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Arizona Legal Ethics

1.11 Rule 1.11 Successive Government and Private Employment

[1.11:100](#) Comparative Analysis of Arizona Rule

- **Primary Arizona References:** [AZ-ER 1.11](#) and accompanying [Comment](#)
- **Background References:** [ABA Model Rule 1.11](#), [Other Jurisdictions](#)
- **Commentary:**

1.11:101 Model Rule Comparison

The 2003 amendments made only very minimal changes to this Rule, most of those occurring in the accompanying Comment. The only change made to the Rule itself was to add to paragraph the requirement that any consent by a government agency be "informed consent, confirmed in writing."

Arizona did not adopt the amendments made to [MR 1.11](#) as a consequence of the recommendations of the ABA Ethics 2000 Commission. Accordingly, the format and structure of [AZ-ER 1.11](#) are significantly different than the format and structure of MR 1.11. Substantively, however, the two Rules are essentially the same.

1.11:102 Model Code Comparison

[AZ-ER 1.11\(a\)](#) is similar to former [DR 9-101\(B\)](#), except that the latter provision used the phrase "in which he had substantial responsibility while he was a public employee." There was no counterpart in the former Model Code to [AZ-ER 1.11\(b\)](#), [\(c\)](#), [\(d\)](#) and [\(e\)](#).

1.11:110 Federal Conflict of Interest Statutes and Regulations

The general federal "conflict of interest" statute is the Ethics in Government Act, [18 U.S.C. § 208](#). Section 208(a) prohibits officers and employees of the executive branch, or of any independent agency of the United States, a Federal Reserve bank director, officer or employee, or an officer or employee of the District of Columbia, from participating in an official capacity in particular matters in which they or certain persons or entities with whom they have specified relationships (spouse, minor child, general partner, organization in which the individual is serving as officer, director, trustee, general partner

or employee, or any person or organization with which the individual is negotiating or has any arrangement concerning prospective employment) have a financial interest.

Section 208(b) permits waivers of these prohibitions in certain cases. First, section 208(b)(1) permits agencies to exempt agencies on a case-by-case basis from the disqualification provisions of section 208(a). Similarly, section 208(b)(3) permits agencies to waive, in certain cases, the disqualification requirement that would apply to special government employees serving on a federal Advisory Committee. Section 208(b)(4) statutorily defines certain types of "financial interests" that will not fall within the purview of Section 208(a). Finally, under Section 208(b)(2), the Office of Government Ethics has the authority to promulgate executive branchwide regulations describing financial interests that are too remote or inconsequential to warrant disqualification under section 208(a).

Regulations promulgated by the Office of Government Ethics establishing standards of ethical conduct for employees of the executive branch are contained in Part 2635 of Title 5 of the Code of Federal Regulations. Regulations promulgated by the Office of Government Ethics, pursuant to the authority conferred by section 208(b)(2), defining the financial interests that are too remote or inconsequential to warrant disqualification, and providing guidance to agencies on the factors to consider when issuing individual waivers under sections 208(b)(1) or (b)(3), are contained in Part 2640 of Title 5 of the Code of Federal Regulations.

[18 U.S.C. § 207](#) governs post-employment conflicts of interest for employees of the federal government. Basically, it prohibits a former government employee from knowingly acting as agent or attorney for, or otherwise representing any person, in any formal or informal appearance before, or making any oral or written or written communication on behalf of any other person, with the intent to influence, to (1) the United States, (2) in connection with any particular government matter involving a specific party, (3) in which matter the former employee participated personally and substantially while an employee of the government. Regulations issued by the Office of Government Ethics implementing, and interpreting, the requirements of that statute, are contained in Part 2637 of Title 5 of the Code of Federal Regulations. 5 CFR § 2637.201(b) (1) makes clear that the statutory prohibition applies to attorneys who in subsequent private practice attempts to represent a client in any matter before or involving the federal government, in which that attorney participated personally substantially while in the government's employ.

1.11:120 Arizona Conflict of Interest Statutes and Regulations

The Arizona statutes that define and regulate conflicts of interest for "all public officers and employees of incorporated cities and towns, of political subdivisions and of the state and any of its departments, commissions, agencies or boards" are found in Article 8 of Chapter 3 of Title 38 of the Arizona Revised Statutes, **A.R.S. §§ 38-501-511**. The two principal substantive provisions of this Article prescribe certain limitations on the activities of public officers and employees while they are in public service (**A.R.S. § 38-503**), and define certain "prohibited acts" for public officers and employees both during and after their tenure in government service (**A.R.S. § 38-504**).

With respect to the conduct of public officers and employees while in public service, **A.R.S. § 38-503** establishes two general requirements:

1. Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any contract, sale, purchase or service to such public agency must disclose that interest in the official records of the public agency involved, and must refrain from voting upon or otherwise participating in any manner in proceedings concerning such contract, sale or purchase. **A.R.S. § 38-503(A)**.

