THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and THE NEW JERSEY STATE CONFERENCE, NAACP, ERIC O'NEAL, SEAN CARTER ANTONIO MELENDEZ and ROBERT GUZMAN, Plaintiffs-Appellants, -v.- THE STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE, Defendant-Appellee.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3357-97T1 On Appeal From: Superior Court of New Jersey Law Division, Mercer County Docket No. MER-L-002687-96 Sat Below: Hon. Linda R. Feinberg

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF APPEAL OF ORDER DENYING *PRO HAC VICE* ADMISSION OF DAVID ROSE AND JOSHUA ROSE

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PRELIMINARY STATEMENT

The Public Interest Law Center of New Jersey, an affiliate of the Appleseed Foundation, brings this appeal on behalf of the National Association for the Advancement of Colored People, the New Jersey State Conference, and certain individuals (collectively, the "Plaintiffs") to challenge the lower court's disqualification of David L. Rose and Joshua N. Rose as their attorneys pursuant to the "appearance of impropriety doctrine."[1]

In her opinion, Judge Feinberg held that "David Rose's knowledge concerning the development and validity of the [Law Enforcement Candidate Record ("LECR")] exam presents an appearance of impropriety that could cast a shadow of doubt about the integrity and outcome of this case." Pa8. In order to reach this conclusion, Judge Feinberg found that David Rose "may have gained information through [his employment with the Department of Justice] that he may not otherwise be entitled to have." Pa9. She imputed this appearance of impropriety to Joshua Rose, Mr. Rose's partner, (T18-20 through T19-7) and, additionally held that the "issues of the college degree requirement, the LECR, and the recruiting practices are so intertwined . . .[that] David Rose cannot be the

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[1] The Public Interest Law Center does not take a position as to whether the appearance of impropriety rule, as incorporated in various provisions of the New Jersey Rules of Professional Conduct, should be abolished. See 115 N.J.L.J. 1004-5 (March 9, 1998). Our representation is limited to the facts of this case and should not be interpreted as advocating more than the reversal of an erroneous and confusing application of the rule in the context of a former government employee.

counsel of record with regard to any aspect of this case," Pa9. This decision is flawed in several respects.

Although Judge Feinberg cited RPC 1.11(a), she did not analyze whether Mr. Rose's supervisory role over the Department of Justice's efforts to encourage police officers, such as defendant, to work directly with Mr. Frank Erwin in order to develop a written examination (subsequently identified as the LECR) constituted a "matter" for purposes of the rule, nor whether the information Mr. Rose did receive from Mr. Erwin was "confidential government information." Instead, Judge Feinberg assumed that confidential information may have passed between Mr. Rose and Mr. Erwin despite the fact that she found that the relationship between Mr. Rose and Mr. Erwin "may not have given rise to an[y] expectation of confidentiality between the two parties." Pa8.

The facts in this case show that Mr. Erwin was not a client of Mr. Rose or the government, was not a government employee, was not a subject of government investigation, and had no partnership or other contractual relationship with the government that would permit a presumption of access to and knowledge of confidences. Mr. Erwin was the sole developer of the LECR and developed that examination after Mr. Rose left government service in 1987. Mr. Rose also had no role in determining the contents of the exam or the conduct of any validity studies. Pa.34. At the time, Mr Rose was employed by the Department of Justice, he and other career attorneys at the Department did nothing more with respect to the development of the LECR than facilitate Mr. Erwin's efforts to

validate his testing instrument by encouraging employers to cooperate with Mr. Erwin and his company, Richardson, Bellows, Henry & Company, Inc. ("RBH"). Pa34;Pa44. Accordingly, Mr. Rose's representation of Plaintiffs does not represent the use of confidential information he obtained under governmental authority and the "switching of sides" that RPC 11.1(a) was intended to prevent.

Judge Feinberg also failed to analyze with any specificity the relevant case law under the "appearance of impropriety" doctrine that is embodied in RPC 11.1(b) and RPC 1.7(c)(2). A review of such cases indicates that the Rules of Professional Conduct are aimed at preventing the appearance of impropriety arising out of (i) an association with a government agency followed by representation of an adverse party, Ross v. Canino, 93 N.J. 402 (1983), (ii) a concurrent representation of two agencies within the same "official family," Matter of Advisory Comm. on Professional Ethics Opinion No. 621, 128 N.J. 577, 594-596 (1992), and (iii) a representation involving a current "member of the same team" as an adverse party or witness. See e.g., Perillo v. Advisory Comm. on Professional Ethics, 83 N.J. 366, 376 (1980). The concerns implicated in such factual circumstances are not present in this case.

There is no likelihood of divided allegiance or loyalty on the part of Mr. Rose -- he seeks to represent the same kind of interest that he represented when employed by the Department of Justice. The public may not reasonably perceive a potential for undue

influence since this matter does not involve an appearance before the Department of Justice or another agency falling within the "official family doctrine." Opinion No. 621, 128 N.J. at 594. In addition, there can be no perception by the public of diminished professional commitment to Mr. Rose's client nor an improper advantage over the State as a result of Mr. Rose's nonprivileged interaction with Mr. Erwin, which occurred over ten years ago.

At the time Mr. Rose had discussions with Mr. Erwin, Mr. Erwin had not developed the LECR or any other examination for a police officer or other law enforcement position. Pa32. Mr. Rose asked generic questions regarding Mr. Erwin's bio-data methodology (i.e., "what kind of answers were indicators or predictors of successful performance,"Pa.46) and, to the extent Mr. Rose received specific answers, they were from examinations developed for non-police related jobs. Pa32. Mr. Erwin does not state that he divulged or may have divulged confidential information concerning the LECR exam or any other exam to Mr. Rose that could prejudice the State Police in this case (Pa18-20) and, thus defendant's claims of appearance of impropriety must also be rejected. Matter of Tenure Hearing of Onorevole, 103 N.J. 548, 562 (1986).

Even if there were some basis for a belief of appearance of impropriety based upon David Rose's discussions with Mr. Erwin while he was in government service, there is no basis for imputing his disqualification to Joshua Rose. Although the trial court speculated that Mr. Rose "may" have gained confidential information through his government employment, it did not find that he actually

acquired such information. In such situations, where no actual or apparent conflict exists, it is inappropriate to extend the disqualification of a former government officer to a member of his firm. Comment to RPC 1.11, "New Jersey Rules of Court" at 130 (1997).

Finally, the Court below erroneously concluded that the issues of the LECR and college degree requirement set forth in Plaintiffs' complaint are "so intertwined" that it would be difficult to disaggregate statistical or expert testimony relating to the separate claims. Pa9. Judge Schuster's decision to proceed with discovery in regard to the LECR claim while staying all action with respect to their educational and recruiting claims belies this conclusion.

