Selected Opinions and DOJ Guidance on Ethical Considerations, Including Conflicts of Interest, Relevant to an Application for Appointment as an Assistant United States Attorney in the Eastern District of New York

- Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics (*Attachment A*)
    - Formal Opinion No. 1991-1, addressing "whether and under what circumstances a lawyer has a duty to disclose to a current or prospective client that the lawyer is seeking or is considering whether to accept future employment with a person or entity having interests that are adverse to the interests of that current or prospective client."

- American Bar Association, Committee on Ethics and Professional Responsibility (*Attachment B*)
    - Formal Opinion No. 96-400, Job Negotiations with Adverse Firm or Party

- United States Courts, Committee on Codes of Conduct of the Judicial Conference of the United States (*Attachment C*)
    - Advisory Opinion 74, Law Clerk's Future Employer
    - Advisory Opinion 81, When Law Clerk's Future Employer is the United States Attorney

- United States Department of Justice, Departmental Ethics Office (*Attachment D*)
    - Ethics Issues for Department Attorneys Upon Entering or Leaving Government Service

ATTACHMENT A

NEW YORK CITY BAR
COMMITTEE REPORT
Formal Opinion 1991-1
April 05, 1991

FORMAL OPINION 1991-1
ACTION: Formal Opinion

OPINION:

This Opinion addresses whether and under what circumstances a lawyer has a duty to disclose to a current or prospective client that the lawyer is seeking or is considering whether to accept future employment with a person or entity having interests that are adverse to the interests of that current or prospective client.

Disciplinary Rule ("DR") 5-101(A) of the Lawyer's Code of Professional Responsibility ("the Code") provides that, except with the consent of the client after full disclosure, a lawyer must decline proffered employment if the exercise of the lawyer's independent professional judgment on behalf of that client "will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests". n1 For the reasons set forth below, the Committee concludes that when a lawyer's interest in obtaining specific future employment is sufficiently focused and concrete, it is a cognizable "financial, business, property, or personal interest [ ]" under the Code, and where the potential future employer is a party or counsel for a party having interests adverse to the interests of the lawyer's client that are the subject of the prospective representation, the interest in that future employment is one that "will" or "reasonably may" affect the lawyer's exercise of independent professional judgment on behalf of the client.

n1 "DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair Independent Professional Judgment.

A. Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests."

Although DR 5-101(A) expressly addresses only the decision to undertake to represent a client, the Committee further concludes that the policies and ethical considerations embodied in the rule apply similarly where the lawyer's conflicting employment interest arises after the representation of the client by the lawyer has commenced. In such case, we conclude that the lawyer must either disclose the interest and seek the client's consent to continue the representation, withdraw from the representation if that can be done without prejudice to the client, or postpone the pursuit of the conflicting employment opportunity until the completion of the existing representation.

We believe that a lawyer's interest in prospective future employment often will have become sufficiently focused and concrete to constitute an "interest" under DR 5-101(A) (i) where the lawyer has made affirmative application for a new position or (ii) where the lawyer is in fact actively considering whether to pursue such a position in light of an expression of interest by the prospective employer. At a minimum, we believe that the disclosure obligations under DR 5-101(A) will arise in all circumstances no later than when an offer of conflicting employment has been extended to the lawyer and has not been promptly declined.

Finally, the policies and ethical considerations discussed herein generally apply not only in the context of litigation or formal adversarial proceedings but also in any legal representation where there is professional interaction between lawyers whose clients have differing and adverse interests. Thus, the Committee notes that the discussion of the application of DR 5-101(A), as set forth herein, should not be viewed as limited to the representation of a client in litigation. It should extend to any lawyer who is to have substantial, personal involvement in the representation of or otherwise to be in a position to exercise or to influence the exercise of professional judgment on behalf of a client regardless of the context.

I.

Employment prospects and opportunities are clearly matters of financial and personal interest to most lawyers. n2 The question is whether specific employment prospects with a party or counsel to a party with interests adverse to those of a client of the lawyer "will" or "reasonably may" affect the lawyer's exercise of professional judgment on behalf of that client.

n2 This Opinion arose from our consideration of situations where a lawyer contemplates "changing jobs", e.g., moving from one law firm to another, from private practice to a corporate or governmental position or from private defense work to a prosecutor's office. The discussion proceeds generally with that context in mind. However, the considerations, analyses, and conclusions can also be applied to a private practitioner's consideration of prospective future retention to represent a party in another matter.

There are several types of situations where at least an apparent conflict between the lawyer's personal interest in potential future employment and the interest of his or her client could arise. For example, where the outcome of the matter is of importance to the potential future employer, the lawyer could be tempted to act or to appear to act so as to benefit the future employer rather than the client in the course of the representation as a means of attempting to secure the future position. A conflict could also arise where the outcome of the matter could have a significant future effect on the perceived advantages of or benefits to be derived from the prospective future employment. Such effect could be of direct financial significance to the lawyer if the future employment were to occur and would, thereby, give the lawyer a potential personal stake in the outcome of the current matter in which he or she represents the party with interests adverse to those of the potential future employer. In short, protection of the interests of the lawyer's current client could be in conflict with the likelihood that the

lawyer will get the future employment or with the potential benefits to the lawyer from the future employment or both.

A third, and probably more common, situation is where the lawyer perceives that his or her actions in the representation of the client may have some impact on the potential employer's view of the lawyer's abilities. The lawyer, conscious of the potential for evaluation, may be more aggressive, litigious or argumentative, on the one hand, or more passive, cooperative or forthcoming, on the other, than he or she otherwise might be. Similarly, the lawyer may respond to the circumstance of confronting a potential future employer by being more reserved or, alternatively, more gregarious; by being more cooperative or, alternatively, more combative. In all such events, the conscious or unconscious deviation in behavior could be to the detriment of the client. Moreover, it would be the direct result of the employment interest.

DR 5-101(A) does not require a showing that the lawyer's exercise of professional judgment will be affected; it requires only that the judgment "reasonably may be". The Committee concludes, in light of the examples set out above, that future employment interests "reasonably may" affect a lawyer's professional judgment. n3

n3 We also believe that the conclusions herein are strongly buttressed by the Canon 9 directive to avoid even the appearance of professional impropriety. It is not unlikely that at least some clients would be distressed to discover that shortly after the completion of the representation of the client, the client's lawyer took a job with the other side. The concern would be even greater if it were known or believed that negotiation over such employment had occurred undisclosed to the client during the course of the representation. Such consequences would clearly tend to undermine confidence in the profession and in the legal system. Conversely, our belief that at least some clients would want to and feel entitled to know about the lawyer's conflicting employment prospects lends support to our conclusion that the conflicting employment prospects "reasonably may" affect a lawyer's exercise of professional judgment.

II.

There is only limited precedent addressing when prospective employment can or will constitute the type of "interest" contemplated by DR 5-101(A). Nevertheless, the precedent we have located is consistent with the conclusions we express herein. n4

n4 We note that DR 5-101(A) does not specifically refer to an interest in future employment. The Code, however, does cite future employment as a possible disqualifying interest of the lawyer in the section regulating government lawyers. DR 9-101(B) states:

"Except as law may otherwise expressly permit: . . . 3. A lawyer serving as a public officer shall not: . . . b. 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."

The inclusion of this section in the Code indicates that the drafters were concerned that prospective employment of a government lawyer may affect the independent judgment of the lawyer and, thereby, affect the lawyer's fair representation of the client. Thus, it is possible to formulate an argument, by negative inference, that the drafters did not consider an interest in prospective employment to be a concern for non-government lawyers. We reject that argument. Instead, we believe that DR 9-101(B) gives further support to our position here by explicitly recognizing the potential ethical significance of future employment prospects. See also Restatement of the Law Governing Lawyers 3206, comment d, illustration 6 (Tent. Draft, No. 3, April 10, 1990); Model Rules of Professional Conduct, Rule 1.12(b) (judicial clerk must disclose to judge negotiations for employment with a party or attorney involved in a matter in which clerk is participating "personally and substantially").

