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U.S. Department of Justice

Professional Responsibility Advisory Office

Washington, D.C. 20530

February 10, 2017

RE: Freedom of Information Act (FOIA) Request PRAO-FOIA-17-004

I write on behalf of the Professional Responsibility Advisory Office (PRAO) to respond to your Freedom of Information Act request dated and received in this office on February 3, 2017. You request "a copy of the 'guidance memo for departing attorneys at the end of the administration'".

Please be advised that PRAO conducted a search of its records and located the Post Employment Issues (December 2016) memorandum which we believe is responsive to your request. Please find the memorandum attached in the e-mail correspondence of this letter.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: https://foiaonline.regulations.gov/foia/action/public/home. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Cordially,

Quadira Zeleke
FOIA Liaison
Professional Responsibility Advisory Office

U.S. Department of Justice

Professional Responsibility Advisory Office

1425 New York Avenue, N.W.
Suite 12000
Washington, D.C. 20530

December 2016

MEMORANDUM

FROM: Professional Responsibility Advisory Office

RE: Professional Responsibility Issues for Department Attorneys to Consider Upon Leaving the Department for Other Employment

Introduction

There are a number of professional responsibility issues that Department attorneys and Assistant United States Attorneys should consider when they leave the Department to pursue other employment. These requirements are similar to, but different from, the requirements under the standards of ethical conduct for employees of the executive branch. We have identified and analyzed these issues below, and we are available to provide case-specific assistance to Department attorneys on these matters while they are employed by the Department. This memorandum is prepared with the expectation that a Department attorney may take it with her upon leaving the Department.

Who Is the Department Attorney's Client?

Generally, the Department attorney's client is the United States. See The Attorney General's Role as Chief Litigator for the United States, 6 Op. O.L.C. 47 (1982) (opining where Department lawyer represents federal agencies, the lawyer represents the interests of the United States as a whole). More specifically, the Department attorney's client is the Executive Branch of the government, inasmuch as Department attorneys represent the position of the current Administration and articulate its position when litigating, negotiating and carrying out their official duties.[1]

[1] You should be aware that District of Columbia Rule 1.6(k) states: "The client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order." D.C. RULES OF PROF'L CONDUCT R. 1.6(k) (2015). Based on Comments 38 and 39 interpreting that provision of the rule, the client may be the Executive Branch or the Department of Justice. The analysis in this memorandum would apply regardless of which entity is deemed to be the client.

Identifying the client is an important consideration under the professional conduct rules because certain professional responsibility obligations – such as the duties of confidentiality and loyalty – are owed only to the client. As discussed further below, only the client may consent to the disclosure of confidential information and to a lawyer's representation despite a conflict of interest.

The Duty of Loyalty

Former Department attorneys owe the United States an ongoing duty of loyalty, which prohibits them from representing a client in a matter in which the attorney participated in a substantial way for the government, even when the lawyer's subsequent representation would not be adverse to the government. Courts have been particularly cautious in situations involving "side switching" government attorneys. The United States District Court for the District of Columbia emphasized that, in examining cases involving former government attorneys accused of "side switching," the court "must be especially careful" for two reasons:

> First, because government attorneys may have had access to more kinds of information in connection with the prior representations than private attorneys typically do, there is a greater potential for misuse of information – including information that is not necessarily confidential in nature – . . . in the revolving door context. Second, the public is generally more concerned about government improprieties than about private improprieties. Thus, the appearance problem is more severe because the public is likely to be more critical of the potential misuse of information.

United States v. Philip Morris, Inc., 312 F. Supp. 2d 27, 38 (D.D.C. 2004) (citing Brown v. D.C. Bd. of Zoning Adjustment, 486 A.2d 37, 49 (D.C. 1984) (en banc)); see also Woods v. Covington County Bank, 537 F.2d 804, 814 (5th Cir. 1976) ("The purpose most often ascribed to the limitation on former government attorneys is to avoid 'the manifest possibility that (a former government lawyer's) action as a public official might be influenced (or open to the charge that it had been influenced) by the hope of later being employed privately to uphold or upset what he had done.'") (quoting ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 37 (1931)).

Possible Disqualification of Former Department Attorney from Handling a Matter

The applicable rule is Model Rule of Professional Conduct 1.11(a)[2] which provides:

> Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
>
> (1) is subject to Rule 1.9(c); and
>
> (2) 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, to the representation.