SUPPLEMENTARY STATEMENT OF FACTS

David Rose was employed by the United States Department of Justice from 1956 until his retirement on December 1, 1987. From 1968 to 1987, he was Chief of the Employment Litigation Section of the Civil Rights Division. Pa40. Mr. Rose has known Frank Erwin since the early 1970's when Mr. Erwin was a representative of the Ad Hoc Committee on the Uniform Guidelines on Employee Selection Procedures and Mr. Rose was the Department of Justice's representative on an interagency committee that was designated to work on such Guidelines. Pa30-31. The Ad Hoc Committee consisted of representatives of major corporations and the industrial psychologists who provided employment selection procedures for them. Pa42. Mr. Erwin represented the views of the large employers

who comprised the Ad Hoc Committee, and made both informal oral presentations and formal written comments on their behalf to the government. Pa31.

In the mid-1980's, the Assistant Attorney General for Civil Rights adopted a policy of working with police departments and testing professionals so that a written selection procedure could be developed that (1) would have less adverse impact than those existing at the time, and (2) would be properly validated to ensure a significant correlation between performance on the examination and performance on the job. Pa31; Pa43-44. In connection with that policy, David Rose and attorneys under his supervision had several meetings with Mr. Erwin between 1985 and 1987. Id.

At the time of these discussions, RBH had not developed an examination for a police officer or a law enforcement position. Pa32. The LECR was created after December 1987, and was not employed by the New Jersey State Police until 1993. Pa32. In one of their initial meetings, Mr. Rose asked generic questions regarding Mr. Erwin's bio-data methodology (i.e., "what kind of answers were indicators or predictors of successful performance," Pa.46) and, to the extent Mr. Rose received specific answers, they were from examinations developed for non-police related jobs. Pa32. There is no evidence that any answers given to Mr. Rose or other Justice employees as explanations to their general questions were subsequently incorporated into the LECR. In addition, Mr. Erwin does not state that he disclosed or may have disclosed any proprietary or confidential information concerning the LECR exam or

any other exam to Mr. Rose. Pa18-20. Mr. Erwin has never shown Mr. Rose the "answer key" to any one of his selection exams. Pa35.

Mr. Rose's role and that of the other career attorneys working on the LECR project was to encourage employers like the New Jersey State Police to participate in RBH's validation studies for the development and use of police officers' examinations by allowing RBH to administer its proposed test on an experimental basis to incumbent officers. Pa34. Mr. Rose played no role in deciding the content of the experimental test or how it would be reformulated and validated. Id. Mr. Erwin was not an employee of the federal government during Mr. Rose's tenure with the Department of Justice, and the development of the LECR was not a contractual "joint venture " between the government and RBH. The government made no payment to RBH in connection with the development of the LECR.

Since Mr. Rose left the Department of Justice and entered private practice, he has talked with Mr. Erwin and has seen him on a social basis. Pa32. Mr. Erwin has also sent Mr. Rose by mail copies of validity reports attempting to show the validity of the LECR and its adverse impact against African-Americans and Hispanics. Pa33. These validity reports are widely distributed to actual or possible test users and to other industrial psychologists and are not confidential. Id. Mr. Rose had no role in validation of the examination or the preparation of these validity studies. Id.

ARGUMENT

I. RULE 1.21-2 DOES NOT AUTHORIZE A TRIAL JUDGE TO DISQUALIFY AN OUT OF STATE ATTORNEY FOR AN "APPEARANCE OF IMPROPRIETY" THAT WOULD NOT DISQUALIFY A NEW JERSEY ATTORNEY UNDER THE NEW JERSEY RULES OF PROFESSIONAL CONDUCT.

Pursuant to R.1:21-2, once a party establishes "good" cause for the admission a lawyer *pro hac vice*, his motion should be granted unless there are sufficient countervailing considerations weighing against the admission. Feriozzi Concrete v. Mellon Stuart, 229 N.J.Super. 366 (App. Div. 1988). See also Pa7. Although the court in Feriozzi did not specify which party has the burden of proving the presence (or absence) of countervailing considerations, it made clear that a "trial judge's apprehension" rather than evidence of an "overriding disqualifying factory" is not a valid basis to deny admission to an out of state attorney. Id. at 369.

The Court below correctly held that an "appearance of impropriety" that would disqualify a New Jersey attorney under the Rules of Professional Conduct might be a sufficient countervailing consideration to warrant denial of a motion for admission *pro hac vice*. Pa8. An alleged "appearance of impropriety," however, that does not violate the New Jersey Rules of Professional Conduct nor the corresponding provisions of the Federal law and regulation should not constitute an overriding disqualifying factor under the *pro hac vice* admission Rule. Because David Rose and Joshua Rose

have shown good cause for admission in this case,[2] they should not be denied admission because of an appearance problem that would not disqualify a New Jersey attorney from representing Plaintiffs.

Under New Jersey law, the party who brings a disqualification based on an attorney's successive representations generally bears the burden of proving that disqualification is appropriate. Ciba-Geigy Corp. v. Alza Corp., 795 F.Supp. 711, 714 & n.5 (D.N.J. 1992)(applying New Jersey law); Reardon v. Marlayne, Inc., 83 N.J. 460, 474 (1980)(the former client has burden of showing that three-part test is met). Contrary to the State Police's assertions (Db8-9; T13-17-25), the fact that this issue arises in the context of a R. 1:21-2 motion does not alter this burden. A party seeking to deny admission to an out of state attorney who has shown good cause for admission faces the same burdens as a party seeking disqualification of an otherwise qualified New Jersey attorney.

Defendants have not met this burden. Under the circumstances presented, there is no evidence in the record indicating that David Rose should have been disqualified from appearing as an attorney in this case under the New Jersey Rules of Professional Conduct.

II. THE COURT BELOW ERRONEOUSLY DISQUALIFIED DAVID ROSE PURSUANT TO RPC 1.11.

In the decision below, Judge Feinberg, citing RPC 11.1(a), determined that an appearance of impropriety inhered in David Rose's representation of Plaintiffs, because he "may have gained

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[2] Although the court below denied Plaintiffs' Motion for Reconsideration, Judge Feinberg conceded that Joshua Rose had shown good cause for admission *pro hac vice*. T18-17-20.

information through [his government] position that he may not otherwise be entitled to have." Pa8-9. This holding cannot be sustained after a careful analysis of the facts presented in this case and an analysis of the relevant law.

When dealing with "ethical problems" and applying "prophylactic rules," courts cannot make sweeping generalizations. Reardon, 83 N.J. at 469. In order to reach a conclusion, a court must first undertake a "painstaking analysis of the facts and precise application of precedent." Id. (quoting United States v. Standard Oil Co., 136 F.Supp. 345, 367 (S.D.N.Y. 1955).

