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Ethics Opinion 308

Ethical Constraints on Lawyers Who Leave Private Employment for Government Service

Lawyers who leave private practice to enter government service must be vigilant to protect the interests of former clients while representing their new clients with diligence and zeal. A government lawyer owes continuing obligations to her former clients to protect client confidences and secrets both from disclosure to others and from use by the lawyer to the disadvantage of the former clients. A government lawyer may not undertake work that is the same as or substantially related to work done for a former client without the consent of the former client. While disqualification of a government lawyer from a matter due to work done for a prior client is not imputed to other lawyers in the government agency or entity, screening measures should be considered in appropriate cases.

Applicable Rules

- Rule 1.6 (Confidentiality)
- Rule 1.7 (Conflict of Interest: General Rule)
- Rule 1.9 (Conflict of Interest: Former Client)
- Rule 1.10 (Imputed Disqualification)

Discussion

Rule 1.11 of the D.C. Rules of Professional Conduct, Successive Government and Private Employment, details specific ethical prohibitions applicable to lawyers who leave public service (e.g., legal counsel to a government agency, judicial officer, or law clerk) and enter private practice. Although there is no parallel rule addressing lawyer movement from private practice to government employment, the D.C. Rules of Professional Conduct address this subject more generally and provide guidance on the ethical constraints that apply when a lawyer leaves private practice to enter public service.**[1] (/bar-resources/legal-ethics/opinions/opinion308.cfm#footnote1)** This opinion summarizes the ethical considerations that a lawyer entering government service should bear in mind in discharging her duties to both her former clients and her new government employer.**[2] (/bar-resources/legal-ethics/opinions/opinion308.cfm#footnote2)**

Duties to Former Clients

A lawyer who leaves private practice to enter government service owes important and continuing ethical obligations to her former clients.**[3] (/bar-resources/legal-ethics/opinions/opinion308.cfm#footnote3)**

1. Confidentiality

First and foremost among a lawyer's duties to former clients is the duty of confidentiality. Rule 1. 6 (a) prohibits a lawyer from revealing a confidence or secret of the lawyer's client or from using a confidence or secret of the lawyer's client to the disadvantage of the client. These two distinct duties continue after the client-lawyer relationship has terminated, see Rule 1.6, Comment [28], and are fully applicable to a lawyer who has moved from private to government employment.

First, Rule 1.6 mandates that a lawyer who has obtained confidences and secrets about a former client in the course of a former representation must be vigilant not to reveal any protected information obtained from the former client no matter how relevant to the work of his new client. Second, Rule 1.6 imposes an additional and perhaps more subtle prohibition

relating to client confidences and secrets; namely that the lawyer not knowingly "use" protected information "to the disadvantage of the client." This prohibition requires that the government lawyer who is presented with an assignment in which he could use former client confidences (without necessarily revealing them to others) to achieve a better result for the government must not do so if there is any reasonably foreseeable disadvantage to the former client. Thus, for example, a lawyer who in private practice represented automobile manufacturers extensively in product liability litigation and learned information in the course of that representation about the client's future plans for design changes could not, as a government employee, use that information to shape an environmental regulation that could be viewed as unfavorable to the former client. While such a government assignment might not be prohibited as a conflict of interest under Rule 1.9 in that it would not involve the same or a substantially related matter, the use of client confidences or secrets even in an unrelated matter to the disadvantage of the former client is prohibited, absent client consent or one of the specific exceptions in Rule 1.6(c) and (d).[4]

(/bar-resources/legal-ethics/opinions/opinion308.cfm#footnote4)

2. Conflicts of Interest

Rule 1.9 provides that a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Rule 1.9 requires that a government lawyer contemplating representation in a matter directly adverse to the interests of a former client determine whether the matter is the same as or substantially related to representation that the lawyer previously provided to the former client.[5] (/bar-resources/legal-ethics/opinions/opinion308.cfm#footnote5) The existence and scope of a "matter" for purposes of Rule 1.9 depend on the facts of a particular representation and the nature and extent of the individual lawyer's involvement. When a lawyer has been directly involved in a lawsuit or transaction on behalf of a client, the Rule plainly prohibits subsequent representation of another client whose interests are materially adverse. "The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." D.C. Rule 1.9, Comment [2]; *see Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 42 (D.C. 1984). If a matter is the same as or substantially related to the work done for the former client, the lawyer may not proceed without written consent of both clients, including the former client.[6] (/bar-resources/legal-ethics/opinions/opinion308.cfm#footnote6) In the absence of such consent, the government lawyer may not undertake the representation.

For lawyers in private practice, disqualification due to former client conflicts of interest under Rule 1.9 is imputed to all other lawyers associated in a "firm" with the disqualified lawyer, thereby effectively barring the lawyer's firm from the new representation (in the absence of client consent). *See* D.C. Rule 1.10. Due to the draconian effects of imputed disqualification on the ability of the government to obtain legal services, however, the principles of imputed disqualification do not apply to disqualify government lawyers who practice in a government agency with a lawyer who is disqualified because of prior client representation. Rule 1.10, Comment [1] ("For purposes of the Rules of Professional Conduct, the term 'firm' . . . does not include a government agency or other government entity."). Thus, unlike the situation in private practice where all lawyers associated in a law firm with a lawyer disqualified under Rule 1.9 also are disqualified through imputation under Rule 1.10, in the government context, the lawyers in a government office, agency, or department who work with a personally disqualified lawyer are not barred from representation adverse to the lawyer's former client.