MODEL RULES OF PROF'L CONDUCT R. 1.11(a) (2016).

Although Model Rule 1.11 prohibits a lawyer from representing a client in certain circumstances, some jurisdictions' versions of the rule prohibit any employment whether or not deemed to be legal representation. See, e.g., D.C. RULES OF PROF'L CONDUCT R. 1.11(a) (2015). Accordingly, one issue to consider is whether a former Department attorney would be representing a client at her new job. The fact that a new position is not specified as an attorney position is not dispositive of whether an attorney is "representing a client" under Model Rule 1.11. For instance, an attorney acting as a consultant could be deemed to be "representing a client" within the meaning of the rule. See, e.g., Comm. for Washington's Riverfront Parks v. Thompson, 451 A.2d 1177, 1192 (D.C. 1982) (determining that a former city attorney would be deemed to have violated the precursor to D.C.'s Rule 1.11—which bans "accepting employment" related to cases handled while in government practice rather than "representation" related to such cases—when he participated in behind-the-scenes counseling that assisted his firm's representation of a client in an administrative hearing but for the fact that the matter involved in the hearing was not the same as the matter he handled while in government practice); Pa. Bar Assoc. Comm. on Legal Ethics and Prof'l Responsibility Op. 94-132 (1994) (noting that former Department attorney was not permitted to act as "legal consultant" for opposing party on a case where she formerly represented the government); MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2016) (concerning the scope of representation of a client and expressly prohibiting a

[2] Because most jurisdictions have adopted some form of the ABA Model Rules of Professional Conduct, this memorandum will focus on those rules to set forth generally Department attorneys' professional responsibilities arising out of their work with the Department. When analyzing a specific professional responsibility issue, attorneys should review the rules of the applicable jurisdiction, which may involve a choice of law analysis to determine which jurisdiction's rules apply.

lawyer from counseling or assisting a client in illegal conduct–thus implying that counseling is part of representation of a client).[3] In this regard, you also should consider that professional responsibility issues may arise if you continue to advise the Department after your departure about matters you handled while at the Department. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7 (2016) (addressing concurrent conflicts of interest); MODEL RULES OF PROF'L CONDUCT R. 1.16(d) (2016) (addressing duties to client upon termination of representation).

Moreover, you should bear in mind that for purposes of a conflict of interest analysis under Model Rule 1.11, the scope of an attorney's "representation" is more broadly defined than under 18 U.S.C. § 207 and includes any behind-the-scenes legal work that an attorney may be performing for her new client. 18 U.S.C. § 207(a)(1) (barring, inter alia, an individual from representing any other person before a Federal department, agency, or court in connection with particular matters involving specific parties in which that individual participated "personally and substantially" while serving in her government position).

Another issue to consider is whether an attorney's work for the Department constituted work on a "matter." Model Rule 1.11(e) defines "matter" as including "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 . . . any other matter covered by the conflict of interest rules of the appropriate government agency." MODEL RULES OF PROF'L CONDUCT R. 1.11(e) (2016). Generally, participating in litigation in any capacity would constitute participation in a matter, while doing regulatory work ordinarily would not be deemed work on a matter. See, e.g., Philip Morris, Inc., 312 F. Supp. 2d at 39-40 (recognizing generally that work on a rulemaking would not constitute participation in a matter, but found that an attorney who spent many hours working on a rulemaking that was the subject of a prior litigation was deemed to have participated in a matter under District of Columbia Rule 1.11(a), even though the attorney never entered an appearance in the case); compare In re Sofaer, 728 A.2d 625, 627 (D.C. 1999) ("The contours of the [Pan Am 103] bombing and the government's investigation and related responses to it were defined sharply enough to constitute a 'matter' under the Rule."). Thus, each situation will have to be evaluated on a case-by-case basis. Ordinarily, conducting investigations and litigating a case would constitute participation in a matter under the relevant rules. On the other hand, providing general training would not constitute participation in a "matter."

A related issue is whether the former Department attorney's work for the Department and a new employer would constitute work on the same "matter." Comment [10] to Model Rule 1.11 provides some guidance in determining whether two particular matters are the same:

[3] As discussed further below, even if an attorney is not deemed to be representing a client, former Department attorneys still may be limited in their new employment by their duty to not to use or disclose confidential information of the United States under Model Rules 1.6 and 1.9(c).