In New York City Opinion 79-37, the Committee concluded that DR 5-101(A), reinforced by Canon 9, prohibited continued representation of a client by a law student absent disclosure and informed consent, if that student has accepted an offer of post-graduation employment with the prosecutor's office handling that case against the student's client. New York City Opinion 79-37 (February 11, 1980). n5 As discussed above, we find no distinction, material to the concerns of DR 5-101(A), between the acceptance of an offer and either the serious consideration of an offer that has been made or the active pursuit of an offer of employment.

n5 Although the Code is addressed to "lawyers" (that is, persons who have been admitted to the Bar), its provisions apply to law students who are functioning as lawyers in clinical education programs, in many instances under the authority of Appellate Division practice orders or other court rules. See Opinion 79-37. In addition, the Code's provisions clearly are binding on members of a law school clinical faculty, whose supervisory responsibility over practicing law students is codified as an ethical obligation in DR 1-104(A). Similar considerations would apply with respect to law students engaged in part-time employment under the supervision of a practicing lawyer.

The Legal Ethics Committee of the District of Columbia Bar recently addressed the situation of a lawyer involved in criminal defense work applying for a position with the United States Attorney's Office and concluded that DR 5-101(A) requires full disclosure and the informed consent of the lawyer's clients who are being prosecuted by that Office no later than when the lawyer takes the first active step toward seeking such new employment. Legal Ethics Committee, District of Columbia Bar, Opinion 210, at 9 (April 17, 1990).

Similarly, a 1990 San Diego Bar Association opinion concluded that while the California ethics rules do not compel the lawyer to reveal to the client that he was hired by opposing party's counsel to act as an expert witness, the lawyer's duty of loyalty may nevertheless require such disclosure if the lawyer's personal financial interests in serving as an expert witness may affect representation of the client. The opinion explained, by way of example, that if a lawyer had acted as an expert witness for a law firm in the past with some expectation of similar employment in the future, then there would be more likelihood that the

lawyer's own financial interests might affect the lawyer's actions in representing the client. San Diego Opinion 1989-4 (June 5, 1990).

Finally, we note that the Committee on Professional Ethics of the New York State Bar Association, relying in part on DR 5-101(A), concluded that a lawyer could not properly undertake the representation of another lawyer who is counsel for an adverse party in a pending lawsuit without at least full disclosure and the consent of the first lawyer's client in that pending lawsuit. N.Y. State 579 (March 20, 1987).

III.

A serious issue arises as to when, in the process of looking for and deciding to accept new employment, the lawyer's interest in such employment becomes sufficiently concrete and serious to require disclosure under DR 5-101(A). The Committee is quite aware of the desirability of a "bright-line" rule that would be easy to apply and would provide unambiguous guidance. However, we have concluded that no such "bright-line" test can adequately accommodate the variety of circumstances in which the issues addressed herein might arise.

Nevertheless, the Committee believes that disclosure would be required under DR 5-101(A) in any case no later than when an offer of conflicting employment is extended to the lawyer, which offer is not promptly declined. Therefore, disclosure would always be necessary at least where an offer of future employment is outstanding and being considered (or has been accepted). This rule, however, is not sufficient. Although disclosure at the point an offer is extended would protect against certain of the types of conflicts identified above; it is not sufficient as to others. In particular, it does not deal at all with the potential conflicting influences that may arise in connection with the process of securing the offer of employment. Therefore, the Committee notes that, in many cases, the disclosure obligations under DR 5-101(A) may arise as soon as the lawyer either (i) has taken clear affirmative steps to seek to obtain specific conflicting employment (e.g., applied for such a position) or (ii) is seriously considering the pursuit of such employment in response to some expression of interest by the potential employer. Both situations can raise the ethical problems identified above. We are not prepared, however, to opine that in all cases the obligation to decline proffered representation or make disclosure will arise at these earlier identified points in the process. n6

n6 For example, the Committee recognizes that law students may send resumes to a large number of possible employers, participate in informational activities such as "job fairs," or attend numerous campus "interviews". None of these activities would generally represent an expression of serious interest in any particular employer or position. Thus, we would not consider such actions to reflect a "focused and concrete interest" that could give a rise to a conflict. The same type of reasoning would apply generally where, for example, a lawyer consults a legal recruiting firm or sends out form letters or resumes to many prospective employers.

IV.

Where applicable, DR 5-101(A) requires disclosure of the conflicting interests to the client, and the client's consent to the representation notwithstanding that interest. This requirement involves full disclosure of all relevant facts, thereby resulting in an informed and knowing consent by the client. As stated by the Committee in Opinion 79-37:

"[T]he consent required by DR 5-101(A) must be an informed consent, made by the client after full disclosure of all relevant facts, including the availability of other counsel as an alternative to continued representation. . . . In this regard we note that special care must be taken in attempting to obtain the consent of indigent persons to avoid possible overreaching and to ensure that adequate disclosures of all relevant facts is made." New York City Opinion 79-37, supra.

In this context, we note that full disclosure may require some explanation to the client of the expected process of application (e.g., that the lawyer may engage in personal interviews with the adverse entity) and its timing, as well as the fact that the future employment is being sought or may occur.

V.

Generally, disclosure and consent will fully satisfy DR 5-101(A). However, we add a caveat and caution.

Canon 5 of the Code and its ethical considerations stress the lawyer's duty of undivided loyalty to the client. Canon 5 instructs a lawyer to exercise independent professional judgment on behalf of the client, while EC 5-1 and EC 5-2 advise the lawyer against allowing anything to compromise or influence that judgment, against accepting employment where such undivided loyalty will be affected and against acquiring any interest or position that would diminish that loyalty once representation has commenced. These Ethical Considerations read as follows:

"EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client.

"EC 5-2 A lawyer should not accept proffered employment if the lawyer's personal interests or desires will, or there is reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his or her judgment less protective of the interests of the client."

Thus, in the context of future employment interests being addressed herein, if the lawyer in fact concludes subjectively that the conflict will interfere with his or her exercise of

independent professional judgment or compromise his or her duty of loyalty, then the lawyer should decline the proposed representation of the client (regardless of whether the client is willing to consent to such representation).

We note that the analogous provision of the Model Rules, Model Rule 1.7(b), also expounds the principle of loyalty, stating:

"A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved." n7

n7 The legislative history of Model Rule 1.7(b) also illustrates the precept of Model Rule 1.7(b), asserting that loyalty to the client is essential and that the lawyer's own interests should not be permitted to have an adverse effect on the lawyer's representation of the client, nor should a lawyer allow related business interests to affect representation.

Under the Model Rules, the lawyer must "reasonably" believe that representation will not be adversely affected by the personal interest. This requirement exists independent of and in addition to the client's consent. We would observe that this requirement is consistent with the pronouncement of EC 5-2; although, it is not explicitly contained in DR 5-101(A).

We believe that these considerations underscore the importance that the disclosure be full and detailed so that the consent, if obtained, will be informed and knowing.

VI.

Although DR 5-101(A) addresses expressly only the decision whether to accept employment to represent a client, other provisions of the Code make it clear that the policies and ethical considerations of Canon 5 -- the duty of loyalty to and the obligation to exercise "independent" professional judgment, untainted by conflicting personal or professional interests, on behalf of the client -- extend throughout the representation. See, e.g., EC 5-1, EC 5-2, DR 5-102(A), DR 5-104(A) and DR 5-105(B). Therefore, the Committee concludes that where the representation has already commenced, a lawyer for whom an interest in future conflicting employment arises should disclose the interest to the client and obtain the client's consent or either postpone seeking such new employment until the representation is completed, n8 or withdraw from the representation, if withdrawal can be accomplished without prejudice to the client (see DR 7-101(A), DR 2-110(A) and (C)). If the lawyer concludes that the conflicting interest will interfere with his or her exercise of independent professional judgment, then disclosure and consent will not be adequate.

n8 EC 5-2 advises that a lawyer "carefully should refrain from acquiring a property right . . . that would tend to make his or her judgment less protective of the interests of the client". The Committee does not consider an application for a job to be such a "property right", but the acceptance of an offered employment position would, in our judgment, come within that language.

VII.

