REPORT OF THE COMMITTEE ON ETHICS[1]

The American Bar Association Standing Committee on Ethics and Professional Responsibility (ABA Committee) has issued several formal opinions that are relevant to lawyers who work in the executive branch, the private lawyers who deal with them, or to both. These opinions address the conflict of interest rules governing former government lawyers, the ethical obligations of lawyers who serve as expert witnesses or expert consultants, and issues concerning ex parte communications with government agencies represented by counsel. While these opinions provide useful and important guidance to lawyers who encounter these problems, a lawyer should also consult the ethics rules and opinions in the jurisdiction(s) in which he or she practices. In addition, lawyers should consult relevant statutes and regulations, such as the conflict of interest rules that apply to former government lawyers and agency regulations governing ex parte communications.

I. ABA FORMAL OPINION 97-409: CONFLICTS OF INTEREST: SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT (AUGUST 2, 1997)[2]

This opinion addressed whether a lawyer formerly employed by a government claims administration agency can represent private claimants before her former agency in connection with the same general types of claims she handled while working for the agency. It also addressed whether the lawyer can bring suit against the agency on behalf of a private client challenging agency rules in whose development and implementation she was involved.[3]

In order to resolve this question, the ABA Committee first had to determine which of the Model Rules of Professional Conduct govern the conflict of interest obligations of former government lawyers. Rule 1.9 (Conflict of Interest: Former Client) generally governs successive representations,[4] while Rule 1.11 (Successive Government and Private

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1. The Committee gratefully acknowledges the assistance of Jacqueline Gerson Cooper, Esq. of Sidley & Austin in the preparation of this report.

2. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-409 (1997).

3. *Id.*

4. Model Rule 1.9, Conflict of Interest: Former Client, provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter 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.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

Employment) specifically governs the obligations of former government lawyers.[5] The question whether Rule 1.9 or 1.11, or both, control the conflict of interest obligations of former government lawyers is critical, because the two rules are much different in scope. For example, the range of

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(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1996).

5. Model Rule 1.11, Successive Government and Private Employment, 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 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 no part of the fee therefrom.

(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 else 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 lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(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 has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1996).

matters from which a lawyer would be disqualified under Rule 1.9 is much broader than the range of matters from which a lawyer would be disqualified under Rule 1.11. Rule 1.9(a) forbids a lawyer who formerly "represented" a client from undertaking an adverse representation in the same or a substantially related matter, while Rule 1.11 forbids a former government lawyer from undertaking an adverse representation only if the lawyer's prior involvement in the matter amounted to "personal and substantial participation." Rule 1.11(d) narrowly defines a "matter" to include decisions "involving a specific party or parties," while Rule 1.9 contains no such limitation, leading the ABA Committee to conclude that it applies to a broader range of situations than Rule 1.11. Finally, a significant difference between the two rules is that conflicts arising under Rule 1.9 are imputed to other lawyers in the former government lawyer's new firm, while conflicts arising under Rule 1.11 are not imputed, so long as the former government lawyer is properly screened.

The ABA Committee concluded, based on the fact that Rules 1.9 and 1.11 "overlap and sometimes conflict with one another," that they are not intended to apply in the same situation.[6] Accordingly, it concluded that "Rule 1.11 occupies the field to the exclusion of Rule 1.9(a) and (b)," reasoning that "Rule 1.11 was plainly intended to define the conflict of interest obligations of former government lawyers, vis-a-vis their former government client as well as adverse third parties."[7] The ABA Committee noted that this conclusion is consistent with the text of the rules, as well as the legislative history and commentary concerning them. It is also consistent with a principal purpose of Rule 1.11: to ensure that the conflict of interest rules do not impose a significant deterrent to public service and do not serve as an impediment to transfer of employment between the public and private sectors.

Even though the ABA Committee concluded that former government lawyers are not subject to the general conflict of interest provisions contained in parts (a) and (b) of Rule 1.9, it nevertheless concluded that they are subject to the provisions in 1.9(c) that prohibit a lawyer from using confidential information obtained during the representation of a former client to the disadvantage of that client. In reaching this conclusion, the ABA Committee noted that the confidential information provisions in Rule 1.9(c) have no analogy in Rule 1.11 and therefore do not conflict with it. In addition, the ABA Committee noted that Rule 1.11 does not contain any provision protecting the confidences of government clients and reasoned that it was unlikely the drafters of the Rules intended for the government to be unprotected in that regard.[8]

The confidentiality provisions of Rule 1.9(c) effectively can preclude a former government lawyer from undertaking representations of private clients in certain circumstances. Specifically, the ABA Committee noted

6. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-409 (1997).