> [A] "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

In an ABA opinion discussing the predecessor to Model Rule 1.11 (Disciplinary Rule 9-101(B)), the ABA set forth the following definition of matter:

> Although a precise definition of `matter' as used in the Disciplinary Rule is difficult to formulate, the term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term matter may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter. By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulation, procedures, or points of law; the same `matter' is not involved because there is lacking the discrete, identifiable transaction or conduct involving a particular situation and specific parties.

ABA Formal Op. 342 (1975). See, e.g., United States v. Villaspring Health Care Ctr. Inc., Civ. No. 3:11-43-DCR, 2011 WL 5330790, at *4-5 (E.D. Ky. Nov. 7, 2011) (concluding that former Kentucky assistant attorney general's involvement in state criminal probe of health care center and subsequent representation of the center in federal False Claims Act suit constitutes the same matter; the state criminal investigation "led directly" to the federal suit and involves the same facts and defendant, and state and federal prosecutors "shared information and conferred about the merits"). Some jurisdictions' rules include a broader definition of matter, and prohibit an attorney from "accepting other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee." See, e.g., D.C. RULES OF PROF'L CONDUCT R. 1.11(a) (2015) (emphasis added).

In considering whether the work an attorney did for the government would constitute the same matter under Model Rule 1.11, courts also consider whether the former government attorney has confidential information from the former government client that may be useful to the new private client. See Dugar v. Bd. of Educ., No. 92 C 1621, 1992 WL 142302, at *4-6 (N.D. Ill. June 18, 1992) (finding that a former Board of Education attorney should be disqualified even though the matter prompting the disqualification motion had not even arisen at the time she was employed with the Board because she was privy to discussions regarding the Board's position on matters potentially related to the litigation at issue); see also Sofaer, 728

A.2d at 628 ("Rule 1.11(a) bars participation in overlapping government and private matters where 'it is reasonable to infer counsel *may have received* information during the first representation that might be useful to the second'; 'the actual receipt of . . . information,' and hence disclosure of it, is immaterial.") (citations omitted) (emphasis added).

The other component of the rule requires that an attorney have participated "personally and substantially" in the matter. Although the term "substantially" might suggest that a former government attorney's participation in a prior matter must be extensive to justify disqualification, the case law demonstrates otherwise. The "substantial" participation requirement means participation in the substance of the prior matter and does not require some particular quantum of effort expended. The rule requires some involvement but does not require that the attorney was directly responsible for the prior matter in question. See United States v. Smith, 995 F.2d 662, 675-76 (7th Cir. 1993) (finding that an AUSA's involvement was "personal" and "substantial" under Illinois Rule of Professional Conduct 1.11(a) (similar to the Model Rule 1.11) when he supervised another AUSA in charge of investigating a related case, attended high level meetings about the case, and signed an immunity agreement for one of the government's witnesses); Sec. Investor Prot. Corp. v. Vigman, 587 F. Supp. 1358, 1367 (C.D. Cal. 1984) (finding that, when the SEC Regional Administrator signed a complaint and trial brief, he assumed the "personal and substantial responsibility of ensuring that there existed good grounds to support the SEC's case"); Sofaer, 728 A.2d at 627 (finding that attorney participated personally and substantially in Pan Am 103 matter when he reviewed and approved a memorandum recommending a response to a subpoena related to that matter, gave advice on whether or how fully to inform the designated witness in the subpoena matter about a particular meeting, and participated in meetings discussing the progress of the Pan Am 103 criminal investigation and related diplomatic actions).

Any analysis concerning whether an attorney participated personally and substantially in a matter under the relevant professional responsibility rules will have to be made on a case-by-case basis. Under Model Rule 1.11(a), if there is a conflict of interest based on the prior government representation, the United States may consent to the former Department attorney's participation. On the other hand, some jurisdictions' post-employment rules do not provide that the government may consent to the conflict, thereby indicating that participation in the matter is barred completely if there is a conflict of interest. See, e.g., D.C. RULES OF PROF'L CONDUCT R. 1.11(a) (2015).[4]

[4] An attorney also should consider 18 U.S.C. § 207(a)(1), which bars, inter alia, an individual from representing any other person before a Federal department, agency, or court in connection with particular matters involving specific parties in which that individual participated "personally and substantially" while serving in his government position. See United States v. Trafficante, 328 F.2d 117 (5th Cir. 1964) (disqualifying former Internal Revenue Service attorney who handled income tax claims against defendants under both Section 207 and the rules of professional conduct from representing defendants in subsequent suits regarding balance due on those income taxes); United States v. Martin, 39 F. Supp. 2d 1333, 1334-35 (D. Utah 1999) (disqualifying former AUSA and

(continued . . .)

