Restricting The Private Law Practice of Former Government Lawyers

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In the post-Watergate era, there has been rising attention to the ethical standards by which lawyers conduct themselves. Lawyers as a class, as d'Tocqueville noted long ago, have been specially regarded in our society since the early days of the Republic. With the revelation of the disproportionately large role played by lawyers in Watergate-type abuses, however, followed closely by lurid disclosures of corporate bribery of government officials at home and abroad, public skepticism about lawyers has unquestionably risen.

One product of this skepticism is renewed attention to what is derisively termed the "revolving door" through which lawyers shuttle back and forth between government service and private industry. Because of a perception that this transit is both unseemly and unhealthy for the body politic, there have been calls to impose drastic new restrictions on lawyers leaving public office and on the law firms or employers with whom they may become affiliated.

Many people regard "Washington lawyers" as a special breed—trading on political influence rather than traditional professional skill. It will be quite surprising for those people to learn that the Legal Ethics Committee of the District of Columbia Bar has proposed the most sweeping restructuring of the provisions of the Code of Professional Responsibility dealing with former government lawyers who engage in private law practice. Although these proposals, if approved by the highest court in the District of Columbia, would directly apply only to members of the District of Columbia Bar, their effect would reach beyond the territorial boundaries of the Nation's capital. Even if they

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did not set a pattern for other states to follow in amending their codes, the radiations from these changes would be felt throughout the country in at least two ways. First, virtually every major federal department and agency has predicted that adoption of the new proposals would discourage entry of lawyers into all levels of federal service, especially those who are not committed to a permanent career in the civil service. Second, unique limitations on law practice in the District of Columbia would tend to channel the hundreds of lawyers leaving the federal government every year to other jurisdictions where their options might be greater.

However desirable either of those consequences might be as a matter of social policy, I regard many of the proposed restrictions as inherently unsound and unwarranted. At the outset of this analysis, however, I must disclose my biases. I am a member of the very committee that has proposed the changes which I shall discuss; on many issues my voice and my vote failed to carry a majority of my colleagues. In addition, as a veteran of the "revolving door" who has served in local and federal government service on a number of occasions, I am naturally reluctant to brick up the passageways I have travelled. With those disclosures on the record, I would like to analyze the issues as I see them.

This Article will outline the steps that already have been taken by the federal government and the bar to prevent conflicts of interest on the part of former government lawyers, with an analysis of recent bar opinions and proposals to restrict representation by former government lawyers, their partners, and their associates.

I. THE PROBLEMS

It is not unusual for lawyers, judges, and legislators to engage in a balancing of private and public interests in order to arrive at fair and workable solutions to society's problems. Lawyers, however, are currently faced with a problem that requires balancing the interests of the government, private clients, and the bar itself. The problem stems from the real or perceived conflicts of interest that may arise when lawyers seek to move from work in government agencies to practice in the private sector. The high pitch at which this problem is being debated is attested to by current commentary[1] and several recent conflicting

1. Several student-authored articles dealing with these issues appeared in 1977. Note, *Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification?*, 1977 DUKE L.J. 512; Comment, *Conflicts of Interest and the Former Government Attorney*, 65 GEO. L.J. 1025 (1977); Comment, *The Disqualification Dilemma: DR 5-105(D) of the Code of Professional Responsibility*, 56 NEB. L. REV. 692 (1977); Comment, *Attorneys: Legal and Professional Ethics: Private Practice and the Former Government Lawyer*, 30 OKLA. L. REV. 365 (1977).

opinions regarding imputed disqualification of the partners and associates of former government lawyers.[2]

Any rule which limits the ability of former government lawyers and their partners and associates to handle cases is bound to have a significant effect on the bar and the government bureaucracies. Approximately 11,000 attorneys hold civilian positions in the executive branch of the federal government, and another 5,000 serve as judge advocates in the military.[3] The lawyer turnover rate in many federal agencies is more than twice that of the national average for private law firms.[4] As a consequence, many former government lawyers are called upon to represent private clients before government agencies, and often before the agency in which the attorney has previously worked.

This phenomenon is hardly accidental. Rather, it is the natural result of the increasingly complex and sophisticated federal regulatory programs and the corresponding legal specialization within the government. Many young lawyers decide to work for federal agencies in order to obtain intensive, specialized training in a particular field of law. This opportunity provides one of the principal inducements enabling the public to obtain the services of bright young lawyers. A lawyer who has spent three or four years in the Federal Trade Commission, the Securities and Exchange Commission, or some other agency, however, can hardly be expected to discard the expertise he gained in government service and undertake to learn a wholly new specialty when he leaves. Similar expectations are shared by more experienced lawyers who enter public service at senior professional levels. It is not surprising that a lawyer who had the initial expertise leading to an appointment as a commissioner with the Federal Communications Commission or as a member of the National Labor Relations Board, for instance, intends to resume practice in his field when his government service ends. The natural forces of the professional market will soon involve the lawyers in either group with clients who have problems in those fields, and representation of the clients' interests will take the lawyers back before their former agencies.

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2. *See* text & notes 38-50 *infra*.

3. Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A.J. 1541, 1541 (1974). The Federal Bar Association represents over 15,000 present and former federal government attorneys who are located in every state and the District of Columbia. Knebel, *Federal Bar on Former Government Attorneys in Private Practice*, DISTRICT LAW., Feb., 1978, at 12. While the focus of this Article will be on lawyers who have served in the federal bureaucracy, the policies and ethical rules involved would apply equally to former state and local attorneys.

4. *See* Jenkins, *Working for Uncle Sam: The Flyaway Problem of Federal Attorneys*, STUDENT LAW., Apr. 1977, at 51. In 1976, 18% of the FTC's lawyers quit. *Id.* The annual turnover rates at the SEC and the Justice Department Antitrust Division average 16% and 14% respectively. *Id.*

That is the "revolving door." It is my thesis that not only is there nothing inherently improper in either of these types of career paths, but that it is socially desirable to encourage them—as long as there are adequate safeguards against actual abuse of office or the appearance of some *plausible* abuse. Supporting this thesis is my solid conviction that while all levels of government cry out for talent, not all professionals who have something to contribute to public service can or will remain indefinitely. Moreover, my observations in New York City government service, in federal service, and in private practice persuade me that the governmental process functions most efficiently and most intelligently when the participants on each side of the table understand the goals, imperatives, and constraints of the participants on the other side. This perspective often comes from prior experience on the other side, or at least from association with someone who has been on the other side.[5] There must be some limits on what may ethically be done, of course, but the protective mechanisms should permit and indeed encourage a system which is essentially healthy for the public interest; the restrictions should concentrate on *real* problems of actual or potential abuse, and not on supercilious speculation.

At the threshold, it is important to define what it is in this area that an ethics code should regulate. A government lawyer leaves public service with what one study has termed "three new assets": expertise, which is the substantive knowledge of the law enforced by his agency; know-how, which is the knowledge of the agency procedures; and influence, which is the network of friendships and moral obligations gained while employed at the agency.[6] There is nothing legally or ethically wrong, in my judgment, with a lawyer's acquisition and use of the first two assets in private practice.[7] These are generally nothing more than can be gained by other experienced and well-trained attorneys who practice in a field for a period of time and are reasonably astute, even though they have never been in public service.[8] In a real sense, the use of these assets is beneficial to the government and the public by insuring that regulated parties are properly counseled in what the law requires. Any argument that lawyers with this special knowl-

5. *See* Kesselhaut v. United States, 555 F.2d 791, 793 (Ct. Cl. 1977) ("Attorneys having both private and Government experience are often better qualified to be of value to courts, as their officers, and to their clients, public and private, than those having one or the other experience alone.").

6. *See Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings on S. 555 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 445, 454 (1977) (report submitted by Center for Applied Ethics of the New York Society for Ethical Culture).

7. *See* D.C. BAR LEGAL ETHICS COMM., OPINIONS, No. 26, at 2 (1977).

8. The Freedom of Information Act, 5 U.S.C. § 552 (1976), and the Sunshine Act, *id.* § 552b, make it unlikely that an agency lawyer will be aware of secret government policies unavailable to the private practitioner. *See* text accompanying note 67 *infra*.

edge of law and lore can offer their clients "special" advantages merely reflects the truism that an expert may be more effective than a generalist.