We have addressed this Opinion to the obligations of the lawyer who is seeking other employment, and we do not undertake to discuss in the abstract the various related issues that may arise in different situations with respect to the obligations of other, associated lawyers. Nevertheless, we note that under the Code, certain conflicts, including a conflict under DR 5-101(A), will be imputed to other lawyers "associated" with the directly affected lawyer in "a law firm". Specifically, DR 5-101(D) provides: "While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101(A) . . ., except as otherwise provided therein." ("Law Firm" is defined quite broadly in the Code to include a legal department and a legal services organization, as well as a law partnership or professional legal corporation. See "Definitions" section of Code.) This provision is a new addition to the Code, being part of the Amendments effective September 1, 1990. As such, there are few examples of its application and little reported analysis. See, e.g., New York State Bar Association, Opinion 615 (Jan. 29, 1991).

While we do not here opine on the application of DR 5-105(D) to any particular set of facts, it is apparent to the Committee that the imputation of conflicting interests of the type discussed herein to other associated lawyers could have results that would appear to be extreme or could be very disruptive in the context of practices we believe to be common and widespread at least within larger professional organizations, including private firms, governmental agencies and legal service organizations. Therefore, this Committee seriously questions the wisdom and suitability of including DR 5-101(A) as a type of conflict that is automatically imputed to other associated lawyers under DR 5-105(D).

First, DR 5-101(A) concerns the individual lawyer's "own financial, business, property or personal interests". If such an interest of one lawyer in a particular case does not also give rise to such a conflicting interest for an associated lawyer (e.g., because of the lawyers' shared financial interests, or the first lawyer's influence over the second lawyer), it is not obvious that it ought to be imputed to the associated lawyer. Of course, if it does constitute such an interest of the second lawyer under DR 5-101(A), then imputation pursuant to DR 5-105(D) is unnecessary.

Second, the possibility of undesirable consequences within "law firms", as broadly defined, from the imputation of conflicts personal to one lawyer to all other lawyers could tempt ethics committees or courts to construe the types of personal interests covered by DR 5-101(A) more narrowly than this Committee believes to be appropriate, when viewed in terms

of the requirements of DR 5-101(A) alone. We believe that there are personal, individual interests that raise conflicts for the particular lawyer if he or she were to represent a client in a specific matter -- and which, therefore, should be disclosed if the lawyer is to be personally involved in the representation -- but that do not raise any tangible ethical concerns where the representation will be undertaken by an associated lawyer with no personal involvement by the lawyer with the personal conflict. In such cases, this Committee is of the opinion that the proper and preferable result would be a limitation of the imputation of the conflict to other lawyers and not the determination that the personal interest may be ignored even by the lawyer with the interest (thereby, presumably reading that type of personal interest out of DR 5-101(A)).

Therefore, this Committee invites the examination by other ethics committees and consideration by the Appellate Division of whether the DR 5-101(A) should be eliminated from the list in DR 5-105(D) of conflicts that are to be automatically attributed to associated lawyers.

Author(s): Professional Ethics Committee
Subject Area(s): Ethics
https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-1991-1

ATTACHMENT B

ABA Formal Op. 96-400

ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-400

American Bar Association

JOB NEGOTIATIONS WITH ADVERSE FIRM OR PARTY

January 24, 1996

A lawyer's pursuit of employment with a firm or party that he is opposing in a matter may materially limit his representation of his client, in violation of Model Rule 1.7(b). Therefore, the lawyer must consult with his client and obtain the client's consent before that point in the discussions when such discussions are reasonably likely to materially interfere with the lawyer's professional judgment. Where the lawyer has had a limited role in a matter or has had limited client contact, it will ordinarily be more appropriate for him to consult with his supervisor, rather than directly with the client. Generally, the time for consultation and consent will be the time at which the lawyer agrees to engage in substantive discussions of his experience, clients, or business potential, or the terms of a possible association, with the opposing firm or party. If client consent is not given, the lawyer may not pursue such discussions unless he is permitted to withdraw from the matter. While the negotiating lawyer's conflict of interest is not imputed to other lawyers in his firm, those other lawyers must evaluate whether they may themselves have a conflict by virtue of their own interest in their colleague's negotiations. Lawyers in the law firm negotiating with the lawyer also have a conflict, requiring similar action to resolve, if their becoming associated with the lawyer would cause their firm's disqualification, or if the interest of any of those lawyers in the job-seeking lawyer's becoming associated with the firm may materially limit their representation of a client adverse to the job-seeking lawyer.

Introduction

Recognizing the increased frequency with which lawyers in private practice change associations, the Committee here addresses the constraints that the Model Rules of Professional Conduct (1983, as amended) place upon a lawyer who explores employment [FN1] with a law firm or party, while he represents a client in a matter adverse to a client of that firm or adverse to that party. [FN2]

A lawyer's actual employment by a firm which he has been opposing in a matter is squarely addressed by Rule 1.9. Model Rule 1.9(a) prohibits a lawyer from switching sides on a matter he is handling. [FN3] Even if a lawyer did not personally work on a particular matter in his former firm, Model Rule 1.9(b) provides that the lawyer may not represent a client at his new firm whose interests are materially adverse to a client of his former firm, if the matter is the same or substantially related to the former firm's representation of the client, and the lawyer has confidential information relating to that representation. [FN4] By reason of Rule 1.10, a lawyer's disqualification under Rule 1.9(a) or (b) is imputed to all lawyers in the new firm. [FN5]

As to discussions or negotiations that may lead to employment with an adverse firm or party, the Model Rules expressly address such discussions or negotiations by government lawyers, judicial officers and law clerks (see Rules 1.11(c) and 1.12), but not those by a lawyer in private practice. From the absence of such a rule, we infer only that negotiations for a new association between a lawyer and an opposing firm or party are not forbidden. However, such negotiations clearly raise ethical issues under Rule 1.7(b), which prohibits a lawyer, without consultation and consent, from representing a client when his personal interests may materially limit the representation. [FN6]

The Ethical Duties Implicated in Employment Discussions with an Adversary

Rule 1.7(b) provides:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation....

In the terms of Rule 1.7(b), a lawyer's pursuit of employment with an adversary firm may, depending on the stage of the discussions, materially limit the lawyer's representation of a client because the degree of the lawyer's interest in the prospective affiliation may affect the discharge of many of his ethical duties to his client.

The first such duty is the lawyer's duty to serve his client without limitations resulting from his own interests. The judgment of a lawyer who is exploring job prospects with an opposing law firm may be affected by the lawyer's desire to curry favor with, or at least not to antagonize, the prospective employer.

A second duty implicated by employment discussions with an opposing party or firm concerns the vigor of the lawyer's representation. Rule 1.3 requires a lawyer "to act with reasonable diligence and promptness in representing a client"; Rule 3.2 requires a lawyer to "make reasonable efforts to expedite litigation consistent with the interests of [his] client." A lawyer's performance of these duties may be compromised by his attention to his job search, or his desire not to offend a prospective employer. This desire may lead the lawyer to recommend or pursue a course of action which does not best serve his client, or may prompt the lawyer to postpone work on the matter when such postponement is not in his client's interest. [FN7]

A third duty is the preservation of confidentiality under Rule 1.6. Job-seeking lawyers must guard against the risk that in the course of the interviews to determine the compatibility of the lawyer with the opposing firm, or the discussions between the lawyer and the firm about the lawyer's clients and business potential, the lawyer might inadvertently reveal "information relating to the representation" in violation of Rule 1.6.

Fourth, at some point, a lawyer pursuing employment with an adversary may have a duty, under Rule 1.4, to communicate such activities to the client, as significant information reasonably necessary to permit the client, to make informed decisions regarding the representation.

At What Point Are Consultation and Consent Required?

In seeking to identify the point at which the consultation and consent mandated by Rule 1.7(b) are required, the Committee has considered all of the foregoing duties, and also Comment [4] to Rule 1.7(b), which states that:

A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate, and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that should reasonably be pursued on behalf of the client.

The Committee believes that there are two overriding factors affecting the "likelihood that a conflict will eventuate" and "materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclosing courses of action": the nature of the lawyer's role in the representation of the client; and the extent to which the lawyer's interest in the firm is concrete, and has been communicated and reciprocated.

