Moving Between Government and Private Practice

Many lawyers work for the government these days. And government lawyers—state, county, city or federal—are subject to Arizona's Rules of Professional Conduct[1] in addition to the conflict of interest rules that apply specifically to them and to their agencies.[2] But a few notable rule exceptions apply to them, mostly when they migrate between the government and private sectors. If you are a government lawyer planning to leave for private practice, or a lawyer planning to join or contract with a government agency, you need to be aware of these rules.

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The ethical rule that applies to these situations is ER 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees). The first part of the rule deals with lawyers leaving government service for the private sector: the second part deals with lawyers either joining a government agency or contracting as private practitioners for work representing a government agency.

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Leaving the government for private practice. ER 1.11(a) prohibits a lawyer who leaves government service for private practice from representing a private client in connection with a matter[3] in which the lawyer participated personally and substantially while in government service unless the appropriate government agency gives its informed consent. The government obviously doesn't want a "side-switcher" using knowledge about the government's case when a former employee becomes a lawyer in a firm representing the government's opponent.[4] But the rule goes even further in that it applies even though the matter involves a case where the private client is not adverse to the government agency involved, and even when the government and the private client have congruent interests. This underlines the underlying purpose of giving the government agency what initially appears to be unfair leverage over lawyers leaving government service: it is intended to prevent the lawyer, while employed by the government, from exploiting public office for the possible benefit of persons that may later become private clients, enhancing the lawyer's own career in the process.[5] The rule is therefore quite different from ER 1.9 (Duties to Former Clients), which requires a former client to show, in order to disqualify its former lawyer, that the lawyer is threatening to represent another person in the same or substantially related matter in which that person's interests are "materially adverse" to the interests of the former client. ER 1.9 protects the interests of a former client after the lawyer ends the representation. ER 1.11 protects the government "client" while the lawyer still works there.[6]

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Assuming the governmental agency refuses to consent to its former employee's representation in a given matter, all is not lost. The disqualified lawyer can be screened by his or her new firm as long as the screen complies with the specific requirements found in the rule itself, at subsection ER 1.11(a)(2).

The restrictions on a former government lawyer don't end there, however. ER 1.11(b) prevents the lawyer from representing a private client if the lawyer is in possession of "confidential government information"[7] that could be used against a person whose interests are adverse to the private client and where that information could be used to the material disadvantage of that person. This is the other side of the same coin considered in ER 1.11(a), and is intended to prevent a former government lawyer from using information only available and actually known to the lawyer because of his or her prior employment in the government.[8]

Moving from private practice to government service. ER 1.11(c) covers the situations where a lawyer in private practice joins a government agency or, as a private practice lawyer, contracts with a governmental agency to represent it for a particular matter or matters. The rule prohibits the government lawyer from further participation in any matter in which the lawyer participated personally and substantially while in private practice. The conflict rules of ER 1.7 (Conflict of Interest: Current Clients) and ER 1.9(c), dealing with using or revealing information relating to the representation of a former client, will apply in these situations, just as they would if the lawyer involved were taking on any new client. Although the imputation of conflicts rules of ER 1.10 (Imputation of Conflicts of Interest: General Rules) do not normally apply to governmental entities,[9] the notion of the "appearance of impropriety" is a factor in determining whether a migrating lawyer may still need to be screened by the governmental entity. Once a more important consideration in our ethics rules than it is now, appearance of impropriety applies in our Code of Judicial Conduct[10] and is

occasionally used in ER 1.11(c) situations, particularly those where a lawyer representing a defendant in a criminal matter withdraws from the representation to join the local prosecutor's office. Several Arizona cases have dealt with these cases with differing results. In *State ex rel. Romley v. Superior Court*,[11] the entire Maricopa County Attorney's Office had been disqualified when a lawyer in private practice joined the MCAO while it was prosecuting a number of his former clients. In reversing the lower court's ruling, the Court of Appeals (in an interesting opinion giving a history of how Arizona courts had previously dealt with the issue and listing various indicators that should be considered in determining whether a reasonable person might see a given situation as presenting a problem) held that screening the lawyer in an office with over 100 lawyers would sufficiently overcome any appearance of impropriety. Not so in *Turbin v. Superior Court*,[12] where the entire Navajo County Attorney's Office, consisting of only seven lawyers, was disqualified when a lawyer defending a case against the agency decided to join it.

Screening. In looking at situations involving lawyers moving between government and private practice, the rules concerning screening should always be kept in mind. Screening, as now defined in ER 1.0(k) and discussed in Comments [8], [9] and [10] to ER 1.0, is a concept that has always been a part of ER 1.11 but which is now becoming more thoroughly understood and utilized with the recent amendments to ER 1.10 that now allow screening in more situations involving lawyers moving between firms.

endnotes

1. Rule 42, Ariz.R.S.Ct.
2. *E.g.*, 18 U.S.C. §207, regulating former U.S. government lawyers who either oppose the government directly or attempt to act in matters in which the government has a direct and substantial interest.
3. "Matter" is defined in ER 1.11(d) as any proceeding, investigation, request for ruling and the like involving a specific identifiable party or parties. It does not include such things as drafting regulations or interpreting agency procedures.
4. *Security General Life Ins. Co. v. Superior Court*, 718 P.2d 985, 987 (Ariz. 1986) (rule intended to prevent conflicts of interest that arise in the "revolving doors" between government and private practice).
5. Geoffrey C. Hazard, W. William Hodes & Peter R Jarvis, The Law of Lawyering §16.04 (4th ed. 2015).
6. ER 1.11(c)(2) additionally provides that it's improper for a government lawyer to negotiate for private employment with any party or its lawyer while personally and substantially involved in a matter with them.
7. "Confidential governmental information" is defined in ER 1.11(e) as information the lawyer acquired under governmental authority. It does not include information that can otherwise be acquired through discovery or processes like the Freedom of Information Act.
8. Ariz. Ethics Op. 02-05 (Conflict of Interest; Former Government Lawyers; Administrative Proceedings; Imputed Disqualification; Screening) (September 2002). Any government lawyer planning to leave government service for the private sector should read this opinion and the references cited.
9. *See* ER 1.10(e) and Comment [3] to ER 1.11 (imputation of conflicts does not apply between officers and employees of governmental agencies "although ordinarily it will be prudent to screen such lawyers").
10. Rule 81, Ariz.R.S.Ct.
11. 908 P.2d 37 (Ariz. 1995).
12. 797 P.2d 734 (Ariz. 1990).