Selected Ethics Opinions and Departmental Ethics Guidance Relevant to an Application for Appointment as an Assistant United States Attorney for the Southern District of New York

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United States Courts, Committee on Codes of Conduct of the Judicial Conference of the United States

- Advisory Opinion 81, When Law Clerk's Future Employer is the United States Attorney
- Advisory Opinion 74, Law Clerk's Future Employer

American Bar Association, Committee on Ethics and Professional Responsibility

- Formal Opinion No. 96-400, Job Negotiations with Adverse Firm or Party

Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics

- 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."

United States Department of Justice, Departmental Ethics Office

- Ethics Issues for Department Attorneys Upon Entering or Leaving Government Service

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

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

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

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

The Revolving Door Part II: Ethics Issues for Department Attorneys Upon Entering or Leaving Government Service

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I. Introduction

While some attorneys may spend their professional lives exclusively in government or private practice, many attorneys move from one practice setting to another and may even make more than one such transition over the course of a legal career. This movement between public and private employment, popularly known as the revolving door, raises ethics issues for attorneys under the rules of professional responsibility and, for those in federal government service, under the federal ethics laws and regulations applicable to executive branch employees. This article discusses the federal ethics rules that require attention whenever an attorney is entering or leaving government service with the Department of Justice (Department). It focuses primarily on the potential conflicts and recusal obligations of an attorney making such a transition and suggests ways that an attorney can address conflicts and ensure that recusal obligations are met. The rules of professional responsibility are addressed in a separate article in this issue.

II. Entering government service

Attorneys entering government service in the Department are subject to federal conflict of interest statutes and executive branch standards of conduct as well as Department-specific regulations. Attorneys should consider the requirements of conflict of interest laws as they separate themselves financially from a former employer such as a law firm. Moreover, they will have recusal obligations with respect to a former employer and former clients even if all financial ties with that employer are immediately terminated. In some circumstances, a new Department attorney will need to consider the Department regulation which prohibits the outside practice of law.

A. Separation from private practice

Attorneys joining the Department should consider a number of ethics issues if they are separating from a private practice. If they have worked for a law firm, they may be disengaging themselves from various financial interests and relationships with a former firm. For an attorney coming from a salaried position with a law firm, the process of disengagement may be relatively simple and may be completed upon resignation from the firm. However, for attorneys who are partners in a law firm, the process can be more complicated. The attorney will be receiving a payment from his or her capital account and may also be entitled to various other payments such as a severance payment, undistributed partnership share, or an unpaid bonus. In addition, the attorney may have vested in a law firm retirement plan. Some firms may be able to make these payments in a single lump sum prior to the date of appointment; however, other firms may make a series of payments that could continue until after the attorney has begun service with the Department. In such a case, the attorney will have a financial stake in the receipt of those payments. Under the conflict of interest statute, 18 U.S.C. § 208 (2008), the attorney must be recused from any matter that would affect the ability or willingness of the firm to honor its obligation to make those payments. Generally, there are few particular matters that could have such a significant effect upon a former firm. Moreover, these conflicts are not difficult to monitor and the screening arrangement for avoiding working on any particular matters that might affect the former firm is relatively straightforward. This recusal under § 208 does not usually exceed in duration the recusal under the impartiality standard discussed below because such payments are typically completed within a year of withdrawal from the firm.

A new Department attorney whose former private practice involved contingency fee arrangements should consider the application of 18 U.S.C. § 203 (2008), which prohibits the acceptance of compensation for representational services, even if provided by another, in connection with any matter in which the United States is a party or has a direct and substantial interest. Because an ongoing contingency fee case will continue to involve representation, an incoming attorney must take steps to ensure that he or she does not share in any earnings based on the representations that occurred after the attorney has joined the Department. If the attorney turns a case over to another attorney to handle, the § 203 issue can be resolved by agreeing upon a fixed amount that is not dependent upon the outcome and which represents payment for the work done on the case prior to joining the Department. If a satisfactory arrangement cannot be reached, the attorney may have to forfeit the right to the fee.