2. Any public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency must disclose that interest in the agency's official records and refrain from any participation in the decision involved. **A.R.S. § 38-503 (B)**.

Minor exceptions are made for purchases made by a school district governing board, and for small purchases by political subdivisions other than school districts. "Relative" is defined, in **A.R.S. § 38-502 (9)** to include spouses, children, grandchildren, parents, grandparents, brothers or sisters of the whole or half blood and their spouses, and the parent, brother, sister or child of a spouse. "Substantial interest" is defined, in **A.R.S. § 38-502(11)** as any direct or indirect pecuniary or proprietary interest which is not a "remote interest," which is defined in **A.R.S. § 38-502(10)**. In addition, there is a prohibition on the employment by a school district or community college district board of any person who is a member, or any person whose spouse is a member, of the governing board of the district (**A.R.S. § 38-503(D)**), and a prohibition on a public officer or employee accepting compensation other than as provided by law for any service rendered or to be rendered in "any case, proceeding, application, or other matter which is pending before" the public agency by which that officer or employee is employed. **A.R.S. § 38-505(A)**.

A.R.S. § 38-504 places the following restrictions, defined as "Prohibited acts," upon public officers and employees which apply both during and following their period of public service:

1. A public officer or employee, after leaving public service, may not represent another person for compensation before the public entity by which the officer or employee was employed during the preceding twelve months with respect to any matter with which the public officer or employee was directly concerned and in which the officer or employee personally participated during the period of public service "by a substantial and material exercise of administrative discretion." **A.R.S. § 38-504(A)**.

2. During the period of public employment or service, and for two years thereafter, a public officer or employee may not, without appropriate authorization, disclose or use, for that individual's personal profit, any information acquired during the period of public service which has been clearly designated as confidential "when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business." **A.R.S. § 38-504(B)**.

3. In addition, a public officer or employee may not ever use or disclose, without appropriate authorization, any information acquired in the course of performing official duties which is declared confidential by law. **A.R.S. § 38-504(B)**.

4. A public officer or employee may not use or attempt to use the officer's or employee's official position to secure anything of value that would not ordinarily accrue to the individual in the performance of official duties, which is "of such character as to manifest a substantial and improper influence upon him with respect to his duties." **A.R.S. § 38-504(C)**.

Violations of these statutes by individual officers or employees can lead to the imposition of criminal penalties. **A.R.S. § 38-510**. In addition, contracts that are entered into in violation of these prohibitions are voidable at the option of the public agency involved, **A.R.S. §§ 38-506(A), 511**. Finally, any person affected by a decision of a public agency may institute a civil action to enforce the provisions of the conflict of interest statutes and, if successful, secure appropriate equitable relief. **A.R.S. § 38-506(B)**.

1.11:130 Definition of "Matter"

All of the restrictions imposed by [AZ-ER 1.11](#) on present or former government lawyers, and on the latter's partners and associates, turn on whether "the matter" involved is one in which the present or former government lawyer had previous involvement, or in connection with which a former government lawyer acquired "confidential government information. [See Section [1.11:500](#), *infra*.] "Matter" is defined in [AZ-ER 1.11\(d\)](#) to include:

- (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 government agency.

Neither the [Comment to AZ-ER 1.11](#), nor any other Arizona authority, address directly what constitutes a "matter" for purposes of applying the Rule. Certain of these authorities suggest, however, that the potentially disqualifying "matter," in which the lawyer was involved while in government or private practice, must be the same as, and not merely related to, the subsequent "matter" that is claimed to give rise to the problem.

For example, in **Arizona Ethics Opinion No. 89-04**, the Committee on the Rules of Professional Conduct (hereinafter "the Committee") concluded that a public defender who had formerly been a deputy county attorney could represent defendants in probation revocation proceedings, even if that individual had learned information concerning the underlying criminal convictions while in the county attorney's office, provided the individual was not privy to knowledge concerning the allegations made in the probation revocation petition. The Opinion thus suggests that a probation revocation proceeding constitutes a separate "matter" from the underlying criminal charges which resulted in the defendant being placed on probation. Similarly, in **Arizona Ethics Opinion No. 81-07**, the Committee ruled that a firm employing a former United States Attorney may represent a corporate client in a malpractice action against its former lawyer, even if the United States Attorney's Office had, during the attorney's tenure there, supervised a criminal investigation of the activities of a former officer of the corporate client which involved limited inquiries into the activities of the defendant lawyer, where it appeared that the investigation did not relate to any legal malpractice by the defendant attorney, and the former United States Attorney's responsibility and participation in the investigation were not substantial. Again, this results suggests that the Committee viewed the former investigation into activities of the lawyer involved represented a separate matter than the subsequent malpractice claim. See also **Arizona Ethics Opinion No. 81-25**, where the Committee held that a former assistant attorney general who had represented the State in certain suits that were still pending could not enter the employment of a private firm that was representing parties in the same suits.