7. *Id.*

8. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-409 (1997).

that a former government lawyer's duty to protect the confidences of its former government client may "materially limit" the lawyer's ability to represent certain clients under Rule 1.7(b).[9] In the face of a Rule 1.7(b) conflict, the representation cannot go forward unless the lawyer both "reasonably believe[s] the representation will not be adversely affected" and obtains the informed consent of the prospective client. The ABA Committee cautioned that it "believes it unlikely" that a lawyer could form a reasonable belief that the representation would suffer no adverse effect when a conflict arises under Rule 1.9(c), unless the former government client consented to waive the confidentiality barrier.[10]

With respect to the facts at issue, the ABA Committee concluded that Rule 1.11 does not bar the former government lawyer from representing private claimants before her old agency, so long as the representations did not involve "particular matters" in which she had been involved. It also concluded that Rule 1.11 did not bar the lawyer from representing a private client in a challenge to agency rules, even where she had been involved in the rulemakings, because rulemakings are not "particular matters." The ABA Committee noted, however, that if zealous and competent representation of a private client required the former government lawyer to use or reveal nonpublic information acquired during her representation of the government to the government's disadvantage, then the representation should not be undertaken, unless the government waived its confidentiality protection.[11]

This opinion will be highly significant to the large number of lawyers who move from the public sector to the private sector each year. By concluding that the conflict of interest obligations of former government lawyers are controlled by the narrowly tailored restrictions in Rule 1.11 rather than the more sweeping restrictions in Rule 1.9, the ABA Committee has reduced the sphere of potential conflicts that will confront a lawyer who decides to leave government service for private practice. This will ensure that the conflict of interest rules do not discourage such job transfers and thus do not serve as an impediment to lawyers entering government service in the first instance.

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9. Model Rule 1.7(b) provides:

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 interest 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.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1996).

10. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-409 (1997).

11. *Id.*

II. ABA FORMAL OPINION 97-407: LAWYER AS EXPERT WITNESS OR EXPERT CONSULTANT (MAY 13, 1997)[12]

This opinion addressed the ethical obligations of a lawyer who serves as an expert witness or a non-testifying expert consultant on behalf of a party who is another law firm's client. It is increasingly common for lawyers who are experts on legal subjects to serve in one or both of these roles, in administrative proceedings as well as litigation matters. The ABA Committee concluded that a lawyer who serves as an expert witness has ethical obligations that differ substantially from those of a lawyer who serves as an expert consultant. Specifically, a lawyer who serves solely as a testifying expert does not form a client-lawyer relationship with the party who retains him, and therefore is not subject to the Rules of Professional Conduct, while a lawyer who serves as an expert consultant does form such a relationship and is subject to the Rules.

In analyzing whether a lawyer serving as an expert witness forms a client-lawyer relationship with the party who retains him, the ABA Committee noted that a client-lawyer relationship generally comes into being as a result of the reasonable expectations of the client and a failure of the lawyer to dispel those expectations. With respect to a lawyer retained solely as a testifying expert, the ABA Committee concluded that the party who engages the expert cannot form a reasonable expectation of a client-lawyer relationship. This is because an expert witness, lawyer or otherwise, has a duty to provide the court with truthful and accurate information. Even though the expert testifies on behalf of a party, he is expected to be a neutral, objective witness and provide opinions adverse to the party if candor so dictates. In addition, clients cannot form a reasonable expectation of an attorney-client privilege because communications between the expert witness and the client are generally discoverable.

In contrast, a lawyer retained as a non-testifying expert consultant serves a much different role, leading the ABA to conclude that a client-lawyer relationship is formed. A consultant typically plays an active role in shaping legal strategy and identifying favorable facts, essentially serving as a partisan advocate. Indeed, the ABA Committee concluded that a lawyer consultant "acts like a lawyer" and essentially occupies the role of "co-counsel." In addition, the communications between a non-testifying consultant and a client generally are not discoverable, giving rise to a reasonable expectation of confidentiality.

In order to avoid misunderstandings, the ABA Committee recommends that a lawyer serving as an expert witness obtain engagement letters from both the engaging law firm and the client that define the expert's limited role and make clear that no client-lawyer relationship is being formed. The ABA Committee acknowledged, however, that in actual practice it is common for the role of an expert witness to evolve into or overlap the role of an expert consultant. When this occurs, a client-lawyer

12. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-407 (1997).

relationship exists and it is incumbent on the lawyer expert to assure that the client is fully informed of and expressly consents to the dual role, particularly since continuing to serve as a testifying witness might require the disclosure of confidences or affect the objectivity of the expert testimony. Accordingly, it may be necessary for a lawyer serving as an expert to update an initial engagement letter as the lawyer's role changes.