The likelihood that a lawyer's job search will adversely affect his "judgment in considering alternatives or foreclosing courses of action" is far greater when the lawyer has an active and material role in representing a client. Thus, if the posture of the case is such that there is no call on the lawyer's judgment in representing a client during the period of his job search, it is not

likely that his search and negotiations will adversely affect his judgment. For example, for a lawyer who has fully litigated a case against the firm he wishes to join, who is awaiting the decision of the appellate court and who presently has no action to take or consider, we do not believe that Rule 1.7(b) comes into play during job explorations with the opposing firm, unless and until a point comes when the lawyer should consider some further action on the client's behalf. [FN8] Similarly, if a lawyer has played a limited, but now concluded role for a client, there is ordinarily no basis for concluding that the lawyer's job search will prejudice the interests of the client on whose matter he had worked, even though others in the firm are continuing the representation.

Whether the lawyer's interest in the opposing firm is concrete and has been communicated is also important in defining the time at which consultation and consent are required. In moments of frustration, stress or boredom, lawyers may consider working elsewhere. Some may read classified ads or give their names to placement services; others may have general discussions of other firms with friends who work elsewhere. The Committee does not suggest that such thoughts or conduct, without more, give rise to an obligation to consult and seek consent of a represented client. It seems unlikely that a lawyer's interest in an association with an opposing firm will materially affect his judgment in handling a matter before the lawyer has communicated that interest to the firm, during the pendency of the adverse representation, or the firm has initiated communication with the lawyer about a possible association.

Furthermore, if a lawyer's interest in another firm, or its interest in him, is not reciprocated, it seems unlikely, in most cases, that such unreciprocated interest will have a material effect on a lawyer's judgment in a matter between them. Thus, no obligation of consultation and consent arises for a lawyer who receives and promptly rejects an unsolicited offer of employment from the opposing firm or party. Similarly, if a lawyer requests to be interviewed by an opposing firm, but it declines, there is unlikely to be a duty to disclose.

The criteria of concreteness, communication and mutuality can be met early in any job search process. They are certainly met at the point that the lawyer agrees to participate in a substantive discussion of his experience, clients or business potential, or the terms of an association. While recognizing that the exact point at which a lawyer's own interests may materially limit his representation of a client may vary, the Committee believes that clients, lawyers and their firms are all best served by a rule which requires consultation and consent at the earliest point that a client's interest could be prejudiced. We, therefore, conclude that a lawyer who has an active and material role in representing a client in litigation must consult with and obtain the consent of that client, ordinarily before he participates in a substantive discussion of his experience, clients or business potential or the terms of an association with an opposing firm. [FN9] The consultation that the Committee here concludes that a job-seeking lawyer should have with a client whom he is currently representing, before he participates in substantive employment discussions, should include all facts that the client should consider in making an informed decision. These include the posture of the case, the nature of the work that the lawyer could or should be doing, and the availability of others in the firm to assume the work that the lawyer is doing. [FN10]

Although compliance with Rule 1.7(b) requires consultation directly with the affected client, and obtaining that client's consent, the Committee recognizes that there may be circumstances in which it is inappropriate or unnecessary for the job-seeking lawyer to raise the potential conflict personally with the client, at least in the first instance. This would be true, for example, if the job-seeking lawyer does not have the principal relationship with, or any direct contact with the client. In such circumstances, the job-seeking lawyer should first make disclosure to his supervisor in the matter, or the lawyer who has the principal relationship with the client. That lawyer may then decide whether to relieve the job-seeking lawyer of further responsibility for the matter pending his employment discussions, or to disclose the job-seeking lawyer's interest in the opposing firm to the affected client, and, on behalf of the job-seeking lawyer, seek to obtain the client's consent to the job-seeking lawyer's continuing to work on the matter. Of course, the job-seeking lawyer cannot continue to work on the matter until he is informed that client consent has been obtained: “A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another lawyer.” See Rule 5.2.

Withdrawal as an Alternative to Obtaining Client Consent

A means that may be available, in some circumstances, to avoid the conflict that would be presented by a lawyer's employment negotiations with a firm he opposes in a matter is for the lawyer to withdraw from the adverse representation before having a substantive discussion of employment with the firm. Such withdrawal is clearly permitted if the client consents. Alternatively, such withdrawal could be made without consent pursuant to Model Rule 1.16(b), if applicable. Under Rule 1.16(b), a lawyer may withdraw from a representation "if withdrawal can be accomplished without adverse effect on the interests of the client". [FN11] Rule 1.16(b) may be invoked, for example, in some situations in which the lawyer is one of several on the engagement, and not the one in charge. Note that although client consent is not required for a withdrawal which can be accomplished without adverse effect on the client's interest, the lawyer managing the matter would be well advised to communicate to the client about the change in staffing and its reason. See Rule 1.4 and discussion infra at 10-11.

Imputation

We have stated that if a lawyer is permitted to cease working on a matter in order to pursue employment negotiations with the firm he is opposing in that matter, the lawyer has avoided a conflict of interest under Rule 1.7(b). The question then arises whether other lawyers in the firm would also be disqualified from working on the matter by virtue of imputation under Rule 1.10. See note 5 supra. Under a literal reading of Rule 1.10, it would appear that the interest of a job-seeking lawyer in association with an opposing firm, which would disqualify him from working on a matter against that firm, would also disqualify all of his colleagues even after he himself had withdrawn from the matter. Such a result would have the effect of severely limiting lawyers' ability to seek new employment, without serving any identifiable purpose under the Model Rules. Accordingly, we will not infer that the drafters of Rule 1.10 intended it to apply so broadly.

Rule 1.10 reflects the belief that when a client is represented by a firm, the client is entitled to the loyalty of the entire firm, even though only some of its members are actively participating in the representation. Similarly, it posits that every lawyer in the firm has access to and is similarly bound to maintain the client's confidences, even though only a few lawyers actually share them. In short, Rule 1.10 embodies certain presumptions that are intended to protect a client who has chosen a firm to represent him, automatically ascribing every lawyer in the firm the same duties of loyalty and confidentiality, whether or not every lawyer is, in fact, in a position to help or harm the client's interests. Thus, if one lawyer is disqualified because of a conflict, then all are disqualified, without regard to whether all, in fact, share the same disability.

In our view, the assumption of shared duties of loyalty and confidentiality embodied in Rule 1.10 is entirely appropriate, and consistent with the Model Rules' overarching interest in client protection, when applied to conflicts that are derived from a firm's representation of clients with differing interests. However, we do not believe it is either logical or practical to extend this same assumption of shared duties to a situation where the disabling conflict is a personal one involving the lawyer's interest in leaving his firm, since there is no reason necessarily to assume that this interest will be shared by his colleagues.

The Model Rules do not require that every lawyer who is associated with a firm demonstrate his loyalty to clients by staying with the firm indefinitely. Indeed, Rule 1.9 specifically contemplates that a lawyer may properly join a firm that he or his firm currently opposes in a matter, and provides protection for the former client in those circumstances. And, as stated above, Rule 1.7(b) protects the client while the lawyer is negotiating for a new association with a firm he is opposing in a matter, by requiring the lawyer either to obtain the client's consent to simultaneous representation and negotiation, or to withdraw from the representation. But client protection is not furthered even in a theoretical sense, in this case, by imputing the negotiating lawyer's interest in new employment to others in the lawyer's present firm, and we conclude that Rule 1.10 should not be read to extend to this situation. In sum, the Rule 1.7(b) conflict that the negotiating lawyer would have if he continued to work on the matter while pursuing such discussions need not, through Rule 1.10, be imputed to others in the firm.

Although we conclude that Rule 1.10 cannot be construed so broadly as to require that all lawyers in a firm be presumed to share their colleague's personal interest in joining the opposing firm in a matter, a lawyer who proposes, without consultation and consent, to take on or continue a representation that his colleague cannot, must himself evaluate, under Rule 1.7(b), whether

his "responsibilities to ... a third person"—i.e., his colleague—or his own interest in his colleague's interest, may materially limit the representation.