There have been occasions, however, involving claims of a conflict interest on the part of a lawyer who had moved from a public defender's office or a private criminal defense practice to a prosecutorial agency, where the courts have applied the "substantial relationship" test of [AZ-ER 1.9](#) that applies to conflicts with the interests of former clients, rather than the "matter" test of [AZ-ER 1.11](#). Thus, in **In re Ockrassa, 165 Ariz. 576, 799 P.2d 1350 (1990)**, the Respondent had been a contract public defender for the City of Kingman in 1982 and 1983 and, in that capacity, had defended a Mr. Otto on three separate occasions on charges of operating a motor vehicle while under the influence of alcohol. In 1986, while employed as a contract Deputy County Attorney in the Mohave County Attorney's Office, the Respondent represented the State in prosecuting two criminal charges against Mr. Otto, who was charged with a third DUI offense within a period of sixty (60) months which, upon conviction, leads to an enhanced sentence. The Court held that Respondent had engaged in representation that

involved an impermissible conflict of interest under AZ-ER 1.9, because Respondent's interests as a prosecutor were materially adverse to the interests of Respondent's former client, Mr. Otto. The Court indicated that it was not necessary for Mr. Otto's prior DUI convictions to be an element of the subsequent offense to establish a "substantial relationship" between the former and the present engagements, because the subsequent prosecution of Otto by his former defense counsel created a substantial danger that confidential information revealed during the course of the former attorney/client relationship would be used against the former client.

A similar result was reached in **State v. Hursey, 176 Ariz. 330, 861 P.2d 615 (1993)**, where a private attorney, Mr. Callahan, who had represented Hursey twice on earlier criminal charges, subsequently accepted a position as a Deputy Pinal County Attorney. Hursey was then arrested again, and Callahan was assigned to handle the prosecution. On the eve of trial, Callahan alleged the two prior criminal convictions, on which he had represented Hursey, for sentencing enhancement purposes. After Hursey was convicted, Callahan delegated to another Deputy County Attorney the task of proving the prior criminal convictions. The Court held that this was a conflict of interest on the part of Callahan because the two prior criminal convictions were "directly in issue" in the subsequent prosecution, and there was an unacceptable danger that Callahan would make use of confidential information he had gained from representing Hursey in private practice. The Court went on to note that the "appearance of impropriety" could not be alleviated by merely assigning part of the case to another prosecutor. See also **Arizona Ethics Opinion No. 85-06**, where the Committee held that a Deputy County Attorney, who had previously worked at the Public Defender's Office, where he had represented a particular criminal defendant and had discussed trial errors with a co-defendant's counsel, could not prosecute the co-defendants without their defense counsel's consent.

1.11:200 Representation of Another Client by Former Government Lawyer

- **Primary Arizona References:** [AZ-ER 1.11\(a\)](#) and accompanying [Comment](#)
- **Background References:** [ABA Model Rule 1.11\(a\)](#), [Other Jurisdictions](#)
- **Commentary:** ABA/BNA § 91:4001, ALI-LGL § 214, Wolfram § 8.10

The special provisions of Rule [AZ-ER 1.11](#), and not the imputed disqualification rule of [AZ-ER 1.10](#), apply when a government lawyer leaves the government to enter private practice. A former government lawyer may not represent a private client in connection with a matter in which the lawyer "personally and substantially participated" while employed by the government, unless the "appropriate" government agency gives "informed consent, confirmed in writing." [AZ-ER 1.11\(a\)](#). The former government lawyer's new firm, however, is not disqualified from such representation if (1) the former government lawyer is screened from any participation in the representation, (2) the former government lawyer does not share in any portion of the fees generated by the representation, and (3) written notice is provided to the lawyer's former agency employer so that it may verify compliance with the rule. *Id.* Neither the former government lawyer nor the lawyer's present firm is prohibited from undertaking or continuing a representation if the former government lawyer was not involved to a material degree in the investigative or deliberative process regarding the transactions in question. **Security General Life Insurance v. Superior Court, 149 Ariz. 332, 718 P.2d 985 (1986)**.

Similarly, a former government lawyer cannot represent a private client whose interests are adverse to a person concerning whom the lawyer actually acquired confidential government information while in the government's employ, in a matter in which the

information could be used to the material disadvantage of that person. [AZ-ER 1.11\(b\)](#). The former government lawyer's firm, however, may undertake or continue such a representation if the former government lawyer is screened from any participation in the representation and does not share in the fees resulting from the representation. *Id.*

The special rules applicable to movement of lawyers into, and away from, government service are justified by the government's need to be able to recruit and retain qualified personnel:

. . . On the other hand, 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 in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service . . .