The only bases for concern in connection with either of the first two types of assets are that they may involve the compromise of what the Code of Professional Responsibility terms "secrets" or "confidences" of the client,[9] or present the unseemliness of "switching sides." On reflection, however, it becomes evident that these concerns can legitimately sweep no more broadly than to restrict the lawyer's subsequent involvement with specific matters or specific parties before the agency during his tenure. Without this focus, the concerns are simply too diffused and formless to be either reasonable or realistic.

It is the third asset, termed "influence," that involves a particularly sensitive objective for regulation by the government and the bar. Influence, as I have defined it, cannot be eradicated in any interdependent society, and it is vain to try. Without having served in a government agency, a highly reputed private practitioner, or a bar association colleague, or a neighbor, may have special advantages in seeing or even persuading a government official. An experienced or intuitive lawyer may know, without any "inside" knowledge, what an agency's likely position or strategy is on an issue. Influence is, in short, not the preserve of the former official, and thus there is no reasonable basis for generally condemning the existence of personal relationships he may have formed.

The ethical goal should be to establish rules that will prevent the use of *specific* knowledge or leverage that is *uniquely* derived—or may reasonably appear to be uniquely derived—from the public service. What the law should strive to control is the actual or apparent diversion of the former public employment itself into a *unique* advantage. Present restrictions in federal law and in the Code of Professional Responsibility generally reflect these distinctions, but some proposed restrictions are, I suggest, undiscerningly broad. The laudatory goal of suppressing improper behavior should not obscure the practical effects of excessive ethical zeal that may unnecessarily damage the legitimate interests of not only lawyers and clients, but also of the government itself, and thus the public.

9. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101 (1976) [hereinafter cited as ABA CODE].

II. THE PRESENT STANDARDS

A. *Individual Disqualification*

1. *Federal Statutes*

Congress has restricted in several ways the activities of federal employees, including lawyers, about to leave government service, as well as former federal employees and their professional colleagues. Under 18 U.S.C. § 201(g), which generally proscribes bribery of public officials, a public official is prohibited from seeking or accepting post-government employment in exchange for performing his official duties.[10]

An employee of the executive branch is also prohibited from participating personally and substantially in a governmental decision in which a person or organization with whom he is either negotiating, or has secured any arrangement concerning prospective employment, has a financial interest.[11]

The activities of former government officers and employees are directly circumscribed under 18 U.S.C. § 207. This section applies with special force to lawyers, prohibiting a former government employee from ever acting as an agent or attorney for anyone in connection with any "matter"—as specifically defined—in which he participated "personally and substantially" as a government employee.[12] In addition, the former employee is prohibited from appearing personally before any court, department, or agency for one year after his employment with the government has ceased, with regard to any particular "matter" which was under his official responsibility within one year prior to the termination of such responsibility.[13]

There has recently been a move within Congress to strengthen the provisions of section 207. On June 27, 1977, the Senate passed the

10. 18 U.S.C. § 201(g) (1976). This provision carries fines of not more than $10,000 and/or imprisonment for not more than two years. Moreover, if the official seeks or accepts anything of value in exchange for being influenced in the performance of his official duties, the penalties include fines of up to $20,000 or three times the monetary equivalent of the thing of value and/or imprisonment for not more than fifteen years, and disqualification from holding any office under the United States. *Id.* § 201(c).

11. 18 U.S.C. § 208(a) (1976). The penalty here is again a maximum $10,000 fine and/or imprisonment for not more than two years. Section 208(b) provides for a waiver of subsection (a) if full disclosure is made and the official responsible for appointment to the position makes a written determination that the interest involved is too insubstantial, remote, or inconsequential to affect the employee's integrity. *Id.* § 208(b).

12. 18 U.S.C. § 207(a) (1976). For a more in depth view of the provisions of section 207, as well as a list of analogous state provisions, see Comment, *Conflicts of Interest and the Former Government Attorney*, 65 GEO. L.J. 1025, 1027-32 (1977).

13. 18 U.S.C. § 207(b) (1976). The types of particular "matters" which trigger the restrictions under both subsections (a) and (b) are narrowly defined as being a "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, [or] arrest." *Id.* § 207(a). For either subsection (a) or (b) to apply, the government must be a party to, or have a substantial interest in, the later proceeding. *Id.* § 207(a), (b).

proposed Public Officials Integrity Act of 1977.[14] Title 5 of that act would amend section 207(a) to proscribe a former employee from aiding or assisting in any matter in which he participated personally or substantially while in government service, thus extending the ban beyond merely acting formally as an "agent or attorney" in such matters.[15] The ban in section 207(b) against handling before any court or agency any matter under the former employee's official responsibility would be extended from one year to two years after leaving government service.[16] Perhaps the most significant proposed amendment to section 207 is a new subsection which provides that former top-level officials[17] may not communicate with their former agencies or departments on *any* matter for a period of one year following the termination of government service.[18] This provision is designed to provide a "cooling off" period to prevent undue influence—actual or apparent—by recently departed agency heads and supervisors.[19]

In addition to the present criminal penalties, the amendments include an innovative provision that would allow the head of a department or agency, upon finding a violation of section 207(a), (b), or (c), to prohibit the former employee from appearing before the agency for up to five years, or to take other appropriate disciplinary action.[20] This civil alternative would encourage enforcement of the prohibitions, since the stiff criminal sanctions often tend to deter prosecution.[21] The bill also establishes an Office of Government Ethics to develop and coordinate policies, rules, and regulations designed to prevent conflicts of interest.[22] Each of these proposals is sound, thoughtful, and measured.

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14. S. 555, 95th Cong., 1st Sess., 123 CONG. REC. S10774 (June 27, 1977) (daily ed.). The bill passed the Senate by a vote of 74 to 5. *Id.* The House of Representatives has not yet acted on S. 555.

15. S. 555, 95th Cong., 1st Sess., § 501, 123 CONG. REC. S10785-86 (June 27, 1977) (daily ed.).

16. *Id.*

17. A top-level official is defined as one in a position classified at GS-16 to 18, or the equivalent. *Id.* These are the senior management positions in the civil service.

18. *Id.* Congress has already prohibited high-level officials in particular agencies from appearing before or communicating with their former agencies within one year after leaving government service. *See* 42 U.S.C.A. § 7215 (Supp. 1977) (supervisory officials within new Department of Energy; including GS-16 to 18 or equivalent); 47 U.S.C. § 154(b) (1976) (FCC commissioners disqualified for one year from appearing before commission). Proposed amendments to the Federal Trade Commission Act prohibit former commissioners and commission employees classified GS-16 or higher from appearing before or communicating with the commission on behalf of a client for one year. H. CONF. REP. No. 95-892, 95th Cong., 2d Sess. 2, 14 (1978) (Conference Report accompanying H.R. 3816).

19. *See* S. REP. No. 95-170, 95th Cong., 1st. Sess. 49 (1977).

20. S. 555, 95th Cong., 1st Sess., § 501, 123 CONG. REC. S10786 (June 27, 1977) (daily ed.).

21. *See* S. REP. No. 95-170, 95th Cong., 1st. Sess. 34 (1977).

22. S. 555, 95th Cong., 1st Sess. 123 CONG. REC. S10785 (June 27, 1977) (daily ed.).

2. *The Code of Professional Responsibility*

The Code of Professional Responsibility recommended by the American Bar Association and adopted by virtually every jurisdiction contains an additional set of relevant restrictions, some applicable by their terms to all lawyers, and some specifically directed at former government lawyers. Under Disciplinary Rule [DR] 4-101(B) every attorney is prohibited from revealing a confidence or secret of his client, or from using a confidence or secret either to the disadvantage of his client or to his own or a third person's advantage, unless the client consents after full disclosure.[23] The policy underlying Canon 4 of the Code has led to the rule that prohibits a lawyer from accepting subsequent employment in matters adverse to the interests of a former client after a *pertinent* confidence has been shared.[24] The purpose behind the rule is to encourage clients to speak freely with their counsel and to foster the public's faith in the reliability and probity of the bar.[25] Under Canon 5, as interpreted in ABA Opinion No. 342, a lawyer is also prohibited from switching sides even where his professional judgment on behalf of a present client will not be affected.[26] A lawyer who has left public employment is obviously bound by the provisions of Canons 4 and 5.

