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Leaving Government Employment: Ethics Issues for Lawyers

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Leaving Government Employment: Ethics Issues for Attorneys

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ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Overview:

- Why Special Rules?
- Applicable Ethics Rules, Statutes and Regulations
- Leaving Government Employment
- The Requirement of Personal and Substantial Participation.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Overview (cont'd):

- Post-Employment Restrictions
- Hypotheticals

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Why Are There Special Rules?

- 1) Treachery of side switching;
- 2) The safeguarding of confidential government information from future use against the government;

--ABA Formal Op 342 (quoted in D.C. LEO 111 1982)

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

- 3) The need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment in those particular matters after they leave government (feathering the nest);
- 4) The professional benefit derived from avoiding the appearance of Evil.

-- ABA Formal Op 342 (quoted in D.C. LEO 111 1982)

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ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Why Are There Special Rules?

18 USC 207 – CFR 261.101

Purpose: “Prohibits certain acts by former government employees which involve or may appear to involve the unfair use of prior government employment.”

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Competing Policy Interests

- 1) Desire to recruit young professionals and competent lawyers;
- 2) Do not want an *entrenched bureaucracy*;
- 3) Do not want to limit a future client's choice of counsel/counsel in specialized areas with technical training and expertise.

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ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Ethics Rules, Statutes and Regulations

- Confidentiality (D.C. Rule 1.6, ABA Model, MD and VA Rule 1.6);
- Conflicts of Interests (D.C. Rule 1.7(b)(4), ABA Model, MD and VA Rule 1.7(a)(2)).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Ethics Rules, Statutes and Regulations (cont'd)

- Successive Government and Private or Other Employment (D.C. Rule 1.11);
- Special Conflicts of Interest for Former and Current Government Officers and Employees (ABA Model, MD, and VA Rule 1.11);
- Former Judge or Arbitrator (ABA Model, MD, and VA Rule 1.12)

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Ethics Rules, Statutes and Regulations (cont'd)

- 18 U.S.C. 207 (Post-Employment Restrictions); 18 U.S.C. 208 (Personal Financial Interests)
- 5 CFR Part 2635, Subpart F (Negotiating for Employment); Part 2641 (Post Employment Restrictions).
- *See generally* U.S. Office of Government Ethics, <https://www.oge.gov/Web/oge.nsf> (last visited June 7, 2024).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Leaving Government Employment – Ethics Rules

- A lawyer serving as a public official cannot negotiate for private employment with any person involved in a matter in which the public official is participating personally and substantially. ABA Model, VA and MD 1.11(d)
- Note that D.C. has no corresponding Rule.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Leaving Government Employment – Ethics Rules (cont'd)

- However, in D.C., a lawyer cannot represent a client where the lawyer's professional judgment "reasonably may be adversely affected by the lawyers . . . own financial . . . or personal interests." D.C. Rule 1.7(b)(4).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Leaving Government Employment – Ethics Rules (cont'd)

- Other jurisdictions have similar provisions: “a conflict of interest exists if . . . there is a significant risk that the representation of [the government] will be materially limited . . . by a personal interest of the lawyer.” ABA Model and VA Rule 1.7(a)(2).
- “a conflict of interest exists if . . . there is a significant risk that the representation of [the government] will be materially limited . . . by a personal interest of the attorney.” MD Rule 1.7(a)(2)

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Leaving Government Employment – Ethics Rules (cont'd)

- Note that ABA, MD, and VA Rule 1.11(d) apply even when the lawyer is not acting as a lawyer for the government.
- The personal interest conflict rules (D.C. Rule 1.7(b)(4) and ABA Model, MD and VA Rule 1.7(a)(2)) require that the government official act as a lawyer.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Leaving Government Employment – Statutes and Regulations

- A government official cannot participate personally and substantially in a matter involving “any person or organization with whom [the official] is negotiating or has any arrangement concerning prospective employment” 18 U.S.C. § 208(a).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Leaving Government Employment – Statutes and Regulations (cont'd)

- Regulations require government officials from participating in a matter that “will have a direct and predictable effect on the financial interests of a person [or entity] ‘with whom [the official] is negotiating or has any arrangement concerning prospective employment.’” 5 CFR 2635 § 601.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Leaving Government Employment – Statutes and Regulations (cont'd)

- Contractual relationships = “employment.” 5 CFR 2635.603(a)(Example 1).
- Board service even without compensation = “employment.” *Id.* (Example 2).
- Negotiations include discussions through intermediaries. *Id.* at 603(b)(1)(i).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Leaving Government Employment – Statutes and Regulations (cont'd)

- An official who rejects an unsolicited offer of employment is not engaged in “negotiations” but an official who defers discussions until the completion of a pending matter is “negotiating.” *Id.* at 603(b)(3)(Examples 1-2).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Leaving Government Employment – Statutes and Regulations (cont'd)