In many cases it is unlikely that a lawyer's job explorations will have any effect on his colleagues' continuing ability to represent client adverse to the firm with which he is negotiating. Illustrative of such situations are those involving a junior lawyer who has had a minor role in a complex matter or an associate on a team who has been urged to find another position. If the job-seeking lawyer's interest in association with an adverse party or firm is unlikely to materially limit the representation of a client by others in the lawyer's present firm, consultation and consent are not ethically required for those other lawyers to continue working on the matter. [FN12] Of course, as stated above, if a lawyer withdraws from a matter because of his job explorations with the opposing firm, his current firm may have to have some discussion with the client about the lawyer's withdrawal, depending on the level of responsibility of the withdrawing lawyer, his relationship with the client and the expense, if any, which the client may be asked to bear by reason of the staffing change. However, in such cases, the discussion will focus on the client's willingness to work with others in the firm, and not upon a conflict imputed to other firm lawyers by reason of the job negotiations of one of them.

Negotiations with an Opposing Party

The analysis of this opinion applies with equal, if not greater, force, if a lawyer engages in interviews or substantive discussion of his qualifications with an opposing party, rather than the firm representing such party. A client is likely to be even more sensitive to its lawyer's job explorations with the client's adversary than to the same negotiations with the adverse firm. We note also that a lawyer who would explore employment with the adverse party must be careful not to violate Rule 4.2, which prohibits a lawyer, in representing a client, from communicating about the subject matter of the representation with a party known to be represented by counsel.

Lawyers in the Negotiating Firm Must Obtain their Client's Consent to an Association that Would Materially Limit the Firm's Representation of its Client

Lawyers in a law firm that pursues an association with a lawyer to whom they are adverse in a pending matter may also have an obligation to consult with their client at some point in the course of employment discussions with a lawyer who is opposing the firm in a matter. This obligation will arise when the firm's interest in hiring the lawyer becomes sufficiently intense to raise a question that such interest may materially limit the firm's on-going representation of its client, in any of the ways discussed supra at 6-7. For example, if the association between a firm and a new lawyer will cause the entire firm to be disqualified from representing its client, by reason of Rules 1.9 and 1.10, consultation with the client is compelled by Rule 1.4 and Rule 1.7(b). Here, the firm's interest in hiring the opposing lawyer would not only materially limit the representation, but it may lead to its termination altogether. Even if disqualification is only a risk, but not a certainty, because of the particular rule or jurisprudence of the jurisdiction, we believe that the hiring firm's client is entitled to consultation about the risk of losing its representation in the midst of an on-going matter, as well as the expense that litigating the issue may entail. Lawyers in the firm must fully review this risk with its client and obtain that client's informed consent early in the hiring process, before the firm engages in substantive discussions of the experience, clients, business potential or terms of association of a lawyer whose arrival could have this effect. Even in a situation in which disqualification is not an issue, [FN13] lawyers in the interviewing firm should, early on, pursue consultation with and consent of their client, if any lawyer handling a matter adversely to the prospect will be involved in, or is likely to be influenced by, the discussions with the prospect.

Conclusion

In sum, we conclude that, for the protection of clients, Rule 1.7(b) requires a lawyer who is actively representing a client in a matter, and who is considering an association with a firm or party to whom he is opposed in the matter, to consult with his client and obtain the client's consent to his continuing to work on the matter while the lawyer explores such association. Generally, the

required consultation should occur before the lawyer engages in a substantive discussion of his experience, clients, or business potential with the opposing firm or party. If the client consents, the lawyer may continue the representation. If the client does not consent, the lawyer must either discontinue the job search that created the conflict, or withdraw from participation in the representation and transfer his work to others in the firm, if withdrawal can be accomplished properly under Rule 1.16. Where the lawyer has had a limited role in a matter or has had limited client contact, it will ordinarily be more appropriate for him to inform his supervisor. The supervisor can then determine whether to relieve the lawyer of responsibility, or to seek the client's consent for the lawyer to continue to work on the matter. While the negotiating lawyer's conflict of interest is not imputed to other lawyers in his firm, those other lawyers must each evaluate whether they may themselves have a conflict by virtue of their own interest in their colleague's negotiations. The lawyers in a law firm seeking to employ a lawyer who is involved in a matter adverse to the firm have similar obligations to their client.

This Committee regularly addresses, as in this Opinion, important issues relating to conflicts of interest. We recognize that among all of the issues this Committee confronts, conflicts of interest decisions generate much attention from the bar because of the possibilities they present for the disqualification of counsel. While there are, undoubtedly, many situations in which disqualification on grounds of conflict is warranted if not compelled, the opportunities for mischief presented by disqualification motions are numerous as well. Thus, we conclude this Opinion with a cautionary note. We do not intend, by this Opinion, to provide additional opportunities for merely tactical or dilatory motions to disqualify where the role of the negotiating lawyer has been such that no real harm can arise by permitting the lawyer to secure a new position of employment. As stated in the Rules themselves, “the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.” See Scope paragraph [18]. It is our hope that members of the profession will approach motions to disqualify in this context, as in any other context, responsibly and with prudence.

[FN1]. For purposes of this Opinion, “employment” includes association as a partner or of counsel.

[FN2]. This Opinion does not address the ethical duties of lawyers in firms that are considering merger.

[FN3]. Rule 1.9(a) provides:

[FN4]. Rule 1.9(b) states:

[FN5]. In relevant part, Rule 1.10 states:

[FN6]. We cannot infer from the Model Rules' failure to address job negotiations by private lawyers, when it specifically treats job negotiations by government lawyers and judicial officers, that private lawyers have no ethical duties when negotiating new employment. Rule 1.7(b) applies in all cases in which a lawyer's personal interests may materially limit his representation of a client, allowing continued representation only after consultation and consent. Rules 1.11 and 1.12 are actually more rigorous than 1.7(b), in that they define circumstances in which negotiations for new employment cannot be pursued at all.

[FN7]. As an example of a case in which the duties of loyalty and vigor were compromised by employment negotiations with the adverse firm, see McCafferty v. Musat, 817 P.2d 1039 (Colo.App.1990). In this legal malpractice case, it was found that a lawyer did not use reasonable care where he recommended that his client accept a very low settlement offer without having conducted adequate discovery but after he had sought and received a job offer from the opposing firm.

[FN8]. Cf. Informal Opinion 52-86 of the Committee on Professional Ethics, Bar Association of Nassau County (December 19, 1986) (lawyer who, during the pendency of a motion on appeal, has interviewed with the legal representative of the adverse party, may, with the informed consent of the client, continue to represent the client in the appellate process until he accepts the position with the adversary firm).

[FN9]. The Committee has labored at extraordinary length to pinpoint this “trigger” point for the client consultation obligations of Rule 1.7(b). The Committee recognizes that in certain cases, the independent judgment of a job-seeking lawyer (or the lawyers in a hiring law firm, see pp. 13-14, infra) may be “materially limit[ed]” by his or their “own interests” either earlier or later than

the point at which there is an agreement to have a substantive discussion. Indeed, such a situation might very early on invoke Rule 1.4 client disclosure obligations, even aside from Rule 1.7(b).

[FN10]. Contacting the clients of the present firm before a lawyer begins employment with a new firm for the purpose of soliciting their business is not permitted. See Informal Opinion 1457 (lawyer may announce withdrawal from firm and new association immediately after departure).

[FN11]. Under Rule 1.16(a)(1), a lawyer must withdraw if continuing the representation would result in violation of the rules of professional conduct. However, this does not mean that the lawyer can put himself in a position where he is violating Rule 1.7(b) and then use that violation as an excuse for withdrawing under Rule 1.16(a)(1).

[FN12]. There are conceivably situations in which negotiations by a lawyer who has, up to the negotiations, been involved in a pending matter adverse to the recruiting firm, would materially limit the ability of one of his colleagues to represent the client. This would be true, for example, where the colleague has an interest in leaving the firm with the negotiating lawyer. In this situation, the colleague's personal interest in the success of the lawyer's negotiations triggers the requirement of Rule 1.7(b) that the colleague obtain client consent before continuing his representation while the lawyer pursues an association with the adverse party or firm. The colleague's actual interest, not an imputation of the lawyer's interest, is the factor that would trigger need for the consultation and consent.

