



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

Opinion 1158 (12/11/18)

**Topic:** Conflicts, lawyer seeking new employment

**Digest:** Subject to provisions regarding protection of confidential information and personal conflicts of interest, and other Rules discussed in this Opinion, a lawyer who has worked on regulatory drafting as in-house counsel for a tax authority may seek new employment in a position seeking to change the current tax code and may work in such a position after leaving the agency.

**Rules:** 1.1(c)(2), 1.6, 1.7, 1.9(c), 1.11

**FACTS**

1. Inquirer is an attorney with the Internal Revenue Service. The lawyer worked on a range of matters over his career at the IRS, including recent work on certain regulatory provisions. Inquirer is seeking other employment, including in positions where the goal is to change the current tax code. As part of these efforts to seek employment, the inquirer would like to seek funding and engage in discussions with academics and practitioners to secure their participation in a project to reform the current tax code.

**QUESTION**

2. May inquirer communicate with funders to seek funding, and with academics and practitioners to secure their participation in the project, while still employed at the IRS?

3. May inquirer communicate with funders and others in connection with this project after he leaves the IRS?

**OPINION**

4. We address in this opinion only the provisions of the New York Rules of Professional Conduct (the “Rules”) and assume that the inquirer’s proposed activities comply with any other

applicable laws and regulations.

### ***Inquirer's Current Job-Seeking Activities***

5. There are four provisions of the Rules that may restrict the inquirer's current job-seeking activities, but none is likely to pose a significant limitation.

6. First, the inquirer may not disclose confidential information in violation of Rule 1.6. Confidential information "consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." Rule 1.6(a). We note, however, that confidential information "does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates." *Id.* While the inquirer must be careful not to reveal confidential information of the IRS in conducting a search for employment or funding, lawyers commonly are able to seek new employment, including establishing new businesses or practices, without disclosing confidential information of their current or prior clients.

7. Second, and most pertinent to the inquirer's current activities, Rule 1.11(d)(2) provides that 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." The term "matter" is defined in Rule 1.0(l) as "includ[ing] 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 other representation involving a specific party or parties." Work on generally applicable regulations such as the inquirer describes would not ordinarily "involv[e] a specific party or parties," and in any case Rule 1.11(e) provides that, for purposes of Rule 1.11, "the term 'matter' as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions." Thus, while the inquirer generally must be careful to avoid negotiating for private employment with persons involved in matters in which the inquirer is currently participating personally and substantially that involve specific parties or persons, the inquirer need not avoid such negotiations if the matter was limited to the rulemaking

function to which he refers.

8. Third, and more generally, Rule 1.7(a)(2) bars a lawyer from representing a client—in this case, the IRS—if a reasonable lawyer would conclude that “there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.” In this case, if the inquirer’s views on the need for reform of the tax code are so strongly felt that a reasonable lawyer would conclude that there is a significant risk that the lawyer’s professional judgment on behalf of the IRS in implementing tax legislation would be adversely affected, the inquirer would have a conflict under Rule 1.7. In most cases, if the inquirer reasonably believes, notwithstanding such a significant risk, that he is able to provide competent and diligent representation, the conflict would be subject to consent by an authorized representative of the employer. *See* Rule 1.7(b). The personal-conflict provisions of Rule 1.7 would be applicable to the inquirer even prior to his current search for new employment. Rule 6.4 reinforces the role of Rule 1.7 in connection with law reform activities such as those that the inquirer contemplates. That Rule provides at the outset, “A lawyer may serve as a director, officer or member of an organization involved in the reform of the law or its administration, notwithstanding that the reform may affect the interests of a client of the lawyer.” But the Rule notes that “[i]n determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7.”

9. Fourth and finally with respect to the inquirer’s current job-seeking activities, Rule 1.1(c)(2) states that “[a] lawyer shall not intentionally . . . prejudice or damage the client during the course of the representation except as permitted or required by these Rules.” In a prior opinion also dealing with conflicts of government lawyers, we noted that Rule 1.1(c)(2) applies only in ways related to the representation and does not preclude conduct prejudicial to a client unrelated to legal services being rendered. N.Y. State 968 ¶ 9 (2013). We did not then need to decide whether we agreed with that view and we likewise do not need to decide that question here, because we conclude that merely seeking to form a group to advocate for changes to the tax code is not “intentionally . . . prejudic[ing] or damag[ing]” the IRS. The IRS exists to implement the tax code as passed by Congress. In any case, all that inquirer is seeking to do while still at the IRS is explore putting together a group that would advocate for such changes. We are

convinced that such activities in this situation do not rise to the level of “prejudice or damage” within the meaning of Rule 1.1(c)(2).

### ***Inquirer’s Potential Future Activities***

10. With respect the inquirer’s potential future work in advocating for changes to the tax code, Rule 1.11 contains three restrictions relating to former government lawyers.

11. Rule 1.11(a)(1) requires that the inquirer comply with Rule 1.9(c), which in turn bars a lawyer from using confidential information to the disadvantage of a former client or revealing confidential information of the former client, with certain exceptions noted there. Rule 1.9 addresses former-client conflicts generally; Rule 1.11 addresses former-client conflicts of government lawyers. Comment [1] to Rule 1.9 specifies that former government lawyers “must comply with this Rule to the extent required by Rule 1.11.” Consistent with our analysis above of Rule 1.6, while the inquirer must be careful to protect the IRS’s confidential information in any future activities, we see nothing about advocating for changes in the tax code that necessarily requires use or disclosure of such information.

12. Relatedly, Rule 1.11(c) bars a lawyer from representing a private client adverse to a person about whom the lawyer has information that the lawyer knows is confidential government information. The inquirer does not suggest that adversity exists to any person about whom the inquirer has such information, so we detect no issue here.

13. Finally, Rule 1.11(a)(2) prohibits a former government lawyer, absent consent from the relevant agency, from representing any client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee; for purposes of this provision, “matter” has the same meaning discussed above, and in particular excludes agency rulemaking functions. Thus, this provision would not be implicated by the lawyer’s prior work on regulations, even if that work were related to the revisions to the tax code that the inquirer might seek. It seems unlikely that work seeking changes in the code would be the same matter as any matter that the inquirer worked on as an agency lawyer, but of course that is for the inquirer to determine.

## **CONCLUSION**

14. Subject to the observations made in this opinion regarding protection of confidential information, potential personal conflicts and other Rules, the inquirer is not restricted by the Rules in seeking to put together a project to advocate for changes in the tax code in which the inquirer would be involved after leaving the IRS, or in participating in such a project after the employment ends.

(16-18)