The Rule of Professional Conduct that specifically applies to an attorney's successive government and private employment is RPC 1.11, and that is the only rule mentioned in the opinion of the trial court. Pa8-9.[3] Rule 1.11 was adopted in 1984 to be consistent with former Disciplinary Rule 9-101(B) and pre-existing decisions such as Ross v. Canino, 93 N.J. at 402 and In re Advisory Opinion No. 361, 77 N.J. 199 (1978). See Comment to RPC 1.11; Opinion No. 569, 103 N.J. at 328 n:2. The Rule has two basic purposes: "to prevent the [actual or attributed] conflict of

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[3] Ethical constraints on former government lawyers also derive from RPC 1.9, which is generally applicable to successive representations of a former client and a present client. Matter of Petition for Review of Opinion No. 569, 103 N.J. at 327-328. RPC 1.9(a) "prohibits any attorney who has represented a client in a matter" from representing "another client in the same or a substantially related matter in which the client's interest are materially adverse to the former client" or from using the "information relating to the representation to the disadvantage of the former client," with exceptions not relevant here. RPC 1.9(b) also incorporates RPC 1.7(c) that sets forth the general appearance of impropriety standard applied in the context of multiple representations.

interest that inheres in switching sides and to avoid the appearance of impropriety arising out of association with a government agency followed by representation of an adverse party." Ross v. Canino, 93 N.J. at 407 (quoting In re Advisory Opinion No. 361, 77 N.J. at 201-202). The conflict of interest prong of the test is incorporated in RPC 11.1(a), and the appearance of impropriety prong is set forth in RPC 11.1(b).[4] Neither applies herein.

A. By Filing to Analyze The Terms "Matter" and "Confidential Government Information," The Trial Court Misapplied RPC 1.11(a).

Pursuant to RPC 1.11(a) a former government employee is disqualified from representing

> a private client in connection with a **matter** (1) in which the lawyer participated personally and substantially as a public officer or employee, (2) about which the lawyer acquired knowledge of **confidential information** as a public officer or employee, or (3) for which the lawyer had substantial responsibility as a public officer or employee. (Emphasis added).

Under RPC 11.1(a) the acquisition of information by an attorney in public service only requires disqualification if the information obtained is "confidential" and arises in the same or a substantially related matter. Matter of Tenure Hearing of Onorevole, 103 N.J. at 559-61. Cf. Ciba-Geigy Corp., 795 F.Supp at 716 (under RPC 1.9(a)(1) the inquiry of whether matters are

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[4] See, e.g., Matter of Petition for Review of Opinion No. 569, 103 N.J. at 328-9(in the absence of an actual or attributed conflict under Rule 11.1(a), the court proceeded to determine whether an appearance of impropriety existed under Rule 11.1(b)).

substantially related focuses on the factual bases of the two representations rather than the similarity in the underlying legal claims). A careful application of the definitions set forth in the Rule demonstrates that RPC 11.1(a) is not applicable to the matter at hand.

For purposes of RPC 11.1, a "matter" includes a specific "proceeding,. . . or other particular matter involving a specific party or parties" in which the lawyer was involved while employed by the government. RPC 1.11(d). Federal regulations dealing with the same ethical issues as RPC 11.1 adopt the exact language as the New Jersey Rule and explain its definition as follows:

> [A] matter [in which the United States is a party or has a direct and substantial interest] typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties. Rulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter.

5 C.F.R. §2637.201(c). David Rose's participation in the program that led to the development of the LECR does not implicate a matter within the RPC 1.11. In 1985-1987, the Department of Justice established a program to foster the development of a better examination for police officers by encouraging several police departments to participate in an experimental validity study of what later became the LECR. That program, in which the United States did not have a "direct and substantial interest," did not involve "rights and duties" and a "specific party;" and, therefore, was not a "matter" within the meaning of RPC 11.1.

The only "matter" involving any of the parties involved in this action was the representation of the United States by David Rose in United States v. State of New Jersey, (D.N.J. Civ. 75-1734), from 1973 until he left the Department of Justice in December, 1987. It is uncontested that the consent decree in that case was entered in 1975, was dissolved in 1992, and constitutes a different "matter" than the challenge herein. Not only was the previous litigation predicated on different facts than the complaint herein, but also the ensuing consent decree did not specify use of any specific written exam, and was dissolved before the exam was ready for use in 1993.

RPC 11.1(a) also does not apply, because the information received by David Rose from Frank Erwin was not confidential information within the meaning of the Rule. "Confidential government information" is information that (i) the lawyer obtained "under governmental authority, (ii) may not be disclosed by the government and (iii) "is not otherwise available to the public." RPC 1.11(e). The fact that a government attorney receives information while employed by the government is not sufficient to bar its use in a subsequent matter, even if it disadvantages the person providing the information. At the time the rule is applied, the government must have a legal privilege or obligation not to disclose the information acquired.

Defendant has provided no evidence through Mr. Erwin (or anyone) else that Mr. Rose ever acquired information from Mr. Erwin that the government was prohibited from disclosing or had a legal

duty not to disclose. Mr. Erwin was not a client of the government, was not a government employee, was not a subject of a government investigation and had no partnership or other contractual relationship with the government that would permit a presumption of access to and knowledge of confidences. Mr. Erwin voluntarily disclosed information to Mr. Rose and never identified that information as confidential. There is simply no evidence in the record justifying Judge Feinberg's conclusion that Mr. Rose may have gained confidential information as contemplated in RPC 11.1(a)(2).

B. By Failing to Analyze The Case Law Developed Under The "Appearance of Impropriety" Standard, The Trial Court Erroneously Disqualified David Rose.

Although the trial court found that an "appearance of impropriety [was] inherent in David Rose's representation of the plaintiffs," Pa9, Judge Feinberg did not analyze with any specificity appellate decisions concerning that doctrine.

The New Jersey Supreme Court "has had a long history of requiring attorneys to avoid even the appearance of impropriety." Opinion No. 569, 103 N.J. at 329. The doctrine is intended not to prevent any actual conflicts of interest but "to instill confidence in the integrity of the legal profession." In re Advisory Opinion No. 415, 81 N.J. 318, 323 (1979). "[T]he `appearance' of impropriety must be something more than a fanciful possibility. It must have some reasonable basis." Higgins v. Advisory Comm. on Professional Ethics, 73 N.J. 123, 129 (1977). Moreover, the

Supreme Court's analysis of whether an appearance of impropriety exists does not take place "in a vacuum," but is, instead, highly fact specific. Opinion No. 415, 81 N.J. at 325.

