

ETHICS OPINION

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QUESTION PRESENTED: Can a partner of a law firm which represents the Government/Prosecution accept a court appointment for Criminal Defense?

ANSWER: Possibly.

ANALYSIS: Several rules of professional conduct may govern this situation. When a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b) as follows:

Rule 1.11 Successive Government and Private Employment

(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 knowingly undertake or continue representation in such a 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 having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned to no part of the fee therefrom.

When a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1) as follows:

(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.

The individual lawyers involved are governed by Rules 1.6, 1.7 and 1.9 as follows:

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

1. to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
2. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegation in any proceeding concerning the lawyer's representation of the client.

Rule 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

1. the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
2. each client consents after consultation.

(b) 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.

Rule 1.9 Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Pursuant to the above rules, a per se conflict of interest does not exist if members of firm A or firm B undertake criminal defense so long as an applicable screening and notice requirement are met. Each situation must be examined in light of the factual situation and individuals involved. An attorney in the firm may undertake criminal defense work if governmental representation doesn't conflict with representation in the criminal case and if the attorney has not obtained confidential information in governmental representation which would conflict with the criminal defense work. If the attorney undertakes criminal defense he or she cannot use any confidential information obtained through representation of a criminal defendant against that client or the government in a subsequent governmental representation. Simultaneous representation of prosecution and defense, even though in unrelated cases, often presents insurmountable problems under Rule 1.7 and is likely to be prejudicial to the administration of justice under Rule 8.4(d).

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