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Detecting and Navigating Imputed Conflicts of Interests of Current and Former Government Officials, Lawyers, and Employees

DISCIPLINARY COMMISSION
OPINION #1-23

Question

When must a lawyer who is a current or former government official or employee disqualify from or decline to accept a legal matter due to a conflict of interest?

Short Answer

A lawyer must disqualify and not participate in a matter or decline to accept a legal matter when the lawyer finds: 1) the lawyer previously was personally and substantially involved in the matter in the lawyer's prior government role, and the lawyer has not received informed consent from the agency to the representation (or the agency and former client if moving from private to public); 2) the lawyer, while a government employee, learned damaging confidential information about a person (who has interests adverse to the new client) that will be materially damaging to that person in the new matter; or 3) the representation would involve the revelation of information that all attorneys are prohibited from disclosing under Indiana Rule of Professional Conduct 1.9(c) (Duties to Former Clients).

Recommended Rules for Review

Indiana Rules of Professional Conduct: 1.9, 1.10, 1.11

Summary

Conflict analysis for current or former government employees is slightly more complicated than customary Rule 1.9 analysis.[1] As with every attorney-client relationship, the duty of loyalty demands that information related to the representation of a client be protected. *See* Ind. Prof. Cond. R. 1.9(c). However, because the conduct of government employees implicates public interest in a way that private practice usually does not, there are nuances to the conflict analysis. Former or current public officials and government lawyers particularly should be aware of potential conflicts when changing employment from government service to the private sector (or vice versa) or when moving from one government agency to another.

As evidenced by the commentary to Rule 1.11, the Court is mindful of the importance of having qualified attorneys available to work in the public sector and of promoting their ability to move freely between government and private sector employment. Accordingly, Rule 1.11 requires disqualification only in specific matters when the former government employee was personally and substantially involved in the same matter while in the employee's public position or when the employee, by virtue of the employee's former public employment, has confidential governmental information about a person in the matter that could be used to damage that person in the matter.

In practical terms, this means that lawyers who are former government employees, when deciding whether a conflict exists that precludes a new representation or participation in a matter, must first examine whether the matters at issue are the same. Did the government employee's work for the government agency rise to the level of a matter or not? Are the same parties involved? Was the former government employee personally and substantially involved? The lawyer next must examine whether, as a government employee, the lawyer learned confidential governmental information about a person that could be used to damage the person[2] in the new matter. If the answer to all these inquiries is "no," the former government employee likely is free to represent the potential client, assuming other factors under the customary Rule 1.9 analysis do not apply.

For lawyers moving from private to public work, the conflict analysis essentially is akin to the typical Rule 1.9 analysis. *See* Advisory Ops. #2-22 and #3-22.

For partners at law firms who want to avoid having imputed to them the conflicts of a colleague who is a former government employee, they should implement a screening mechanism at the firm. This screening should include the following parameters: 1) the conflicted attorney does not participate in the matter; 2) no information regarding the matter is shared between the conflicted attorney and other members of the firm; 3) the conflicted attorney earns no part of

[1] For a more thorough analysis of a lawyer's obligations under Indiana Professional Conduct Rule 1.9, review Advisory Opinion #2-22.

[2] "Person" under Rule 1.11 includes natural persons and legal persons, such as corporations.

the fee for the matter; and 4) the former government agency of the conflicted attorney is given sufficient notice of the situation to enable it to determine compliance with Rule 1.11. Ind. Prof. Cond. R. 1.11(b), 1.10.

The following general rules should be considered:

1. Absent informed and written consent from the agency, a lawyer who formerly worked in public service, as a lawyer or otherwise, shall not represent a client in the private sector when, as a public employee, the individual was personally and substantially involved in the matter, regardless of whether the private client's interests align with or are in opposition to the government's interest. Indiana Professional Conduct Rule 1.11(a).
2. Matters involve discreet sets of facts and parties and do not include broad subject areas, such as rule and regulation drafting. *See* ABA Formal Advisory Op. 342 (1975).
3. When analyzing conflicts of former government employees, there is no "substantially related" matter analysis, the analysis turns only on whether the matter is the same. Indiana Professional Conduct Rule 1.11(a).
4. Absent knowing consent from the agency and from their former client, current government employees shall not participate in matters in which they were personally and substantially involved while in the private sector. Indiana Professional Conduct Rules 1.11(d), 1.9.
5. It is not a waivable conflict for a lawyer who possesses confidential government information (not otherwise known by the public) about a third person to represent an opposing party in a matter when the specific information learned during government employment could be used to damage that person. This information must be actually known by, and not simply imputed to, the lawyer. Indiana Professional Conduct Rule 1.11(c).
6. Absent effective screening and notice, conflicts are imputed to the lawyer's firm or agency. Indiana Professional Conduct Rules 1.11, 1.10.
7. With limited exceptions, government employees who are lawyers shall not negotiate for employment with a party or private attorney in a matter while personally and substantially involved in the matter. Indiana Professional Conduct Rule 1.11(d)(ii).