[Comment, AZ-ER 1.11, ^ 3.](#) . Notwithstanding that stated purpose, these rules and restrictions also seem to be applied when a lawyer moves from a prosecuting governmental agency to a public defender's office, even though both may be publicly funded.

Security General Life Insurance Company v. Superior Court In and For Yuma County, 149 Ariz. 332, 718 P.2d 985 (1986), involved a petition for special action from a trial court order disqualifying an individual who had formerly served as the Director of the Department of Insurance from handling a matter in private practice involving Security General on the grounds that, while serving as Director, he had signed orders affecting Security General. In accepting jurisdiction and reversing, the Supreme Court noted that [AZ-ER 1.11](#) provides for disqualification when a lawyer undertakes to represent a private client in a matter in which the lawyer participated personally and substantially as a public officer or employee, and that the Rule generally applies in a situation where the agency with which the lawyer was formerly associated is a party to the action or in which confidential agency information will be used for the benefit of a private client, and is intended to discourage government attorneys from acting in a fashion which helps them secure private employment. To support a disqualification, however, the Rule requires a showing of both "substantial" and "personal" participation in the matter which is the subject of the action by the lawyer while in public service, and that showing was not satisfied by the mere signing of orders prepared by others.

The rules that govern the limitations upon the ability of a lawyer who leaves government service to enter private practice to accept engagements for clients whose interests are adverse to state agencies the lawyer represented while with the government were summarized by the Committee on the Rules of Professional Conduct ("the Committee") in **Arizona Ethics Opinion No. 02-05**. The issue is controlled by [AZ-ER 1.9](#) and [1.11](#). The first limitation, imposed by [AZ-ER 1.11\(a\)](#), is that the matter for which the private client seeks representation may not be one in which the attorney participated personally and substantially while in government service. This serves the purpose of preventing a lawyer from exploiting public service for the advantage of a private client. This conflict may be waived by the appropriate official of the agency involved and, even if it is not, the lawyer's firm may avoid disqualification by screening the lawyer from participation in it and any share of the fees earned from it.

Second, the attorney may not possess any confidential government information, as that term is defined in [AZ-ER 1.10\(e\)](#), which could be used to the material disadvantage of the agency. This conflict cannot be waived, but imputation of it to other members of the lawyer's firm can be avoided through screening. Finally, under what is now [AZ-ER 1.9\(c\)](#), the lawyer would be precluded from using information relating to the former representation of the agency to its disadvantage, without the agency's informed consent.

If this limitation is not waived by the agency through such informed consent, it will be imputed to other lawyers in the former government lawyer's firm.

In **Arizona Ethics Opinion No. 89-04**, the Committee on the Rules of Professional Conduct (hereinafter "the Committee") concluded that a public defender who had formerly been a deputy county attorney could represent defendants in probation revocation proceedings, even if that individual had learned information concerning the underlying criminal convictions while in the county attorney's office, provided the individual was not privy to knowledge concerning the allegations made in the probation revocation petition. Similarly, in **Arizona Ethics Opinion No. 83-02**, the Committee ruled that, where a firm employs a former city attorney who continues to represent the city in one pending litigation matter, that attorney and other lawyers in the firm may represent the firm's clients in matters before the governing body or other tribunals of the city, if these matters are wholly unrelated to the litigated case and the attorney had no involvement with them while employed as a city attorney. In **Arizona Ethics Opinion No. 83-15**, the Committee concluded that a firm employing a former city attorney may represent clients before the city in a matter in which the attorney involved had substantial responsibility, provided that the city consents after full disclosure.

In **Arizona Ethics Opinion No. 81-07**, the Committee ruled that a firm employing a former United States Attorney may represent a corporate client in a malpractice action against its former lawyer, even if the United States Attorney's Office had, during the attorney's tenure there, supervised a criminal investigation of the activities of a former officer of the corporate client which involved limited inquiries into the activities of the defendant lawyer, where it appeared that the investigation did not relate to any legal malpractice by the defendant attorney, and the former United States Attorney's responsibility and participation in the investigation were not substantial. In **Arizona Ethics Opinion No. 82-11**, the Committee concluded that an attorney could properly represent a defendant charged with violating a municipal ordinance, even though that attorney had been a member of the Charter Council which established the town government.

On the other hand, in **Arizona Ethics Opinion No. 80-04**, the Committee ruled that a former assistant attorney general may not represent a client in a case arising from a suit that occurred while the attorney was in the attorney general's office. Interestingly, in that same Opinion, the Committee also concluded that other lawyers in the lawyer's private firm were also precluded from handling the matter.