Possible Disqualification of Former Department Attorney's New Employer

If a former Department attorney had a conflict of interest in handling a particular matter for a new employer, the rules also would prohibit the attorney's new employer from participating in such a matter unless the former Department attorney is screened and is apportioned no fee from the matter, and the new employer notifies the government of the screening measures. See MODEL RULES OF PROF'L CONDUCT R. 1.11(b) (2016). The screen must be erected promptly. See Analytica, Inc. v. NPD Research Inc., 708 F.2d 1263, 1267-68 (7th Cir. 1983) ("[I]t was not enough that the lawyer 'did not disclose to any person associated with the firm any information . . . on any matter relevant to this litigation,' for 'no specific institutional mechanisms were in place to insure that information was not shared, even if inadvertently,' until the disqualification motion was filed – months after the lawyer had joined the firm."); see also United States v. Goot, 894 F.2d 231, 235 (7th Cir. 1990) ("The predominant theme running through this court's prior decisions is that disqualification is required when screening devices were not employed *or were not timely employed*.") (emphasis added); Atasi Corp. v. Seagate Tech., 847 F.2d 826, 831 (Fed. Cir. 1988) (noting that presumption of shared confidences was not clearly overcome because oral screening measures were not timely employed or adequately communicated); Cobb Publ'g, Inc. v. Hearst Corp., 907 F. Supp. 1038, 1047 (E.D. Mich. 1995) (opining that delay of 11 or 18 days in setting up ethical wall is too long); In re Essex Equity Holdings USA v. Lehman Bros., Inc., 909 N.Y.S.2d 285, 391,393 (Sup. Ct. 2010) (disqualifying law firm for failure to comply with screening requirements when former AUSA who participated in a criminal investigation was subsequently employed by law firm representing persons in a related arbitration; notification to law firm employees of the screening was "vague, untimely and ineffective" and there was "interaction rather than isolation between the conflicted attorney and others involved in the matter").

concluded that his consultation on the issuance of subpoenas and other supervisory actions, "taken as a whole, creates the 'reasonable appearance' of significance" that amounted to personal and substantial participation under Section 207).

Prohibition on Use of Confidential Government Information

This rule also imposes specific prohibitions on a former government attorney's use of confidential government information. Model Rule of Professional Conduct 1.11(c) provides:

> 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. As used in this Rule, the term "confidential government information" means information that 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. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

MODEL RULES OF PROF'L CONDUCT R. 1.11(c) (2016).

This rule prohibits former Department attorneys from representing a client in a private matter that would be adverse to a person about whom they have confidential government information as a result of their employment with the Department. Confidential government information would include, for example, information protected by the Privacy Act and Fed. R. Crim. P. 6(e). Based on the proscriptions in this rule, and those discussed below regarding Model Rule 1.9(c), former Department attorneys likely would be precluded from participating in any matters in which confidential government information they learned while a Department attorney would be relevant to the private matter. See Kronberg v. LaRouche, No. 1:09cv947(AJT/TRJ), 2010 WL 1443934, at *4 (E.D. Va. Apr. 9, 2010) (disqualifying former AUSA who acquired confidential government information about a defendant during the AUSA's participation in a criminal prosecution over 20 years earlier from representing a government witness in a subsequent lawsuit against the defendant; claim of lack of memory of confidential government information does not negate disqualification requirements under the Rule).

Restrictions on Negotiating for Employment

Model Rule of Professional Conduct 1.11(d)(2)(ii) also places restrictions on a Department attorney's ability to negotiate for private employment. This rule states in relevant part:

> Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee . . . shall not . . . 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. . . .

MODEL RULES OF PROF'L CONDUCT R. 1.11(d)(2)(ii) (2016). Accordingly, to the extent a Department attorney works on the substance of a particular matter, she would be prohibited from negotiating for employment with anyone who is involved in that same matter.[5]

Who May Consent to an Attorney's Representation Notwithstanding a Conflict of Interest?

