

represents a city and subsequently is employed by a Federal agency.

Paragraph (a) of § 11.111, like current § 10.111(b), flatly forbids a practitioner to accept other employment in a matter in which the practitioner participated personally and substantially as a public officer or employee; participation specifically includes acting on a matter in a judicial capacity. There is no provision for waiver of the individual practitioner's disqualification. The USPTO has disciplined a practitioner for accepting private employment in a matter in which he had personal responsibility while a public employee. See *Friedman v. Lehman*, 40 USPQ2d 1206 (D.D.C. 1996) (reprimanding attorney who, as an examiner signed a restriction requirement in a patent application, and in retirement gave expert testimony by deposition about the patent that issued on a continuation application of application wherein he signed the restriction requirement).

"Matter" is defined in § 11.1(w) so as to encompass only matters that are particular to a specific party or parties. The making of rules of general applicability and the establishment of general policy will ordinarily not be a "matter" within the meaning of § 11.111. When a practitioner is forbidden by paragraph (a) to accept private employment in a matter, the partners and associates of that practitioner are likewise forbidden, by paragraph (b), to accept the employment unless the screening and disclosure procedures described in paragraphs (c) through (f) are followed.

Section 11.111 forbids practitioners to accept other employment in connection with matters that are the same as or "substantially related" to matters in which they participated personally and substantially while serving as public officers or employees. The leading case defining "substantially related" matters in the context of former Government employment is *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (*en banc*). There the D.C. Court of Appeals, *en banc*, held that in the "revolving door" context, a showing that a reasonable person could infer that, through participation in one matter as a public officer or employee, the former Government practitioner "may have had access to information legally relevant to, or otherwise useful in" a subsequent representation, is *prima facie* evidence that the two matters are substantially related. If this *prima facie* showing is made, the former Government practitioner must disprove any ethical impropriety by showing that the practitioner "could not have gained

access to information during the first representation that might be useful in the later representation." *Id.* at 49–50. In *Brown*, the Court of Appeals announced the "substantially related" test after concluding that, under former DR 9–101(B), see "Revolving Door," 445 A.2d 615 (D.C. 1982) (*en banc*) (*per curiam*), the term "matter" was intended to embrace all matters "substantially related" to one another—a test that originated in "side-switching" litigation between private parties. See § 11.109; *Brown*, 486 A.2d at 39–40 n.1, 41–42 & n.4. Accordingly, the words "or substantially related to" in paragraph (a) are an express statement of the judicial gloss in *Brown* interpreting "matter."

Paragraph (a)'s absolute disqualification of a practitioner from matters in which the practitioner participated personally and substantially carries forward a policy of avoiding both actual impropriety and the appearance of impropriety that is expressed in the Federal conflict-of-interest statutes and was expressed in the former Code of Professional Responsibility.

Paragraph (c) requires the screening of a disqualified practitioner from such a matter as a condition to allowing any practitioners in the disqualified practitioner's firm to participate in it. This procedure is permitted in order to avoid imposing a serious deterrent to practitioners' entering public service. Governments have found that they benefit from having in their service younger persons who do not intend to devote their entire careers to public service, as well as more experienced practitioners. Some practitioners might not enter into short-term public service if they thought that, as a result of their active governmental practice, a firm would hesitate to hire them because of a concern that the entire firm would be disqualified from matters as a result.

There is no imputed disqualification and consequently no screening requirement in the case of a judicial law clerk. But such clerks are subject to a personal obligation not to participate in matters falling within paragraph (a) of § 11.111, since participation by a law clerk is within the term "judicial or other adjudicative capacity."

"Other employment," as used in paragraph (a) of § 11.111, would include the representation of a governmental body other than an agency of the Government by which the practitioner was employed as a public officer or employee. In the case of a move from one Government agency to another, however, the prohibition provided in paragraph (a) might be waived by the Government agency with which the

practitioner was previously employed. As used in paragraph (a), it would not be "other employment" for a practitioner who has left the employment of a particular Government agency and taken employment with another Government agency (*e.g.*, the Department of Justice) or with a private law firm to continue or accept representation of the same Government agency with which the practitioner was previously employed.

Paragraph (c) of § 11.111 would permit a practitioner to receive a salary or partnership share established by prior independent agreement, while prohibiting the attorney's compensation from being directly related in any way to the fee in the matter in which the practitioner is disqualified.

Section 11.112 would extend the basic requirements of § 11.111(a) to privately employed arbitrators. Section 11.112(a) is substantially similar to § 11.111(a), except that it allows an arbitrator to represent someone in connection with a matter with which the practitioner was substantially involved while serving as an arbitrator if the parties to the arbitration consent. Section 11.112(b) makes it clear that the prohibition set forth in § 11.112(a) does not apply to partisan arbitrators serving on a multimember arbitration panel.

Section 11.113 would address situations where the client is an entity, as opposed to a person. An organizational client is a legal entity, which cannot act except through its officers, directors, employees, shareholders, and other constituents. The duties defined herein apply equally to corporations and unincorporated associations. "Other constituents" as used herein means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations. Customers of an organizational client are not constituents.

When one of the constituents of an organizational client communicates with the organization's practitioner in that person's organizational capacity, the communication is protected by § 11.106. Thus, by way of example, if an organizational client requests its attorney to investigate allegations of wrongdoing, interviews made in the course of that investigation between the attorney and the client's employees or other constituents are covered by § 11.106. This does not mean, however, that constituents of an organizational client are the clients of the practitioner. The practitioner may not disclose to such constituents information relating to the representation except for