

You have presented a hypothetical in which an attorney has been appointed to serve as Commissioner in Chancery in a suit brought by a homeowner's association to enforce its lien for unpaid assessments. The lot owner ("Defendant A") and several creditors are defendants. The lot owner's daughter, ("Defendant B"), who is one of the defendants by virtue of being a beneficiary of a deed of trust, has alleged a conflict in the Commissioner's appointment based upon the following two incidents:

Incident #1: Two years prior to the Commissioner's appointment, the Commissioner's law partner represented a realtor in connection with a real estate ethics complaint filed by Defendant B. The realtor worked for the realty company associated with the development where Defendant's A's lot is located. A letter of reprimand was issued against the realtor for failing to provide Defendant B with a copy of the ratified contract of purchase and commission reduction agreement upon signing or initialing. All other allegations of wrongdoing by the realtor were dismissed. The representation was concluded two to three weeks prior to the Commissioner's association with the law partner and the formation of their law firm. The Commissioner was unaware of the representation prior to Defendant B's allegations of a conflict.

Incident #2: Several years ago (the exact date is unknown), Defendant B consulted with one of the other defendants, an attorney then in private practice, regarding a possible fraud claim against Defendant A. The alleged basis of the fraud claim is unknown. Defendant B believes that the attorney with whom she consulted, in turn, contacted the Commissioner's law partner about her case. The law partner has no recollection of the matter.

With regard to this hypothetical, you have asked the following question:

Is it a conflict of interest for this attorney to serve as Commissioner in Chancery in this case or would it be impermissible as involving the appearance of impropriety?

The governing provision for this question is Rule 1.11¹, which in pertinent part, addresses attorneys serving in public roles and their potential conflicts from private practice. Specifically, Rule 1.11(d)(1) states as follows:

¹ Note that under the current Rules of Professional Conduct, Rule 1.11 is the governing provision for potential conflicts of interest for attorneys in the public sector. That provision, in effect since January 1, 2000, does not contain the phrase "appearance of impropriety" which had been found in the title of the predecessor to Rule 1.11, DR 9-101. As that phrase does not appear in the current rules, this opinion does

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.

An application of this provision to this attorney serving as Commissioner in Chancery means that the attorney could not work as Commissioner on the unpaid assessments matter if he participated "personally and substantially" in that assessment case in his private practice.

The hypothetical presents two possible sources of conflict under Rule 1.11(b). First is Incident #1, which involves work done by a partner of the Commissioner on behalf of one of the defendants in the assessment case. The partner assisted that defendant in bringing a complaint against a realtor, who was associated with the development where the lot in the assessment case is located. Rule 1.11(b) only creates a conflict where the attorney in the public role himself had worked on the matter in question; hence, the descriptor "personally." This is not a provision imputing work done by other members of the government officer's firm to that officer; the conflict is personal to him. As this Commissioner did not at any time work on this assessment collections matter either personally or substantially, Incident #1 does not create a conflict for his service as Commissioner.

Similarly, Incident #2 is also not the source of a conflict of interest here. That incident is the not the subject matter of the Commissioner's service: the assessments case. Rather, the second incident involved fraud charges brought by one person against another, both of whom are now defendants in the assessment case. Even if the fraud case and the assessments case are somehow so inextricably linked as to count as the same "matter", the Commissioner never worked on the fraud case.² Again, the Commissioner never worked personally or substantially on the assessment case in private practice; accordingly, he does not have a conflict of interest under Rule 1.11.

not use that language to determine whether or not there is a conflict of interest in this Commissioner's service.

² Note that Rule 1.11 contains the following definition of "matter":

- (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.

While the Committee assumes that the assessment enforcement case is not the same matter as the fraud case or the realtor complaint, the hypothetical lacks sufficient detail to make an unqualified, definitive determination of that point.

Committee Opinion
January 10, 2006

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.