

Ethics Opinion No. 83-4

Propriety of a Government Attorney Entering Private Practice with a Firm Handling Litigation Against the Attorney's Former Agency.

The Ethics Committee has been requested to issue an opinion regarding the ethical responsibility of a government attorney who leaves government service for private practice. In this particular case, the government attorney proposes to associate with a law firm which represents a plaintiff suing the government lawyer's agency. As an employee of the agency, the government lawyer did not occupy a legal position, but occupied a supervisory position. In such a supervisory position, the government lawyer had some awareness and supervisory responsibility for the defense of the case, but was not the attorney actually representing the agency.

The provisions of American Bar Association Model Rules of Professional Conduct 1.11 and American Bar Association Formal Opinion 342 (November 24, 1975) provide guidance regarding the manner in which successive government and private employment is to be treated in Alaska.

DR 9-101(B) provides:

A lawyer shall not accept private, employment in a matter in which he had substantial responsibility while he was a public employee.

If an attorney is prohibited by DR 9-101(B) from accepting private employment, then DR 5-105(D) may prohibit any partner or associate of his firm from accepting or continuing such employment.

DR 9-101(B) is discussed in American Bar Association Formal Opinion 342 (November 24, 1975). In that opinion, the American Bar Association defined "matter" and "substantial responsibility" as follows:

. . . matter is the discrete and isolatable transaction or set of transactions between identifiable parties.

. . . substantial responsibility envisages a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question. It contemplates a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question. With a responsibility so strong and compelling that he probably became involved in the investigative or decisional processes, a lawyer upon leaving the government service should not represent another in regard to that matter . . . in that accepting subsequent employment regarding that same matter creates a suspicion that the lawyer conducted his governmental work in a way to facilitate his own future employment in that matter.

The definition of "matter" obviously includes a particular piece of litigation. Whether or not the government lawyer exercised "substantial responsibility" is a matter which must be determined under the facts of each particular case.

American Bar Association Formal Opinion No. 342 also makes it clear that it is significant that DR 9-101(B) uses the words "public employee," and not the word "lawyer." DR 9-101(B) accordingly applies to the lawyer whose former public or governmental employment was in any capacity and without regard to whether it involved work normally handled by lawyers.

The command of refusal of employment by an individual lawyer set forth in DR 9-101(B), however, does not necessarily activate the extension of that disqualification to the firm set forth in DR 5-105(D). American Bar Association Formal Opinion No. 342 recognizes that an individual lawyer, who is disqualified, maybe screened from any direct or indirect participation in the matter. This is allowed because an inflexible extension of disqualification throughout the firm would often result in a real hardship to a client if complete withdrawal of representation was mandated, because substantial work may have been completed regarding specific litigation prior to the time the government employee joined the law firm or the client may have relied in the past on representation by the firm. This screening procedure has been commonly recognized for many years as a method of dealing with successive government and private employment of attorneys. The present status of the development of this area of legal ethics appears as Rule 1.11 in the 1983 American Bar Association Model Rules of Professional Conduct.

In dealing with matters rising under DR 9-101(B), the provisions of American Bar Association Model Rules of Professional Conduct 1.11 provide guidance. This rule provides:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer who has knowledge, acquired as a public officer or employee, of confidential

government information about a person may not represent a private client whose interests are adverse to that person in a matter in which the information is material. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom: and

(2) written notice is promptly given to the adverse party to enable that person to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter: or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has legal privilege not to disclose.

American Bar Association Formal Opinion 342 (November 24, 1975) also provides guidance regarding the manner in which successive government and private employment is to be treated in Alaska, to the extent that Opinion No. 342 is not inconsistent with Rule 1.11.

Approved by the Board of Governors on June 8, 1983.