Ethical Minefields and Application of the Rules

Ethical Minefield #1 – Was it a "matter?"

Hypothetical #1: Attorney A worked for the Indiana Department of Health for several years, and while there redrafted the rules and regulations involving hospital licensing, which were then adopted verbatim. After Attorney A left the

Department of Health, a local hospital sought to hire Attorney A to challenge the Department of Health's application of the regulations that Attorney A drafted. May Attorney A represent the hospital?

Under this set of facts, Attorney A may represent the hospital because the work that Attorney A did at the Department of Health was not a "matter." Regulation drafting is not a "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."[3] *See* Ind. Prof. Cond. R. 1.11(e).

Instead, if Attorney A had worked in the enforcement arm of the Department of Health and participated in the investigation of the complaint against the hospital for violating said regulations, Attorney A would not be permitted to represent the hospital in the investigation of the violation, absent the informed written consent of the Department of Health.

Hypothetical #2: Attorney A represented a county board of zoning appeals. During his tenure as the board's counsel, Attorney A worked on conditional use application permits for several companies regarding construction of a new housing development in the county. While the applications were pending, Attorney A accepted an offer with ABC law firm, which represents a local engineering company that is one of the companies seeking a permit for the project. Before the applications were granted, a citizens' group objected to the project and to ABC law firm's participation in the hearing before the board on those objections. ABC law firm argued that Attorney A received no confidential information from the board during his employment. Must ABC law firm be disqualified?

It depends. Attorney A must disqualify and take no part in the subsequent hearing on the group's objections because he participated in the application process that is at issue. Thus, the two legal matters would be considered the same "matter" for Rule 1.11 purposes. Further, because the two situations involve the same matter, ABC law firm's assertion that Attorney A received no confidential information from the board is of no import; once it is established that the two legal issues involve the same matter, a conflict is established, regardless of whether the

[3] Former government attorneys should be aware of any conflict-of-interest rules specific only to their agency to avoid running afoul of Indiana Professional Conduct Rule 1.11(e)(2).

former government lawyer received confidential information during his work on the matter. *See, e.g. State Ex Rel. Jefferson County Bd of Zoning Appeals v. Wilkes*, 655 S.E.2d 178, 187 (W.V. 2007).

However, if ABC law firm has established a screening process that effectively screens Attorney A from the matter, then ABC law firm likely may continue to represent the engineering company and participate in the hearing, provided adequate notice is given to the board. If the firm does not have such a screening process, Attorney A's conflict will be imputed to the firm, and the firm will not be able to participate in the hearing before the zoning board.

Ethical Minefield #2 – Personal and substantial involvement

Hypothetical #3: Attorney B worked for a municipal government for ten years before leaving for private practice. During his stint, Attorney B did research for and handled cases involving motor vehicle accidents between municipal employees and civilian drivers. Client Y would like to hire Attorney B to take over his lawsuit against the municipality and its Employee X for injuries sustained in a motor vehicle accident. When Client Y initially filed his case, Attorney B was employed by the municipality but was unaware of Y's matter and was not aware of any information about Employee X. May Attorney B represent Client Y?

Under this set of facts, Attorney B is free to represent Y. While Attorney B handled similar cases for the municipality and was an employee of the municipality when the case was filed, Attorney B had no personal and substantial involvement in Y's matter and learned no information about Employee X.