These rules and restrictions are applicable even if the private attorney's former government service was not in a capacity of an attorney, or occurred before the individual was admitted to practice. See **Security General Life Insurance Company v. Superior Court In and For Yuma County, 149 Ariz. 332, 718 P.2d 985 (1986)**. Thus, in **Arizona Ethics Opinion No. 86-08**, the Committee held that it was not a conflict of interest for an attorney who had served on a Board of Adjustment prior to becoming a lawyer, to represent clients in proceedings to set aside earlier decisions of the Board as arbitrary or illegal. In that same Opinion, however, the Committee ruled that an attorney who had been a clerk in the civil division of a County Attorney's Office prior to admission to the bar should decline the representation of clients in cases seeking to set aside decisions of that County's Board of Adjustment, where the cases involved facts that the attorney had learned during the clerkship.

1.11:210 No Imputation to Firm if Former Government Lawyer Is Screened

The language of [AZ-ER 1.11\(a\)\(1\)](#) and [1.11\(b\)](#) suggests that, even if a lawyer in a private firm had participated personally and substantially, while in public service, in a matter being handled by the firm, or the matter might involve confidential government information about a person learned by the former government lawyer while in public

service, the resulting disqualification will be personal to the lawyer, and not imputed to other members of the firm, if the affected former public lawyer "is screened from any participation in the matter and is apportioned no part of the fee therefrom." That rule, however, has not been consistently applied by the Arizona authorities.

In **Arizona Ethics Opinion No. 83-18**, the Committee ruled that a public defender contract between a city of two lawyers, one of whom was a former city attorney, which provided that all pending cases that arose during the tenure of the former city attorney would be handled by the other lawyer, is ethically proper if the former city attorney is screened from these cases. Similarly, in **Arizona Ethics Opinion No. 80-19**, the Committee concluded that a public defender's office could hire a former deputy county attorney who had written and filed an appellate brief in a case in which members of the public defender's office represented the defendant, if the attorney was screened from that action as well as any other cases in which that attorney had substantial responsibility while in the county attorney's office. In **Arizona Ethics Opinion No. 83-15**, however, the Committee concluded that a firm employing a former city attorney may represent clients before the city in a matter in which the attorney involved had substantial responsibility, provided that the city consents after full disclosure, and did not discuss the screening option.

In **Arizona Ethics Opinion No. 80-04**, the Committee ruled that a former assistant attorney general may not represent a client in a case arising from a suit that occurred while the attorney was in the attorney general's office. Interestingly, in that same Opinion, the Committee also concluded that other lawyers in the lawyer's private firm were also precluded from handling the matter, and again did not discuss the screening alternative. In **Arizona Ethics Opinion No. 81-18**, the Committee ruled that an attorney previously employed by the Arizona Corporation Commission to research and draft opinions and orders for a hearing officer could not participate in the representation of a utility in connection with an intervenor's appeal of a Commission Order granting the utility a rate increase, if the attorney had prepared a draft opinion following a rehearing before the Commission affirming a previous Order granting the increase. The Committee went on to point out that the attorney's disqualification was imputed to other members of the attorney's firm, and could not be waived or consented to by either the utility or the Commission. Finally, in **Arizona Ethics Opinion No. 81-25**, the Committee ruled that a former assistant attorney general who represented the State in still pending suits could not enter the employ of a private firm that was representing parties in those suits.

1.11:300 Use of Confidential Government Information

- **Primary Arizona References:** [AZ-ER 1.11\(b\)](#) and [\(e\)](#) and accompanying [Comment](#)
- **Background References:** [ABA Model Rule 1.11\(b\)](#), [Other Jurisdictions](#)
- **Commentary:** ABA/BNA § 91:4001, ALI-LGL § 214, Wolfram § 8.10McAuliffe, Arizona Civil Rules Handbook - 1999 Edition (West Group 1999) 927-934

[AZ-ER 1.11\(b\)](#) provides that a former government lawyer cannot represent a private client whose interests are adverse to a person concerning whom the lawyer, while in public service, acquired information that the lawyer knows is confidential government information, in a matter in which the information could be used to the material disadvantage of that person. Rule [ER 1.11\(b\)](#). The former government lawyer's firm, however, may undertake or continue such a representation if the former government lawyer is screened from any participation in the representation and does not share in the fees resulting from the representation. *Id.*

There are no Arizona authorities that address specifically issues arising under this particular provision. The [Comment](#) to the Rule notes that "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." Comment, AZ-ER 1.11, ^ 3. The Court in **Security General Life Insurance Company v. Superior Court In and For Yuma County**, 149 Ariz. 332, 718 P.2d 985 (1986) did observe, in passing, that one of the reasons for the [AZ-ER 1.11](#) itself, and particularly the restrictions applicable to the use of confidential government information, was to discourage government attorneys to act in a fashion which helps them secure private employment.

1.11:310 Definition of "Confidential Government Information"

The term "confidential government information" is defined, in [AZ-ER 1.11\(e\)](#), to encompass:

... information which 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.

