

1 Ethical Considerations when Leaving or Returning to Government Practice

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2 Key Authorities

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- Iowa R. Prof. Conduct 32:1.11 (“SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES.”)
 - Cross-reference Rules 32:1.7 (“Conflict of interest: current clients”) and 32:1.9 (“Duties to former clients”).
- Iowa Code § 68B.7 (“Prohibited use of influence”) and § 68B.34 (“Additional penalty”).
 - Criminalizes certain “knowing[] and intentional[]” violations of conflict of interest laws.
- 18 U.S.C. § 207 (“Restrictions on former officers, employees, and elected officials of the executive and legislative branches.”)
 - Criminalizes certain violations of conflict of interest laws (federal).
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3 Guiding Principles

- Enforce certain basic conflict rules
 - Avoid concurrent conflicts (duties to one client clashing with duties to another)
 - Protect confidentiality for current and former clients
- Balance competing interests
 - Prevent lawyer from exploiting public office
 - vs.
 - Encourage public service
 - Rule 32:1.11 Comment 4:

“The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver . . . are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification . . . to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.”

4 Scenario 1

GOVERNMENT=> PRIVATE PRACTICE

- Background:
 - Government attorney is personally and substantially involved in criminal investigation before charges are filed.
 - Attorney leaves and goes into private practice.
- Can the attorney represent one of the defendants when charges are filed?
 - No.

- Rule 32:1.11(a): “[A] lawyer who has formerly served as a public officer or employee of the government . . . shall not otherwise represent a 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 gives its informed consent, confirmed in writing.”
- Also raises issues under Rule 32:1.9(c) (forbidding use of information against former client) and Rule 32:1.7(a)(2) (concurrent conflict if representation of new client is materially affected by duties owed to former client).
- Iowa Code § 68B.7: former State employee “shall not . . . receive compensation for any services rendered on behalf of any person . . . in relation to any case . . . with respect to which the person was directly concerned and personally participated . . .”

5 Scenario 2

GOVERNMENT=> PRIVATE PRACTICE

- Background:
 - Government attorney files case against defendant.
 - Attorney leaves and goes into private practice.
 - Government later amends pleading to add second defendant.
- Can the attorney represent the second defendant?
 - No.
 - Rule 32:1.11(a): “[A] lawyer who has formerly served as a public officer or employee of the government . . . shall not otherwise represent a 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 gives its informed consent, confirmed in writing.”
 - Issues still exist under Rules 32:1.7(a)(2) and 32:1.9(c) (duties to former client)
 - Issues still exist under Iowa Code § 68B.7, which prohibits receipt of compensation “in relation to any case . . . with respect to which the person was directly concerned and personally participated. . .”

6 Scenario 3

GOVERNMENT=> PRIVATE PRACTICE

- Background:
 - Government attorney files case against defendant.
 - Attorney leaves and goes into private practice.
 - Government later amends pleading to add second defendant.
- Can the attorney’s firm represent the second defendant?
 - Yes (if there is compliance with Rule 32:1.11(b)).
 - Note: Rule 32:1.10 (“Imputation of conflicts of interest”) does not apply to current/former government lawyers.
 - Requirements of Rule 32:1.11(b):
 - disqualified lawyer must be screened
 - written notice must be given to “the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.”

7 Scenario 4

GOVERNMENT=> PRIVATE PRACTICE

- Background:
 - Government attorney files case against defendant.
 - Attorney leaves and goes into private practice with the firm representing the defendant.

- Can the firm continue to represent the defendant?
 - Yes (if there is compliance with Rule 32:1.11(b)).
 - Requirements:
 - disqualified lawyer must be screened
 - written notice must be given to “the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.”

8 Scenario 5

GOVERNMENT=> PRIVATE PRACTICE

- Background:
 - Government attorney’s agency initiates action against defendant.
 - Attorney has limited involvement.
 - Attorney leaves and goes into private practice.
- Can the attorney represent the defendant?
 - Maybe.
 - Did the attorney learn any confidential information that would create a conflict under Rule 32:1.7(a)?
 - Did the attorney “participate[] personally and substantially” in the matter while still employed by the government?

9 “Personal” and “Substantial” Involvement

- *Sorci v. Iowa Dist. Ct. for Polk Cty.*, 671 N.W.2d 482, 492 (Iowa 2003):
 - “According to the ABA, however, “ ‘substantial responsibility’ ... contemplates a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question.” ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975), *reprinted in* 62 A.B.A.J. 517, 520 (1976).”
- Examples :
 - Advising a client
 - Authoring correspondence or reports
 - Signing a pleading
 - Appearing at a hearing
- *United States v. Clark*, 333 F. Supp. 2d 789 (E.D. Wis. 2004):
 - “To participate ‘personally’ means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter.”
 - “‘Substantially,’ means that the employee’s involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance.”
 - “It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue.”