[FN13]. Such a situation would arise when the new association is not contemplated until the matter is concluded, or when the firm plans to, and may permissibly withdraw if and when the new association is formed.
ABA Formal Op. 96-400

End of Document

ATTACHMENT C

Committee on Codes of Conduct Advisory Opinion
No. 74: Pending Cases Involving Law Clerk's Future Employer

This opinion addresses the issue of appropriate procedures a judge should take when it is contemplated that a law clerk may accept employment with a lawyer or law firm that is participating in a pending case.

The Committee advises that such a circumstance does not in itself mandate disqualification of the judge. The law clerk, however, should have no involvement whatsoever in pending matters handled by the prospective employer. The Committee believes that the need to exclude the law clerk from pending matters handled by the prospective employer arises whenever an offer of employment has been extended to the law clerk and either has been, or may be, accepted by the law clerk; the formalities are not crucial.

The occasion for these precautionary measures does not arise merely because the law clerk has submitted an application for employment, but there may be situations in which, because of the nature of the litigation, or the likelihood that a future employment relationship with the clerk will develop, the judge feels it advisable to take these precautionary measures even at a preliminary stage of the employment discussions.

To deal appropriately with this issue, the judge should take reasonable steps to require that law clerks keep the judge informed of their future employment plans and prospects. *See*, *generally*, Canon 4C(4) of the Code of Conduct for Judicial Employees.

In appropriate circumstances, the judge may elect to inform counsel that the law clerk may have a prospective employment relation with counsel and that the procedures described here are being followed.

June 2009

Committee on Codes of Conduct Advisory Opinion
No. 81: United States Attorney as Law Clerk's Future Employer

In Advisory Opinion No. 74, the Committee dealt with appropriate procedures when a law clerk has been extended an offer of employment by a lawyer or a law firm and the offer has been or may be accepted by the clerk. This opinion deals with appropriate procedures when a clerk has been offered employment by a particular United States Attorney's office, and the offer has been or may be accepted by the law clerk. The United States Attorney's office is not a law firm and the law clerk would have no financial interest in that office. *See* Advisory Opinion No. 38 ("Disqualification When Relative Is an Assistant United States Attorney"). Nonetheless, participation by the law clerk in a pending case involving the prospective employer may reasonably create an appearance of impropriety and a cause for concern on the part of opposing counsel. *See* Canon 3F(1) of the Code of Conduct for Judicial Employees.

The judge should isolate the law clerk from cases in which that particular United States Attorney's office appears. *See* Advisory Opinion No. 74.

To avoid a future appearance of impropriety or potential grounds for questioning the impartiality of the court, a former law clerk should be disqualified from work in the United States Attorney's office on any cases that were pending in the court during the law clerk's employment with the court. A court rule may be adopted for this purpose. *See, e.g.*, Sup. Ct. R. 7; D.C. Circuit Rule 1(c).

June 2009

ATTACHMENT D

The Revolving Door: Professional Responsibility Considerations for Attorneys Entering or Leaving the Department of Justice

Stacy M. Ludwig
Deputy Director
Professional Responsibility Advisory Office

I. Introduction

There are a number of professional responsibility issues for attorneys to consider upon entering or leaving the Department of Justice, including the duty of loyalty, which requires that an attorney avoid conflicts of interest, and the duty of confidentiality, which obligates an attorney to maintain the confidences of her current and former clients. This article discusses the ABA Model Rules of Professional Conduct Rule 1.11, which is the primary rule governing an attorney's professional obligations in the revolving door context. The article also examines Model Rules 1.6, 1.7, and 1.9, which address other conflict and confidentiality issues arising in this situation. Finally, the article discusses the Model Rules of Professional Conduct, because most jurisdictions have substantially similar versions of these rules.

II. Professional responsibility issues to consider upon leaving the Department

A. Rule 1.11(a)(2)

Model Rule 1.11(a), commonly referred to as the "side switching rule," prohibits a former government attorney from representing a client in a matter in which the attorney participated in a substantial way for the government, even when the lawyer's subsequent representation would not be adverse to the government. The United States District Court for the District of Columbia has emphasized that, in examining cases involving former government attorneys accused of "side switching," the court "must be especially careful" for two reasons:

First, because government attorneys may have had access to more kinds of information in connection with the prior representations than private attorneys typically do, there is a greater potential for misuse of information—including information that is not necessarily confidential in nature—... in the revolving door context. Second, the public is generally more concerned about government improprieties than

about private improprieties. Thus, the appearance problem is more severe because the public is likely to be more critical of the potential misuse of information.

United States v. Philip Morris, Inc., 312 F.Supp.2d 27, 38 (D.D.C. 2004) (citing *Brown v. D.C. Bd. of Zoning Adjustment*, 486 A.2d 37, 43 (D.C. 1984) (en banc)); *see also Woods v. Covington County Bank*, 537 F.2d 804, 814 (5th Cir. 1976) ("The purpose most often ascribed to the limitation on former government attorneys is to avoid 'the manifest possibility that (a former government lawyer's) action as a public official might be influenced (or open to the charge that it had been influenced) by the hope of later being employed privately to uphold or upset what he had done.' ") (quoting ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 37 (1931)). Rule 1.11(a)(2) (2009) provides:

> Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
>
> (2) shall not otherwise represent a 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 gives its informed consent, confirmed in writing, to the representation.

Model Rules of Prof'l Conduct R. 1.11(a)(2) (2009).

There are a number of distinct issues to consider in determining whether past Department employment complies with Model Rule 1.11(a). One issue to consider is whether a former Department attorney would be representing a client at her new job. The fact that a new position is not specified as an attorney position is not dispositive of whether an attorney is "represent[ing] a client" under Model Rule 1.11(a). For example, an attorney acting as a consultant could be deemed to "represent a client" within the meaning of the rule. *See, e.g.*, Pa. Bar Assoc. Comm. on Legal Ethics and Prof'l Responsibility Op. 94-132 (1994) (former Department attorney was not permitted to act as "legal consultant" for opposing party on a case where she formerly represented the government).

Another issue to consider is whether an attorney's work for the Department constituted work on a "matter." Model Rule 1.11(e) defines "matter," for the purpose of this Rule only, as:

> 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 ... any other matter covered by the conflict of interest rules of the appropriate government agency.

Model Rules of Prof'l Conduct R. 1.11(e) (2009). The phrase "involving a specific party or parties" serves to narrow the definition of "matter" and distinguishes "matter" as used in this Rule from its meaning in other Rules. This Rule is written broadly enough to disqualify government lawyers from participating in a matter even when that matter is not adverse to their former client.

Generally, participating in litigation in any capacity would constitute participation in a matter, while doing regulatory work ordinarily would not be deemed work on a matter. *See, e.g.*, *United States v. Philip Morris, Inc.*, 312 F. Supp. 2d 27, 39-40 (D.D.C. 2004) (court generally recognized that work on a rulemaking would not constitute participation in a matter, but found that an attorney who spent many hours working on a rulemaking that was the subject of a prior litigation was deemed to have participated in a matter under District of Columbia Rule 1.11(a), even though the attorney never entered an appearance in the case); *see In re Sofaer*, 728 A.2d 625, 627 (D.C. 1999) ("The contours of the [Pan Am 103] bombing, the government's investigation, and related responses to it were defined sharply enough to constitute a 'matter' under the Rule."). Each situation will need to be evaluated on a case-by- case basis.

A related issue is whether the former Department attorney's work for the Department would constitute work on the *same* "matter." Comment [10] to Model Rule 1.11 provides some guidance in determining whether two particular matters are the same. " 'A matter' may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters

involve the same basic facts, the same or related parties, and the time elapsed." Model Rules of Prof'l Conduct R. 1.11 cmt. [10] (2009).