There are no Arizona authorities that elaborate upon this definition as set forth in the Rule.

In a wholly unrelated context, the Arizona Supreme Court has observed that: "[I]nformation known to governmental employees is not necessarily secret or confidential ..." **Application of Levine**, 97 Ariz. 88, 97, 397 P.2d 205, 211 (1964). In Arizona, however, there are a number of statutes that provide that information provided to various governmental agencies, either upon the agency's request or pursuant to the regulatory mandates of the statute itself, are to remain "confidential." A listing of such statutes, and of the types of documents and other information to which they apply, can be found in the "Privileges and Confidential Documents Checklist" in **McAuliffe, Arizona Civil Rules Handbook - 2003 Edition (West Group 2003) pp. 1010-1017**.

[1.11:400](#) Government Lawyer Participation in Matters Related to Prior Representation

- **Primary Arizona References:** [AZ-ER 1.11\(c\)](#) and accompanying [Comment](#)
- **Background References:** [ABA Model Rule 1.11\(c\)](#), [Other Jurisdictions](#)
- **Commentary:** ABA/BNA § 91:4001, ALI-LGL § 213, 214, Wolfram § 8.9.4, State Bar of Arizona Manual on Professionalism 112-114 (1992)

[AZ-ER 1.11\(c\)](#) contains the restrictions that apply to lawyers who migrate the other way, *i.e.*, move from private practice to government service. Under [AZ-ER 1.11\(c\)\(1\)](#), after entering government service, the lawyer involved may not have any involvement in a matter "in which the lawyer participated personally and substantially while in private practice or nongovernmental employment," unless applicable law provides that nobody can act in the lawyer's place in the matter. A similar rule has also been applied by the Arizona authorities where a lawyer moves between two governmental offices which regularly represent clients whose interests conflict, *e.g.*, a public defender's office and a prosecutor's office in the same county. The special rules applicable to movement of lawyers into, and away from, government service are justified by the government's need to be able to recruit and retain qualified personnel:

. . . On the other hand, 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 provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service . . .

[Comment, AZ-ER 1.11, ^ 3.](#)

In **In re Ockrassa, 165 Ariz. 576, 799 P.2d 1350 (1990)**, the Respondent had been a contract public defender for the City of Kingman in 1982 and 1983 and, in that capacity, had defended a Mr. Otto on three separate occasions on charges of operating a motor vehicle while under the influence of alcohol. In 1986, while employed as a contract Deputy County Attorney in the Mohave County Attorney's Office, the Respondent represented the State in prosecuting two criminal charges against Mr. Otto, who was charged with a third DUI offense within a period of sixty (60) months which, upon conviction, leads to an enhanced sentence. The Court held that Respondent had engaged in representation that involved an impermissible conflict of interest under [AZ-ER 1.9](#), because Respondent's interests as a prosecutor were materially adverse to the interests of Respondent's former client, Mr. Otto. The Court indicated that it was not necessary for Mr. Otto's prior DUI convictions to be an element of the subsequent offense to establish a "substantial relationship" between the former and the present engagements, because the subsequent prosecution of Otto by his former defense counsel created a substantial danger that confidential information revealed during the course of the former attorney/client relationship would be used against the former client.

A similar result was reached in **State v. Hursey, 176 Ariz. 330, 861 P.2d 615 (1993)**, where a private attorney, Mr. Callahan, who had represented Hursey twice on earlier criminal charges, subsequently accepted a position as a Deputy Pinal County Attorney. Hursey was then arrested again, and Callahan was assigned to handle the prosecution. On the eve of trial, Callahan alleged the two prior criminal convictions, on which he had represented Hursey, for sentencing enhancement purposes. After Hursey was convicted, Callahan delegated to another Deputy County Attorney the task of proving the prior criminal convictions. The Court held that this was a conflict of interest on the part of Callahan because the two prior criminal convictions were "directly in issue" in the subsequent prosecution, and there was an unacceptable danger that Callahan would make use of confidential information he had gained from representing Hursey in private practice. The Court went on to note that the "appearance of impropriety" could not be alleviated by merely assigning part of the case to another prosecutor. See also **Arizona Ethics Opinion No. 85-06**, where the Committee held that a Deputy County Attorney, who had previously worked at the Public Defender's Office, where he had represented a particular criminal defendant and had discussed trial errors with a co-defendant's counsel, could not prosecute the co-defendants without their defense counsel's consent. On the other hand, in **Arizona Ethics Opinion No. 89-04**, the Committee ruled that a former Deputy County Attorney, who had taken a position as a Public Defender, could represent a defendant being prosecuted by his former employer, if the only knowledge he had gained about the client in his previous employment was that the defendant was being investigated or charged.

