To Deal or Not to Deal:

DC Bar Ethics Opinion No. 391

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In October 2025, the Ethics Committee of the D.C. Bar released Opinion No. 391 (the "Opinion"). Most bar opinions do not get media coverage, but this one did. The reason was obvious even though the opinion was careful not to be overly specific: it "*related to prospective agreements between a government and lawyers or law firms with conditions that may limit or shape their law practices*." Put more directly, it had to do with the agreements some of the country's prominent law firms struck with the government in recent months, which potentially prohibits these firms from representing a client whose "*position is directly adverse to a program or policy in which the government in question has a strong interest*."

The Opinion was the result of "*inquiries from bar members*," the Committee wrote, although one can imagine that those "inquiries" were not from people in favor of the law firms' agreements or from those seeking to enter into agreements themselves. It was no doubt delicate ground for the Committee to cover and it was appropriately careful not to name names, or throw stones. The agreements have drawn vehemently opposing views and much of that is rooted in political questions. But some of it is rooted in ethical questions and the Committee touched on issues that are deeply relevant to all practitioners.

There are some things about the circumstances the Committee wrote about that are undeniable. One is that lawyers in private practice have been frequently called upon to represent the federal government and doing so does not automatically create an insurmountable conflict or an ethical dilemma. Major law firms have often found themselves representing the government in some matters while simultaneously representing clients in other matters where the government is on the other side. That may or may not pose conflicts. Whether it did largely depended on how connected the matters were, with lawyers avoiding matters with direct adversity or where one matter was substantially related to another.

This "relational" test was historically made easier by a view that the government was not a monolith. Thus, a firm advising the federal government in trade negotiations would not view itself as conflicted if it also represented a client in seeking antitrust signoff for a merger. But as the Committee noted in the Opinion, those lines are not so clear now given that the current position of the U.S. Department of Justice "*is that a private lawyer's adversity to any element of the federal government constitutes a conflict with the entire executive branch, if not the entire U.S. government*."

That raises a whole host of question. For example, the law firms who made agreements with the federal government have robust white collar practices and represent their clients in matters adverse to the Department of Justice. Are they now conflicted out of that representation by virtue of an unrelated international trade assignment? It is hard to believe that law firms would see it that way – it would mean sacrificing entire white collar practices. And nothing about the last several months suggests that the Department of Justice's broad view of conflicts is actually being enforced.

[1] The views contained in this article are solely those of the author.

But is this broad view the source of the ethical dilemma even if it is not being enforced? The Committee seems to think so, in part because of the uncertainty in *whether* the policy would be enforced and *when*.

One of the widely accepted ways of overcoming a potential conflict is seeking informed consent from the client. But what happens if a lawyer has no idea what a conflict is or whether that view of conflict will change? The Committee seemed troubled by that question:

> *As for the waiver option, if a law firm does not know what actions on their part might trigger adverse government action, the firm may be unable to provide the requisite "full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation." That would mean, in turn, that clients could not provide the informed consent that is a prerequisite to a valid waiver. Similarly, if the precise nature and breadth of the commitments made by a law firm are unclear or are subject to change unilaterally by the government, the firm cannot be confident of its ability to remove the cause of the conflict because the conflict may reignite with little or no notice.*

All of these pose difficult ethical questions. So does one other issue the Committee raised: assessing how a lawyer acts when their personal interests are at stake.

Some of the law firms who have entered deals have defended them as being necessary to preserve the viability of their firms. Critics have pushed back on that, pointing to the continued viability of the firms who chose to sue the federal government instead of striking a deal. Those critics have accused the firms of acting primarily in their financial interests.

The Committee seemed concerned with that issue as well, noting:

> *Conflicts of interest are not limited to adversity between a lawyer's clients. A lawyer's own financial, personal, or other interests also may create a conflict (sometimes called a "personal interest" conflict) between her clients and her.*

This is difficult terrain to navigate. Being a lawyer is a job. We all have financial interests we think about. Law firms are surely in the business of advancing their clients' interests, but they are handsomely rewarded for doing that. Is it a conflict if a lawyer cares about the reward too? Maybe that depends on how you view the lawyer's role, something that has drawn much debate recently.

In the end, the Committee was notably non-committal:

> *Lawyers and law firms that contemplate agreeing with a government to conditions that may limit or shape their law practices must examine whether such conduct will create issues under the Rules of Professional Conduct. This might include conflicts of interest for engagements (existing or new) adverse to that government, improper restrictions upon the lawyers' right to practice, or interference with the lawyers' professional independence. If a conflict is found to exist, obtaining a valid waiver may be difficult. Lawyers who represent the government in seeking, negotiating, or implementing such agreements also must consider their responsibilities under the Rules of Professional Conduct.*

In short: "you should all be thinking about it." The answers are not cut and dry. And here, those questions are particularly challenging because they are wrapped up in broader issues about politics, values and the country's direction. One thing is certainly true: it is rare for law firms to be so central to that political debate. But that spotlight does not appear to be diminishing.