In the context of former government service, an appearance of impropriety can arise independently from an attorney's actual role in a prior matter by virtue of his association with the relevant government agency. Matter of Tenure Hearing of Onorevole, 103 N.J. at 560. Thus, RPC 11.1(b) prohibits a lawyer

> from representing a private client in connection with a matter that relates to [his] former employment as a public officer" even if the lawyer did not personally and substantially participate in it, have actual knowledge of it, or substantial responsibility for it.

This Rule is concerned with the perceived "high risk" of impropriety that arises when a former government employee represents a private interest in a matter that is adverse to the interests of his government employer. See, e.g., Ross v. Canino, 93 N.J. at 402 (former attorney general precluded from participating in lawsuit involving matters investigated by division for which he had ultimate, but not substantial responsibility); Opinion No. 569, 103 N.J. at 325 (former deputy attorney general barred for six months from representing licensee before professional boards that he had represented during his employment); Opinion No. 361, 77 N.J. at 199 (assistant prosecutor barred for six months from appearing in a criminal matter against state and county in which he had served).

There is no switching of sides by Mr. Rose in this matter. The United States and the Department of Justice are not involved in

this action and their interests are not aligned with either the State Police or Mr. Erwin.[5] Indeed, Mr. Rose seeks to represent in this case the interests of African-American and Hispanic applicants for employment, as he did while employed at the Department of Justice. There is no evidence that he seeks to represent any interest here that is adverse to the United States or his former agency employer.

Furthermore, RPC 1.11(b)'s mandate against "switching sides" is limited to a "matter" as defined under RPC 1.11(d). Because David Rose's general involvement in facilitating the development of a police exam during his employment with the Department of Justice was not connected with a specific "matter" in which the United States was a party or had a direct or substantial interest, RPC 11.1(b) cannot "stigmatize his current representation with the appearance of impropriety." Matter of Tenure Hearing of Onorevole, 103 N.J. at 561. Contrary to defendant's assertion (Db15), David Rose's appearance as counsel for Plaintiffs in their challenge to the State Police's use of the LECR does not create the risk of impropriety that usually arises when an attorney associated with one side of a "matter" then switches to the other.

In addition to Rule 1.11(b), the appearance of impropriety standard may be found directly in RPC 1.7(c)(2) -- i.e., the general rule about conflicts of interest-- and indirectly in several other provisions to which Rule 1.7 is made applicable.

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[5]There is no evidence that the Department of Justice has a legal obligation to protect Mr. Erwin's commercial interest in the LECR or an interest in defending the State Police's use thereof.

See, e.g., Rule 1.9(b)(former client); Rule 1.13(e)(organization as client); and Rule 3.7(b)(lawyer as witness). Rule 1.7(c)(2) prohibits multiple representation

> in those situations in which an ordinarily knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest or to the interest of one of the clients.

The focus of this standard is primarily upon the representation of different parties. In the context of government employment, the Supreme Court has held in various situations that the concurrent representation of two agencies within the same "official family" may be impermissible, because the personal, political and governmental ties between certain public employees, boards, or agencies of government raise the risk that such ties may influence an attorney's decisions and "detract from the performance of [his or her] public responsibilities." Opinion No. 621, 128 N.J. at 595. See, e.g., Opinion No. 415, 81 N.J. at 323 (prohibiting concurrent representation of municipality and county who interests may be antagonistic); Higgins, 73 N.J. at 129 (prohibiting attorney-freeholder from representing defendant in criminal action in county in which he holds office); In re Professional Ethics Opinion No. 452, 87 N.J. 45 (1981)(prohibiting attorney or members of his firm from concurrently serving as municipal prosecutor and planning board attorney). These cases all involve concurrent representations, a situation that is not present here; and thus, cannot justify the lower court's finding of an appearance of impropriety.

Nevertheless, considerations inherent in the aforementioned cases regarding divided loyalty and impaired judgement also pertain to a class of cases where a government lawyer has worked on the "same team" with an adverse party or witness. See Perillo, 83 N.J. at 379 (holding that municipal attorney cannot represent municipality in any proceedings against municipal employees, including police, where attorney has had "regular and frequent contact with such employees in the course of handling municipal business"). Cf. State v. Galati 64 N.J. 572 (1974) (attorney who was regularly retained by local policemen's association should avoid representing criminal defendants in cases where a member of the association is expected to testify for the prosecution). In these cases, the New Jersey Supreme Court has found an appearance of impropriety when the relationship between the government attorney and the adverse party is a "close, ongoing professional relationship," Perillo, 83 N.J. at 376-77.

Mr. Erwin was not a government employee or even a contractor of the government. He never worked closely with Mr. Rose on a case or other specific matter, and thus never served on the "same team." The lack of an ongoing relationship in the handling of government business is one of the many facts distinguishing Perillo from the instant matter. Consequently, there can be no perception by the public of diminished professional commitment to Mr. Rose's client nor an improper advantage over the State as a result of Mr. Rose's arms-length interaction with Mr. Erwin -- a witness, not a party -- which occurred over ten years ago. Cf. Matter of Tenure Hearing of

Onorevole, 103 N.J. at 561-62 (where there was no suggestion that an administrative law judge received confidential information or generated a personal bias during a previous proceeding at which he presided that would have prevented him from fairly representing his current client or gave him some improper advantage over a currently adverse party who had testified in that prior hearing).

For all the foregoing reasons, David Rose's representation of the Plaintiffs in this action is not an "appearance of impropriety" as the phrase is used in RPC 1.11 and other Rules of Professional Conduct. Accordingly, the lower court's finding of an appearance of impropriety must be reversed.

III. THE COURT BELOW ERRONEOUSLY DISQUALIFIED JOSHUA ROSE BECAUSE OF HIS AFFILIATION WITH DAVID ROSE

Even if there is some appearance of impropriety in the fact that David Rose had discussions while in government service with Mr. Erwin, an expert witness that defendant intends to call in this case, there is no basis in case law or the Rules of Professional Conduct to impute this disqualification to Joshua Rose.

Under New Jersey Rules of Professional Conduct, disqualification is imputed to other members of a lawyer's firm when there is an actual or attributed conflict of interest under RPC 1.7(when there is a 'directly adverse" relationship between the representation of two clients), RPC 1.9(a)(when a "substantial relationship" exists between a matter in which the lawyer represented a former client and a matter in which he represents an interest adverse to the former client, Reardon, 83 N.J. at 472) or

RPC 1.11(a)(when a former government attorney seeks to represent private clients in "a particular matter involving a specific party or parties" in which he participated, about which he obtained confidential information or for which he had responsibility, Ross v. Canino, 93 N.J. at 402).

