

The Revolving Door: 6 Tips For Prosecutors Switching Sides

By **Stewart Bishop**

Law360, New York (May 27, 2016, 3:43 PM ET) -- The lure of a well-compensated gig in private practice has for years coaxed many a government lawyer to make the move through the revolving door to the defense side, but former prosecutors say departing public attorneys should be prepared to roll up their sleeves and embrace a different frame of mind.

Assistant U.S. attorneys, U.S. Securities and Exchange Commission enforcement lawyers and other attorneys from government agencies large and small, state and federal, are often eager to parlay considerable trial experience into a lucrative career in a private white collar or complex civil litigation practice. However, former government attorneys are often hit with a whole new set of challenges in areas such as bringing in business or effectively communicating with corporate and individual clients.

Former federal prosecutor Robert A. Mintz, now chair of the government investigations and white collar group at McCarter & English LLP, said government attorneys should be prepared to develop some new skill sets as lawyers on the private side.

“In order to succeed, it requires not only the ability to be a good lawyer and handle yourself in courtrooms and depositions, but it also involves the ability to work closely with your client, to try to understand their needs and their concerns, including often their emotional state, and to try and balance all of that with your goal of getting the best outcome for your client,” Mintz said.

Here, Law360 takes a look at what it takes for a government attorney to make the leap successfully.

Get Your Head In A Different Game

It may seem simple, but experts say it’s important to get out of the mindset of a prosecutor and into that of a defense attorney. Richard Roper, a former U.S. attorney for the Northern District of Texas, now of Thompson & Knight LLP, said you need to recognize you are no longer on the government’s team.

“Be prepared to zealously challenge their theories and acknowledge that your former governmental colleagues can be wrong,” Roper said.

Former Manhattan Assistant U.S. Attorney David I. Miller, now of Morgan Lewis & Bockius LLP, said when you’re a federal prosecutor, you work with agents from various federal agencies, but you all are serving the public. That means that while you coordinate and report to your supervisors, you are not beholden to a single client calling you with particular demands.

“So when you’re in the government, your responsibility may be to do justice, or your responsibility may be to work with your law enforcement partners in achieving a certain resolution for a case. But when you’re in private practice, your responsibility is to serve your client as zealously and diligently as possible, and hopefully to achieve a successful result,” Miller said.

Watch Your Tone

Making the switch from representing the government, aka the public, to advocating on behalf of individuals and companies means you’re also going to have to change the way you interact with your client.

Reid J. Schar of Jenner & Block LLP, a former federal prosecutor who led the corruption trials of former Illinois Gov. Rod Blagojevich, said that in government, rarely does your client knock on your door and say, "I wasn't happy with that cross-examination," or "I didn't like the way you charged that case," whereas in private practice, for the first time, you'll have clients you're trying to satisfy who won't hesitate to pick up the phone and call you.

“It does require an acknowledgement and work on making sure — because you are now working for that client — that the client is satisfied and up to date on what’s happening and getting what they need. And that you’re being efficient with time and efficient with costs, all the things that you’ve got to manage in the private sector,” Schar said. “That is a very new experience for many.”

White collar attorney Carolyn F. McNiven of Greenberg Traurig LLP, who spent over 13 years as a federal prosecutor in Chicago, said former prosecutors may need to adjust how they speak about cases when talking to clients. Prosecutors tend to be blunt in their assessments about consequences because they’re used to speaking to criminal defendants across a table, McNiven said.

“You have to adopt a very different bedside manner when you’re talking to a client, particularly an individual. Although you may say the same things, you may be saying it in a different way. So tone and delivery are particularly important, particularly around bad news,” McNiven said.

Dealing with an institutional client can bring its own set of challenges. McNiven said you need to consider the practicalities of your advice when talking to a corporate client, and to the greatest extent possible understand how it will be received and make sure it is put in a way that maximizes its potential for actually being followed.

Enroll In Business Development 101

Being a former prosecutor has some major advantages going into private practice, including significant trial experience and an insider’s knowledge of how sections of the government operate. But when it comes to bringing in work, ex-prosecutors can be at a disadvantage, having often had little to no experience in business development.

Unlike a lateral hire, prosecutors who leave the government generally don’t have a book of business to bring with them, said Joseph A. Fazioli of Dechert LLP, who spent 12 years as an assistant U.S. attorney for the Northern District of California.