Canon 9, which generally forbids even the appearance of impropriety, contains a disciplinary rule that expressly imposes special duties upon former government attorneys. It provides that a lawyer "shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."[27]

Reflecting the goal of avoiding even the "appearance" of impropriety, this directive has often been applied.[28] Problems most fre-

23. ABA CODE, *supra* note 9, at DR 4-101(B).

24. The test most often applied is whether the matters embraced in the pending suit are substantially related to the matters involved when the attorney represented the former client. *See* Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 570 (2d Cir. 1973), and cases cited therein. For a thorough discussion of the issues involved when a lawyer has a conflicting interest regarding two private clients, see Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to that of Former Client*, 55 B.U.L.R. 61 (1975).

25. *See* Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 570-71 (2d Cir. 1973).

26. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS No. 342 (1975), at 3 & n.8, *reprinted in* 62 A.B.A.J. 517 (1976) [hereinafter cited as ABA OPINION No. 342]. This opinion thoroughly considers the ethical restrictions on former government lawyers and their partners and associates.

27. ABA CODE, *supra* note 9, at DR 9-101(B); *see id.*, EC 9-2. Prior to the adoption of the Code, Canon 36 of the Canons of Professional Ethics applied to the former government employee, and provided in part: "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ." This language was found unworkable, partly because public officials were found to have "passed upon" matters which they merely rubber stamped and in which they took no active part. *See* ABA OPINION No. 342, *supra* note 26, at 7.

28. *See, e.g.*, Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 757 (2d Cir. 1975); General Motors Corp. v. City of New York, 501 F.2d 639, 648-52 (2d Cir. 1974); D.C. ETHICS COMM., OPINIONS, No. 26 (1977); *id.* No. 16 (1975); N.Y. BAR ASSOCIATION COMM. ON

quently arise when courts and bar associations attempt to give content to the phrases "private employment;"[29] "matter,"[30] "substantial responsibility,"[31] and "public employee"[32] contained in DR 9-101(B).

The policy considerations behind the restrictions on post-government service employment go beyond the general considerations of Canon 4, which are intended to preserve the confidences of prior clients.[33] Additional policy considerations underlying DR 9-101(B) are the need to discourage government lawyers from acting in a manner intended to secure future private employment, the general benefit to the profession and the public which results by avoiding the appearance of impropriety, and the treachery of switching sides.[34] Thus, DR 9-101(B) has been read to prohibit private representation by a former government lawyer even though he received no confidential information on the matter while working for the government.[35]

The placement of this rule as part of Canon 9 is important because it underscores the crucial fact that what is at stake is *apparent* impropriety, even though there may not be any *actual* violation of the standards applicable to lawyers in general. In considering any expansion of the disciplinary rules under Canon 9, it is important to remain sensitive to the nature of the undertaking: determining the scope of restrictions that are essentially cosmetic but no less important in maintaining public confidence essential to the effectiveness of our legal system.

PROFESSIONAL AND JUDICIAL ETHICS, OPINIONS, No. 889, at 21 (1976) [hereinafter cited as OPINION No. 889].

29. *See* General Motors Corp. v. City of New York, 501 F.2d 639, 643-44 (2d Cir. 1974) (former Justice Department attorney employed in antitrust matter by City of New York on contingent fee basis engaged in private employment).

30. *See* Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 570-74 (2d Cir. 1973) (common issue of fact of Burlington's control over Patentex constituted same matter); ABA OPINION No. 342, *supra* note 26, at 6 ("The same law or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter").

31. *See* United States v. Standard Oil Co., 136 F. Supp. 345 (S.D.N.Y. 1955) (interpreting Canon 36); ABA OPINION No. 342, *supra* note 26, at 9.

32. *See* Woods v. Covington County Bank, 537 F.2d 804, 810-12 (5th Cir. 1976) (naval reserve attorney who investigated securities fraud allegedly perpetrated on POWs did not represent government interest); *cf.* Handelman v. Weiss, 368 F. Supp. 258, 262-63 (S.D.N.Y. 1973) (attorney retained to serve as assistant to trustee of liquidated company by non-profit organization created by act of Congress could not later represent plaintiffs in related action).

33. ABA CODE, *supra* note 9, at CANON 4. Indeed, it is questionable how far the policy of preserving confidences shall apply to the government as a client. The courts have recognized a general "executive privilege" for confidential policy discussion, *e.g.*, United States v. Nixon, 418 U.S. 683, 708-13 (1974), but statutes like the Sunshine Act and the Freedom of Information Act, 5 U.S.C. §§ 552, 552b (1976), *see* text accompanying note 67 *infra*, demonstrate that the overall nature of an open and democratic government should be to foster public awareness of government operations.

34. ABA OPINION No. 342, *supra* note 26, at 3-4; *see* General Motors Corp. v. City of New York, 501 F.2d 639, 649 (2d Cir. 1974); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 37 (1931); Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657, 659-60 (1957).

35. D.C. BAR LEGAL ETHICS COMMITTEE, OPINIONS, No. 26, at 2-3 (1977); *see* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 134 (1935).

B. *Imputed Disqualification*

1. *Code of Professional Responsibility*

Beyond the restrictions applicable directly to a former government lawyer, there is an important question whether DR 9-101(B) disqualifications are imputed to his partners and associates. There is considerable uncertainty whether the principle of imputed disqualification applies, and if it does, whether it is absolute or can be displaced by some type of screening device that insulates the disqualified attorney from the matter—such as a waiver from his former agency. Obviously, the answers to these questions also have an impact on the former government lawyer himself, because his own options in private practice contract if he would taint prospective colleagues in any law firm he might join.

Congress has not enacted any statutes that directly prohibit a former government employee's partners and associates from participating in cases in which the employee himself is disqualified. In fact, section 207(c), which places restrictions on partners of *current* government employees, specifically provides that partners of former employees are *not* subject to any of the restrictions in sections 203, 205, and 207.[36] Thus, the guidance in this area is provided almost solely by the Code of Professional Responsibility, and the legislative history of section 207(c) shows a deliberate intent to leave these issues within the primary control of the bar.[37]

A well-established ethical principle holds that where a member of a law firm is disqualified from a matter, the disqualification extends to his firm.[38] This general rule reflects the normally close personal and

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36. 18 U.S.C. § 207(c) (1976).

37. S. REP. No. 2213, 87th Cong., 2d Sess. 12 (1962). As noted in the Senate report, the version of section 207 that first passed the House of Representatives contained an explicit provision to forbid—for two years—any activity by a partner of a former official in which that former official was himself prohibited from engaging. The House report had explained the basis for this provision:

> (g) *Partners.* The status and obligations of partners of Government employees under the conflict of interest statutes is not specified in present law. Under the Canons of Ethics of the American Bar Association (canons 6, 36, and 37), and at common law (see United States v. Standard Oil Co., 136 F. Supp. 345 (S.D.N.Y. 1955)), the activities of partners are *to some extent* imputed to each other and *to some extent* disqualify non-Government partners from activities with which Government partners have become identified. The *unsettled state of the law* has given rise to serious confusion as to the precise limits of the doctrine of imputation. For this reason, the bill (sec. 207(c) and (d)) prescribed the disqualification of partners of Government employees and former Government employees in the executive branch, the independent agencies, and the District of Columbia, and the limits on such disqualification.

H.R. REP. No. 748, 87th Cong., 1st Sess. 12 (1961) (emphasis added). Thus, Congress chose to eliminate this subsection knowing the law was unsettled, but reasoned that resolution of the problem should be left in the domain of legal ethics, free of congressional intervention one way or the other.

