Reconsideration of Original Opinion, Issued November 16, 1989,
Upon Receipt of Additional Facts
September 13, 1990

LEGAL ETHICS OPINION 1299

APPEARANCE OF IMPROPRIETY-FORMER GOVERNMENT ATTORNEY: REPRESENTATION OF CLIENT BY FORMER GOVERNMENT ATTORNEY IN MATTER IN WHICH HE WAS ORIGINALLY INVOLVED WHILE A PUBLIC EMPLOYEE.

The Committee herewith renders its reconsideration of the question as originally posed, related to prior employment as a government attorney engaged in rulemaking for the federal government, based upon more recent and clarified recitation of additional facts, incorporating by reference the Committee's original opinion rendered on November 16, 1989.

As you recently have stated the facts, an attorney, while a federal civil service employee, provided legal services and supervised other attorneys who provided legal services to a federal agency in publishing a proposed regulation which attempted to define an operative term in a federal statute, which term was material to the agency's enforcement program as a result of a consent order negotiated by the attorney in question for the purpose of resolving litigation between the agency and private parties. After the agency received public comment in response to the proposed regulation, the attorney further counseled agency officials concerning (i) legal issues raised in the public comments and (ii) the effect of the consent order upon the agency's flexibility in interpreting the statutory term in question.

You have also indicated that, before the agency took any further action, the attorney transferred to a position with no responsibility for providing legal services to the agency concerning the interpretive regulation. After the attorney transferred, the agency amended the proposed regulation on two separate occasions, which amended proposals differed materially from the proposals for which the attorney had had responsibility. You note that, although the attorney knew of those developments through informal conversation with other government attorneys who continued to work on the rulemaking effort, the attorney in question had no contact with any agency official on the subject.

Further, you inform the Committee that, before the agency adopted its final rule, the attorney resigned from public employment. More than five months subsequent to the attorney's resignation, the agency adopted a final rule substantially in line with the third of its proposals rather than with the first of its proposals for which the attorney in question had substantial responsibility.

Finally, you indicate that, prior to accepting employment offered by a private party in litigation challenging the substance of the agency's adoption of the final rule as arbitrary, capricious, or inconsistent with law, the attorney requested an opinion from the agency's ethics official. The official rendered an opinion indicating that such employment would not violate federal statutory or regulatory restrictions on post-employment conduct by

former federal employees, but indicating also that the determination by the official did not address the requirements of legal canons of ethics which might be of concern in the attorney's situation.

You have requested that the Committee opine as to the propriety of the attorney's accepting employment by a private party who challenges the substance of the agency's adoption of the final version of the rule which you indicate differed materially from the initial proposed rule for which the attorney had substantial responsibility. You have specifically indicated that no challenge was being posed as to the procedure by which the agency adopted the rule.

The Committee reiterates its reference to DR:9-101(B) and Ethical Consideration 9-3 which provide that, in order to avoid even the appearance of impropriety, a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee. Furthermore, the Committee reiterates its opinion that the permissive nature of the United States Code's post-employment provisions does not vitiate the provisions of Virginia's Code of Professional Responsibility as embodied in DR:9-101(B). Finally, the Committee also reiterates its opinion which construes the term "matter" as broad enough to encompass rulemaking.

Under the specific additional and clarified facts of your inquiry, however, the Committee is of the opinion that the attorney's substantial responsibility in the matter of the proposed regulation ended when the new rule was ultimately promulgated utilizing a third draft for which the attorney had had no substantial responsibility and which differed substantially from the original [first] draft for which the attorney had had substantial responsibility. Thus, under the facts you have now stated, it is the opinion of the Committee that it would not be improper for the attorney to accept employment by private parties challenging the substance of the rule as arbitrary, capricious or inconsistent with the law, provided that the language of that rule was proposed and adopted subsequent to any proposal on which the attorney had worked and for which he had had substantial responsibility.

However, the Committee cautions the attorney that the Code of Professional Responsibility's mandate, exhorting the lawyer to preserve a client's secrets and confidences is not diminished by the passage of time. (See DR:4-101; LE Op. 1207, LE Op. 672) In addition, the Committee cautions that a balance must be struck between the mandates of DR:7-101, directing the attorney to zealously represent the client, and the requirements of DR:4-101. Thus, if the preservation of the former client's secrets and confidences negatively impacts upon the zealous representation of the new [private] client challenging the rule, the attorney's less-than-zealous representation would be improper.

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Legal Ethics Committee Notes. Rule 1.11 allows a law firm to avoid disqualification in certain circumstances if it screens the former government lawyer.