Ethics Opinion
001029

Ethics opinions are issued by the State Bar of Montana s Ethics Committee in answer to prospective situations sent in by Montana lawyers. The opinions are advisory only.

FACTS:
Information is requested as to the effect an attorney's successful election to a constitutionally mandated public office will have on the continuation of the attorney's former firm and the extent to which the attorney candidate can continue to engage in private legal work once in public office under the Rules of Professional Conduct. The firm does not expect to routinely encounter the former firm member's political office before the courts. Both the Montana Constitution and statutes addressing the office presuppose the position is full time. Both also presuppose that the public officer will not be acting as an attorney in the public office, but will be acting in the name of the public interest. It is not mandated that the office holder be an attorney, though the office is primarily regulatory in function.

QUESTIONS PRESENTED:

1. May an attorney continue with the private practice of law consistent with the Rules of Professional Conduct if elected to a full time constitutionally mandated public office?

2. If elected, can the firm name continue either by the elected official continuing to practice with the firm in "off hours" or having a family member, who is also an attorney, become "of counsel"?

3. If elected, may such public officer receive an agreed-upon percentage of fees from pending cases earned prior to his or her accession to office which are resolved after the such official assumes the political office?

SHORT ANSWERS:
1. No. See Ethics Opinion 001028.
2. No.
3. No. See Ethics Opinion 001028.

DISCUSSION:
To a significant extent, the issues raised in this Opinion are discussed in Ethics Opinion 001028. The office in question is a constitutionally decreed full-time office charging the public officer to act in the best interest of the public. As explained in Opinion 001028, when representation of public bodies is involved, the conflict of interest standard applied is one that eschews the appearance of impropriety. The Committee applies that standard in this situa-tion to instill public confidence in the integrity of the legal profession. Although the Committee is not authorized to determine standards of conduct appropriate to public officials, in this situation, the public official in question is a member of the bar. It is to the capacity of a member of the bar holding full time public office that this Opinion is directed.

An attorney elected to full time state-wide public office must dissolve an existing law partnership *(see note 1)*. Upon accession to office, a lawyer is still subject to Rule 1.7 *(see note 2)* (concerning general conflicts of interests); Rule l.9 *(see note 3)* (concerning conflicts of interests with former clients); Rule 1.11 *(see note 4)* (concerning successive government and private employment); and statutes and government regulations regarding conflict of interest. (The statutes and regulations may circumscribe the extent to which the Rules apply; however, we concern ourselves with the lawyer's duties under the Rules and leave interpretation of the law to others.)

As stated in Opinion 001028, positions of public trust call for especially vigilant conduct by the elected attorney. Public scrutiny of attorneys holding public positions accentuates that need. The public is alert and sensitive to the impropriety of conflicts of interest. Preservation of public confidence in the bar and public officers calls for no less. Please refer to Ethics Opinion 001028 for the complete analysis of this issue, as well as the third issue raised addressing fees. When an attorney accepts a constitutional-ly mandated full-time public office, he or she must give up any future financial benefits of private practice while that attorney holds office. This does not preclude the attorney from receiving benefits earned up to the date of departure from the firm into public office.

Rule of Professional Conduct 7.5(c) and enclosed Ethics Opinion 861126 provide that "[T]he name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm." The "of counsel" lawyer's name should not be included in the firm name unless the lawyer is already a named partner or named shareholder and is retiring. Given the facts as presented, this would not be the case for the requesting attorney's family members. Designation of either as "of counsel" would not provide a basis tor either tamily member's name to be a part of the firm name.

THIS OPINION IS ADVISORY ONLY

One member submitted the following concurrence:

I concur in the Committee's disposition of Opinion No. 001029 and, pursuant to Rule III. A. 2 of the Operating Rules of the Ethics Committee, write separately with respect to Question No. 1 to add slightly to the Committee's analysis. For purposes of the concurrence, I accept the Committee's statement of facts.

DISCUSSION:
To a significant extent, the issues raised in Question 1 are the same as those discussed in Ethics Opinion No. 001028. The only difference is that in Opinion No.
001028, the officeholder is required to be an attorney. Accordingly, the officeholder is subject to direct application of the Rules of Professional Conduct in discharging the office's duties. In this case, while the officeholder may by happenstance be an attorney, the office and its duties do not themselves involve the practice of law and the officeholder will not necessarily be acting as an

attorney while fulfilling the duties of the office. As such, the officeholder is sub-ject to the restrictions set forth in Mont. Code Ann. § 2-2-101 through -304. The proper interpretation and application of those provisions is not before the Committee. Rather, the question before this Committee is whether, under the Rules of Professional Conduct, an attorney can still engage in the private practice of law while holding the referenced office. The Committee correctly concluded that the attorney can not.