38. *See, e.g.*, Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, Inc., 224 F.2d 824, 826-27 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956); W.E. Bassett Co. v. H.C. Cook Co., 201 F. Supp.

financial relations among members of a law firm and the ease of communication among them. Since all members of a firm share in ethical obligations to any member's client, it is logical to subject them to common restrictions as well. The concept of "imputed knowledge" also normally operates to attribute to an attorney the confidences or secrets learned by other attorneys in a firm for which he previously worked,[39] but an exception to this principle has recently been found where a former associate of a large firm had not worked on matters directly at issue in later litigation.[40]

The Code of Professional Responsibility originally provided explicitly for disqualification of partners and associates in DR 5-105(D), but that provision applied only where the attorney was disqualified under DR 5-105(A). That rule requires disqualification where an attorney has a conflict of interest involving two or more present clients. In 1974, the ABA amended DR 5-105(D) to broaden the imputed disqualification and to make it apply whenever an individual attorney is required to withdraw from employment under any disciplinary rule.[41] Apparently, however, the drafters of the amendment were only focusing on the other restrictions contained under Canon 5, and there was no consideration of the possible impact of the broader language on former government lawyers, their partners, and their associates in light of DR 9-101(B).[42]

2. *Recent Developments*

The amended version of DR 5-105(D), as well as the bar's increased awareness of conflict of interest problems since the Watergate scandal, has led to a rash of action aimed at applying the imputed disqualification doctrine to the former government lawyer. In 1975, the ABA issued the first opinion considering the application of amended DR 5-105(D) to the partners and associates of a former government lawyer disqualified from a matter under DR 9-101(B).[43] A literal

821, 824-25 (D. Conn.), *aff'd*, 302 F.2d 268 (2d Cir. 1962) (*per curiam*); ABA CODE, *supra* note 9, at DR 5-105(D); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 33 (1931). This rule has been applied on occasion to former government lawyers. *See* Telos, Inc. v. Hawaiian Tel. Co., 397 F. Supp. 1314, 1318 (D. Hawaii 1975); Traylor v. City of Amarillo, 335 F. Supp. 423, 425 (N.D. Tex. 1971); *cf.* United States v. Standard Oil Co., 136 F. Supp. 345, 350 n.4, 360-64 (S.D.N.Y. 1955) (the firm involved apparently admitted that if the former government lawyer working on the case was disqualified, the disqualification would apply to the firm; the court found against disqualification of the former government attorney).

39. Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, Inc., 224 F.2d 824, 826 (2d Cir. 1955); United States v. Standard Oil Co., 136 F. Supp. 345, 364 (S.D.N.Y. 1955).

40. *See* Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 588 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975).

41. *See* ABA CODE, *supra* note 9, at DR 5-105(D).

42. *See*, Moskowitz, *Can D.C. Lawyers Cut the Ties that Bind?*, JURIS DOCTOR, Sept. 1976, at 34, 35.

43. ABA OPINION NO. 342, *supra* note 26.

reading of DR 5-105(D) would lead to only one conclusion: any ethically required disqualification of any lawyer disqualifies his entire firm. The ABA, however, adopted a balancing approach. The opinion sets forth the policies underlying DR 9-101(B),[44] and balances them against the "weighty policy considerations in support of the view that a special disciplinary rule relating only to former government lawyers should not broadly limit the lawyer's employment after he leaves government service."[45] The factors weighing against strict disqualification of the entire firm include the following: the rule should not hamper the ability of the government to attract competent lawyers by imposing harsh penalties on those willing to enter government service; the rule should not serve as a mere tool of litigants to deprive their opponents of competent counsel; and the rule should not needlessly interfere with the right of litigants to choose counsel, particularly in areas which require specialized training and experience.[46]

The ABA chose to adopt a screening and waiver procedure as the most practical method of satisfying the competing interests. Where the government agency involved is satisfied that screening measures adopted by the firm "will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interests of the government," the ABA Committee concluded that the agency may waive firm disqualification under DR 5-105(D).[47]

In contrast to the practical approach adopted by the ABA stands the Tentative Draft Opinion for Inquiry 19 issued by the Legal Ethics Committee of the District of Columbia Bar in 1976.[48] The issuance of the draft provoked a veritable firestorm of reaction from federal agencies and major law firms. Although final adoption of the tentative draft eventually failed by a margin of one vote, it remains the foremost statement favoring absolute firm disqualification under DR 9-101(B). Ironically, the District of Columbia Code of Professional Responsibility does not include the amendment to DR 5-105(D) which expanded imputed disqualification to any case involving a violation of a disciplinary rule. The draft was based on the policies behind DR 9-101(B), principally, the goal of avoiding even the appearance of impropriety. "The rule is primarily aimed at conduct which gives rise to an inference—whether or not factually true—that a public official was influ-

44. *See* text & notes 26-27 *supra*.
45. ABA OPINION NO. 342, *supra* note 26, at 4.
46. *Id.* at 5.
47. *Id.* at 12.
48. The draft appears in DISTRICT LAW., Fall 1976, at 39.

enced in the use of his or her authority by the hope of later private legal employment."[49] The opinion proceeds to identify eight types of real or apparent ethical improprieties that may arise when a government attorney enters private practice. The opinion then reasons that these problems can only be eliminated by disqualification of his partners and associates as well, and rejects screening as an adequate remedy. These potential problems will be set forth and analyzed below, as will the proposed amendments to DR 9-101 which the District of Columbia Bar Legal Ethics Committee drafted after the tentative draft narrowly failed to muster an absolute majority of the committee.

In addition to the ABA and District of Columbia interpretations, at least three other bar associations have recently considered the issue of imputed disqualification attaching to the colleagues of the former government lawyer. The New York City Bar Association Committee on Professional and Judicial Ethics is generally in accord with the position taken in ABA Opinion 342.[50] The only area of disagreement is with the ABA's proposal to allow the affected agency the final say in deciding whether to waive disqualification in a litigated matter or similar proceeding. The New York City Bar committee believes that absolute discretion in the agency involved would compel the refusal of consent because government counsel would fear that if a waiver were granted, and the case were lost, he would be subject to criticism or discipline for failure to utilize the veto power.[51] Reaching the contrary conclusion, the Maryland State Bar Association and the Montgomery County, Maryland, Bar Association ruled essentially in accordance with the District of Columbia Tentative Draft Opinion for Inquiry 19, imputing a former government employee's disqualification to his firm.[52]

The issue of imputed disqualification was recently litigated before the United States Court of Claims in *Kesselhaut v. United States*.[53] A suit was brought to recover counsel fees allegedly owing plaintiffs because of their representation of the Federal Housing Administration [FHA] in tax matters. A member of the firm representing the plaintiffs had been general counsel for the FHA during the period when the

49. *D.C. Legal Ethics Committee Tentative Draft Opinion for Inquiry 19*, DISTRICT LAW., Fall 1976, at 39, 40 (footnote omitted).

50. *Compare* ABA OPINION No. 342, *supra* note 26, at 12, *with* OPINION No. 889, *supra* note 28, at 28.

51. OPINION No. 889, *supra* note 28, at 29.

52. MARYLAND STATE BAR ASSOCIATION COMM. ON ETHICS, INFORMAL OPINION, Docket 77-10 (1976); MONTGOMERY COUNTY, MARYLAND, BAR ASSOCIATION ETHICS COMM., OPINIONS, No. 19 (1976). These opinions were based on rather egregious facts that may not have lent themselves to any adequate screening procedures. The County Bar Association opinion indicated that screening might be appropriate in other cases. *Id.* at 6.

53. 555 F.2d 791 (Ct. Cl. 1977).

events giving rise to the suit occurred. The suit came to the firm in question through the former FHA general counsel. He explained to the plaintiffs that he could not participate in the case but referred them to other members of the firm. The firm decided to take the case and took steps to isolate him from the case, assuring that no one communicated with him about the case and locking the cabinets which contained the case documents. He was also excluded from any participation in fees from the case. The government sought to have the firm disqualified on the basis of the disqualified partner's previous association with the FHA. The trial judge agreed and ordered the firm disqualified, finding that, even though the screening might be effective, there remained an appearance of impropriety. The Court of Claims reversed. The court reasoned that to disqualify the entire firm because of superficial appearances was too harsh where appropriate screening procedures had been taken.[54] The court noted the dire consequences of an absolute disqualification rule: "Should an attorney, having left Government perhaps contrary to his own volition, ineluctably infect all the members of any firm he joined with all his own personal disqualifications, he would take on the status of a Typhoid Mary, and be reduced to sole practice under the most unfavorable conditions."[55] Furthermore, the court cautioned that the negative effect on government recruiting could not be ignored.[56] Only through a balancing approach could the interests of the government, the attorney, and the client be fairly weighed.