Although Judge Feinberg speculated that Mr. Rose "may" have gained confidential information through his government employment, she did not find that he actually acquired such information. In such situations, where no actual or apparent conflict exists, it is inappropriate to extend the disqualification of a former government officer to a member of his firm. The Comment to RPC 1.11 clearly supports such conclusion.

> In those situations [delineated in Rule 1.11(a)], the disqualification would extend to the firm with which the lawyer was associated. In other situations, where **no actual conflict existed**, disqualification of a former government employee does not extend to the firm with which the lawyer is associated. (emphasis added)

Id., "New Jersey Court Rules" at 130. See also Ross v. Canino, 93 N.J. at 408-9 (where former Attorney General neither participated in investigation nor acquired knowledge of its substance, disqualification due to appearance of impropriety not imputed to firm); Matter of Petition for Review of Opinion No. 569, 103 N.J. 325, 333 (1986)(where former government attorney had no actual knowledge of investigation initiated while he was employed, 6-month disqualification period imposed upon attorney, not his firm).

Therefore, even if Judge Feinberg correctly held that an appearance of impropriety arose from David Rose's discussions with

Mr. Erwin about Mr. Erwin's methodology and the general standards or indicators employed in his exams, there is no basis for imputing this disqualification to Joshua Rose.

IV. THE COURT BELOW ERRONEOUSLY DISALLOWED DAVID AND JOSHUA ROSE FROM REPRESENTING PLAINTIFFS IN REGARD TO THEIR CLAIMS NOT RELATED TO THE ENTRY LEVEL WRITTEN EXAM

In the proceeding below, Judge Feinberg granted Plaintiffs' motion to admit Richard T. Seymour, of the Lawyers Committee for Civil Rights Under Law, to represent them in their challenge to the LECR exam. She nonetheless disallowed David and Joshua Rose from representing Plaintiffs in regard to their claims which were not related to this exam. Pa1-2.

The lower court held that David Rose "cannot be the counsel of record with regard to any aspect of this case," because the issues of the LECR, college degree requirement, and the State Police's recruiting practices are "so intertwined that it would be difficult to separate out the statistical or expert testimony [for each claim], and discovery in the case would necessarily overlap." Pa9. Judge Schuster's decision to proceed with discovery in regard to the LECR claim while staying all action with respect to Plaintiffs' educational and recruitment claims belies this conclusion. See Proposed Scheduling Orders prepared by both parties attached to Letter from Renée Steinhagen to Larry Pincus dated April 17, 1998.

CONCLUSION

For the reasons set forth above and in Plaintiffs' Brief in Support of the Application for Leave to Appeal Denial of Admission *Pro Hac Vice*, the lower court's decision should be reversed and David and Joshua Rose's motion for admission *pro hac vice* should be granted.

Dated: April 17, 1998
Newark, New Jersey

Respectfully submitted,

Renée Steinhagen, Esq.
Attorney for Plaintiffs-Appellants

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and THE NEW JERSEY STATE CONFERENCE, NAACP, ERIC O'NEAL; SEAN CARTER; ANTONIO MELENDEZ AND ROBERT GUZMAN Plaintiffs - Appellants v. THE STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE, Defendant- Appellant.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **DOCKET NO. A -_____** **On Appeal from: The Superior Court of New Jersey, Law Division, Mercer County No. MER-L-002687-96** **Sat Below: Hon. Linda R. Feinberg**

Brief in Support of Application for Leave to Appeal Denial of Admission *Pro Hac Vice*

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Cases

Other Authorities Cited

This Court should hear plaintiffs' appeal of the order denying leave to appear *pro hac vice* to David Rose and to Joshua Rose because it raises an important question about the discretion of the trial court to deny admission to out-of state attorneys under Rule 1:21-2 even though they did not violate the standards of the New Jersey Rules of Professional Conduct. This Court has granted leave to appeal to redress a similar abuse of discretion regarding *pro hac vice* admission in Feriozzi Concrete v Mellon Stuart, 229 N.J. Super. 366 (App. Div. 1988). The Court below indicated that its order is "final" for purposes of certifying an appeal. Pa 17 Tr. p. 20. The interest of justice in hearing this appeal is stronger than in Feriozzi as denial of counsel may, as a practical matter, foreclose plaintiffs from pursuing Count I of the complaint alleging that the four year college degree requirement imposed by the New Jersey State Police starting in 1993 has a discriminatory effect. Count I is the claim that led plaintiffs to pursue this action.

The Court below applied a double standard. Despite the absence of any evidence that would support a finding of an "appearance of impropriety" under the New Jersey Rules of Professional Conduct, the trial court ruled that speculation that there might be evidence of such an appearance was sufficient to justify denial of the *pro hac vice* motion by David Rose and to impute disqualification to his partner, Joshua Rose. No rule or case precedent supports the ruling.

STATEMENT OF FACTS

David Rose was employed by the United States Department of Justice from 1956 until his retirement on December 1, 1987. From 1969 to 1987, he was Chief of the Employment Litigation section of the Civil Rights Division. During the relevant time, there were approximately 35 attorneys in the section. Pa 30.

During the 1980's, the Assistant Attorney General for Civil Rights adopted a policy of working with police departments to help them develop examinations that: (1) would have less adverse impact than those existing at the time; and (2) would be properly validated to ensure some correlation between performance on the examination and performance on the job. Pa 31. In connection with that policy, David Rose had meetings with Frank Erwin between 1985 and 1987. Id.

At some point after December 1987, Mr. Erwin developed an examination known as the LECR. It was ready for use in 1993. Defendant's decision to use the LECR as a tool for identifying a small group of applicants to be invited to the next level of the selection process in 1993 is the subject of Count II of the complaint. The main issue in Count II is whether defendant used the least discriminatory available valid alternative to select candidates. While the validity of the LECR may be of some relevance in this action, the history of its development bears very little relation to the issues in the case.

In order to validate an exam, a test developer must have the co-operation of employers so that questions and exam formats can be tested on working police officers to determine which questions and formats correlate with successful job performance. Mr. Erwin avers that he attended seven meetings where David Rose was present

between May 1985 and December 1987. One of these meetings, in 1985, was attended by representatives of defendant and three other police employers. The subject of the meetings was "the LECR development program." PA 19-20. Erwin Certification. That program consisted of assembling a consortium of police employers for the purpose of a validity study. [Feb. DLR] Apart from his statement that he attended the meetings to work in "good faith" with the government, Mr. Erwin does not state that he divulged or that he might have divulged any type of "confidential government information" during any of those meetings, or that he had any expectation of confidentiality when dealing with the government. Because the LECR did not exist, and was not validated at the time Mr. Rose was with the government, Mr. Erwin could not have disclosed information concerning the LECR or its validity to Mr. Rose and Mr. Rose did not have access to it. Id.