Although the ABA Committee concluded that a lawyer serving as an expert witness is not subject to the Rules as such because no client-lawyer relationship is formed, it noted that the lawyer's obligations under law apart from the Rules may give rise to limits under the Rules on the lawyer's ability to represent other clients. For example, the ABA Committee assumed for purposes of its opinion that the lawyer owes a duty of confidentiality to the party on whose behalf he is testifying.[13] Such a duty to maintain confidences would limit the lawyer's ability to undertake concurrent representations adverse to the party on whose behalf he is testifying, because any concurrent representation would be subject to Rule 1.7(b).[14] In addition, even though a lawyer serving as an expert witness is not subject to the general conflict of interest rules concerning former clients and subsequent representations, subsequent representations also might be subject to Rule 1.7(b) based on duties of confidentiality imposed by other law.[15]

This opinion provides a bright-line rule for lawyers who serve as expert witnesses and expert consultants: A lawyer enters into a relationship governed by the Rules when he is retained as an expert consultant, but does not enter into such a relationship when he is retained merely as an expert witness. Thus, a lawyer serving as an expert consultant is subject to the full panoply of conflicts rules, confidentiality obligations, and other duties set forth in the Rules. In contrast, a lawyer serving as an expert witness is not subject to the Rules per se with respect to that engagement, but may be limited by the Rules to the extent that the Rules incorporate other law.

III. ABA FORMAL OPINION 97-408: COMMUNICATIONS WITH GOVERNMENT AGENCY REPRESENTED BY COUNSEL (AUGUST 2, 1997)[16]

This opinion addressed whether a lawyer who is representing a private party in a controversy with a government entity may communicate about the matter with responsible government officials without the prior consent of government counsel. This question might arise, for example, when a

13. *Id.* In a footnote, the ABA Committee noted that some courts have deemed an expert witness to be an agent of the client while others have held that the relationship between an expert witness and client as confidential. Neither of these relationships, however, gives rise to an attorney-client privilege. Therefore, communications between an expert witness and client are ordinarily discoverable.

14. *See supra* note 9 for text of Rule 1.7(b).

15. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-407 (1997).

16. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-408 (1997).

lawyer is representing a private party in an administrative matter before a regulatory agency such as the Federal Energy Regulatory Commission (FERC), which is represented by a general counsel and staff attorneys, and the private party wants to contact individual commissioners or their staffs about the particular matter.

The ABA Committee framed the issue as whether and to what extent Rule 4.2,[17] which forbids a lawyer from communicating with a person the lawyer knows to be represented by another lawyer without other lawyer's consent, applies to a lawyer's communications with government officials. This "no contact" rule is designed to protect represented persons from interference or overreaching by opposing counsel. The ABA Committee noted that the text of Rule 4.2 does not define the "person[s]" to whom it applies, but that the commentary to the rule indicates that it applies to represented organizations and government entities, as well as individuals. The commentary, for example, discusses controversies between government agencies and private parties. Accordingly, the ABA Committee concluded that Rule 4.2 is generally applicable to communications by lawyers with represented government entities.[18]

The ABA Committee acknowledged, however, that additional considerations arise with government entities because the federal Constitution guarantees citizens the right to petition the government for redress of their grievances. Thus, the "no contact" rule cannot be applied in such a way as to frustrate a citizen's right to petition government decision-makers through a lawyer. The ABA Committee noted that it has limited jurisdiction to define the scope of the constitutional right to petition the government, but concluded that the appropriate way to reconcile the opposing considerations is to make unconsented contacts with government officials subject to two conditions. First, in order for an unconsented contact to fall within the right to petition, the government official contacted must have authority to take or recommend action in the controversy, and the purpose of the communication must be to address a policy issue, including settling the controversy. Second, even where a communication appears to fall within the right to petition, the lawyer for the private party must give government counsel advance notice of the intended communication so government counsel can advise their clients whether the communication should be entertained. In the case of proposed written communications, the lawyer for the private party should provide copies of the written material in advance to government counsel. These conditions, the ABA committee concluded, properly balance the right of citizens to seek direct access to government officials with the government's need to protect itself from overreaching by lawyers for private parties.[19]

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17. Model Rule 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1996).

18. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-408 (1997).

19. *Id.*

The ABA opinion also cautions lawyers to consult other authority, such as applicable case law and regulations, that may impose different standards. Lawyers who practice before the FERC, for example, should consult the agency's rules regarding ex parte communications.[20] These rules broadly proscribe a party or his counsel from undertaking off-the-record communications with members of the Commission, administrative law judges, or any other employee of the Commission "regarding any matter pending before the Commission in any contested on-the-record proceeding."[21] The rules also enumerate specific exceptions, such as communications relating solely to procedural matters,[22] communications "[f]rom any person when otherwise authorized by law,"[23] and communications "[w]hich the participants agree may be made on an ex parte basis."[24]

20. 18 C.F.R. § 385.2201 (1997).
21. 18 C.F.R. § 385.2201(a) (1997).
22. 18 C.F.R. § 385.2201(b)(3) (1997).
23. 18 C.F.R. § 385.2201(b)(4) (1997).
24. 18 C.F.R. § 385.2201(b)(6) (1997).