In light of the present confusion on this important subject, it is worthwhile to examine the alleged bases for absolute disqualification of the law firm of an individually disqualified former government lawyer. Even if there is some merit to that approach, there may be overriding disadvantages. If absolute firm disqualification is not necessary, one must question whether disqualification is unwarranted, and what are the most appropriate screening procedures.

3. *The Alleged Bases of Absolute Firm Disqualification*

More than twenty years ago, Judge Irving Kaufman, now Chief Judge of the Second Circuit, aptly observed: "When dealing with ethical principles, it is apparent that we cannot paint with broad strokes."[57] The ethical conscience of every American, and particularly lawyers, was pricked by the revelations surrounding the Watergate scandal. That fact, however, should not lead to unwarranted restrictions on attorneys' activities that may eventually redound to the detriment of the

54. *Id.* at 793.
55. *Id.*
56. *Id.*
57. United States v. Standard Oil Co., 136 F. Supp. 345, 367 (S.D.N.Y. 1955).

government, the bar, and the public. An objective look at the arguments offered in favor of absolute imputed disqualification reveals that the real ethical problems are exaggerated and do not warrant a broad overreaction.

One reason offered for broadening the principle of imputed disqualification is to reduce the occasions in which a former government lawyer is apparently linked with matters before his old agency. There is an underlying feeling among many members of the public and some members of the bar that restrictions on former government attorneys are necessary to lock the "revolving door."[58]

The mere fact that lawyers and other persons move from law firms and private industry into the government and out again is not evidence of unethical conduct.[59] Rather, it is essentially a healthy mobility that leavens government service and enlightens private representation. Moreover, if it is desirable to change the structure and operation of the federal civil service, the appropriate body for such action is the United States Congress, not local or even national bar associations. If Congress wishes to create barriers between the civil service and private industry, it has the power to achieve that objective in any one of a number of ways, including imposition of additional restrictions on post-public-service employment. Since what is involved is fundamentally a matter of general public policy, the organized bar must be restrained lest it usurp the power to make a decision that properly belongs within the halls of elected legislatures. Significantly, the proposed amendments to 18 U.S.C. § 207 that recently passed the Senate contain no imputed disqualification provisions.[60]

A second, related argument made in favor of a rule of absolute imputed disqualification is that it is essential for the avoidance of the "appearance" of impropriety. This is the argument made most eloquently in the District of Columbia Bar Tentative Draft Opinion for Inquiry 19:

> First, when a matter involving the administration of justice is at issue, the need to maintain public confidence in the system is so great that the necessity to avoid even the appearance of impropriety becomes the goal sought to be achieved, rather than simply avoiding the impropriety.[61]

58. *See* Freedman, *Legal Ethics Forum*, 63 A.B.A.J. 724, 725 (1977); Jenkins, *Working Both Sides of the Court: The Cozy Game Between Federal Agencies and Washington Law Firms*, STUDENT LAW., Feb. 1977, at 34, 52-53; Lanouette, *The Revolving Door—It's Tricky to Try to Stop It*, NAT. J., Nov. 19, 1977, at 1796.

59. *See* text & notes 1-9 *supra*.

60. See text & notes 11-19 *supra*.

61. *D.C. Bar Tentative Draft Opinion for Inquiry 19, supra* note 49, at 40. *But see* ABA OPINION No. 342, *supra* note 26, which rejects the significance of an "appearance" of impropriety in this context:

Although we are properly concerned about maintaining the confidence of the public, and thus should strive to avoid even the appearance of impropriety, the tentative draft misjudges how appearances should be measured. The draft opinion states that we must recognize that the public "may not appreciate sophisticated justifications of practices that seem questionable."[62] The disciplinary rules of the bar should not be based, however, on the misperceptions of an uninformed or cynical public.[63] The appearance of a conflict should be the basis of a sanction only when it would *reasonably* appear to a *fully informed* observer that a real danger of some *specific* impropriety exists. "The danger of damage to public confidence in the legal profession would be great if we were to allow unfounded charges of impropriety to form the sole basis for an unjust disqualification."[64]

Public confidence in the government and the legal profession depends, in the long run, upon the delivery of first rate services by the government and the private bar. To the extent that a rule of absolute firm disqualification would harm government recruiting and withhold qualified representation from clients, then the true public interest may accommodate some "appearance" of impropriety.[65]

A disciplinary rule which has no sound basis in actual impropriety, and carries with it detriments to the public good, cannot be supported solely on the basis of avoiding an appearance of impropriety. To assess the disqualification of partners and associates of former government lawyers, we must examine the several areas of possible impropriety described in the Tentative Draft Opinion for Inquiry 19, and determine whether an actual impropriety exists, and if so, whether a screening and waiver mechanism might prevent it.

> It is obvious, however, that the "appearance of professional impropriety" is not a standard, test, or element embodied in DR 9-101(B). DR 9-101(B) is located under Canon 9 because the "appearance of professional impropriety" is a policy consideration supporting the existence of the disciplinary rule. The appearance of evil is only one of the underlying considerations, however, and is probably not the most important reason for the creation and existence of the rule itself.

Id. at 3.

62. *D.C. Bar Tentative Draft Opinion for Inquiry 19, supra* note 49, at 40.

63. *See* Kesselhaut v. United States, 555 F.2d 791, 793 (Ct. Cl. 1977) ("an inexorable disqualification of an entire firm . . . is entirely too harsh . . . when truly unethical conduct has not taken place and the matter is merely one of the superficial appearance of evil, which a knowledge of the facts will dissipate."); Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976) ("It does not follow, however, that an attorney's conduct must be governed by standards which can be imputed only to the most cynical members of the public.").

64. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 589 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975).

65. *See* Woods v. Covington County Bank, 537 F.2d 804, 813 n.12 (5th Cir. 1976) (there must be a reasonable possibility of improper conduct and even then the likelihood of public suspicion must outweigh the social interests served by the lawyer's continued participation in the case); *cf.* ABA CODE, *supra* note 9, at EC 9-2 (a lawyer's "duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism.").

a. *Confidentiality.* The first area of impropriety offered in Inquiry 19 is the fear that a former government attorney will reveal government secrets, confidences, or trial tactics to a private adversary. First, there is some question as to how many "confidences" the government has or should have. It is the stated policy of the government to run public affairs openly.[66] Effective mechanisms have been provided, under the Freedom of Information Act and the Sunshine Laws, to insure that agencies operate openly and that steps are taken to make most government information available to the public.[67] Second, if a former public official is properly screened, then by definition there is no breach of his obligation not to use confidential government information in a particular matter for private gain.

b. *Unfair Advantage to One Private Party Over Others.* The fear is, again, that an attorney possesses confidential information and will use it unfairly to the disadvantage of other private parties. But again, if the attorney is adequately screened from participating in the private client's representation, there is no basis for a reasonable appearance of impropriety.

c. *Favoritism to Former Colleagues.* This problem is premised on the questionable assumption that former colleagues still working in the agency will favor the former employee's law firm. However, if the former official does not participate in the case, and his former colleagues are aware that he has no financial interest in the matter, the speculative possibility of "favoritism" drops out of the picture. If this assumption had any validity, it would be more likely to operate in cases where the Code clearly has no force; namely where the former colleague is actively participating in a matter in which he had no prior involvement, and which he is, therefore, legally and ethically permitted to handle before his former agency.

d. *Switching Sides.* This objection is grounded on the belief that laymen tend to view lawyers with opprobrium when they switch from representing plaintiffs to representing defendants, or vice versa, in similar kinds of cases, or represent private parties against the government after having worked for the government. This fluidity, of course, is a traditional function of the lawyer in the Anglo-American adversary system, which the opinion does not purport to condemn. If the lawyer is screened from a case on which he worked while a government em-

66. *See* Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1210-11 (4th Cir. 1976); 5 U.S.C. §§ 552, 552(b) (1976).
67. *See* 5 U.S.C. §§ 552, 552b (1976).

ployee, there cannot be even a *reasonable* appearance of impropriety. Thus, there is no legitimate reason for penalizing the former official's partners and associates.

