Approved 3-25-91
Date

MINUTES OF THE SENATE COMMITTEE ON ELECTIONS.

The meeting was called to order by SENATOR DON SALLEE at
Chairperson

1:30 ~~a.m./~~p.m. on March 19, 1991 in room 529-S of the Capitol.

All members were present ~~except~~: or excused:

Committee staff present:
Pat Mah, Legislative Research Department
Ardan Ensley, Office of the Revisor of Statutes
Clarene Wilms, Committee Secretary

Conferees appearing before the committee:
Carol Williams, Public Disclosure Board
Ron Smith, Kansas Bar Association
Claire McCurdy, Attorney, Kansas Department of Transportation

The meeting was called to order shortly after 1:30 p.m. by Chairman Don Sallee.

SB-338 - prohibiting certain actions and activities.

Carol Williams, Public Disclosure Commission, presented written testimony concerning SB-338, noting the new language would prohibit a state officer or employee who has, within the preceding two years, participated in the making of a contract with any person or business from becoming a consultant or contracting with such person or business for one year following termination of employment as a state officer or employee. She further reminded committee members of her request that they clarify the definition of "employment" as set forth in K.S.A. 46-233(b). Consequently the Senate Elections Committee members voted to clarify K.S.A. 46-233(b) by adding the new language after employment "for wages or as a consultant or under any other contract of hire". (Attachment 1)

In answer to a query it was noted Boards were exempt.

Ron Smith, Kansas Bar Association, appeared before the committee and presented testimony. (Attachment 2) Mr. Smith told the committee that the actions of lawyers and their position in working for the state was regulated by Rule 1.11 of disciplinary rules developed and enacted by the Supreme Court with violation of said section including possible disbarment.

Claire McCurdy, Attorney, KDOT, representing Secretary Gary Stotts, noted the department was concerned about lines 24-25, page 1 of SB-338 noting the word "participate" needed to be defined. She stated the bill held potential to severely impact all employees in the Department of Transportation since it limits the ability of the department employees moving on from state employment to other positions.

The question was raised whether the bill applied to persons moving between state agencies and it was noted it does not apply to governmental agencies.

Senator Lee moved, with a second from Senator Martin to approve the minutes of March 4 and 5, 1991. The motion carried.

The meeting adjourned at 1:55 p.m.

GUEST LIST

SENATE ELECTIONS COMMITTEE

DATE March 19, 1991

(PLEASE PRINT) NAME AND ADDRESS	ORGANIZATION

STATE OF KANSAS

KANSAS PUBLIC DISCLOSURE COMMISSION

109 W. NINTH
TOPEKA, KANSAS 66612
PHONE: (913) 296-4219

Testimony before House Elections on Senate Bill 338

By Carol Williams, Kansas Public Disclosure Commission

Senate Bill 338 which is before you this afternoon would amend a provision of the Governmental Ethics Laws, K.S.A. 46-233. The new language would prohibit a state officer or employee who has, within the preceding two years, participated in the making of a contract with any person or business from becoming a consultant or contracting with such person or business for one year following termination of employment as a state officer or employee.

The Kansas Public Disclosure Commission requested the Senate Elections Committee to clarify the definition of "employment" as set forth in K.S.A. 46-233(b). The Commission was in disagreement as to whether an individual who is an independent contractor providing consulting services to an entity could be considered "employed" by that entity. At its February 12, 1991 meeting the Commission reviewed an advisory opinion request from Joan Lewerenz. Ms. Lewerenz asked the Commission if she could provide consulting services as an independent contractor to a private sector organization which she had been involved in contracting with as a state employee for SRS. The Commission could not render an advisory opinion because the vote was split on the issue. The issue concerned the phrase "accept employment". Some members felt that employment, by definition, would include providing consulting services. Some members felt that employment meant the narrower interpretation of an employer-employee relationship.

Senate Elections Committee members voted to clarify K.S.A. 46-233(b) by adding the new language after employment "for wages or as a consultant or under any other contract of hire".

The Commission takes no position on this bill. The new language does accomplish the Commission's objective by providing language which more clearly defines employment.

Senate Elections
March 19, 1991
Attachment 1

STATE OF KANSAS

KANSAS PUBLIC DISCLOSURE COMMISSION

109 W. NINTH
TOPEKA, KANSAS 66612
PHONE: (913) 296-4219

February 12, 1991

Opinion No.