Joshua Rose graduated from law school in 1987 and joined David Rose as his employee in February 1989. In 1995, they formed a professional corporation, Rose & Rose, P.C.. In 1988, David Rose began representing the NAACP in investigations against municipal employers. In 1989, the NAACP filed suit against a number of municipal employers in New Jersey and elsewhere. Both David and Joshua Rose appeared in those actions and both have appeared in most of the 15 or more other actions they have brought on behalf of the NAACP over the past nine years. Joshua Rose began to take "first chair" responsibility in NAACP actions in 1993, the same year that Dennis Hayes became General Counsel of that organization. Pa 28.

Mr. Hayes has averred that he considers the NAACP to have a distinct relationship with Joshua Rose and that he would retain Joshua Rose and rely upon his expertise in employment cases even if David Rose were not involved. Pa 23. Indeed, Joshua Rose took primary responsibility for this action in 1995. He investigated the claims, wrote the "justification memo" that preceded the filing of this action, drafted the complaint, and appeared for the NAACP without David Rose at negotiations preceding the decision to file suit. Pa 23.

In April 1993, defendant gave an examination for entry level police officer candidates. A number of candidates were refused admission on the ground that they lacked the four year college degree (or 60 credits plus 2 years of military service). Some of these candidates contacted the NAACP. Negotiations ensued in 1994 and 1995.

During the course of negotiations, defendant shared public information with plaintiffs showing the numbers of persons by race and Hispanic origin who entered each stage of the selection process for the preceding seven recruit classes and those who passed to the next stage. Analysis of that data showed that the college degree requirement imposed in 1993 significantly reduced the proportion of African Americans and Hispanics who were deemed eligible to take the written exam. It further showed that defendant's use of the LECR (starting in 1993) had an even greater discriminatory effect against African American and Hispanic candidates than the College

requirement.[1] During the pre-complaint investigation, plaintiffs learned that there is a new examination for entry level police officers that has less disparate impact and has been validated.

The data about the effect of the LECR as used by defendant in 1993 and 1997, and whether a less discriminatory alternative is available are the primary issues in Count II. It is difficult to imagine how discussions about the possibility of developing the LECR that happened before December 1, 1987 would be relevant to this case or how is relevant to the issues raised in this case. Also relevant is the less discriminatory alternative offered by the new examination. None of this information could have existed in 1987, more than five years before the relevant events occurred.

The group of attorneys who have both the expertise to handle a complex statistical case of this nature and the desire to undertake such an action without financial support is very small. Pa 23. The NAACP has not provided any financial support for this action to date. Mr. Hayes has averred that he is not aware of any lawyer who will pursue the college degree claim on behalf of the NAACP if Rose & Rose is disqualified. Pa 23. Undersigned counsel, Renee Steinhagen of the Public Interest Law Center of New Jersey, agreed to serve as local counsel in this action. She has not agreed to serve as lead counsel and is not able to devote the resources

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[1] Defendant chose to use the exam differently in 1997. In 1997, it invited a larger pool of the people who passed the LECR in 1993 to participate in a second stage screening process. From the data produced to date, it would appear that the exam has less disparate impact when used to identify a larger number of eligible candidates. Plaintiffs have also identified a new exam that has less disparate impact when used in the manner defendant used the LECR in 1993. The primary issue in Count II is thus defendant's decision to use the LECR and its decisions on how to use the exam it selects, not the history of Mr. Erwin's effort to develop the LECR or the quality of his validity studies.

necessary to undertake that role. Although Mr. Seymour of the Lawyer's Committee for Civil Rights Under Law agreed to pursue Count II, relating to the LECR, his retainer with the NAACP is limited to that Count and it appears unlikely at this juncture that he will agree to pursue Count I relating to the four year college degree requirement.

The question of whether a four year college degree is sufficiently related to job performance to justify its indisputable disparate impact has been raised in numerous articles, but has never been answered in a judicial forum. It is an important question of public policy that may be foreclosed by the ruling below.

PROCEDURAL HISTORY

In September 1993, plaintiff NAACP, filed a charge of discrimination with the United States EEOC on behalf of a number of its members. The NAACP had been contacted by members who were turned away from the April and July 1993 examinations for failure to meet the four year degree requirement. The charge claimed that defendant uses discriminatory practices in the selection for hiring of entry level state troopers. The relevant portions of the Consent Decree in United States v State of New Jersey, (D. N.J. Civ. 75-1734), expired in late 1992. Defendant adopted the four year college degree requirement in February 1993. It first used the LECR exam in April 1993 (114th class) , and used it again in July 1997 (115th Class).

David Rose represented the NAACP in the meetings that led to filing the charge, and in subsequent discussions with defendant and others. Joshua Rose took primary responsibility for the case during the fall of 1995. He completed the factual investigation, handled client contacts, appeared at settlement meetings with defendant

and obtained a right to sue letter in March 1996. He ultimately drafted the complaint that was filed on or near July 1, 1996, attended a scheduling conference with Judge Carchman, and drafted the Amended Complaint filed in October 1996 as well as the initial *pro hac vice* motion paper filed in January 1997.

Defendant opposed the motion for admission of David Rose and Joshua Rose *pro hac vice* filed in February and Judge Carchman conducted a hearing on March 14, 1997. During a break in the hearing, David Rose discussed the issue with defense counsel, leading him to believe that defendant's objections related only to Count II. Pa 36. Before Judge Carchman ruled, he granted plaintiffs an opportunity to supplement the motion to address the concerns he raised. Based upon the comments of Judge Carchman and of defense counsel, plaintiffs withdrew the *pro hac vice* motion and sought separate counsel for Count II. Richard Seymour of the Lawyer's Committee for Civil Rights under Law[2] agreed to represent plaintiffs on Count II and a motion for *pro hac vice* admission of David Rose, Joshua Rose and Richard Seymour was filed in late September. In the mean time, Judge Carchman was appointed to the Appellate Division. The proceeding was therefore transferred to Judge Feinberg.

Defendant opposed the *pro hac vice* motion filed in February as to David Rose solely on the ground that the Certification of Frank Erwin, Pa ~~Tab 4~~ #Tab 4 contained evidence showing that David Rose gained knowledge concerning "the overall validity

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[2] The Lawyers' Committee was formed by President Kennedy as a vehicle for member firms to provide legal services for the Civil Rights movement. It typically staffs cases with significant assistance from attorneys employed by large corporate firms. The Lawyer's Committee has agreed to handle only the testing claim.

and job relatedness of the LECR test," Letter Brief of February 13, 1997. **Mr. Erwin, however, did not certify that Mr. Rose gained knowledge about the validity or the job relatedness of the exam.** His certification specifies that the discussions related to development of an exam and makes no claim that there was a confidential relationship or any possibility of the disclosure of confidential information. Id. Defendant's claim was based solely upon the speculation of counsel. Defendant offered no reason to oppose the motion by Joshua Rose.