A new Department attorney should also consider the application of 18 U.S.C. § 205 (2008), which prohibits the acceptance of a fee award "in consideration of assistance in the prosecution" of a claim against the United States. 18 U.S.C. § 205(a)(1) (2008). For example, § 205 could prohibit an attorney from accepting attorney's fees for work on a case involving a claim against the United States even though that work was completed before the attorney joined the Department. A petition for attorney's fees to be paid by the United States is a claim against the United States where the fee petition is incident to the underlying claim. A new attorney who may be entitled to receive payments arising out of claims against the United States should consult with a Department ethics official to determine whether § 205 would apply to the acceptance of the payment.

The Department's Supplemental Regulation generally prohibits a Department attorney from engaging in the outside practice of law, with certain limited exceptions. 5 C.F.R. § 3801.106 (2009). Attorneys, therefore, must wind up their affairs with their former firm prior to joining the Department and cannot continue to handle a case or work on a client matter. There is an exception that would allow a waiver where the prohibition on the outside practice of law would unduly "prohibit an employee from completing a professional obligation entered into prior to [g]overnment service." 5 C.F.R. § 3801.106(b)(2) (2009). Thus, in rare and limited circumstances of a very short duration, an attorney may be given permission to complete a professional obligation provided that no compensation is received for this work and that the United States is not a party or does not have a direct and substantial interest.

B. Recusal based on relationship with a former firm and former clients

An attorney entering government service has a so called "covered relationship" with a former law firm or former client under the administrative standards of conduct. 5 C.F.R. § 2635.502(b)(1)(iv) (2009). Under the impartiality standard, a Department attorney is obligated to consider recusal from a specific party matter in which the former firm or former client is a party or represents a party. 5 C.F.R. § 2635.502(a) (2009). This applies only to the clients for which the Department attorney personally provided legal services. It does not extend to all the clients of the firm. However, there is no de minimis amount of service. If the attorney performed any work on a client matter, that person is a personal client. Nevertheless, in such cases, it may be appropriate to waive the disqualification. The recusal obligation is measured for 1 year from the date that the attorney last provided services to that client.

C. Recusal based on relationship with a spouse's firm and clients

A Department attorney also has a covered relationship with a spouse's employer and a spouse's personal clients, 5 C.F.R. § 2635.502(b)(1)(iii), and therefore may not work on a specific party matter in which the spouse's firm or personal client is a party or represents a party. A Department attorney is not recused from a specific party matter that involves a client of the spouse's firm that is not the spouse's personal client, as long as the firm itself is not representing that client in a specific party matter. If the spouse is a partner in a law firm, the conflict of interest statute, 18 U.S.C. § 208 (2008), applies and the scope of the recusal is broader. It covers not only cases with formal parties but also policy making or rulemaking.

A Department attorney who is coming from a law firm needs to provide an appropriate person with a list of the attorney's former clients, including the date that service was last provided, if known, so that the gatekeeper will be able to effectively screen matters that are covered by the recusal. Attorneys will also need to provide a screener with the name of a spouse's employer and a list of the spouse's current clients. The list of a spouse's clients should be updated whenever changes occur.

D. Recusal based on personal or political relationships

A new Department attorney should be aware of the Department regulation that bars participation in a criminal investigation or prosecution if the attorney has a personal or political relationship with a person or organization (1) who is substantially involved in the conduct being investigated or prosecuted, or (2) whom the attorney knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution. 28 C.F.R. § 45.2(a) (1996). A political relationship arises from a close identification with an elected official, candidate, political party, or campaign organization through service as a principal advisor or official. An employee is presumed to have a close personal relationship with a father, mother, brother, sister, child, or spouse. Other relationships, such as friendships, may be personal within the meaning of the regulation where the association is sufficiently close that it would be viewed as creating partiality.

A Department attorney who believes that his or her participation in an assigned matter would be covered by the prohibition must notify a supervisor and provide sufficient facts to enable the supervisor to determine whether the matter should be reassigned. 28 C.F.R. § 45.2(b) (1996). A supervisor may determine in writing that the relationship will not affect the attorney's impartiality and will not create an appearance of a conflict of interest or a loss of integrity of the investigation or prosecution.