10 Scenario 6

GOVERNMENT=> PRIVATE PRACTICE

- Background:
 - Gov’t attorney is substantially involved in agency’s consumer protection action against defendant.
 - Attorney leaves and goes into private practice.
- Can the attorney represent a consumer or class of consumers in a civil action against the same

defendant arising out of the same events?

- Only with the agency's approval.
- Rule 32:1.11(a)(2): former government attorney "shall not otherwise represent a 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 gives its informed consent, confirmed in writing."
- Comment 3: "Paragraph[] (a)(2) . . . appl[ies] regardless of whether a lawyer is adverse to a former client and [is] thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client."

11 Scenario 7

PRIVATE PRACTICE => GOVERNMENT

- Background:
 - Attorney actively represents client in litigation between private parties.
 - Attorney goes into government practice.
 - Government decides to prosecute the attorney's former client based on the same facts at issue in the civil case.
- Can the attorney serve as government counsel in the prosecution?
 - No.
 - Rule 32:1.9: "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 . . . unless the former client gives informed consent, confirmed in writing."
 - Rule 32:1.11(d): gov't attorney "shall not: (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing."
 - Rule 32:1.7(a): "a lawyer shall not represent a client . . . if . . . the representation of one client . . . will be materially limited by the lawyer's responsibilities to . . . a former client. . ."

12 Scenario 8

PRIVATE PRACTICE => GOVERNMENT

- Background:
 - Same as Scenario 7, except the prosecution is unrelated to the civil litigation in which the attorney represented the client.
- Can the attorney serve as government counsel in the unrelated prosecution?
 - Maybe.
 - Rules 32:1.9 and 32:1.11: no involvement in "the same or a substantially related matter."
 - Rule 32:1.7: can't represent new client if there is "significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to . . . a former client."
 - Did the attorney learn confidential information about the former client that could be relevant to the prosecution?

13 Scenario 9

PRIVATE PRACTICE => GOVERNMENT

- Background:
 - Same as Scenario 7, except the government is planning to prosecute the party *adverse* to the one the government lawyer previously represented.
- Can the attorney serve as government counsel?

- Yes, if agency consents in writing.
- ok under Rules 32:1.7 and 32:1.9 because adverse party was not “client”
- Rules 32:1.11: government lawyer cannot “participate in a matter in which the lawyer participated personally and substantially while in private practice . . . unless the appropriate government agency gives its informed consent, confirmed in writing.”
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14 Scenario 10

GOVERNMENT=> GOVERNMENT

- Background:
 - City gets into dispute with state agency.
 - City Attorney leaves, accepts position as attorney for state agency.
- Can the attorney represent the state agency in the same matter?
 - No.
 - Same ethical considerations as moving to private practice.
 - Rule 32:1.9(c) (forbidding use of information against former client)
 - Rule 32:1.7(a)(2) (concurrent conflict if representation of new client is materially affected by duties owed to former client)

15 Scenario 11

GOVERNMENT=> GOVERNMENT

- Background:
 - Private party sues two different government agencies.
 - Attorney for the first agency accepts position with the second agency.
- Can the attorney represent the second agency ?
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 - Considerations:
 - Are the interests of the two agencies aligned?
 - Did the attorney learn any confidential info about the first agency that could be used against the second? (See Rules 32:1.7 and 32:1.9.)
 - Do the two agencies even constitute different clients?
 - Rule 32:1.11, Comment [5]: “The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these rules.”

16 Scenario 12

SIMULTANEOUS GOVERNMENT/PRIVATE

- Background:
 - Part-time city attorney represents city in connection with traffic citations against defendant.
 - DOT brings administrative license suspension action against defendant.
- Can the attorney represent the defendant in the DOT matter?
 - No.
 - *Iowa Supreme Court Attorney Disciplinary Bd. v. Howe*, 706 N.W.2d 360, 374 (Iowa 2005):
 - Attorney’s charging decision could have been influenced by his desire to avoid later administrative consequences for defendant/client.
 - Two cases were the same “matter” for purposes of Iowa Rules of Professional Conduct.

- Public confidence in the integrity of the system could be impacted.

17 **Scenario 13**

SIMULTANEOUS GOVERNMENT/PRIVATE

- Background:
 - Part-time city attorney represents city in connection with traffic citations against defendant.
 - Defendant is separately charged with burglary.
- Can the attorney represent the defendant in the burglary matter?
 - No.
 - *Howe*, 706 N.W.2d at 376-77:
 - “Divided loyalties” -- Attorney’s ongoing, close relationship with city police officers might prevent him from zealously defending the defendant.