In **Arizona Ethics Opinion No. 81-29**, the Committee ruled that an attorney who had represented a criminal defendant before becoming a prosecutor may not prosecute the former client in another criminal case. The Committee pointed out, however, that the attorney had a duty to advise other prosecutors in the office of the prior representation in the event the office decides to charge the former client with a crime, and the infectious disqualification principle would not require the hiring of a special prosecutor to handle the matter.

A separate issue, and one which the Arizona authorities have handled differently in the context of government agencies than for movement between private firms, is whether the personal disqualification of an individual prosecutor or public defender should be imputed to, and operate to disqualify, the entire office in which the disqualified attorney is employed. The issue of whether an entire office should be disqualified because of an "appearance of impropriety" was first addressed in **State v. Latique, 108 Ariz. 521, 502 P.2d 1340 (1972)**, which arose under the former Code of Professional Responsibility. In that case, the Court approved the disqualification of the entire Maricopa County Attorney's Office because a deputy public defender who had acted as the defendant's co-counsel had accepted a position as the chief deputy county attorney while the prosecution of the defendant was still pending, even though the individual involved took no part in the prosecution. The Court held in part that the "office would have to divorce itself from the prosecution . . . because the appearance of unfairness cannot be permitted." **Id., 108 Ariz. At 523.**

Although the Model Rules of Professional Conduct did not retain the prohibition on the appearance of impropriety contained in Canon 9 of the Code of Professional Responsibility, the Arizona Supreme Court has held that the "appearance of impropriety" standard survives as part of any analysis of a possible conflict of interest. **Gomez v. Superior Court, 149 Ariz. 223, 717 P.2d 902 (1986)**; **State ex rel. Romley v. Superior Court, 181 Ariz. 378, 891 P.2d 246 (App. 1995)**; **Sellers v. Superior Court In and For Maricopa County, 154 Ariz. 281, 742 P.2d 292 (App. 1987)**. An appearance of impropriety should be enough to cause an attorney to closely scrutinize whether to proceed with the engagement that gives rise to the conflict, but it is generally "too slender a reed" on which to rest an order requiring the attorney's disqualification, except in the rarest of cases. **Sellers v. Superior Court In and For Maricopa County, 154 Ariz. 281, 289, 742 P.2d 292, 299 (App. 1987)**.

The issue arose again in **Turbin v. Superior Court, 165 Ariz. 195, 797 P.2d 734 (App. 1990)**, where the defendant sought to disqualify the entire Navajo County Attorney's Office after his defense counsel left to join that office. The County Attorney's Office relied heavily on the fact that the new Rules of Professional Conduct had been adopted since the decision in **Latique**, and they did not contain the prohibition on the appearance of impropriety on which the **Latique** Court had based its decision. The Court of Appeals disagreed and held that "the appearance of impropriety, which was so thoroughly discussed in **Latique**, still has a definite place in the balancing test the trial court must apply in resolving the question of disqualification." **165 Ariz. at 199**. The Court ruled that the trial court should consider the four factors articulated in **Alexander v. Superior Court, 141 Ariz. 157, 685 P.2d 1309 (1984)**, and in addition whether there had been a showing of prejudice or the lack thereof. Applying all these considerations to the facts before it, the Court found that the disqualification of the entire Navajo County Attorney's Office was appropriate, in part because of the public perception of impropriety that would result were disqualification denied. But see **State ex rel. Romley v. Gottsfield, 171 Ariz. 195, 829 P.2d 1241 (App. 1992)**, where precisely the opposite result was reached, under similar facts, with respect to the Maricopa County Attorney's Office.

The issue of the circumstances in which it might be appropriate to disqualify an entire office because of a disqualifying conflict of interest of one of its members was definitively addressed in the decision in **State ex rel. Romley v. Superior Court In and For Maricopa County, 184 Ariz. 223, 908 P.2d 37 (App. 1995)**, in which the trial court had disqualified the entire Maricopa County Attorney's Office from particular prosecutions on which one Deputy County Attorney had worked while in private practice based on the need to ensure the integrity of the prosecutions and to avoid the "appearance of impropriety." The Court of Appeals, in reversing, noted that the first step in the analysis should be whether the particular lawyer who had changed positions would be disqualified

from participating in the prosecution. If the defendant carries the burden of showing that the individual in question personally and substantially participated in the matter involved, then the burden shifts to the prosecuting agency to show why vicarious disqualification should not be ordered. In assessing this issue, the trial court should take into account the policies underlying [AZ-ER 1.11\(c\)](#), the length and intensity of the prior representation, the nature of the crime, as well as the size of the prosecutor's office and whether it had put in place adequate mechanisms to screen the individual from any knowledge of, or involvement in, the prosecutions affected. See also **State v. Sustaita, 183 Ariz. 240, 902 P.2d 1344 (App. 1995)**.