III. Leaving government service

A Department attorney who is planning on leaving government service should make consideration of the applicable ethics laws and regulations a key part of this transition. The recusal obligation

that comes into play as soon as the attorney begins to seek employment is of immediate concern. Beyond that, the attorney should consider the ethical restrictions that follow him or her after leaving government service. The best time to plan for addressing post-employment restrictions is prior to leaving government service. For example, identifying matters that an employee worked on at the Department is a much easier task if it is completed prior to leaving the Department. Generally speaking, a Department attorney is not barred from seeking and accepting employment with any particular private sector employer unless the attorney served as a procurement official subject to the provisions of the Procurement Integrity Act. 41 U.S.C.A. § 423 (West 2002).

A. Seeking employment

A Department attorney who begins to seek outside employment should consider recusal obligations under both the administrative standards of conduct, 5 C.F.R. § 2635.604(a) (2009), which apply to unilateral contacts, and the criminal conflict of interest statute, 18 U.S.C. § 208 (2008), which applies to employment negotiations. An attorney is disqualified from participating in any particular matter that would affect the financial interests of a prospective employer with whom the attorney is seeking employment.

One way contacts and communications. An attorney's recusal obligation is triggered even before an actual negotiation is underway. The definition of "seeking employment" in the administrative standards of conduct covers not only bilateral negotiations but also certain unilateral contacts or communications by either side. 5 C.F.R. § 2635.603(b) (2009). For example, if a Department attorney submits a resume to a law firm or calls the firm and expresses interest in working for the firm, the attorney has begun to seek employment with that firm and must be recused. However, a communication made solely for the purpose of requesting a job application or inquiring as to whether the firm is hiring would not be considered seeking employment. If the law firm initiates the contact with a Department attorney by asking if the attorney would be interested in employment with the firm, the attorney will have begun seeking employment with the firm if he or she makes any response other than a clear rejection of the unsolicited employment overture. For example, a response that merely postpones or delays an answer would not be a definitive rejection.

Two way employment discussions. The recusal obligation under § 208 applies whenever an attorney has an agreement or arrangement, or is engaged in negotiation, for future employment. A negotiation begins whenever there is a mutual discussion or communication with a person with a view toward reaching an agreement regarding future employment. 5 C.F.R. § 2635.603(b)(1)(i) (2009). A negotiation may require more than an initial expression of interest in working at a law firm and an affirmative response by the firm. Conversely, if the law firm reaches out to recruit a Department attorney and the attorney expresses an interest in employment discussions, a negotiation may not necessarily have begun although the attorney must still be recused under the administrative regulation. However, it is important to note that negotiation is a much broader concept than might commonly be understood and occurs well before a discussion of specific terms and conditions of employment such as compensation. Negotiation occurs whenever there is an expression of mutual interest in reaching an agreement regarding employment.

Matters covered. The recusal obligation under both 18 U.S.C. § 208 (2008) and 5 C.F.R. § 2635.604 (2009) applies to any "particular matter" that will affect the financial interest of the prospective employer. A "particular matter" is any matter that: involves specific parties, such as litigation; covers a judicial or other proceeding; is an application or a request for a ruling or other determination; is a controversy; is a contract, claim, charge, accusation, or arrest; or involves a deliberation, decision, or action focused on the interests of specific persons, or a discrete and identifiable class of persons. 5 C.F.R. § 2635.402(b)(3) (2009). Thus, a "particular matter" includes rulemaking and legislation or policy that is narrowly focused on the interests of an identifiable class of persons. If a Department attorney is uncertain as to whether a matter is a "particular matter," the attorney should consult an ethics official.