- An official who sends a resume to 25 companies in the industry that they regulate is not “negotiating” until they receive a response indicating an interest in employment discussions. *Id.* at Example 6.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Leaving Government Employment – Statutes and Regulations (cont'd)

- But a government official who has been working on an enforcement case against a company is “negotiating” when they send a resume to that company. The “negotiations” end after 60 days if the company does not respond or earlier if the company rejects the resume. *Id.* at Example 10.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Leaving Government Employment – Statutes and Regulations (cont'd)

- A government official who retains a recruiter for their private job search is negotiating with any entity to which the official knows that the recruiter has contacted. *Id.* at 603(c) (Example 1).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

“Personal and Substantial Participation”

- The requirement of “personal and substantial participation” applies in multiple contexts:
 - Negotiating for employment (5 CFR 2635.402(b)(4), ABA Model 1.11(d)(2)(ii); MD Rule 1.11(d)(2)(B); VA Rule 1.11(d)(2)) and
 - Post-employment restrictions (18 U.S.C. 207(a)(1)(B); 5 CFR 2641.201(a); D.C. Rule 1.11(a), ABA Model, MD and VA Rule 1.11(a)(2)).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

“Personal and Substantial Participation” (cont’d)

- What does “personal” and “substantial” mean? Do these terms have the same or different meaning under the legal ethics rules and federal statutes or regulations?

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

“Personal and Substantial Participation” (cont’d)

- The inquiry is a factual one focusing on what the lawyer actually knew and did. D.C. Legal Ethics Op. 315.
- “Participation” in some fashion, beyond mere knowledge, may be required. 5 CFR 2641.201(1).
- “Personal” participation means direct participation or “direct and active supervision.” *Id.* at (2)(ii).



ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

“Personal and Substantial Participation” (cont’d)

- A government lawyer drafts a standard form contract. A contracting officer uses that form. The lawyer has not participated “personally” in the matter. *Id.* at (3)(Example 1).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

“Personal and Substantial Participation” (cont’d)

- One government lawyer asks another for advice on handling a particular issue in a case. The second lawyer gives some advice and thereby participates “personally” in the matter. *Id.* at Example 2.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

“Personal and Substantial Participation” (cont’d)

- Substantial participation – this is typically the most nuanced test and is more difficult to satisfy than “personally” or “participation.” The various authorities – ethics opinions and regulations – are not in perfect alignment.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

“Personal and Substantial Participation” (cont’d)

- “Substantial participation” turns on “a factual inquiry into whether the ‘involvement was direct, extensive and, substantive, not peripheral, clerical, or formal.’” D.C. Ethics Op. 315.
- Did the role at issue involve the lawyer “in the merits of the case[?]” *Id.*

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

“Personal and Substantial Participation” (cont’d)

- Substantial participation “should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial.” 5 CFR 2641.201(i)(3).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

“Personal and Substantial Participation” (cont’d)

- A single instance of advice on litigation strategy can be substantial participation. *Id.* at Example 3.
- A government official decides not to act on an application for assistance made by private entities because of difficult policies questions raised by the application. This constitutes substantial participation. *Id.* at Example 7.

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ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Post-Employment Restrictions

- Ethics rules prohibit any role by the former government official in a matter in which they participated personally and substantially while in government. *E.g.*, D.C. Rule 1.11(a). Adversity to the government is not required. *Id.*

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Post-Employment Restrictions (cont'd)

- Ethics in Government Act prohibits only communications to or appearances “with intent to influence” before the former official’s agency even in matters in which the former government official participated personally and substantially. 18 U.S.C. 207(a)(1); 5 CFR 2641.101 (a). Behind the scenes assistance is not prohibited (unlike the ethics rules).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Post-Employment Restrictions (cont'd)

- Note that at least some federal agencies have regulations that go further than the statute. See, e.g., 17 CFR 200.735-8 (SEC); IRS Circular 10.25 (IRS).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Post-Employment Restrictions (cont'd)

- Ethics in Government Act covers more than matters in which the former government official participated personally and substantially.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Post-Employment Restrictions (cont'd)

- For two years, a former government official cannot appear or communicate, with intent to influence, before or with their former agency regarding a matter that was “under his official responsibility” in the last year of their government service. 18 U.S.C. 207(a)(2); 5 CFR 2641.202(a).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Post-Employment Restrictions (cont'd)

- Ethics in Government Act also prohibits “senior employees” who made more than \$195,231 for 2025 (a figure that is adjusted annually) from appearing or communicating, with intent to influence, before or with their former agency for a period of one year. 18 U.S.C. 207 (c); 5 CFR 2641.204(a). *See also* 18 U.S.C. 207(d) and 5 CFR 2641.206 for 2 year restrictions on “very senior employee[s].”