“Government attorneys in some instances have a very high upside, but when they return to private

practice, they have to be able to paint the picture, both inside the firm and outside the firm, of how they can support existing clients as well as grow and develop future business opportunities for the firm,” Fazioli said. “It really requires you to exercise a set of entrepreneurial skills, and taking the initiative, which is not necessarily present in the public sector.”

McNiven said part of developing strong business growth skills is figuring out who does a good job and watching what they do. While everyone does things differently, when it comes to attracting new business to the firm, take a look at what others at your firm are doing and figure out what you’re comfortable with and what makes sense to you, she said.

“The most basic thing is to ask for business. People are often reticent to do that, so make sure that you remember to ask, and don’t be too proud to ask for something small,” McNiven said.

Miller said business development is an important part of what a white collar practitioner does and in order to be successful at it you have to do it constantly.

“When you return to private practice or if this is your first time in private practice at a firm, you’re going to realize very quickly that you should spend a significant amount of your free time engaged in business-development-related activities,” Miller said. “Whether it be networking, pitches, meeting with potential clients, speaking at seminars, writing articles, or some would say more significantly, marketing yourself internally within a large firm.”

Spread Out

So you’ve been hard at work for years litigating complex criminal fraud cases and racking up trial experience, meaning it’s best to focus solely on white collar matters in private practice, right? Wrong, said Edgar Bueno of Morris Manning & Martin LLP, a former Georgia federal prosecutor.

“Be prepared for affirmative civil enforcement. ... You are in for a rude awakening in private practice if you think you can focus exclusively on criminal matters,” Bueno said. “In the current enforcement environment, a successful white collar defense attorney should have prosecutorial experience but must also be well-versed in civil procedure and resolution.”

He said this approach is all the more relevant in light of recent statements by Deputy U.S. Attorney General Sally Quillian Yates regarding her namesake Yates Memo, that there will be greater coordination between the civil and criminal divisions of the Department of Justice at the beginning of an investigation.

Schar said former prosecutors need to be strategic. Many ex-federal prosecutors leave for the defense side thinking they’ll just do white collar, but a better way can be to focus not only on white collar but also on complex civil litigation. The skill set you bring as a prosecutor and a trial lawyer is completely applicable to the complex civil practices of most firms, he said.

“If you really just focus on white collar, what you end up doing is leaving half of what’s really available in terms of practice area unexplored,” Schar said. “So I think the real strategic thinkers in this area are the ones that go out and try to ensure that their work in the civil arena is heavily litigation oriented with white collar investigations as well.”

Remember Where You Came From

Simply because you hung up your government spurs doesn't mean you're free and clear of all of your obligations as a prosecutor. Roper said to be mindful of conflicts and disqualifications based on your prior government service and accept that you may never be able to handle a matter that in any way relates to a case that you handled as a prosecutor or that falls within the statutory cooling-off period requiring disqualification.

"A zeal for business can blind some attorneys from recognizing legal conflicts and issues that may still exist, and dealing with matters touching on your prior government service could lead to sanctions and even criminal prosecution," Roper said.

By ignoring these obligations, you can inflict immediate and irreparable damage to your reputation, your law license, your firm's reputation or a client's case, or worse, end up in jail, according to Bueno.

He suggested beginning the process of clearing up conflicts with your new law firm as soon as is practicable.

Sell Yourself To Your New Firm

While bringing in new business is an important aspect to private sector work, of equal importance is that former prosecutors market themselves inside their new firm, and let partners and existing clients know about their expertise and how they can help.

Fazioli said when prosecutors leave the government and join large global law firms, it can be a challenge to integrate with the firm's partners, who are spread out in numerous offices across the world.

"That really requires initiative to make oneself known and to introduce yourself to others. To pave the way for even tighter integration, I was advised that I would need to be able to paint the picture for colleagues of how I could support existing clients as well as grow and support future business opportunities for the firm," Fazioli said.

McNiven said that former prosecutors are attuned to getting in touch with other former prosecutors to get referrals in instances of joint defense situations or conflicts, but to really be successful, you need to go beyond that and market yourself within your own firm.

"You want to educate yourself as much as possible about your partners and the big firm clients and seek the advice of the folks that are essentially responsible for your success, whether it be the manager of a particular office or the head of a particular practice group, and pick their brains about how to approach the other members and what works in the firm," she said.

--Editing by Jill Coffey.