e. *Buying the Opposition's Best People.* This potential problem, which strains credulity, is premised on the assumption that law firms will, or even have, "bought" a key opposition attorney for the purpose of hampering government enforcement efforts. Thus, the argument runs, the incentive to raid the government should be eliminated by banning the firm from any involvement in the matter. No government program or case, however, depends upon the talents, knowledge, or dedication of a particular public official. Nor is there any plausible reason to believe that private law firms are motivated by such unrealistic assumptions. Even if such an instance occurred during a pending case or matter, it is plausible to assume as well that, if the firm's eligibility depends on a waiver, the affected agency would deny the offending firm the right to continue the matter by refusing its consent.

f. *Abuse of Government Power to Further the Attorney's Career—Ingratiating Oneself.* This conflict of interest presumes that government attorneys do favors for, or "go easy" on, potential employers or their clients. This risk seems highly illusory. First, quite the opposite effect seems likely; attorneys who wish to be hired by private law firms are far more likely to try to impress them with their skill and knowledge. Few firms are interested in hiring incompetent sycophants. Furthermore, this assumption contradicts, or at least shows the absurdity of, the previous allegation. The draft opinion argues that law firms dealing with the government are corruptly hiring away all the most effective *and* least effective government lawyers. These inconsistent hypotheses seem unworthy of enough credence to support a prohibition that must at least rest on a *reasonable* appearance of impropriety. Finally, there are obvious checks within an agency to prevent a single attorney from handing over favors to private parties.

g. *Abuse of Power—Instituting Government Action for Use in Later Private Litigation.* The assumption underlying this problem is that attorneys will institute government action to obtain discovery of information against a potential defendant in private litigation, or to obtain subsequent private employment to uphold or upset that action. These concerns show only that it is possible to construct situations which would certainly be improper but which rarely, if ever, take place in the real world. They posit what would be a criminal abuse of power and a palpable obstruction of the administration of justice. Moreover,

these potential conflicts would be neutralized by individual screening, and therefore do not relate to the question of firm disqualification.

Thus, most of these so-called conflicts of interest are speculative at best. For those that have any basis in reality, there is no reason to assume that screening and waiver procedures, combined with the threat of disbarment and criminal sanctions, are not adequate to prevent possible abuses. If there is no substantial possibility of abuse in fact, the mere potential for an "appearance" of impropriety is not sufficient to support a blanket rule requiring the disqualification of an entire firm, particularly in light of the adverse consequences of such a proscription.

4. *The Consequences of Absolute Firm Disqualification*

A rule of absolute disqualification of the partners and associates of a former government attorney carries with it several undesirable effects. Some of these factors apply to the disqualification of the former government employee himself, and suggest that there are countervailing considerations that must be balanced even when the proper scope of individual disqualification is considered. They suggest the need for special care in deciding whether to extend the disqualification.

Initially, there is a strong public interest in allowing clients free choice in choosing their own counsel.[68] The bar has an ethical obligation to see that competent counsel is available to meet the needs of the public.[69] It is not unrealistic to assume that in many specialized areas of federal practice there are a limited number of law firms with sufficient expertise to handle the legal problems with particular competence and efficiency. In such areas, it would be unwise to impose unnecessary restrictions on the client's ability to select the most capable firm.

For similar reasons, it is bad public policy to create artificial, anticompetitive barriers to the entry of lawyers into the private market. Although the states' actions in adopting and enforcing disciplinary rules are generally exempt from federal antitrust attack,[70] the public interest in preserving a competitive legal market is similar to the interests and policies protected by the antitrust laws, and those policies should be an important consideration in regulating lawyers' conduct.[71] Furthermore, severe hardship may be imposed upon private clients should their firm choose to hire a government attorney who has worked on a matter involving that client. A policy of firm disqualification

68. *See* Woods v. Covington County Bank, 537 F.2d 804, 810, 812 (5th Cir. 1976).

69. *See* ABA CODE, *supra* note 9, at CANON 2, EC 2-1.

70. *See* Bates v. State Bar of Arizona, 433 U.S. 350, 359-63 (1977).

71. *But cf.* Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 757 n.9 (2d Cir. 1975) (disagreeing with district court language regarding antitrust implications of limiting the ability of lawyers to represent interests opposing those of clients of former firm), *aff'g*, 370 F. Supp. 581 (E.D.N.Y. 1973).

would confront the firm with an unattractive dilemma: either decline to hire a lawyer otherwise deserving a position, or abandon a client. If the entire firm must be disqualified, the firm would be forced to drop the client in mid-stream during litigation or other legal representation. Since the Code sensibly embodies a policy of discouraging needless withdrawals from representation,[72] there should be hesitancy to create situations in which withdrawal would be required.

The people who would suffer most from a strict imputation rule are the lawyers in government service. Obviously, a lawyer working for a government agency will be faced with fewer options should he choose to leave public service.[73] A firm with a case in which the lawyer had participated is unlikely to drop a client to hire a former government attorney, and any firm must consider the possibility that a government lawyer may have handled a case against potential new clients. The impact is bound to be substantial because a government lawyer will likely seek employment with firms that handle the types of cases with which he is familiar. "A concern both for the future of young professionals and for the freedom of choice of the litigant in specialized areas of law requires care not to disqualify needlessly."[74] Furthermore, the right to follow a chosen profession free from unreasonable government interference comes within the liberty and property concepts of the fifth amendment.[75] This constitutional policy counsels against burdening government attorneys' ability to obtain the employment of their choice in the private sector unless there is a demonstrably substantial reason for doing so.[76]

According to many federal departments and agencies, the most devastating impact of a broad disqualification rule would be on the recruitment of lawyers for government service. Numerous senior officials have gone on record predicting those consequences and opposing the District of Columbia Bar's Tentative Draft Opinion for Inquiry 19 and its pending proposals to broaden the Code's provisions on disqualification. The Senate Committee on Governmental Affairs, reporting on the Public Officials Integrity Act of 1977, recognized the need to act

72. *See* ABA CODE, *supra* note 9, at DR 2-110.

73. *See* Moskowitz, *supra* note 42, at 36-37. At least one Washington law firm turned down applicants solely on the basis of their government experience in light of the D.C. Bar Tentative Draft Opinion for Inquiry 19. *Id.*

74. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 589 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975).

75. *See* Greene v. McElroy, 360 U.S. 474, 492 (1959).

76. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 & n.23 (1976); *cf.* Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972) (in regulating the various professions, a state cannot foreclose opportunities in a way that denies due process); Schware v. Board of Bar Examiners of N.M., 353 U.S. 232, 238-39 & n.5 (1957) (a state cannot exclude a person from the practice of law in any way that contravenes due process).

cautiously when tightening the post-employment restrictions of 18 U.S.C. § 207:

> Conflict of interest standards must be balanced with the government objective in attracting experienced and qualified persons to public service. Both are important, and a conflicts policy cannot focus on one to the detriment of the other. *There can be no doubt that overly stringent restrictions have a decidedly adverse impact on the government's ability to attract and retain able and experienced persons in federal office.*[77]

A provision for inflexible firm disqualification must be classified as overly stringent. That conclusion is bolstered by the fact that the Senate amendments do not provide for imputed disqualification.[78]

With an automatic disqualification rule, it would only make sense for well-qualified law school graduates to opt for private practice over government service, if for no other reason than that they thereby keep their options open: they can always enter public service later, but the door may not swing the other way. Some would answer that there is presently an overabundance of applicants for each position available as a government attorney. But as the chief of the appellate section of the Justice Department Antitrust Division commented: "the problem is usually one of quality, not quantity."[79] The problem would perhaps be more acute with attempts to select experienced lawyers for supervisory positions. Such counsel typically have substantial responsibility over many matters, and thus they would taint their future firms over a much wider range. They may be unnecessarily discouraged from accepting supervisory positions under those circumstances, particularly when senior government lawyers often receive lower compensation than they would in private practice. In any case, government attorneys would have an incentive to refrain from getting involved in a wide range of matters. Although some of these fears may seem exaggerated, they cannot be lightly disregarded. The scope and depth of the adverse comments from responsible federal officials should carry presumptive weight.

An additional complication would arise if only one or a few local bars adopt a strict rule of imputed disqualification. In such a situation only certain lawyers and law firms would be disadvantaged. Disparate rules on such a highly significant practical issue could channel lawyers leaving government service into particular jurisdictions.

77. S. REP. No. 95-170, 95th Cong., 1st Sess. 32 (1977) (emphasis added).
78. See text & notes 14-22 *supra*.
79. Letter from Barry Grossman to D.C. Bar Legal Ethics Committee, at 2 (Oct. 4, 1976) (on file with committee).