The individual who may provide consent to a former Department attorney's work on a case notwithstanding a conflict of interest will vary and depend on a number of factors. In many instances, the United States Attorney for the former AUSA's Office or the Assistant Attorney General for the component in which the former Department attorney worked will be the individual who may provide the requisite consent, but depending on the nature of the conflict,

[5] Department attorneys also should bear in mind that the Standards of Conduct impose additional restrictions on their ability to negotiate for other employment. See 5 C.F.R. § 2635.604. This provision requires that any employee who is "seeking employment" with a particular employer must disqualify him/herself from participating in any matter involving the prospective employer.

The definition of "seeking employment" is broader than what might otherwise be the common-sense definition of the phrase. "Seeking employment" is defined in the Standards of Conduct to include situations in which an employee is engaged in negotiations with any person with a view toward reaching agreement regarding possible employment. However, it also includes an *unsolicited* communication with a person *or* an intermediary regarding possible employment with that person, if that communication solicits any response other than a rejection. Id.

For further guidance on this issue, current and former Assistant United States Attorneys should consult with the Office of General Counsel in the Executive Office for United States Attorneys; current and former Main Justice attorneys should consult with the Departmental Ethics Office in the Justice Management Division.

someone at a higher level may need to provide consent.

The Duty to Not to Use or Disclose Confidential Information

Confidentiality is one of the core duties an attorney owes her client. See In re Am. Airlines, 972 F.2d 605, 619 (5th Cir. 1992) ("[A] lawyer's obligation of confidentiality must be seen as part of the lawyer's primary duty of loyalty . . . ."); Greig v. Macy's Northeast, Inc., 1 F. Supp. 2d 397, 400 (D.N.J. 1998) (stating that the duty of confidentiality is "basic to the legitimate practice of law").

This duty is codified in Model Rule of Professional Conduct 1.6(a), which provides, in relevant part, that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . [or] the disclosure is impliedly authorized in order to carry out the representation. . . ." MODEL RULES OF PROF'L CONDUCT R.1.6(a) (2016); see also MODEL RULES OF PROF'L CONDUCT R. 1.8(b) (2016) ("A lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."). "The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 3 (2016), (emphasis added); see Stepak v. Addison, 20 F.3d 398, 406 (11th Cir. 1994).

Other precedent provides that information obtained in the course of an attorney-client relationship is required to be "sheltered from use," regardless of who else may know of it, because of the duty of loyalty inherent in that relationship. See Brennan's, Inc. v. Brennan's Rests., Inc., 590 F.2d 168, 172 (5th Cir. 1979) (rejecting the idea that an attorney is relieved from his duty to protect confidential information because both parties are privy to it as a result of prior joint representation.). The phrase "information relating to the representation" has been interpreted to include a broad spectrum of information, including information that may not itself be protected but reasonably could lead to the discovery of such information by third persons. See MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 4 (2016); ABA Comm. on Ethics and Prof'l Responsibility, Formal Ethics Op. 98-411 (1998) (noting that, in lawyer-to-lawyer consultations, use of hypotheticals that enable another lawyer to determine identity of one's client may, under some circumstances, violate Rule 1.6); United States v. Stepney, 246 F. Supp. 2d 1069, 1073-4 (N.D. Cal. 2003) ("The ethical rules governing attorneys require that all information pertaining to a client's case be kept confidential."); D.C. Bar Ethics Op. 312 ("[T]he critical point in identifying secrets is not whether the information came from the client or who else knows it, but whether it was `gained from the professional relationship' and (1) the client has asked that it be held inviolate or (2) revelation of it would be embarrassing, or likely detrimental to the client").

Some courts also have concluded that information in the public record does not lose its confidential status. See NCK Org. v. Bregman, 542 F.2d 128, 133 (2d Cir. 1976) ("The client's privilege in confidential information disclosed to his attorney 'is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources

for such information, or by the fact that the lawyer received the same information from other sources.'") (quoting Emle Indus., Inc. v. Patentex, 478 F.2d 562, 572-73 (2d Cir. 1973) (quoting H. Drinker, Legal Ethics 135 (1953)); Buckley v. Airshield Co., 908 F. Supp. 299, 306 (D. Md. 1995) (client's privilege in confidential information is not lost when the information is part of the public record); Cohen v. Wolgin, CIV. A. No. 87-2007, 1993 WL 232206 (E.D. Pa. June 24, 1993) (same); In re Anonymous, 932 N.E.2d 671,674 (Ind. 2010) ("the Rules contain no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources"); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Marzen, 779 N.W.2d 757,766 (Iowa 2010) ("the rule of confidentiality is breached when an attorney discloses information learned through the attorney-client relationship even if that information is otherwise publicly available").

