opinion dated April 4, 2002. This opinion is based only upon a review of Supreme Court Rule 4, the Rules of Professional Conduct, and relevant advisory opinions of which I am aware. This is a non-binding, informal advisory opinion pursuant to Missouri Supreme Court Rule 5.30(b). It is not intended to be a substitute for consultation with legal counsel who is experienced in the area of ethics as applied to this situation. It is not intended to be a substitute for the judgement of the fact finder in a matter before a court. It is based solely upon the limited facts you have presented in your letter to this office. If additional facts are present, other than those presented in your letter, the analysis may be different. This opinion does not affect an adjudicator's ability to rule on a motion for disqualification or make other determinations in a pending case.

This is a matter that should be addressed with the regulatory law judge. It is not possible for our office to give you an "advance ruling" on whether there is a conflict of interest that would violate the Rules of Professional Conduct under these circumstances. While you have attempted to give us information on the inner workings of the agency, there is much that we do not know about the inter-relationships and amount of interaction between the Commission, Staff, General Counsel, and the regulatory law judge.

We do not rule on questions of whether a potential or actual conflict would necessitate disqualification. There are numerous factors an adjudicator may

ATTACHMENT 1

consider in determining whether disqualification from representation on any individual case is warranted, including the stage of the proceedings, the effect on the client, and the right of the client to counsel of choice, the actual prejudice to the other party, etc.

Are you aware of the revision to Rule 4-1.11? Please see the enclosed copy of the amended rule. I would agree with your comment that Rule 4-1.11 would seem to apply, (although it does not expressly cover this situation), in the sense of the ability to screen the conflicted lawyer from participation in the matter to avoid the conflict being imputed to all members of the General Counsel office. However, if screening has not already been undertaken, it is possible that this remedy will not suffice.

Rule 4-1.11 as well as 4-1.7 both have provisions for proceeding with the representation with the informed consent of the client. I would suggest that further analysis should be undertaken with regard to "who is the client" under these circumstances. Your letter refers to General Counsel representing "staff". Consider if this is an accurate characterization, or whether General Counsel represents "the state" or the "consumers" or "the Commission" or some other entity. I am not offering an opinion on this aspect, but point out that this is often the crux of the analysis in conflicts issues.

Another issue that you may wish to consider further is the propriety of an adjudicator re-hearing a case on remand, if that adjudicator had ex parte contacts with an attorney on the case, in the interim period. I offer no opinion on this, but it seems that this may be an appropriate focus of inquiry in considering this entire situation.

I am sorry we cannot be of more help in this instance, but I hope these comments give you some direction for your further analysis.

Sincerely,

Maridee F. Edwards
Chief Disciplinary Counsel

ME/mc

choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality. Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

Adverse Positions. The second aspect of loyalty to client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 1.10(b) and (c) concerning confidentiality have been met.

Code Comparison

DR 5–105(D) provides that "if a lawyer is required to decline or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or affiliate with him or his firm, may accept or continue such employment."

Supplemental Missouri Comment

Rule 1.16 should be followed concerning the duty of an attorney to withdraw once he is disqualified from representing a client.

4–1.11. Government and Private Employment

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private 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 consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is 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 enable it to ascertain compliance with the provisions of this Rule.

(b) 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. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d)(1) A lawyer who also holds public office, whether full or part-time, shall not engage in activities in which his or her personal or professional interests are or foreseeably could be in conflict with his or her official duties or responsibilities. A lawyer holding public office shall not attempt to influence any agency of any political subdivision of which such lawyer is a public officer, other than as a part of his or her official duties, or except as authorized in sections 105.450 to 105.496, RSMo.

(2) No lawyer in a firm in which a lawyer holding a public office is associated may undertake or continue representation in a matter in which the lawyer who holds public office would be disqualified, unless the lawyer holding public office is screened in the manner set forth in Rule 4.1.11(a).

(e) As used in this Rule, the term 'matter' includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(f) As used in this Rule, the term 'confidential government information' means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

(Amended eff. Oct. 19, 2001.)

Comment

This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable

in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

Code Comparison

Rule 1.11(a) is similar to DR 9-101(B), except that the latter uses the terms "in which he had substantial responsibility while he was a public employee."

Rules 1.11(b), (c), (d) and (e) have no counterparts in the Code.

Supplemental Missouri Comment

A lawyer who has been employed in a public agency should check appropriate state and federal statutes and regulations which may place other limitations on his right to practice after he leaves his governmental employment.

Supplemental Missouri Comment to Rule 4-1.11(d)

Lawyers often serve as legislators or hold other public offices. This is highly desirable as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. However, the public officer lawyer's position on matters of public policy can be inconsistent with the interests of a client. The lawyer should advise the client in all such situations and at all times be mindful of the disclosure and consent requirements of Rule 4-1.7.

4-1.12. Former Judge or Arbitrator

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is 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 tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitrator panel is not prohibited from subsequently representing that party.

Comment

This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multi-member court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules correspond in meaning.

Code Comparison

Paragraph (a) is substantially similar to DR 9-101(A), which provides that "A lawyer shall not accept employment in a matter upon the merits of which he has acted in a judicial capacity." Paragraph (a) differs, however, in that it is broader in scope and states more specifically the persons to whom it applies.

There is no counterpart in the Code to paragraphs (b), (c) or (d).

With regard to arbitrators, EC 5-20 states that "a lawyer who has undertaken to act as an impartial arbitrator or mediator ... should not thereafter represent in the dispute any of the parties involved." DR 9-101(A) does not provide a waiver of the disqualification applied to former judges by consent of the parties. However, DR 5-105(C) is similar in effect and could be construed to permit waiver.