Use of third-party intermediaries. A Department attorney may be considered to be seeking employment even though the communication is made through a personal friend, search firm, or other intermediary. 5 C.F.R. § 2635.603(b)(1)(i) (2009). For example, if either the Department attorney or a law firm uses an employment search firm, the law firm will be considered to be a prospective employer when the law firm is identified. A completely blind search through an intermediary would not be disqualifying. However, as soon as the Department attorney knows the identity of the law firm, that firm is considered a prospective employer and disqualification from matters affecting that firm is required.

When seeking employment ends. Because not all seeking employment efforts lead to actual employment, it is important to know when an attorney is no longer seeking employment. If an attorney has submitted an unsolicited resume or employment proposal and has received no indication of interest from a prospective employer after 2 months, then seeking employment with that employer will have ceased. 5 C.F.R. § 2635.603(b)(2) (2009). Seeking employment also ends when either the attorney or the prospective employer rejects the possibility of employment and all discussions of employment have terminated. Depending on the circumstances, a recusal may continue for some amount of time after seeking employment has ended.

Notification and documentation of recusal. An attorney is not required to notify a supervisor that he or she has begun a job search or even that the attorney has had job discussions with a potential employer. However, an attorney who has been assigned to work on a case that would call for recusal should not work on the matter and should notify the person responsible for the assignment. 5 C.F.R. § 2635.502(e)(1) (2009). Although a written disqualification is not required by regulation, it is a recommended practice in order to document the recusal. 5 C.F.R. § 2635.502 (e)(2) (2009).

B. Post-employment restrictions

The federal post-employment restrictions are set forth in 18 U.S.C. § 207 (2008). This section contains six distinct post-employment restrictions which could potentially apply to a former Department attorney, depending on such factors as the kind of matter, the degree of involvement, and the type of position. However, most post-employment questions concern the permanent ban on switching sides in a matter on which the attorney personally worked, the 2-year restriction on matters that were under the former attorney's official responsibility, and the 1-year restriction on contacts with the Department by a former employee who served in a senior position.

Permanent restriction for matters personally worked on. Under 18 U.S.C. § 207(a)(1) (2008), a former Department attorney is barred from representing a private party on a specific party matter in which the attorney participated personally and substantially while working for the Department. This restriction lasts for the life of the specific party matter. A court case with named parties is the clearest example of a specific party matter, but the concept includes any matter that will affect the legal rights of specific individuals. This would include an investigation, charge, accusation, arrest, or enforcement action and also includes contracts, grants, licenses, and approvals involving specific parties.

The restriction prohibits the former Department attorney from making any communication to, or appearance before, an employee of the United States with the intent to influence that employee on the covered matter. Notably, this statute does not prohibit a former attorney from providing behind the scenes assistance. Former Department attorneys will need to consult applicable bar rules with respect to behind the scenes assistance. Model Rules of Professional Conduct Rule 1.11, for example, requires screening in such cases.

Two-year restriction for matters under official responsibility. Under 18 U.S.C. § 207(a)(2) (2008), a former Department attorney is barred from representing a private party on a specific party matter that was actually pending under the attorney's official responsibility during the

attorney's last year in government service. This restriction lasts for 2 years from the date the attorney left government service. A matter is considered to have been actually pending if it was referred to the attorney for assignment or was referred to, or under consideration of, a person the attorney supervised. 5 C.F.R. § 2641.202(j) (2009). The fact that an attorney is disqualified from participating personally in a specific party matter does not remove that matter from the attorney's official responsibility. A Department ethics official can assist a former Department attorney who is uncertain as to whether a matter was actually pending under the attorney's official responsibility.

One year restriction on contacting former agency. The third major post-employment restriction imposes a 1-year cooling off period on certain senior officials. 18 U.S.C. § 207(c) (2008). This restriction is tied to the amount of pay the officials receive. Persons who are paid under the Executive Schedule, certain members of the Senior Executive Service, certain Administrative Law Judges, and persons whose pay is equal to or greater than 86.5 percent of level II of the Executive Schedule are covered. 18 U.S.C. § 207(c) (2008).