However, if Attorney B became aware through his work on similar cases while working for the municipality that Employee X had three prior accidents and a history of reckless driving (of which the municipality was aware), Attorney B likely would be prohibited by Indiana Professional Conduct Rules 1.11(c) and 1.9(c) from taking on the representation of Y. His firm, on the other hand, could represent Client Y, assuming Attorney B was effectively screened from participation in the matter. This would involve ensuring that no information regarding the matter is shared between Attorney B and other members of the firm; Attorney B is apportioned no part of the fee for the matter; and the municipality is given sufficient notice to enable it to determine the firm's compliance with Rule 1.11.

Hypothetical #4: Attorney A was a private attorney who had approximately 30 active criminal cases in various stages of prosecution when she accepted

employment with the county prosecutor and referred her clients to different counsel. May Attorney A be involved in the prosecution of any of her former clients? Does the entire prosecutor's office need to disqualify from cases involving Attorney A's former clients?

Under these facts, Attorney A cannot be involved in any way in the prosecution of her former clients in the pending matters. *See* Ind. Prof. Cond. R. 1.9(a); 1.11(d).

However, assuming Attorney A is effectively screened by the county prosecutor's office from these cases, Rule 1.11 does not require that the entire prosecutor's office disqualify from the matters. Moreover, Attorney A likely would be able to participate in future prosecutions of her former clients, provided the prosecution was not substantially related to the matters in which she represented them prior to joining the prosecutor's office.

Ethical Minefield #3 – Confidential government information

Hypothetical #5: Attorney A worked as an Assistant United States Attorney and assisted in the prosecution of X for his role in a child exploitation ring. Through his role at the U.S. Attorney's office, Attorney A learned a lot about X's personal life, criminal proclivities, and very specific (signature) modus operandi. The case ultimately was settled by a plea agreement, and information regarding the specific modus operandi was never made public. Attorney A subsequently joined the XYZ law firm. XYZ represents a local business that employs X, who is currently suing the business for racial discrimination under Title VII of the Civil Rights Act. Must XYZ law firm disqualify from the case? If not, may Attorney A participate in the matter?

Under this set of facts, Attorney A likely is free to participate in the matter. In contrast to the second hypothetical in Ethical Minefield #1, the two matters at issue in this hypothetical are not the same. Accordingly, the next step of conflict analysis under Rule 1.11 must be examined – did the former government employee receive confidential information unavailable to the public about a person that could be used to materially disadvantage that person in the new matter? While Attorney A may have learned confidential information about X that is not otherwise available to the public, there is no indication that the information learned would have any relevance to Plaintiff X's racial discrimination suit against his employer, and, as such, could not be considered information under Rule 1.11(c) that could be used to the material disadvantage of

X. Therefore, neither Attorney A nor XYZ law firm must disqualify from the racial discrimination lawsuit.

If the facts are changed so that XYZ law firm represents Client Y, who is criminally charged with child exploitation, a different result might be required under Rule 1.11 if Attorney A learned confidential information during the prosecution of X that could unfairly impact Client Y. For example, if it becomes clear to Attorney A after an initial investigation into the evidence against Client Y that X (who was living in Client Y's basement) actually committed the crime due to the unique modus operandi, then Attorney A must disqualify and remove himself from the case. At such point, a proper defense of Y would require Attorney A to delve into confidential information he learned about X only because of Attorney A's prior employment, which he is prohibited from disclosing.

However, assuming Attorney A promptly notifies XYZ law firm that he has a conflict, and a proper screening is done (with notice to the U.S. Attorney's office), XYZ law firm may be able to continue its representation of Client Y. so long as Attorney A did not share the information about X with his partners and does not participate in the matter.

Conclusion

The crux of Rule 1.11 conflict analysis comes down to whether a former government employee personally and substantially worked on a specific matter during the employee's tenure with the government, and, to a lesser extent, whether the former employee possesses confidential governmental information that could be damaging to a third party. It is important that a proper balance is struck between governmental integrity and the ability of government agencies to hire willing and capable attorneys. Former government employees can be valuable assets in the private sector, but care must be taken to screen for potential conflicts to avoid the law firm's disqualification from matters.

This nonbinding advisory opinion is issued by the Indiana Supreme Court Disciplinary Commission in response to a prospective or hypothetical question regarding the application of the ethics rules applicable to Indiana judges and lawyers. The Indiana Supreme Court Disciplinary Commission is solely responsible for the content of this advisory opinion, and the advice contained in this opinion is not attributable to the Indiana Supreme Court.