In considering whether the work an attorney did for the government would constitute the same matter under Model Rule 1.11, courts also consider whether the former government attorney has confidential information from the former government client that may be useful to the new private client. *See Dugar v. Bd. of Educ.*, No. 92 C 1621, 1992 WL 142302, *4-6 (N.D. Ill. Jun. 18, 1992) (unpublished) (court found that a former Board of Education attorney should be disqualified, even though the matter prompting the disqualification motion had not even arisen at the time she was employed with the Board because she was privy to discussions regarding the Board's position on matters potentially related to the litigation at issue); *see also Sofaer*, 728 A.2d at 627-28 ("Rule 1.11(a) bars participation in overlapping government and private matters where it is reasonable to infer counsel *may have received* information during the first representation that might be useful to the second; the actual receipt of ... information, and hence disclosure of it, is immaterial.") (citations omitted) (emphasis added). In some jurisdictions "matter" is defined to include a "substantially related matter." *See* D.C. Rules of Prof'l Conduct R. 1.11 (2007).

The other component of the rule requires that an attorney has participated "personally and substantially" in the matter. Although the term "substantially" might suggest that an attorney's participation in a prior matter must be extensive to justify disqualification, the case law demonstrates otherwise. The "substantial" participation requirement means participation in the substance of the prior matter and does not require some particular quantum of effort expended. The rule requires some involvement but does not require that the attorney was directly responsible for the prior matter in question. *See, e.g.*, *United States v. Smith*, 995 F.2d 662, 675-76 (7th Cir. 1993) (court found that an AUSA's involvement was "personal" and "substantial" under Illinois Rule of Professional Conduct 1.11(a) (similar to the Model Rule 1.11) when he supervised another AUSA in charge of investigating a related case, attended high-level meetings about the case, and signed an immunity agreement for one of the government's witnesses); *Sec. Investor Prot. Corp. v. Vigman*, 587 F.Supp. 1358, 1367 (C.D. Cal. 1984) (district court found that, when the SEC Regional Administrator signed a complaint and a trial brief, he assumed the "personal and substantial responsibility of ensuring that there existed good grounds to support the SEC's case").

Any analysis concerning whether an attorney participated personally and substantially in a matter under the relevant professional responsibility rules will have to be made on a case- by-case basis. Under Model Rule 1.11(a), if there is a conflict of interest based on prior government representation, the United States may consent to the former Department attorney's participation.

B. Rule 1.11(b)

If a former Department attorney were to join a firm and had a conflict of interest in a particular matter, the rules also would prohibit the attorney's firm from participating in such a matter unless the former Department attorney is screened and is apportioned no fee from the matter and unless the firm notifies the government of the screening measures. *See* Model Rules of Prof'l Conduct R. 1.11(b) (2009). The screen must be erected promptly. *See Analytica, Inc. v. NPD Research Inc.*, 708 F.2d 1263, 1267-68 (7th Cir. 1983) ("[I]t was not enough that the lawyer 'did not disclose to any person associated with the firm any information ... on any matter relevant to this litigation,' for 'no specific institutional mechanisms were in place to insure that information was not shared, even if inadvertently,' until the disqualification motion was filed—months after the lawyer had joined the firm."); *see also United States v. Goot*, 894 F.2d 231, 235 (7th Cir. 1990) ("The predominant theme running through this court's prior decisions is that disqualification is required when screening devices were not employed *or were not timely employed*.") (emphasis added); *Atasi Corp. v. Seagate Tech.*, 847 F.2d 826, 831 (Fed. Cir. 1988) (presumption of shared confidences was not clearly overcome because oral screening measures were not timely employed or adequately communicated); *Cobb Publ'g, Inc. v. Hearst Corp.*, 907 F.Supp. 1038 (E.D. Mich. 1995) (delay of 11 or 18 days in setting up ethical wall is too long).

C. Rule 1.11(c)

This rule also imposes specific prohibitions on a former government attorney's use of confidential

information. Rule 1.11(c) provides:

> 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. As used in this Rule, the term "confidential government information" means information that 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. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

Model Rules of Prof'l Conduct R. 1.11(c) (2009). This rule prohibits a former Department attorney from representing a client in a private matter that would be adverse to a person about whom she has confidential government information as a result of her employment with the Department. Based on the proscriptions in this rule, and those discussed below regarding Model Rule 1.9(c), former Department attorneys likely would be precluded from participating in any matters in which confidential government information they learned while a Department attorney would be relevant to the private matter.

D. Rule 1.11(d)(2)(ii)

In addition, Model Rule 1.11(d)(2)(ii) places restrictions on a Department attorney's ability to negotiate for private employment. This rule states in relevant part:

> Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee ... shall not ... negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially....

Model Rules of Prof'l Conduct R. 1.11 (d)(2)(ii) (2009). Accordingly, to the extent a Department attorney works on the substance of a particular matter, she would be prohibited from negotiating for employment with anyone who is involved in that same matter.

E. Rule 1.6

Former Department attorneys also continue to owe a duty of confidentiality to the United States. Rule 1.6 prohibits a lawyer from revealing any "information relating to the representation of a client." Model Rules of Prof'l Conduct R. 1.6(a) 2009. This protection is much broader than the evidentiary privilege given to attorney-client confidentiality. The confidentiality mandated by Rule 1.6 "exists without regard to the nature or source of the information or the fact that others share the knowledge." *Perillo v. Johnson*, 205 F.3d 775, 800 n. 9 (5th Cir. 2000) (quoting ABA Model Code of Prof'l Responsibility, Canon 4, DR 4-101, EC 4-4) (internal quotation marks and alterations omitted). Other precedent provides that information obtained in the course of an attorney-client relationship is required to be "sheltered from use," regardless of who else may know of it, because of the duty of loyalty inherent in that relationship. *See Brennan's, Inc. v. Brennan's Rests., Inc.*, 590 F.2d 168, 172 (5th Cir. 1979) (rejecting the idea that an attorney is relieved from his duty to protect confidential information because both parties are privy to it as a result of prior joint representation.).

Finally, the phrase "information relating to the representation" has been interpreted to include a broad spectrum of information, including information that may not itself be protected but reasonably could lead to the discovery of such information by third persons. *See* Model Rules of Prof'l Conduct R. 1.6 cmt. [4] (2009); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 98-411 (1998) (noting that, in lawyer-to-lawyer consultations, use of hypotheticals that enable another lawyer to determine identity of one's client may, under some circumstances, violate Rule 1.6); *See, e.g.*, D.C. Bar Op. 297 ("[W]e believe that the inquirer [a former government attorney] must honor his confidentiality obligations to the government ... as a general matter"). Consequently, even after attorneys leave the Department, they may

not reveal the United States' confidential information, absent the United States' consent.

F. Rule 1.9(c)

Model Rule 1.11(a)(i) directs that attorneys leaving government service also are required to follow Model Rule 1.9(c). *See* Model Rules of Prof'l Conduct R. 1.11(a)(i) (2009) ("[A] lawyer who has formerly served as a public officer or employee of the government ... is subject to Rule 1.9(c).") Model Rule 1.9(c) states:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Model Rules of Prof'l Conduct R. 1.9(c) (2009). In addition to the prohibition against *revealing* confidential government information, an attorney is only permitted to *use* confidential information to the United States' detriment if the United States consents or if the information has become "generally known." This term is not clearly defined in the Model Rules or in legal jurisprudence. Some courts have concluded that information does not become "generally known" simply because it is made public; the manner of its disclosure and subsequent accessibility are the determinative factors. *See, e.g.*, *Steel v. Gen. Motors Corp.*, 912 F.Supp. 724, 739 (D.N.J. 1995) ("The information age has not neglected the legal profession, and step-by-step checklists on litigating a particular type of case can be found in every law library and computerized legal database in the country. The fact that this type of information is publicly available does not make 'information relating to the representation' of GM 'generally known.' "). Other courts subscribe to the view that information is "generally known" when it is a matter of public record. *See Capacchione v. Charlotte-Mecklenburg Bd. of Educ.*, 9 F.Supp.2d 572, 580 (W.D.N.C. 1998) (without further discussion, opining that matters of public record are not considered to be confidential). Ultimately, however, even if a Department attorney could use the information covered by this Rule because it is generally known, she could not reveal it, unless the United States consents.

