

# **ETHICS AND THE ATTORNEY IN GOVERNMENT EMPLOYMENT**

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Attorneys in government employment are subject to the same ethical duties and obligations as attorneys in private practice. Further, the lines between government employment and private practice become blurred when the practices mix, e.g., a government attorney maintaining part-time private practice. However, certain ethical problems are particularly unique to attorneys in government employment. These issues generally concern conflicts of interest, confidentiality and successive private employment.

## **CONFLICTS OF INTEREST**

### **I. Government Attorney Performing More Than One Government Function At the Same Time**

Occasionally, an attorney, within the scope of his or her government employment, may be asked to perform potentially conflicting duties. For example, these conflicting duties could be:

- (1) Attorney asked to take a legal position potentially adverse to the public interest of the Commonwealth; or
- (2) Attorney asked to defend public agency and public agency's employee in a pending dispute.

Unfortunately, there is no "bright line" rule for determining whether a conflict of interest exists in such matters. While the existence of an actual conflict of interest makes the issue easier to resolve, frequently the appearance of impropriety alone may be sufficient to create a conflict issue. In the final analysis, the determination of a conflict will be based on the facts of a given case.

## **II. Government Employment/Part-Time Private Practice**

By far, the greatest potential for conflict of interest arises where an attorney, while in government employment, also maintains a private practice.

While the problem usually arises from government attorneys exercising a prosecution function, either as an elected County Attorney or Commonwealth's Attorney permitted to maintain a private law practice, the potential for a conflict exists for any government attorney permitted to engage in part-time private practice. Pursuant to KRS Chapter 15, County Attorney and Assistant County Attorneys are permitted to engage in the private practice of law. Subject to certain city class size limitations and population limitations, Commonwealth's Attorneys are also permitted to engage in the private practice of law.

In the event of a possible conflict of interest in a situation where a government attorney maintains a part-time private practice, the ability to identify the attorney's government "client" is important on the issue of waiver. Under Rule 1.7, a conflict of interest may be waived by the affected clients. This may present a problem for elected government attorneys. For such attorneys, the more cautious approach taken by the KBA is that the attorney's client is the "public

interest." As a result, there is no identifiable "client" to obtain a waiver from in order to avoid a conflict. In the case of a government attorney employed by a state agency, under the general rule, a waiver could be obtained from the agency.

In Kentucky Bar Association v. Lovelace, Ky., 778 S.W.2d 651 (1989), the Supreme Court stated,

"A prosecutor must decline employment in any civil action when there is any reasonable probability that a criminal prosecution might arise from the circumstances of the case. If, after accepting employment in a civil matter a criminal prosecution arises from the circumstances of the case, the prosecuting attorney must withdraw from the civil proceeding and disqualify . . . from handling the prosecution."

Based on the Court's language in Lovelace, and the position of the Kentucky Bar Association, the conflict of interest rules favor disqualification in the private practice matter rather than disqualification from the favored government employment.

In Kentucky Bar Association v. Marcum & Triplett, Ky., 830 S.W.2d 389 (1992), a County Attorney and the Assistant County Attorney, acting as a private practice law firm, represented a plaintiff in a medical malpractice action against a doctor. The County Attorney and the Assistant County Attorney, acting in their prosecutorial capacity, pursued a criminal prosecution against the doctor for dispensing a controlled substance without a proper medical reason. The Supreme Court held this was a conflict and issued a public reprimand.

More recently, in Kentucky Bar Association v. Twehues, Ky., 849 S.W.2d 549 (1993), the Court lightened the effect of Loveless by stating:

"We reject the notion that any criminal allegation of misconduct made against the civil client of a prosecutor, regardless of the evidence, requires the prosecutor to immediately withdraw from

the representation. Such a rule would be subject to abuse and would effectively prohibit any private practice by a prosecutor."

### **WHO IS THE "CLIENT"?**

Many ethical rules, and in particular, rules regarding conflicts of interest and confidential communications, are dependent upon identifying who is the client. For attorneys in private practice, the identification of the client is rarely, if ever, an issue. (As an aside, ethical problems in private practice typically arise where the attorney is being paid by a third party, although this practice is specifically authorized by RPC 1.8(f)).

Possible "clients" for the attorney in government employment may be:

- (1) The public interest;
- (2) The government;
- (3) Agency who employs the attorney;
- (4) Official in the agency with whom the attorney has conferred.

The general rule is that the agency in which the attorney is employed is deemed the "client" for the purpose of the Rules of Professional Conduct. In the event the government attorney is specifically assigned to represent a particular employee of the agency, the employee is deemed to be the "client" for the purpose of maintaining the confidences of the employee/client. ABA Informal Opinion 1413 (1978).

The Connecticut Bar Association, in Informal Opinion 85-13 (1985), held that the individual members of a local government Board were deemed to be the "clients" of the attorney with an expectation of privacy and confidentiality in the event the individual members conferred with the counsel for the Board on Board business. However, the Opinion went on to state that if

an individual member was acting adverse to the principles of the Board, the attorney's greater duty was to the over-arching client, the Commission, to notify the Commission of the adverse conduct.

### **SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT**

Rule 1.11 is expressly designed to limit an attorney from representing a private practice client in a matter in which the attorney had previously participated as a public employee. This Rule is not absolute, and such private employment is prohibited only if certain criteria exists, to wit:

- (1) Attorney must have participated "personally and substantially" as a public employee in the matter now the subject of private practice.
- (2) Public body or government agency may consent to any potential conflict after consultation.

Paragraph (a) of Rule 1.11 also provides for the imputed disqualification of any lawyer in a firm with the ex-government attorney. Another lawyer in such a firm may only take the case if two criteria are met:

- (1) Disqualified attorney does not participate in the matter and receives no portion of any fee; and
- (2) Government agency given prompt written notice to enable government agency to determine compliance with Rule 1.11.

### **Confidential Government Information**

If a lawyer, during public employment, obtains confidential information about a person, the lawyer may not later represent another person adverse to the first person. The Rule provides a slight "safe harbor" provision by stating that the information so obtained must be to the "material disadvantage" of the first person in the private legal matter at issue. This disqualification also extends to any other lawyer in the firm, with the same limitations of Paragraph (a) regarding screening and no receipt of any fee.

**Public Employee Shall Not:**

- (1) Participate in a manner in which the attorney "participated personally and substantially" while in private practice or non-governmental employment;
- (2) Negotiate for private employment with any person, or is a party or an attorney in a manner in which the lawyer is participating "personally and substantially."

**REFERENCES:**

ABA/BNA Lawyers' Manual on Professional Conduct