

## Dissenting Opinion To Opinion 2003-2

I write to express my dissent from the Committee's Opinion 2003-2. While the Committee's Opinion is well-reasoned it rests on an axiom that I cannot accept. The Committee's Opinion holds, without support, that:

The Committee believes that the case law construing "matter" within the context of Rule 1.11 can be used to construe "matter" within the context of Rule 1.12. The Committee recognizes that the Inquiring Attorney's present employment is not "private," but the Committee believes that the policies underlying Rule 1.11 apply equally to subsequent public employment as to subsequent private employment.

Opinion at 3.

I do not agree. The exercise of the State's police power is one of the most serious aspects of government. *See Parish Council of Parish of East Baton Rouge v. Louisiana Highway and Heavy Branch of Associated General Contractors, Inc.*, 131 So.2d 272, 277-78 (Ct. App. La. 1961) (*quoting* 16 C.J.S., "[police power] is the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society . . . an inherent attribute of sovereignty, and the greatest and most powerful attribute of government."). For a free and just society to respect the police power of the State, that power must be exercised in the most independent manner without the appearance of bias or taint.<sup>1</sup> *See Higgins v. Advisory Committee on Prof. Ethics Supr. Ct. of N.J.*, 373 A.2d 372, 375 (N.J. 1977) ("in upholding 'the fundamental principle of disinterested justice which is the bulwark of our judicial system', our Court asserted that 'a community without certainty in the true administration of justice is a community without justice.'") (citation omitted). Thus, I do not

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<sup>1</sup> It is one thing for a private attorney to be looked at as a "hired gun." It is quite another for a prosecutor to be look at that way. A private attorney must zealously represent his or her client. A prosecutor must do justice.

equate the role of a prosecutor (even one prosecuting administrative violations) with that of an attorney in private practice. Thus, I do not agree that the term “matter” should be defined the same for an attorneys in public and private practice when considering whether an attorney should be precluded from accepting a matter on which that attorney previously worked as a judge or law clerk.

In defining the term “matter” I would look to the Second Circuit’s “same facts” test which focuses the inquiry on the similarity of facts involved in the prior public and current private representations. *See Flego v. Phillips, Appel & Walden, Inc.*, 514 F.Supp. 1178 (D. N.J. 1981) *citing General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974). In *General Motors Corp.*, after looking at the respective pleadings and the allegations in the complaints against the same defendant, the court determined that the two cases involved the same matter. 501 F.2d at 651. The Court then disqualified the attorney who had prepared the two complaints using the same facts. *Id.* Similarly, in this situation, although the claims may be different, the proceedings may be different, and the parties may be different, the underlying facts are the same facts that the attorney heard when she was a law clerk.

In considering how to define “matter” as that term is used in Rule 1.12, my view is colored by the burdens that such a definition might cause. A broad definition of “matter” for a public sector attorney, particularly a Deputy Attorney General, should cause little harm. The Attorney General’s office is one of the largest legal offices in Delaware employing well over a hundred attorneys. If one attorney is disqualified from a single representation, surely the Attorney General can find a replacement to handle that case. The disqualified attorney would not

suffer any economic hardship.<sup>2</sup>

A narrow definition of “matter” as that term is used in Rule 1.12, might well cause the legal system to fall into disrespect. Litigants might well feel that they were had, because they had been prosecuted by someone who had previously sat in judgment upon them in a related matter. *See Cho v. Superior Court of Los Angeles County*, 39 Cal.App.4th 113, 120 (Ct. App. Cal. 1995) (“the parties and the public’s perceptions of impropriety needs to be alleviated by a process which assures that neither the former judge nor his law firm has or will receive an unfair advantage.”); *see also, In re Opinion No. 415 Supreme Court Advisory Committee on Prof. Ethics*, 81 N.J. 318, 324 (N.J. 1979) (“Attorneys who serve as counsel for governmental bodies must avoid not only direct conflicts of interest, but any situation which might appear to involve a conflict of interest.”). The nuances of Rule 1.12 and Rule 1.11 will not be understood by the general public. The general public will simply look at a prosecutor as the same judge (or law clerk) before whom they had already appeared regarding the similar circumstances. I believe that the harm from a public distrust of the legal system is significant. *See In re Opinion No. 415*, 81 N.J. at 323 (“[t]o maintain public confidence in the bar it is necessary that the appearance of, as well as actual, wrongdoing be avoided.”); *see also, Woods v. Covington County Bank*, 537 F.2d 804, 813 (5<sup>th</sup> Cir. 1976) (“[t]he requirement that a lawyer avoid even the appearance of impropriety reflect’s the bar’s concern that some conduct which is in fact ethical may appear to the layman as unethical and thereby erode public confidence in the judicial system or the legal profession.”). When one balances the respective benefits and detriments, it leads to the conclusion that the term “matter” as that term is used in Rule 1.12, must be read in its broadest

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<sup>2</sup> The same is not true in private practice where many attorneys practice solo or in small firms and a broad definition of “matter” could have a material adverse effect on their practice.

sense when it comes to government attorneys, particularly prosecutors.

Because I would define the term “matter” as that term is used in Rule 1.12, in its broadest sense when it comes to Attorney General’s office, and because as I understand the facts of the inquiry the “matters” are related, I would advise the Inquiring Attorney not to participate in the administrative prosecution referred to in the inquiry.<sup>3</sup>

Respectfully,

Stuart M. Grant  
Member of the Ethics Committee

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<sup>3</sup> I express no view, and the Committee was not asked to express a view, if the inquiry were made by an attorney in private practice who sought to bring a civil action rather than prosecute an administrative violation.