A final problem which might arise if a strict imputation rule is adopted was noted by the Assistant Attorney General in charge of the Justice Department's Office of Legal Counsel—the office that interprets federal conflict-of-interest rules. He pointed out that such a rule would likely lead to a parsimonious interpretation of the disciplinary rules governing individual disqualification.[80] If those interpreting the rules perceive imputed disqualification to be harsh, there will be a tendency to narrow the circumstances where DR 9-101(B) would be applied to the individual lawyer.

The adverse consequences of an inflexible rule of imputed disqualification are substantial and unanswered. Weighed against the marginal reasons for such a rule, the proper result is, I submit, obvious.

5. *Alternatives to Absolute Disqualification: Screening and Waiver*

These arguments suggest that the principle of imputed disqualification should not be extended at all to the partners and associates of former government lawyers. There appears to be a consensus, however, that the principle should be at least presumptively applicable in this situation. This consensus rests on the belief that there are sufficient risks of impropriety to warrant exclusion of the firm unless special precautions are taken to obviate the dangers.

The use of screening and agency consent were suggested in ABA Opinion 342 to avoid disqualification of an entire firm,[81] and were endorsed in a modified form in New York City Bar Opinion 889, which held adequate screening sufficient by itself.[82] The concepts are not new, and screening procedures have been utilized by some agencies for years.[83]

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80. Letter from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, to D.C. Bar Legal Ethics Committee (Mar. 23, 1976), at 2 (on file with Committee) [hereinafter cited as Scalia Letter].

81. *See* ABA OPINION No. 342, *supra* note 26, at 12.

82. *See* OPINION No. 889, *supra* note 28.

83. The Federal Maritime Commission regulations provide that when any former employee is prohibited from appearing or representing anyone before the commission in a particular matter:

> any partner or legal or business associate of such former member, officer, or employee shall be prohibited from (1) utilizing the services of the disqualified former member, officer, or employee in connection with the matter, (2) discussing the matter in any manner with the disqualified former member, officer, or employee, and (3) sharing directly or indirectly with the disqualified former member, officer, or employee in any fees or revenues received for services rendered in connection with such matter.

46 C.F.R. § 502.32(c) (1977). Other agencies provide for screening and/or agency waiver in cases of imputed disqualification. *See* 16 C.F.R. § 4.1(b)(4) (1978) (FTC; screening required); Letter of Harvey L. Pitt, General Counsel, Securities and Exchange Commission, to D.C. Bar Legal Ethics Committee (Oct. 15, 1976), at 7 (on file with committee) (listing factors considered by SEC to determine whether former employee is sufficiently isolated from matter); Scalia Letter, *supra* note 80, at 1 (Justice Department consents to waiving firm disqualification where adequate screening safeguards have been utilized). *See also* Internal Revenue Service Final Report of the Chief Counsel's Advisory Committee on Rules of Professional Conduct, 41 Fed. Reg. 41,106, 41,113-17 (1976).

Initially, it is important to note that no one has yet pointed to any abuses of screening and agency consent procedures.[84] One might properly question where the burden of proof should lie on the effectiveness of screening, when the potential effects of an absolute firm disqualification rule could be so devastating to government recruiting and the careers of agency lawyers.

There are three major arguments offered against screening and waiver procedures.[85] The first argument is directed at the screening element and maintains that there is no practicable way to enforce the screening procedures which are established within private law firms.[86] Even assuming the accuracy of the point, however, it does not prove the case. Countless functions of a lawyer take place on the assumption that his own sense of personal honor and professional responsibility will lead him to conform his conduct with what the Code prescribes. This system necessarily depends on assumptions which are, unfortunately, in some cases belied. But the system generally works. For instance, the Code forbids the coaching of witnesses to induce them to construct testimony.[87] Yet we do not consider that rule inadequate simply because no monitor stands at the lawyer's elbow each time he interviews a witness.

Moreover, in the case of the former government lawyer who has been isolated from a case, a violation of the screening procedures would require a conspiracy by at least two lawyers, a fact which makes a violation much less likely. There is little chance of an inadvertent violation, especially if the law firm has received agency approval of specific screening procedures suggested by the firm. In any case, there are several ways that violations of screening procedures could be uncovered. Any of the members of the affected firm who learn of a violation would presumably be required to report it.[88] Opposing government counsel would in many cases be able to detect violations if truly secret government information was leaked and utilized. Furthermore, an agency could condition its consent on the firm's allowance of inspection of its screening procedures to insure that relevant files are sealed and that all personnel know of the restrictions.

The second argument against screening and waiver states that agency consent is inefficacious because the agency lawyers granting consent are not disinterested; they are setting precedents that may one

84. *See* Scalia Letter, *supra* note 80, at 1 (assistant attorney general knew of no instances of abuse of current waiver procedures).

85. *See* Freedman, *supra* note 58, at 724.

86. *Id.*

87. *See* ABA CODE, *supra* note 9, at EC 7-26, EC 7-28.

88. *See id.*, at DR 1-103. *But see* Note, *The Lawyer's Duty to Report Professional Misconduct*, 20 ARIZ. L. REV. 509, 511 & n.21 (1978).

day be applied to them if they enter private practice.[89] The argument assumes less *bona fides* and objectivity than most government lawyers possess. In addition, empirical evidence demonstrates that agencies are quite prepared to be strict in denying former employees the right to appear before them,[90] and in requiring strict screening of former agency employees in firms appearing before them.[91] Also, the federal administrative agencies have often required stricter standards for individual lawyer qualification than those necessitated by the Code of Professional Responsibility.[92]

Further minimizing the likelihood of a conflict of interest is the ability to articulate standards that can be applied neutrally. The anticipation of public disclosure of the decision will also serve to filter out self-interested decisions. Congress apparently feels the agencies are capable of fair decisions in this regard,[93] and the bar should keep in mind that ultimate responsibility for public decisionmaking rests with the government itself.

A third concern has been voiced about the lack of clarity or consistency in criteria and standards for a screening system.[94] Development of criteria for screening and consent decisions based on actual experi-

89. *See* Freedman, *supra* note 58, at 724-25.

90. *See* National Talent Assocs., Inc., TRADE REG. REP. (CCH) ¶ 21,366, at 21,260 (1977) (former attorney denied opportunity to participate in proceeding before commission; despite evidence that no knowledge of matter gained during government service, an appearance of impropriety remained).

91. Subsequent to the adoption of ABA Opinion No. 342, *supra* note 26, the FCC had occasion to consider whether to disqualify the law firm of a former FCC chairman, Dean Burch, from representing a client in a matter in which Mr. Burch participated substantially while with the FCC. Mr. Burch had filed an affidavit with the FCC prior to the adoption of Opinion No. 342, stating that he had in no way participated in the case since leaving the commission. In light of Opinion 342, the commission found this affidavit inadequate and gave the law firm seven days within which to file additional affidavits and comply with the ABA mandate. *In re* RKO General, Inc., 58 F.C.C.2d 435, 440-41 (1976). In a subsequent opinion, the Commission found that Mr. Burch had been, and would be, adequately screened from the case to allow the firm to proceed with the representation. *In re* RKO General, Inc., 59 F.C.C.2d 641 (1976). Additional affidavits were submitted by Mr. Burch and the chairman of the law firm confirming that all firm personnel were prohibited from communicating with Mr. Burch on the matter, that he was denied access to the files on the case, that his compensatory scheme with the firm effectively isolated him from sharing in any fees attributable to the proceeding, and that the firm had represented this client for 30 years prior to Mr. Burch's joining the firm. *Id.* The *RKO General* case also illustrates how other private parties to a proceeding will aid in enforcing screening procedures. Another party to the proceeding before the FCC vigorously fought continued representation by Mr. Burch's firm with their own affidavits and allegations.

92. The National Labor Relations Board regulations require that no former employee may engage in practice before the board in any case which was pending in any regional office to which he was attached at the time he was employed with the Board. 29 C.F.R. §§ 102, 119 (1977). The Federal Trade Commission and the Federal Maritime Commission require the consent of the agency when a former employee wishes to represent a party before the Commission in a matter which was pending while the former employee served with the Commission. *See* 16 C.F.R. § 4.1(b) (1978) (FTC); 46 C.F.R. § 502.32 (1977) (FMC).