III. Professional responsibility issues to consider upon starting Department employment

A. Rule 1.11(d)

Under Model Rule 1.11(d), a Department attorney cannot represent the United States in a matter in which she participated personally and substantially while in private practice, unless the United States consents. *See* Model Rules of Prof'l Conduct R. 1.11(d)(2)(i) (2009) ("[A] lawyer shall not participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment" without the Government's consent). The analysis concerning what constitutes "representation in a matter" and "personal and substantial participation" is the same as the analysis discussed above under Rule 1.11(a)(2).

B. Rule 1.9(a)

Rule 1.11(d) also requires that attorneys entering government service from the private sector comply with Model Rule 1.9, governing duties to former clients. *See* Model Rules of Prof'l Conduct R. 1.11(d)(1) (2009) ("A lawyer currently serving as public officer or employee ... is subject to Rule ... 1.9[.]") Model Rule 1.9 is both broader and narrower than Model Rule 1.11 in its prohibitions regarding conflicts of interest. Model Rule 1.9(a) provides:

> 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 gives informed consent, confirmed in writing.

Model Rules of Prof'l Conduct R 1.9(a) (2009). The definition of "matter" in Rule 1.9 is broader than the definition of "matter" in Rule 1.11 because a "matter" is not limited to representation of a party or parties. Therefore, activities such as lobbying or policy making could be considered matters even if no identifiable parties are involved. *See, e.g.*, D.C. Rules of Prof'l Conduct R. 1.0(h) (defines "matter" to include "lobbying activity"; *see also* D.C. Bar Op. 344 (2008) (definition of matter in Rule 1.6—and thus presumably Rule 1.9—includes lobbying and policy making).

The scope of matter on which an attorney is prohibited from working under Model Rule 1.9(a) also is defined to include a substantially related matter. Comment [3] to Model Rules 1.9 provides:

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

Model Rules of Prof'l Conduct R. 1.9 cmt. [3] (2009). Courts have articulated a number of tests for deciding whether a substantial relationship exists between a current and former representation. One court has summarized the various tests this way:

> There are three primary tests for substantial relationship used throughout the country .... The first approach compares the facts of the former and current representations .... The second approach, which has not been widely adopted, insists that the issues involved in the two representations be identical or essentially the same .... The third approach, developed by the Seventh Circuit Court of Appeals, blends the fact and issue comparisons into a three-step test... The Seventh Circuit states: [D]isqualification questions require three levels of inquiry. Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation. Second, it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters. Finally, it must be determined whether the information is relevant to the issues raised in the litigation pending against the former client.

Carey v. Danis, 89 S.W.3d 477, 495 (Mo. 2002) (citations omitted). Courts have found that the purpose of the rule is to prevent a former client's confidences from being used against her. *See, e.g., Kaselaan & D'Angelo Assoc., Inc. v. D'Angelo*, 144 F.R.D. 223, 239 (D.N.J. 1993) (citing *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 162 (3d Cir. 1984) ("It is a prophylactic rule to prevent even the potential that a former client's confidences and secrets may be used against him. Without such a rule, clients may be reluctant to confide completely in their attorneys. Second the rule is important for the maintenance of public confidence in the integrity of the bar. Finally, and importantly, a client has a right to expect the loyalty of his attorney in the matter for which he is retained.")

The other issue to consider under Model Rule 1.9(a) is whether the interests of a former client are "materially adverse" to those of the United States, which differs from Rule 1.11(a) that applies even if the subsequent representation is not adverse to the former government client. Opinions discussing former client conflicts most often address situations in which the potentially conflicted attorney is litigating against his former client, which invariably satisfies the adversity requirement. *See, e.g., Paul v. Judicial Watch*, 571 F.Supp. 2d 17, 21 (D.D.C. 2008). A representation also is likely to be adverse when an attorney cross-examines a former client. *See In re Cendant Corp. Sec. Litig.*, 124 F.Supp.2d 235, 241-42 (D.N.J. 2000) *citing* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 92-367; *but see United States v. DeCay*, 406 F. Supp. 2d 679, 686 (E.D. La. 2005) ("[T]he materials submitted in camera do not suggest that DeCay's defense would be buttressed by eliciting any testimony from the former client that could prejudice him, and the attorney's office file on his client does not reveal any information that could be used to the client's disadvantage.").

C. Model Rule 1.9(b)

For lawyers entering the Department from law firms, Rule 1.9(b) establishes the situations in which an attorney could have an imputed conflict due to his or her firm's representation of a current or former client. Rule 1.9(b) provides:

> A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,
>
> > (1) whose interests are materially adverse to that person; and
> >
> > (2) about whom the lawyer has acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

Model Rules of Prof'l Conduct R. 1.9(b) (2009). In addition to the requirements of material adversity and substantial relation, discussed above, Rule 1.9(b) also requires that an attorney acquired material confidential information in order for a firm's representation of a current or former client to be imputed to him or her. The definition of "confidential information" is analyzed above in the Rule 1.6 subsection. If the interests of the United States are materially adverse to the interests of the current or former client of the Department attorney's former firm and that attorney acquired any material confidential information relating to her firm's representation of the current or former client, Rule 1.9(b) prohibits the attorney's representation of the United States unless the current or former client consents.

Even if the United States' interests are not materially adverse to the interests of the former client of a Department attorney or the current or former client of the Department attorney's former firm, the confidentiality limitations set forth in Rule 1.9(c), discussed above, still apply to an attorney leaving a firm to work for the Department. Therefore, except in limited circumstances, a Department attorney is prohibited from using or revealing confidential information of a former client or a prior firm's current or former client, unless the current or former client consents. As discussed below, the situation may create a conflict of interest for the Department attorney in representing the United States.

D. Model Rule 1.7

Rule 1.11(d) also requires that attorneys entering government service from the private sector comply with Model Rule 1.7, governing duties to current clients. *See* Model Rules of Prof'l Conduct R. 1.11(d)(1) (2009) ("A lawyer currently serving as public officer or employee ... is subject to Rule ... 1.7[.]"). Because a Department attorney, in most situations, is bound to maintain the confidential information of a former client (and the clients of her former firm), that attorney may face a conflict of interest under Rule 1.7(a)(2) in representing the United States. The Rule states in pertinent part, that: "[A] lawyer shall not represent a client if ... there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a former client[.]" Model Rules of Prof'l Conduct R. 1.7(a)(2) (2009).

Comment [8] to Rule 1.7 defines "materially limited" as whether "there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." Because a Department attorney likely will be prohibited from using or revealing a former client's confidential information, her representation of the United States would be materially limited if that confidential information is relevant to the matter she is handling for the Department. The United States may consent to the Department attorney's representation, notwithstanding the conflict of interest. In other words, the United States may consent to the Department attorney's representation with the understanding that she will be bound not to use or disclose any of her former client's confidential information. If, however, the former client does not consent to the use and disclosure of her confidential information, a Department attorney may find it difficult to represent the United States without using or disclosing a former client's confidential information. It may be difficult, if not impossible, for the attorney to distinguish confidential information learned during the prior representation from confidential information learned while representing the United States.

IV. Conclusion

An attorney's fundamental duties of loyalty and confidentiality, which never expire and can be imputed to an attorney from her firm, impose obligations on attorneys entering or leaving the Department. Many of the resulting conflicts of interest can be cured with the consent of the United States and/or the private client; however, when an attorney has confidential information of a former client, subsequent related representation becomes much more difficult.

ABOUT THE AUTHOR

Stacy Ludwig is the Deputy Director of the Department of Justice's Professional Responsibility Advisory Office (PRAO). Ms. Ludwig is also an adjunct professor at Georgetown University Law School where she teaches professional responsibility courses. She is a member of the District of Columbia Bar's Legal Ethics Committee, which is responsible for writing opinions about the application of the District of Columbia Rules of Professional Conduct. Previously, she was an adjunct professor at George Washington University Law School and American University's Washington College of Law where she taught professional responsibility courses, and was an Assistant United States Attorney in the District of Columbia in the Civil Division where she was appointed Senior Litigation Counsel.

This article does not address the Standards of Conduct issues arising when attorneys enter or leave the Department. That topic is addressed in a separate article. PRAO extends its appreciation to Steven Giballa for his assistance with this article.