



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1205 (10/26/2020)

Topic: Government Employee Negotiating for Private Employment

Digest: A lawyer serving as in-house counsel for a federal agency may not negotiate for private employment with an organization that is an adverse party in litigation before the agency where the lawyer is participating personally and substantially in the litigation.

Rules: 1.0(l) & (n), 1.11

FACTS

1. The inquirer serves as in-house counsel for a federal agency. The inquirer would like to apply for a position with a private employer that is an adverse party in litigation before the agency.
2. The inquirer is “personally and substantially” involved in the litigation in which the private employer is an adverse party. The inquirer states, however, that the confidential information he obtained while representing the agency on the matter did not precipitate his interest in the private practice position. Moreover, if the inquirer were offered and accepted a position with the private employer, the inquirer would not participate in the matter.

QUESTION

3. Do the New York Rules of Professional Conduct bar a lawyer in public service from applying for a job with the private employer who is an adverse party in litigation before the agency?

OPINION

4. Our jurisdiction is limited to addressing provisions of the New York Rules of Professional Conduct (the “Rules”). We assume for purposes of this opinion that the inquirer’s proposed activities comply with any other applicable laws and regulations, but we do not analyze them. *See* N.Y. State 1148 ¶ 4 (2018).
5. Rule 1.11(d)(2) states that “[e]xcept as law may otherwise expressly provide, 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.” (Emphasis added.) The Terminology section of the Rules provides: “Person includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity.” Rule 1.0(n). The term “matter,” which

is broadly defined in Rule 1.0(l), “includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.”

6. As Comment [4] to Rule 1.11 recognizes, Rule 1.11 “represents a balancing of interests,” and notes that a “lawyer should not be in a position where benefit to [a private] client might affect performance of the lawyer’s professional functions on behalf of the government.”

7. The inquirer’s proposed conduct is prohibited by Rule 1.11(d)(2). Under the language in Rule 1.11(d), the inquirer is “currently serving as a public officer or employee.” He seeks to “negotiate for private employment with a[] person” (the private employer) “who is involved as a party ... in a matter in which the lawyer is participating personally and substantially.”

8. The fact that the inquirer’s desire to join the private employer is not connected to any confidential information obtained while working with the federal agency, and the fact that he would recuse himself from participating in the litigation if hired by the private employer, do not avoid the prohibition in Rule 1.11(d)(2). Furthermore, the restrictions in Rule 1.11(d)(2) cannot be waived by the government or the private employer. *Compare* Rule 1.11(a)(2) (expressly permitting appropriate government agency to give informed consent to former governmental lawyer’s conflict) *with* Rule 1.11(d)(2) (not mentioning consent). *See also* ABA 96-400, n. 6 (“[ABA Model] Rules 1.11 and 1.12 are actually more rigorous than 1.7(b), in that they define circumstances in which negotiations for new employment *cannot be pursued at all*”) (emphasis added).

9. Although the inquirer’s proposed conduct is prohibited by Rule 1.11(d)(2), that does not mean that he is perpetually forbidden from negotiating for employment with the private employer. Once the matter in which he is currently participating personally and substantially concludes, the inquirer will no longer be barred from negotiating for a position with the private employer. Furthermore, if the inquirer leaves the federal agency and is no longer a government officer or employee, he may ethically negotiate for a position with the private employer.

10. If the inquirer is ultimately hired by the private employer, he will need to comport with the requirements in Rule 1.11(a) through (c). *See, e.g.*, N.Y. State 1148 ¶ 11 (“a onetime government lawyer may represent clients adverse to the lawyer's former government employer unless that lawyer had a personal and substantial involvement in the same specific matter in which the lawyer now proposes to challenge the government's position”).

CONCLUSION

11. A lawyer serving as in-house counsel for a federal agency may not negotiate for private employment with an organization that is an adverse party in litigation before the agency where the lawyer is participating personally and substantially in the litigation.

(20-20)