In the second motion for admission *pro hac vice*, plaintiffs clarified the fact that the LECR did not exist in the 1985-87 time frame described by Mr. Erwin so that there was no possibility that Mr. Erwin had information concerning validity or job relatedness that he could have shared with David Rose prior to Mr. Rose's retirement on December 1, 1987. Pa 32.

In its Letter Brief filed on October 27, defendant raised a second argument: That David Rose is disqualified under R.P.C. 1.11(a) due to his participation, as a government lawyer, in an action filed in 1975.

In 1975, as Chief of the Employment Litigation section of the Civil Rights Division of the United States Department of Justice, David Rose appeared as counsel in United States v State of New Jersey, (D. N.J. Civ. 75-1734). The consent decree filed in settlement of that action did not specify use of any specific written exam and was entered some 18 years before the exam was ready for use. The Decree expired in October 1992 insofar as provisions relating to race and national origin were concerned. [Amended Complaint, {para. 8}] None of the plaintiffs were involved in the Consent

Decree action. It was an entirely separate matter from this action. David Rose was not involved with it after December 1, 1987 when he left government service.

Plaintiffs pointed out in the reply brief and on reconsideration that the 1975 consent decree was not the same "matter" under the definition provided by R.P.C. 1.11(d); and that there was no evidence to suggest that David Rose had obtained "confidential government information" relating to any issue in this case as that term is defined in R.P.C. 1.11(e); that there is no case law indicting that the facts of this case would present an appearance of impropriety.

THE RULING BELOW

Judge Feinberg ruled, by Order of November 19, 1997, that there was an appearance of impropriety as to David Rose and that plaintiffs had not shown "good cause" to admit Joshua Rose under R.P.C. 1:21-2. Although the basis for her ruling is not entirely clear, R.P.C. 1.11(a) is the only authority cited as to David Rose. She states the basis for her ruling as follows:

> With regard to whether David Rose's involvement with Frank Erwin, RBH and the development of the LECR constitutes an appearance of impropriety, the Court is satisfied that is does. While the relationship between Mr. Rose and Mr. Erwin **was not an attorney-client relationship and may not have given rise to an expectation of confidentiality between the two parties**, Mr. Rose still had access to information that was relevant to the development and validity of the LECR as a result of his employment with the Department of Justice. Since the validity of the LECR is a pivotal issue in this case, **Mr. Rose's knowledge concerning the development and validity of the exam presents an appearance of impropriety** that could cast a shadow of doubt about the integrity and outcome of this case.
>
> Since Mr. Rose seeks admission to practice law in New Jersey for the duration of this litigation, he would be subject to the New Jersey Rules of Professional Conduct. Pursuant to R.P.C. 1.11(a) . . . plaintiffs should not be

> allowed to benefit and defendants should not be disadvantaged by any information that Mr. Rose may have obtained . . .

Pa Tab 1, 17-18, Op. at 6-7 (emphasis added)

Plaintiffs filed a motion for reconsideration by Notice of November 29, 1997. The motion cited case precedent not included in the earlier memoranda and was supported by additional certifications showing that Joshua Rose has the expertise and client relationship required for "good cause" to be admitted under Rule 1:21. NAACP General Counsel Dennis Hayes further averred that it is difficult to find qualified counsel for actions of this nature and that he is not aware of any qualified counsel willing to take the case if neither David nor Joshua is admitted.

Rather than rebut the arguments and authorities cited by plaintiffs, the letter brief by defense counsel opposing reconsideration raised a novel theory entirely unsupported by rule or case precedent. Defendant argued that it need not produce evidence of any appearance of impropriety in order to support a finding of "countervailing considerations" to deny a motion for admission under Rule 1:21-2. Rather, defendant argued and the court effectively held that plaintiff must prove a negative - that there is nothing to show an appearance of impropriety. Pa Tab 3, p. 13. Defense counsel summed up the factual basis for her argument as follows:

> If David Rose is allowed in this case, your Honor, he's taking Frank Irwin's deposition, something may occur to him in discussions with Frank Irwin back when the LECR was in its formative stages and when **Mr. Irwin was showing him parts and components of another test**, that's important, and the state police should not be disadvantaged by that.

Pa Tab 3, p. 16 (emphasis added).

Judge Feinberg adopted the argument that a finding of "countervailing considerations" to disqualify attorneys seeking *pro hac vice* admission for under Rule 1:21-2 is wholly discretionary and could be supported as to David Rose for the reasons set forth in her written opinion. Pa Tab 3, p. 18.

With regard to Joshua Rose, she found that plaintiffs had shown the requisite "good cause" under Rule 1:21 but that the difficulty of screening Joshua Rose from the knowledge she imagined that David Rose might have obtained in government service provides sufficient "countervailing considerations" to justify barring him from the case. She further found, despite the evidence to the contrary, that she "is sure" that the NAACP could find alternative counsel for Count I. Tr. p. 19.

ARGUMENT

This Court should hear this interlocutory appeal because the ruling below may effectively deny plaintiffs representation; because the issues relating to attorney admission have been finally decided and are unrelated to the merits; and because it raises an important question of law: Whether out of state attorneys who have shown good cause for admission *pro hac vice* under Rule 1:21, can be disqualified for "countervailing considerations" on the basis of evidence that could not support an order to disqualify a New Jersey attorney under the rules of professional conduct and controlling authority.

A. Leave to Appeal is in the Interest of Justice

Rule 2:2-4 states that leave to appeal should be granted in the interest of justice. Plaintiffs urge this Court to hear this appeal because the disqualification of counsel, in

the context of a public interest case was based upon clear error in the application of Rule 1:21-2 and because the effect of the disqualification may bar plaintiffs from raising an important issue of public policy. The trial court clearly viewed her order as "final" for purposes of appeal: " MS STEINHAGEN: I have certain questions . . . whether we can take this up on a interlocutory appeal. THE COURT It's a final Order." Pa Tab 3, p.20.

This Court has granted leave to appeal in less compelling circumstances than those presented here. In Feriozzi Concrete v Mellon Stuart, 229 N.J. Super. 366 (App. Div. 1988), this court granted leave to appeal in order to clarify the fact that there must be actual "countervailing considerations" to justify the denial of a motion under Rule 1:21-2 upon a showing of good cause to admit counsel Here, the Court found "countervailing considerations" consisting of a finding that plaintiffs' counsel is in breach of a special heightened ethical standard that is not found in the New Jersey Rules of Professional Conduct nor any case law on the subject. This Court should clarify the ruling in Feriozzi to hold that there must be some basis in law and fact to support a finding of "countervailing considerations." Leave to appeal was also granted on the question of attorney representation in Re Tenure Hearing of Onorevole, 103 N.J. 548 (1986) which involved a motion to disqualify a New Jersey lawyer.