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Post-Employment Restrictions (cont'd)

- The “senior employee” financial threshold is reset on an annual basis. See Legal Advisory from Emory A. Rounds, III, to Designated Agency Ethics Officials (January 5, 2023) (available at www.oge.gov)

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Post-Employment Restrictions (cont'd)

- Members of Congress and their staff are separately regulated by the Ethics in Government Act, 18 U.S.C. 207(f).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Post-Employment Restrictions (cont'd)

- Waiver: Office in Government Act restrictions are subject to limited exceptions and waiver under limited circumstances. 5 CFR 2641 Subpart C. ABA Model and MD Rule 1.11(a)(2) allow for waiver by the government agency. VA Rule 1.11(b) requires waiver by the government agency and the private client. D.C. Rule 1.11(a) is unwaivable. See Comment [3].

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Post-Employment Restrictions (cont'd)

- Scope: Ethics in Government and the legal ethics rules apply only to matters “involving a specific party or parties.” *E.g.* D.C. Rule 1.11(g).
- “The making of rules of general applicability and the establishment of general policy will ordinarily not be a ‘matter’ within the meaning of Rule 1.11.” Comment [3] to D.C. Rule 1.11; *see also* 5 CFR 2641.201(h); D.C. Legal Ethics Op. 297.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Post-Employment Restrictions (cont'd)

- Scope (cont'd): Legal ethics rules apply to work on the “same matter” as well as on a “substantially related matter.” The “substantial relationship” test is borrowed from the former client conflict rule – Rule 1.9, albeit applied not in precisely the same way. See Comment [4] to D.C. Rule 1.11; *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Post-Employment Restrictions (cont'd)

- Scope (cont'd): Comment [10] to ABA Model and Maryland Rule 1.11 takes a slightly different tack: “a ‘matter’ may continue in another form. In determining whether two particular matters are the same, the attorney should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.”

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Post-Employment Restrictions (cont'd)

- Imputation: All of the various versions of Rule 1.11 allow for a firm to take a matter that the former government official could not accept if the former government official is (a) timely screened, (b) with notice to the government agency and other relevant parties, (c) so long as the former government official is not apportioned a part of the fee. *E.g.* D.C. Rule 1.11(c)-(e).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Post-Employment Restrictions (cont'd)

- Confidentiality: Former government officials who acted as lawyers in their government service owe the government the same duty of confidentiality as any former client under Rule 1.6.

ABA FORMAL OPINION 209 (2024)

- Clarifies the Scope of Model Rule 1.11(c)
- Re: “Confidential Government Information”
- Disqualification Rule
- Prohibits improper use of a lawyer’s official government position and exploitation of confidential government information.

ABA FORMAL OPINION 209 (2024)

- What are we talking about?
 - A lawyer who now has private clients
 - Who is either a former or current (part-time) govt officer or employee
 - Who acquired confidential government info
 - By government authority (subpoena)
 - About a person (individual, entity, or public entity)
 - Government is prohibited by law/privilege from disclosing info and
 - The info is not otherwise public

ABA FORMAL OPINION 209 (2024)

Lawyer may not now represent a private client (including a private government client as outside counsel) adverse to the interests of the person about which the confidential government information relates.

* Note: D.C. Rule 1.11 has no counterpart.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT Hypothetical #1

- Lawyer for zoning board handles challenge to height restriction for a planned residential building. Lawyer then goes into private practice and handles an application to the same zoning board for a special exception to allow additional underground parking for the same building. The “same or substantially related matter?”

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Hypothetical #1

- No. *Brown v. D.C. Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Hypothetical #2

- Lawyer for U.S. Department of Interior works extensively on issuing proposed regulations concerning Native American tribes. Lawyer handled negotiations with various tribes concerning the proposed regulations. Now in private practice, the lawyer is hired by a tribe to represent it in these same negotiations.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Hypothetical #2

- On behalf of the tribe, the lawyer is likely to take position adverse to the positions he advocated while in government.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Hypothetical #2

- The lawyer is not per se disqualified from representing the tribe in the rulemaking process. The ‘matter’ is not a matter “involving a specific party or parties.” The lawyer cannot reveal or use protected information acquired in the course of government service. D.C. Legal Ethics Op. 297.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Hypothetical #3

- State Department attorney is periodically briefed on criminal investigation by Department of Justice regarding a terror attack. The victims of the attack sought to subpoena State Department records to demonstrate foreknowledge of the attack by the government.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Hypothetical #3

- The attorney participates in the discussion about how to handle the subpoena and helps formulate the strategy that gets the subpoena quashed. Eventually, the perpetrators of the attack are identified and connected with a foreign government.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Hypothetical #3

- The attorney, now in private practice, agrees to represent the foreign government in various litigation against it by the victims based on an assumption of the foreign government's culpability. Once the representation becomes public, the lawyer is the subject of criticism and negative publicity.

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Hypothetical #3

- The lawyer withdraws after only two weeks.
Rule 1.11 violation?

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

Hypothetical #3

- Yes. *See In re Sofaer*, 728 A.2d 625 (D.C. 1999).

ETHICS ISSUES IN LEAVING GOVERNMENT EMPLOYMENT

THANK YOU!

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