Joan S. Lewerenz
1321 Pembroke Lane
Topeka, Kansas 66604

Dear Ms. Lewerenz:

This opinion is in response to your letter of January 22, 1991 in which you request an opinion from the Kansas Public Disclosure Commission concerning a conflict of interest issue.

We note at the outset that our jurisdiction is limited to the application of K.S.A. 46-215 et seq. and K.S.A. 75-4301 et seq. Thus, whether some other statutory system, common law or agency policy relates to your question is not covered by this opinion.

We understand you request this opinion in your capacity as a Policy Consultant and Staff Assistant for Management Services of the Kansas Department of SRS. Prior to this position you worked for the State as a Social Services Administrator for SRS and in that position were involved in contracting with ASK Associates. While the initial contract was let for competitive bid, amendments were not. You no longer have any involvement in or oversight of the ASK contract.

You advise us that ASK has asked you to provide consulting services to it as an independent contractor and not as an employee. Your question is whether that arrangement would be permissible.

K.S.A. 46-233 is the only section of the laws under our jurisdiction which applies to this factual situation. We note, since the

amendments to the initial contract were not competitively bid, that the prohibition in subsection (a) does apply. Thus it would be impermissible for you, at this time, to enter into an employer-employee relationship with ASK. You could, however serve, as a consultant on an independent contractual basis.

Sincerely,

Ruth Schrum

Ruth Schrum, Chairman

By Direction of the Commission

RS:DDP:dlw

information" 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.

Comment

This rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, 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. However, 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 are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

Senate Elections
March 19, 1991
Attachment 2

POSITION STATEMENT March 18,
From the Kansas Bar Association

TO: Members, Senate Elections Committee

FROM: Ron Smith, KBA Legislative Counsel

SUBJ: SB 338

KBA has no problem with the intent of the bill, which we understand to be that if a state employee or official makes a contract on behalf of the state they then should not be allowed to enter the private sector and benefit from such contract.

However, the new language in Section 1(b) is ambiguous and, with regard to lawyers formerly employed by the state, may conflict with existing Disciplinary Rules of the Judicial Branch, which govern the conflicts of interest of all attorneys, whether state officers or not.

Lawyers that leave state service into the private sector do not lose their duty of loyalty to previous clients. Disciplinary Rule 1.11 regulates that duty. It is entitled "Successive Government and Private Employment" by attorneys. If as a state officer, the attorney participated "personally and substantially" as a public officer in "connection with a matter," then the attorney and the successor law firm cannot represent the entity, *unless the appropriate government agency consents after consultation."*

SB 338 prohibits any successive government employment by attorneys and employers (law firms or corporations) for a two year period. As such the statute and the rule potentially conflict. That raises a question as to who can regulate the practice of law. We obviously believe that issue is resolved -- at least with attorneys -- in that

Supreme Court is empowered to make such determinations.[1]

The statute can be read two ways. On one hand, after two years the attorney may be allowed to do something that under the Court Rule he is forever barred from doing -- absent consent of the former client, the state of Kansas. On the other hand, if the state consents, the Rule allows an attorney to immediately work on the other side in the matter. That may sound like favoritism, but it really isn't. It is even-handed. The state of Kansas must consent "after consultation." That means full disclosure and consideration by the state. The state is under no compulsion to agree.

Attorneys who violate Rule 1.11 face discipline, including disbarment. Thus, in our judgment, the state maintains greater control over lawyer-employees of state government through the Court rule than they would under SB 338. Rather than create a potential lawsuit by enacting SB 338 the way it reads now, you might simply make an exception for government lawyers and recognize and defer, in the statute, to Rule 1.11.

This can be accomplished on page 2, line 4, inserting after "(e)" the following: "Nothing in this act shall be construed to create or deny rights, duties and obligations of attorneys subject to Model Rule of Professional Conduct 1.11, as amended, by the Kansas supreme court."

"(f)"

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[1]Under Article III, Sec. 1, of the Constitution, the supreme court has the inherent power to prescribe conditions for admission to the Bar, to define, supervise, regulate and control the practice of law, whether in or out of court, and statutory regulations are effective and directory only when they accord with the inherent power of the judiciary." Martin v. Davis, 187 Kan. 473 (1960).

2-2

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 government 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 information 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 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; 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