A recent change in the pay structure for Senior Level (SL) and Scientific or Professional (ST) positions, effective on April 12, 2009, means that some persons serving in these positions will be subject to the 1-year restriction. The Senior Professional Performance Act of 2008, Pub. L. No. 110-372, § 2, 122 Stat. 4043 (2008), essentially merged base pay and locality pay for SL and ST positions. There are nearly 100 positions in 14 Department components in the SL series. If a person serving in one of these SL positions is paid at a pay threshold that will trigger the restriction, they will be subject to the 1-year cooling off restriction required under § 207(c). In 2009, the threshold is $153,105. Thus, a person serving in an SL position who is paid at or above $153,105 on the effective date of the new pay system, April 12, 2009, is subject to the 1-year restriction as a senior employee. *Id.*

Former Department attorneys who served in a senior position are barred for 1 year after leaving the senior position from making, with the intent to influence, any communication to or appearance on behalf of another person before their former agency on any matter, without regard to the former senior employee's prior involvement in the matter. The scope of this restriction depends upon the component that the attorney worked in. If the former attorney served in a separate designated component, then the attorney is only barred from communications with that component. A former senior attorney who served in a component that was not designated as separate is barred from communicating with all non-designated components. Former Executive Level employees are barred from communicating with the entire Department. United States Attorneys do not serve in an Executive Level position. A former United States Attorney is barred for 1 year from making covered communications with the office in which the former United States Attorney served, as well as with the Executive Office for United States Attorneys. Former United States Attorneys are not barred by 18 U.S.C. § 207(c) (2008) from communications with other U.S. Attorney's offices which are each designated separate components.

Other post-employment restrictions under § 207. Three other provisions of the post-employment law arise less frequently, either because they concern specialized subject matter or apply only to a small class of former attorneys. Nevertheless, attorneys should be aware of these other restrictions that could apply, depending upon the kind of matters they worked on and the position in which they served. For example, 18 U.S.C. § 207(b) (2008) prohibits all former Department attorneys from providing even behind-the-scenes assistance concerning an ongoing trade or treaty negotiation that the attorney worked on during the last year of government service. Another post-employment restriction, 18 U.S.C. § 207(f) (2008), applies only to senior and very senior officials and prohibits them from representing, aiding, or advising a foreign government or foreign political party back before the government. Finally, under 18 U.S.C. § 207(d) (2008), a former very senior official is prohibited from contacting an executive branch official serving in an Executive Level position. For the Department, the only very senior position is the Attorney General.

Restriction on sharing in fees. Former Department attorneys are prohibited by 18 U.S.C. § 203

(2008) from receiving or sharing in compensation for representational services, even when provided by another, in connection with a matter in which the United States is a party or has a direct and substantial interest, if the representation occurred during the time when the former attorney was working for the Department. For example, an attorney who joined a law firm as a partner would not be able to share in fees for representations that occurred during the time that the attorney was employed by the Department. Section 203 also makes it a violation of the statute for the payer of such compensation. This potential conflict is generally resolved in one of two ways. The firm may have an accounting system that allows it to segregate the fees it earned from representations before the government and to ensure that the former Department attorney's share of partnership profits does not include any such fees, or the firm may arrange to pay the former Department attorney a fixed salary for a period of time until those billings have worked their way through the system, and the attorney may then begin sharing in firm profits.

Post-employment advice. The post-employment laws can present a host of highly technical questions. When is a matter the same specific party matter that a former attorney worked on while with the Department? When is a communication made with the intent to influence? When is a communication intended to be attributed to a former Department attorney? When is public commentary considered a prohibited communication or appearance? These questions involve the application of highly technical criminal statutes to complex facts. Federal ethics regulations expressly provide that an attorney who has left the Department may continue to request and receive advice from Department ethics officials regarding their obligations under the post-employment laws. 5 C.F.R. § 2641.105 (2009). A former Department attorney will not be deemed to be acting on behalf of another person by contacting a Department ethics official regarding the meaning of 18 U.S.C. § 207 (2008) or its application to the attorney's activities. A Department ethics official can assist a former Department attorney in interpreting and applying this statute. A Department ethics official can also assist a former Department attorney in determining whether a matter was pending under the attorney's official responsibility or whether a case is the same specific party matter as a case that the attorney worked on while employed by the Department.