D.C. Rule 1.11, which deals with the lawyer who moves from government to private practice, similarly does not extend the imputed disqualification of a former government lawyer to other lawyers in the private firm, but does require the implementation of specified screening mechanisms in order to avoid imputed disqualification. *See* Rule 1.11(c)-(e). While our Rules do not expressly require such screening in the government context for a lawyer who is disqualified by a prior client

relationship under Rule 1.9, consideration and implementation by the government agency of voluntary screening measures that effectively insulate the lawyer from ongoing contact with the matter from which she is disqualified should be considered.[7] (/bar-resources/legal-ethics/opinions/opinion308.cfm#footnote7) Such measures provide important assurances to the lawyer's former clients that the lawyer's ethical obligations under Rules 1.6 and 1.9 are being met and signal an appropriate recognition by the government agency of the importance of these obligations.

Duties to New Client

In highlighting the duties owed to former clients, this Opinion does not intend to ignore the new government attorney's ethical obligations to her new government client. Like all attorneys subject to these rules, the attorney must represent her government client competently (D.C. Rule 1.1), "zealously and diligently within the bounds of the law" (D.C. Rule 1.3), and in a manner that avoids conflicts of interest or impairment of the lawyer's professional judgment (D.C. Rule 1.7). Like all government lawyers, a lawyer joining the government from private practice also must be sensitive to those provisions of the D.C. Rules of Professional Conduct that specifically address the ethical obligations of government lawyers. *See, e.g.*, D.C. Rule 3.8 (Special Obligations of a Prosecutor). Finally, government lawyers must be sensitive to the reality that the D.C. Rules of Professional Conduct are just one element of the larger body of authority governing the conduct of government attorneys;[8] (/bar-resources/legal-ethics/opinions/opinion308.cfm#footnote8) discussion of the specific elements of those statutes and regulations, however, is beyond the scope of this opinion.

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1. In addition to the D.C. Rule of Professional Conduct, there are criminal and civil statutory and regulatory prohibitions and obligations applicable to government employees, including lawyers. These statutes and regulations, which address subjects such as conflicts of interest, financial disclosure, restrictions on payments and post-employment activities, include (1) the criminal conflict of interest laws in chapter 11 of title 18, United States Code; (2) the restrictions on gifts in 5 U.S.C. §§ 7351 and 7353; (3) the financial disclosure requirements of 5 U.S.C. app. § 101, et seq.; (4) Executive Order 12731; and (5) the Standards of Ethical Conduct for Employees of the Executive Branch set forth in 5 C.F.R. part 2635. This opinion will not address these requirements, which also must be complied with by the government attorney.

2. Similarly, this Opinion does not address the ethical issues that are presented when a private lawyer temporarily provides legal services to a government agency or entity. See D.C. Bar Opinion 268 (1996) (Conflict of Interest Issues Where Private Lawyers Provide Volunteer Legal Assistance to the D.C. Corporation Counsel).

3. A lawyer in private practice contemplating a move to government service also must be sensitive to ethical obligations that may arise during the transition process. To the extent that the lawyer's move to government service involves termination of ongoing client representations, the lawyer must do so in a manner that minimizes possible adverse impact on the client and that complies with the requirements of D.C. Rule 1.16. Even in the case of concluded client representations, there may be continuing client obligations, including the need to provide for the proper transfer or disposition of client files. These obligations have been addressed in other Committee Opinions and will not be revisited here. See, e.g., D.C. Bar Opinion 283 (1998) (Disposition of Closed Client Files); D.C. Bar Opinion 294 (1999) (Sale of Law Practice by Retiring Lawyer). In addition, a lawyer in private practice contemplating a move to the government also must be sensitive to any potential conflicts of interest that may be presented during the course of seeking government employment. See, e.g., D.C. Bar Opinion 210 (1990) (Representation of Criminal Defendants by Attorney Seeking Position as Assistant U.S. Attorney).

4. Because Rule 1.6 is limited to client confidences and secrets, its restriction does not extend, of course, to general information about an industry, area of practice, legal interpretations, economic sectors, and the like that a lawyer learns in the course of her professional career.

5. To the extent that determination of what constitutes “the same or a substantially related matter” presents difficult questions of interpretation under the applicable ethical rules, the government attorney should utilize the significant resources represented by the U.S. Office of Government Ethics and the agency ethics officer designated for her particular agency.
Rule 1.11, which governs lawyers who leave

6. Rule 1.11, which governs lawyers who leave government service for private practice, contains no provisions for waiver of the lawyer’s disqualification. This is not the case for the “reverse revolving door” i.e., private practice to government, which is governed by Rule 1.9. Comment [3] to Rule 1.9, while noting that Rule 1.11 governs the transition from government to private practice, expressly states that “disqualification from subsequent representation is for the protection of clients and can be waived by them.

7.The screening measures identified in Opinion 279 (Availability of Screening as Cure for Imputed Disqualification) provide guidance on important factors that should be considered in establishing an ethical screen.

8. ee, e.g., statutes and regulations cited in Note 1 supra.