One of the significant aspects of these decisions is their implicit recognition of the principle that, in the context of a prosecutor's or public defender's office, screening the individual lawyer from knowledge of and participation in the matter that gives rise to the conflict may be effective to avoid disqualification of the entire office. That principle has now been codified for lawyers in private practice by the adoption of [AZ-ER 1.10\(d\)](#).

A related issue is the nature and extent of the restrictions, if any, that are applicable to a lawyer and/or to others associated with that lawyer, who simultaneously holds a public office while still engaging in the private practice of law. In **Arizona Ethics Opinion No. 93-09**, the Committee addressed the issue whether it represented a conflict of interest for a lawyer who was also a legislator, or members of that lawyer-legislator's firm, to engage in lobbying activities on behalf of clients before the legislature. The Committee held that there was no *per se* prohibition on a lawyer-legislator also engaging in lobbying activities on behalf of clients, but noted that the lawyer-legislator's duties to the public or to constituents might in certain circumstances represent a responsibility that might materially limit the lawyer's ability to lobby for a client. If the lawyer-lobbyist concludes that representation of a client for lobbying purposes will be adversely affected by the fact that the lawyer is also a legislator, then neither the lawyer involved nor any member of the firm with which that lawyer is associated may accept that engagement. Similarly, in **Arizona Ethics Opinion No. 93-07**, the Committee ruled that a public defender elected to serve on a City Council ordinarily may not represent defendants in criminal cases where police officers employed by that City had arrested the defendant(s) or were to testify at trial against them.

An attorney who has a contract to serve as a public defender in Superior Court may also serve as a Judge *pro tempore* for civil and domestic relations matters in that Court, provided there is a full disclosure to all parties in each case assigned to the attorney in that capacity and there are no persons involved in those cases who have an interest in matters being handled by the attorney under the public defender contract. **Arizona Ethics Opinion No. 87-21**. That attorney may not, however, serve in that Court as a Judge *pro tempore* in criminal or juvenile proceedings. **Id.** The Committee addressed a similar issue in **Arizona Ethics Opinion No. 82-14**, which involved a firm that employed an attorney who also served as a city councilman. The Committee concluded that neither the attorney involved nor other members of the firm could: (1) practice in a Justice Court where the Justice of the Peace also serves as the City Magistrate, (2) represents plaintiffs in personal injury actions against the city, (3) practice in the City's Magistrate Court, or (4) handle criminal or civil litigation in which employees of the city may be adverse parties or witnesses.

In **Arizona Ethics Opinion No. 81-17**, the Committee held that a former city attorney whose law partner was a special deputy county attorney "identified in the mind of the public as a prosecutor" could not represent criminal defendants in Magistrate Court, unless the individual had no knowledge of the cases involved while employed as a city attorney. In **Arizona Ethics Opinion No. 80-12**, the Committee ruled that an attorney whose law partner serves as a member of the Complaint Committee of the State Board of Accountancy may only represent accountants before the Board if the proceedings do not involve the Complaint Committee, or only involve proceedings which occur subsequent to

consideration of the matter by the Complaint Committee. That attorney could not, however, represent an accountant before the Board in connection with complaints filed against the accountant which had been considered and/or brought by the Complaint Committee.

On the other hand, in **Arizona Ethics Opinion No. 81-31**, the Committee opined that, if a partner in a law firm serves on a municipal planning and zoning commission, other members of the firm are not precluded from handling their own personal matters before that commission, provided the partner recuses himself before they are considered. Similarly, in **Arizona Ethics Opinion No. 80-15**, the Committee held that an attorney who served as an uncompensated member of the Governor's Council on Children, Youth and Families, and who has no policy making powers on the Council, could continue the *pro bono* representation of handicapped children in class action suits against the state and certain of its officers and agencies. Finally, in **Arizona Ethics Opinion No. 80-14**, the Committee ruled that the partners of an attorney appointed to act as a magistrate in Municipal Court may appear before other judges in that same court system.

1.11:500 Government Lawyer Negotiating for Private Employment

- **Primary Arizona References:** [AZ-ER 1.11\(c\)\(2\)](#)
- **Background References:** [ABA Model Rule 1.11\(c\)](#), [Other Jurisdictions](#)
- **Commentary:** ABA/BNA § 91:4001, ALI-LGL §§ 156, 214, Wolfram § 9.10

[AZ-ER 1.11\(c\)\(2\)](#) provides that, except as law may otherwise expressly permit, a lawyer in public service shall not "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."

Neither the [Comment to AZ-ER 1.11](#), nor any other Arizona authority, address this issue directly or elaborate upon the provisions of the Rule itself. The Court in **Security General Life Insurance Company v. Superior Court In and For Yuma County, 149 Ariz. 332, 718 P.2d 985 (1986)** did observe, in passing, that one of the reasons for the Rule, and particularly the restrictions applicable to the use of confidential government information, was to discourage government attorneys to act in a fashion which helps them secure private employment.