The erroneous disqualification of counsel leaves plaintiffs in an untenable situation. Failure to prosecute the claims relating to the college degree requirement in this action, in which the LECR is at issue in a separate count, may bar a future action under the entire controversy doctrine. Yet the ruling below leaves plaintiffs without counsel to pursue the claim in Count I. Because the college degree issue is an

important question of public policy, this Court should remedy the error before it operates to block the claim entirely.

B. There Is No Basis to Disqualify Joshua Rose

Even if this Court were to hold that Judge Feinberg had the discretion to disqualify David Rose on the basis of speculation, the case law and the rules clearly state that disqualification is imputed to other members of a lawyer's firm only under three conditions:

1) Where there is an actual conflict of interest with a present or former client, R.P.C 1.10; in re: Cipriano, 68 N.J. 398 (1975);

2) when a former government attorney seeks to represent private clients in a "matter" ("a particular matter involving a specific party or parties" 1.11(d)) in which he participated; about which he obtained "confidential government information" or for which he had substantial responsibility while in government service, R.P.C. 1.11(a); or

3) when a "substantial relationship" exists between a matter in which the lawyer represented a former client and a matter in which he represents an interest adverse to that former client. Reardon v Marlayne, 83 N.J. 461, 472 (1980)(attorney and his firm disqualified in suit against car maker when attorney represented same car maker in earlier suits involving similar issues of liability).

Here, the Court found expressly that there was no actual conflict of interest and it is undisputed that David Rose has at all times represented parties adverse to defendant. The only possible basis for imputing disqualification and the only authority the Court cited for disqualifying David Rose is thus R.P.C. 1.11(a).

A "matter" is defined to mean a specific proceeding involving the same parties. R.P.C 1.11(d). Yet it is very clear from the record that the "matter" for which defendant claimed disqualification under Rule 1.11 was United States v State of New Jersey, (D. N.J. Civ. 75-1734). Def. Brief of Oct. 27, 1997. That "matter" ended in 1992. None of the plaintiffs was involved in it. It is plainly not the same matter as the present lawsuit.

Even if there is some appearance of impropriety in the fact that David Rose had discussions while in government service with an expert witness that defendant plans to call in this case, there is no basis for imputing that disqualification to other members of his firm.

Any appearance of impropriety here is in the nature of the impropriety found in Opinion 569, 103 N.J. 325 (1986), pursuant to R.P.C. 1.11(b). There, an attorney who had represented a licensing board while in government service sought to represent a private party in defending an investigation that began while he was in government service. Citing the impropriety of an attorney appearing to switch sides in a matter, the court held that the attorney would be disqualified but that the disqualification would last only six months and would not be imputed to other members of his firm. Id. at 333. In this case, there is no suggestion that Mr. Rose switched sides and more than ten years have elapsed since he retired from government service.

C. Unsupported Speculation is Not Sufficient to Disqualify a New Jersey Attorney for an Appearance of Impropriety; It Was Error to Apply a Double Standard to Out of State Counsel

The burden of proof to show an appearance of impropriety is not stringent but it does require evidence. As the Supreme Court has stated:

> Whether an appearance of impropriety exists is not to be determined in a vacuum. As Justice Sullivan pointed out in *Higgins [v. Advisory Committee on Professional Ethics]*, 73 N.J. 123 (1977)], "[i]t must have some reasonable basis" and "must be something more than a fanciful possibility." 73 N.J. at 129. We must view the conduct as an informed and concerned private citizen and judge whether the reputation of the Bar would be lowered if the conduct were permitted.

Re Hearing of Onorevole, *supra,* 103 N.J. 548 at 562 (1986)(*quoting*, Re Opinion 415, 81 N.J. 318 at 325).

In the only relevant case cited by the Court, the New Jersey Supreme Court described the basis for the appearances of impropriety rule as a presumption that *a former client* shared confidences that will be relevant in related litigation, Reardon v. Marlayne, Inc., supra, 83 N.J. at 472-473. The rule generally appears at R.P.C. 1.9.

R.P.C. 1.11 is intended to apply the same policy in the context of former government lawyers. Matter of Petition for Review of Opinion No. 569, 103 N.J. 325, 327-328 (1986). It thus presumes that former government attorneys obtained confidential information available to the government. Because the government is so vast that strict application of the rule would severely curtail opportunities for former government lawyers, however, the bar on former government lawyers is limited to specific proceedings or "matters" in which the lawyer was involved while in the government.

The Court below erred in finding that David Rose is disqualified under R.P.C. 1.11(a) when the evidence clearly demonstrated that the present case is not a "matter" that existed when he was in government service; R.P.C. 1.11(d); and that he did not obtain relevant confidential government information; R.P.C. 1.11(e). Judge Feinberg's

statement that David Rose obtained information about the validity of the LECR before his retirement in 1987 is plain error. He could not have obtained information that did not exist.

Defendant did not argue that it had evidence that would support the disqualification of New Jersey counsel. Rather it argued, and the Court effectively held, that attorneys who show good cause for admission under Rule 1:21-2 may be disqualified based solely on speculation that confidential information might, for some reason, have been passed from Mr. Erwin to David Rose. The Court found that information about validity was disclosed although it did not exist for several years after Mr. Rose left government service. Her speculation was further debunked by her own finding that Mr. Erwin was not in a confidential relationship with Mr. Rose, and did not have an expectation of confidence, Pa Tab 2, Opinion p. 6. Finally, Mr. Erwin, in his affidavit never stated that he disclosed any confidential information or that he had any evidence about validity or the disparate impact of a test that did not exist.

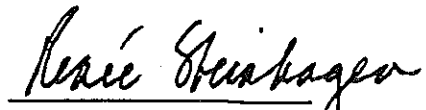
The finding that relevant confidential information was disclosed to Mr. Rose in his government capacity is nothing more than fanciful speculation. Should facts arise indicating that Mr. Rose obtained some relevant knowledge in a confidential government capacity, he could be disqualified at that time. He should not be barred from this action by an "apparition of impropriety" that has no basis in evidence. Moreover, this apparition should not overshadow the independent basis Judge Feinberg found constituting good cause to admit Joshua Rose.

CONCLUSION

For all the foregoing reasons, plaintiffs request that this Court grant plaintiffs' application for leave to appeal.

Dated: January 23, 1998

Respectfully submitted,



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