Does the Duty of Confidentiality Change Once an Attorney Leaves the Department?

The duty of confidentiality continues after the attorney-client relationship has terminated. See MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 20 (2016); Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998) (opining the attorney-client privilege survives the client's death). Hence, former government attorneys continue to be bound by the strictures of the confidentiality rule. See, e.g., D.C. Bar Ethics Op. 297 ("[W]e believe that the inquirer [a former government attorney] must honor his confidentiality obligations to the government . . . as a general matter[.]"). Consequently, even after attorneys leave the Department, they may not reveal the United States' confidential information without the United States' consent.

Likewise, former Department attorneys may not use confidential information to the United States' detriment unless the United States consents or the information is "generally known." See MODEL RULES OF PROF'L CONDUCT R. 1.9(c)(1) (2016) ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to the client, or when the information has become generally known . . . ."); MODEL RULES OF PROF'L CONDUCT R. 1.9(c)(2) (2016) ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client.").

The term "generally known" is not clearly defined in the professional responsibility rules or the jurisprudence. Some courts and legal treatises have concluded that information does not become "generally known" simply because it is made public. Rather, the manner of its disclosure and subsequent accessibility are the determinative factors:

> Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositories such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and

> similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known . . . .
>
> A lawyer may not justify adverse use or disclosure of client information simply because the information has become known to third persons, if it is not otherwise generally known.

RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 59, cmt. d (2000). One district court has opined:

> Advice and information about how to conduct lemon law litigation against various manufacturers, including GM, along with form pleadings and interrogatories, proliferate in legal periodicals, practice manuals, law review articles, textbooks, and through bar association conferences and publications. However, this is true of just about every type of matter there is to litigate. The information age has not neglected the legal profession, and step-by-step checklists on litigating a particular type of case can be found in every law library and computerized legal database in the country. The fact that this type of information is publicly available does not make "information relating to the representation" of GM "generally known." Rule 1.9(a)(2) also contemplates knowledge of the decision-making processes of GM personnel regarding legal claims, the internal workings of the GM organization, the particular personalities, expectations, negotiating techniques, and management styles of GM personnel, historical and technical information regarding GM vehicles, and GM claims handling processes and procedures. This type of information is protected by the attorney-client relationship whether the matter involves a complicated legal issue, such as in antitrust law, or whether it involved the "*pro forma*" litigation of lemon law claims. It would be available to someone whose extensive experience as a local counsel for GM legal and technical personnel and who was trusted enough for his firm to be one of only a few granted blanket settlement authority by GM, but it is not generally known.

Steel v. Gen. Motors Corp., 912 F. Supp. 724, 739 (D.N.J. 1995). In discussing the term "generally known," the D.C. Bar has opined:

> We stress here that we are here referring to information that is truly generally known so that the lawyer in question is certain that the information is not new to the person whom the lawyer is discussing it with. For example, if the press has widely reported that a particular corporation was one of several that had been sued by a federal agency, then it could hardly be argued that a moving lawyer had revealed a 'secret' by mentioning that he or she had worked on that litigation at the existing firm.

See D.C. Bar Ethics Op. 312.

Importantly, although a former Department attorney may be permitted to use "generally known" information learned while working for the Department, she would be prohibited by Model Rules 1.6 and 1.9(c)(2) from revealing the information without the United States' consent. The person who could consent to the disclosure of confidential information would be the same person who could consent to representation by a lawyer notwithstanding a conflict of interest.