IV. Rules applicable to political appointees under the Executive Order

Political appointees to full-time, non-career positions are subject to additional revolving door restrictions under Executive Order 13490 of January 21, 2009. 74 Fed. Reg. 4673 (Jan. 26, 2009), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-1719.pdf. Appointees are required to sign an Ethics Pledge which extends time periods and expands the scope of recusal obligations upon entering government service beyond those established under the administrative standards of conduct. Moreover, upon leaving government service, appointees in senior positions are subject to an extended ban on contacting their former agency. Finally, there are special lobbying related restrictions that apply to political appointees upon entering and leaving government service.

A. Restrictions upon entering government service

Paragraph 2 of the Ethics Pledge bars an appointee for a period of 2 years from the date of appointment from participating in any specific party matter that is directly and substantially related to a former employer or a former client. *Id.* A former employer is any person whom the appointee has served as an employee, officer, director, trustee, or general partner during the 2 years prior to appointment. *Id.* at 4674. A former client includes only those persons whom the appointee has served personally as an attorney, agent, or consultant during the 2 years prior to appointment. *Id.* For example, the restriction applies only to an appointee's former personal clients and not other clients of an appointee's former law firm for whom the appointee did not personally provide services. *Id.* at 4674-75.

The Ethics Pledge expands the definition of specific party matter under 5 C.F.R. § 2641.201(h) (2009) to include any meeting or communication with a former employer or former client that

relates to an appointee's official duties. *Id.* at 4674. The practical effect of this expanded definition is to virtually preclude any communication with a former employer or former client that involves the official business of the Department. The only exception to this ban is for a meeting or other event that is open to all interested parties and that deals with a particular matter of general applicability, such as general policy or legislation. An appointee may participate in such an event even though a former employer or client is in attendance.

The Office of Government Ethics (OGE) has provided guidance as to when an event is considered open to all interested parties. The event need not be open to all comers but will be considered open if at least five distinct stakeholders are in attendance. Thus, there is an exception to the ban on communications with a former employer or client for a five stakeholder event that deals with general policy. OGE has also advised that an appointee is not precluded from consulting with experts at educational institutions and think tanks on general policy matters provided that the organization does not have a financial interest, as opposed to an academic or ideological interest.

Paragraph 3 of the Ethics Pledge bars an appointee who was a registered lobbyist during the 2 years prior to appointment from participating in any particular matter that the employee lobbied on during that 2-year period or in any specific issue area in which that particular matter falls. *Id.* This restriction applies for 2 years from the date of appointment. In addition, a former registered lobbyist may not seek or accept employment with any executive agency that the appointee lobbied during the 2 years prior to appointment. *Id.*

B. Restrictions upon leaving government service

Paragraph 4 of the Ethics Pledge applies to any appointee who is subject to the 1-year cooling off period under 18 U.S.C. § 207(c) (2008) at the time of the appointee's departure from government service. It extends that 1-year period to 2 years from the end of the appointment. *Id.* This restriction only extends the duration of the § 207(c) restriction and does not otherwise alter its substance. So, for example, the component designations that limit the scope of section 207(c) for some Department senior officials are applicable, except for the restriction on lobbying contained in Paragraph 5.

Paragraph 5 of the Ethics Pledge adds an additional restriction on lobbying for appointees who are subject to Paragraph 4. *Id.* It bars the former appointee from lobbying "any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration." *Id.* Lobbying means to act as a registered lobbyist under the Lobbying Disclosure Act. *Id.* at 4674.

V. Conclusion

This article is intended to alert attorneys to the ethical considerations involved in making this career transition. Current Department attorneys are encouraged to contact an ethics official whenever they have questions regarding these or other ethics rules. Former Department attorneys may continue to contact a Department ethics official after they have left government service regarding their obligations under the post-employment law. A clear understanding of applicable ethical requirements is key to making such career transitions smoothly and successfully.

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