While I have not been able to find any authority directly on point - perhaps because this question has not often been asked - virtually every authority I could find dealing with concurrent public and private legal representation requires that an "appearance of impropriety" standard be applied. Here, even though the "public" side of the equation doesn't involve legal representation per se, it is clear that the "appearance of impropriety" standard should still be applied in determining whether concurrent private legal representation is appropriate. Among other things, the duties imposed by the Constitution, statutes and at common law on a public official are analogous to those imposed on an attorney when representing a private party, i.e. the public officeholder's duty to the public is one of undivided loyalty. See e.g. Mont. Code Ann. § 2-2-103; *Lovejoy v. Grubbs*, 432 So. 2d 678, 681 (Fla. Ct. App., Fifth Dist.,1983)("public officials hold positions of public trust; they are under an inescapable obligation to serve the public with the highest fidelity, good faith, and integrity.. . Such required conduct demands undivided loyalty and compels public officers to refrain from outside activities which interfere with the proper discharge of their duties"). More importantly, however, an "appearance of impropriety" standard is appropriate in this situation because of the Bar's overriding need to instill public confidence in the integrity of the legal profession.

Under the "appearance of impropriety" standard, "[t]he point is not whether impropriety exists, but that any appearance of impropriety is to be avoided." *In re Advisory Opinion of Kentucky Bar Ass'n.*, 613 S.W. 2d 416 (Ky. 1981). Applying that standard here I have, for the reasons discussed below, no difficulty in concluding that the accession to high political office effectively precludes the maintenance of a private legal practice by the officeholder.
First, at this high level of public office it is impossible, at least in the public's eye, to separate the person from the office. To illustrate this fact, a person holding one of the Mont. Const. art. VI, § 1 offices are not compensated on an hourly basis and have no specific requirements as to the number of hours they are to work. They are simply expected to do their job, whatever it takes. This fact alone under-cuts the premise of the request: In an office of this nature there are no "off hours" in which the office-holder can con-duct his private law practice. As explained in Opinion No. 001028, the absolute and undivided nature of the loyalty the officeholder has toward the public, by definition, leaves no room for a loyalty to a private client.

Second, while an attorney may be able to understand and even abide by technical demarcations between his respective loyalties, it is clear that the public would not perceive it as such. As an example, while the specific litigation referenced in the opinion request preceded the attorney's (as yet hypothetical) accession to office, if the attorney can continue with the representation of private clients in that case after accession there is no logical reason why the attorney could not enter into new engagements after that date as well. The possibility thus arises that officeholder could be sought out by private clients because of "who he knows" and the perceived ability to "pull strings." Indeed, the holding of such office could prove to be a very effective client-

development tool. I believe that the Bar has an overriding interest in setting a standard for its members that clearly separates ongoing public service from private gain. While the skill, experience, and reputation of attorneys - and especially those who have previously gained experience in public service - is a legitimate basis upon which private clients can select an attorney, the fact an attorney currently holds a high public office simply is not an appropriate basis upon which the decision to retain a lawyer
should be based.

Third, the concurrent private practice of law and holding of high elected office raises the potential of circumstances arising that could threaten the officeholder's independent judgment or otherwise prejudice the interests of the attorney's private client. For example, facts may be discovered during the course of the private legal case that may prove embarrassing to the officeholder in the attorney's public or political capacity. Those facts may also require the case to be steered in a direction that creates a direct conflict with the attorney's public duties. Indeed, the opinion request itself acknowledges this possibility. In all of these circumstances the officeholder would need to disentangle, which may prejudice the client and distract from the attorney's public responsibilities. Similarly, while the "aura" of the office may be of benefit to the party being represented by the officeholder, one could easily anticipate that the opposing party would believe that such an advantage was prejudicial and seek to disqualify the officeholder. The consequence of a dispute focused on the status of the attorney - rather than the merits of the client's case - could easily prove prejudicial to the latter. The "appearance of impropriety" standard requires that these foreseeable situa-tions be avoided.

Finally, I believe that the Bar itself has an overriding need to underscore the value and importance of public service by clearly placing it on a plane that is apart from and above private gain. Not doing so would risk the Bar's credibility and status in the eyes of the public and would diminish the sacrifices that are made every day by those members of the Bar who willingly forego the opportunity for private gain in exchange for the privilege of serving the public. Thus I concur with the Committee's conclusion that when an attorney accedes to one of the Mont. Const. art. VI, sec. 1 offices, he or she must give up any future financial benefits of private practice while that attorney holds office. This does not preclude the attorney from being compensated for services rendered prior to accession to public office.

NOTES

1 The same general analysis must apply regardless of the form of the practice entity, including professional corporations and limited liability corporations.

2 **RULE 1.7 Conflict of Interest: General Rule**
(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

3 **RULE 1.9 Conflict of Interest: Former Client**
A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) 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 consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

4 **RULE 1.11 Successive 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 govern-ment 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 informa-tion 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 per-sonally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful dele-gation 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) 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.

(e) As used in this Rule, the term "confidential government informa-tion" means 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.