The Duty of Confidentiality Applies in Every Context

Department attorneys are prohibited from disclosing the United States' confidential information regardless of the circumstances. These circumstances would include making statements when employed as a television commentator or consultant, testifying at a Congressional hearing (even when appearing pursuant to a subpoena), speaking to the media or in any other oral presentation. See D.C. Bar Ethics Op. 288 (opining that attorney had professional responsibility obligation to seek to quash or limit a Congressional subpoena seeking attorney's files relating to representation of a current or former client containing confidences or secrets client did not want disclosed and that absent a judicial order forbidding disclosure of the information, an attorney may, but is not required to, disclose information if Congress overrules the attorney's objections, orders the production of the documents and threatens to hold the attorney in contempt for failure to comply with the subpoena). The prohibition also applies when a former Department attorney participates on social media or writes a book, treatise, article, or any other similar publication.[6]

[6] Department attorneys also should bear in mind that, prior to terminating employment with the Department, they are prohibited from making or negotiating "an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation." See MODEL RULES OF PROF'L CONDUCT R. 1.8(d) (2016). Courts routinely have criticized lawyers who make arrangements to benefit from the publication of their client's stories. See, e.g., United States v. Hearst, 638 F.2d 1190, 1197-98 (9th Cir. 1980) (admonishing lawyer for contracting to write a book about his client's case while the representation was ongoing); The Florida Bar v. Niles, 644 So. 2d 504, 507 (Fla. 1994) (suspending lawyer for, inter alia, having his client interviewed for a television program without her consent).

The issue to consider is what information a former Department attorney may be prohibited from disclosing on social media, in an oral presentation or a publication without the United States' consent. By way of example, courts have found that government lawyers breached their confidentiality obligations when they disclosed their client's change in position (see Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850 (W. Va. 1995)) or revealed the existence of a search warrant to the subject before its execution. See In re McNerthney, 621 P.2d 731, 733 (Wash. 1980); see also Robinson v. Grievance Comm., 420 N.Y.S.2d 430, 432 (App. Div. 1979) (per curiam) (acquitting AUSA of bribery and obstruction of justice for divulging confidential information about a criminal investigation to organized crime figures, but disbarring AUSA for disclosing client confidences, misconduct, and other violations).

Other authorities suggest that a wide range of information concerning specific matters on which an attorney worked may constitute confidential information. For instance, the District Court for the District of Columbia has acknowledged that D.C. Rule 1.6 could be implicated by a Department attorney's disclosure of the government's nonpublic information relating to the strategies and tactics in cases on which the Department attorney worked. See Jacobs v. Schiffer, 47 F. Supp. 2d 16, 20 (D.D.C. 1999), rev'd in part on other grounds, 204 F.3d 259 (D.C. Cir. 2000). The Court opined that the Department attorney could disclose the information to his attorney, but the information could not be disclosed further. Id. at 21.

The District of Columbia Bar has concluded that the confidentiality duty includes attorney work product because "revelation of case facts, legal theory, speculations and legal or factual research could be embarrassing or detrimental to a client[.]" See D.C. Bar Ethics Op. 223 (1991). The District of Columbia Court of Appeals has concluded that client confidences also may include information pertaining to the conduct of the client. See In re Gonzalez, 773 A.2d 1026, 1030 (D.C. 2001) (finding that an attorney impermissibly disclosed client confidences when in moving to withdraw his representation, he alleged that his client "not only missed appointments and failed to provide necessary information, but also 'made misrepresentations to her attorneys.'"). In most instances, however, an attorney's general legal knowledge and expertise, and her knowledge of a client's business or industry is not considered to be confidential client information. See ABA Formal Op. 97-409 n.17 (1997) ("[a government lawyer's] general knowledge of policies and practices of her former agency gained through employment by or representation of that agency . . . would ordinarily not be considered disqualifying under Rule 1.9(c)."); D.C. Bar Ethics Op. 275 (1997) (general legal knowledge and general knowledge about how an industry operates is not a client confidence).

At bottom, whether a former Department attorney properly may disclose certain information on social media, orally or in writing likely would depend on the specific facts of each situation. Because the scope of confidential information is so broad, there would be few situations in which a former Department attorney would not have at least some confidential information about a matter she handled for the Department. Moreover, it may be difficult to divorce the confidential information an attorney learned while working for the Department from the publicly available information, such that an attorney's public statements would be free from the effect of the confidential information.

Conclusion

The rules on confidentiality and conflicts of interest may impose substantial restrictions on a Department attorney's post-employment activities.[7] PRAO is available to provide specific advice on the issues discussed in this memorandum to individual Department attorneys before they leave the Department.

[7] This memorandum is not intended to include a discussion of every statute or professional conduct rule that may be implicated upon your departure from the Department. There may be other statutes or rules that you should consider. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.6 (2016) (generally prohibits an attorney from making an extrajudicial statement that has a substantial likelihood of materially prejudicing an adjudicative proceeding in which the attorney is participating or has participated).