93. In the Public Officials Integrity Act of 1977, the Senate provided for administrative, as well as criminal, remedies when 18 U.S.C. § 207 (1976) is violated. *See* S. REP. No. 95-170, 95th Cong., 1st Sess. 31, 34 (1977).

94. *See* Freedman, *supra* note 58, at 724.

ence is surely manageable and could be a constructive function for local and national bar associations. Repudiation of the screening concept entirely, however, simply because there are at present no formal standards for general guidance, is unjustified.

A rather intriguing argument against the ability of agencies to waive imputed disqualification was presented in the Maryland State and Montgomery County Bar Association Opinions.[95] Those opinions involved a former hearing examiner who had recommended denial of rezoning of a tract of land. The former hearing examiner later wished to serve, or at least have other members of his firm serve, as private counsel for a party seeking rezoning of the same tract of land. Both opinions, as part of the basis for their decisions, reasoned that consent to representation could not be given because the former client was the "public" and there was no practical way to procure the consent of the public. This argument is an interesting legalism, but makes little sense. Every power exercised by a government agency or official is exercised in the name of the public. If government officials can decide how to spend the taxpayer's money, adopt regulations broadly affecting the private sector, and generally implement the public interest, there is simply no sound reason to deny that officials are competent to waive a law firm's technical disqualification to represent a private client, when they are satisifed that the public interest permits it.

III. Some Possible Amendments to The Code: The D.C. Bar Proposals

After the D.C. Bar Legal Ethics Committee narrowly voted down the Tentative Draft Opinion for Inquiry 19, the committee referred the subject matter of the inquiry to its Subcommittee on the Code of Professional Responsibility for the development of relevant amendments to the Code. The subcommittee responded with proposals for extensive amendments of the disciplinary rules under Canon 9.[96] Reflecting the committee's unhappy experience with Inquiry 19, the thrust of the recommendations is away from an absolute disqualification rule, and instead defines rather elaborate procedures for screening and waiver of presumptive disqualification of the firm. In addition, the new proposals contain several provisions, which were not at issue in Inquiry 19, to restrict the activities of present and former government lawyers.

95. See text & note 52 *supra*.

96. The subcommittee recommendations contained a majority and a minority proposal. The majority proposal was generally more restrictive of the activities of former government lawyers and their law firms. Both proposals are set out in District Law., Winter 1977, at 46. These are the proposals discussed in the text. At the request of the Board of Governors of the D.C. Bar, the Legal Ethics Committee reconsidered those proposals and has published a slightly revised set that responds to some of the criticisms made below. See District Law., Aug.-Sept., 1978, at 44-57.

The committee tentatively adopted the proposals and requested comments from the bar before making its final recommendations to the D.C. Bar Board of Governors.[97] These efforts by the committee probably represent the most comprehensive proposals on this subject to date. The following are the major code amendments proposed by the committee and a brief analysis of each.

A. *Individual Disqualification*

1. *DR 9-101(B).*

The proposal would extend the present ban on a former government lawyer's handling of matters in which he exercised substantial personal responsibility while in the government. There is little doubt that the relevant considerations tip strongly in favor of continuing an ethical prohibition focusing on specific matters.

2. *DR 9-101(C).*

> A lawyer serving as a public officer or employee shall not participate in any matter in which he or she participated personally and substantially while in private practice.

This new provision is the converse of DR 9-101(B) and is well warranted. There is no reason to tolerate the real or apparent conflict of interest arising from a government attorney's working on a case on which he also worked as a private practitioner. Almost every government agency has enough lawyers to avoid enmeshing a particular lawyer in a flagrantly unseemly reversal of roles in a matter. The government is unlikely to refuse to hire a competent lawyer because he may be disqualified for a particular case. Thus, as in DR 9-101(B), there is no need to allow a waiver of disqualification for the individual attorney.[98]

3. *DR 9-101(D).*

> For one year after leaving public office or employment, a lawyer shall not accept private employment with or on behalf of any person

97. The Board of Governors must decide what recommendations to make to the D.C. Court of Appeals, which in turn decides whether to promulgate any changes in the current Code.

98. Congress has recently acted to provide for the disqualification of individual supervisory attorneys in the new Department of Energy when these attorneys worked on certain matters in private practice. Essentially the statute provides that an attorney may not participate in any department proceeding for one year after terminating employment with an energy concern where that concern is materially involved in the proceeding, and an attorney may not for one year after commencing service with the department participate in any proceeding for which in the previous five years he participated substantially or had direct responsibility while employed by an energy concern. The statute does contain a waiver provision that may be exercised by the Secretary of Energy if the prohibition would work exceptional hardship on the employee or be contrary to the national interest. *See* 42 U.S.C.A. § 7216 (Supp. 1977).

> who was involved as a party or as attorney for a party in any matter in which the lawyer participated personally and substantially as a public officer or employee within one year before leaving public office or employment.

The impact of this provision is that, for one year, an attorney cannot work for any private enterprise or law firm which was involved in any matter on which the attorney worked during the year prior to leaving public service. This new restriction has been bitterly condemned by federal agencies, federal lawyers, and private firms as ill-conceived and mischievous. Many critical comments have noted that it would place lawyers leaving government service, particularly senior lawyers, in an employment "limbo" for a year. Bolstering the argument that this restriction would discourage talented lawyers from going into government service, the general counsels of the Departments of State, Defense, Commerce and Treasury reported that the mere pendency of the proposed ban has led highly qualified young lawyers to decline offers to work for the government.[99]

The committee's proposal goes too far and is, therefore, unwise. It may make sense, responding to what may be a reasonable appearance of the impropriety of "switching sides," to prevent immediate employment of government lawyers by a private company that has a matter pending before that attorney. The company's direct financial interests are often squarely dependent upon decisions made by government lawyers. Thus, the public might reasonably perceive it to be unseemly for the lawyer to switch his allegiance without even a "cooling off" period. But to extend this ban to law firms is unnecessary. A law firm profits by performing competent legal work, and although it may be indirectly benefited—in the form of obtaining future work—by certain government action on behalf of its clients, the benefits are more tenuous and remote than those accruing to the client whose interests are directly involved. Moreover, it is important to keep in mind that the improprieties of concern here are *at most* apparent rather than real. There is no evidence to support the underlying assumption that law firms hire government lawyers who fail to represent adequately their present client, the government.

The foreclosure of a government lawyer's employment opportunities with whole classes of private companies and law firms would result in even more disadvantages than a strict rule of imputed disqualification. The committee's proposal does not even leave open to the firm the option of discontinuing its representation in the matter so that it

99. Letter from R. Mundheim (Treasury), H. Hansell (State), D. Siemer (Defense), C. Haslam (Commerce) to D.C. Bar Legal Ethics Committee (Feb. 8, 1978), at 3 (on file with committee).

can hire the government lawyer. The employment itself is banned, even if the matter has been concluded. This rule would operate with special harshness on senior lawyers who in a year might well handle matters involving virtually every company in an industry and most law firms specializing in their field of expertise. Under such a regime, the only lawyers easily able to leave government service when they desire will be those who can afford a one year sabbatical. Significantly, Congress has not seen fit to curtail so severely the outside employment opportunities of the government's lawyers. There is little justification for the bar to do so in the absence of concrete evidence of ethical violations. The current federal conflict-of-interest statutes, coupled with present and proposed restrictions on the individual lawyer's personal participation in particular matters, should be sufficient to filter out the type of blatant favoritism at which this amendment is aimed.

4. *DR 9-101(E).*

> For one year after leaving public office or employment, a lawyer shall not personally participate in counseling or otherwise representing any client with respect to the adoption of any provision of a proposed rule or regulation of general applicability or with respect to the validity, interpretations, scope, application or proposed modification or rescission of any provision of a rule or regulation of general applicability, if the lawyer previously participated personally and substantially as a public officer or employee in the drafting, review, promulgation, interpretation or application of such proposed or effective provision within one year before leaving public office or employment.

This proposal has some merit, but suffers from the vice of overbreadth. Its basic theme is that the evil—real or apparent—of "switching sides" may extend beyond "particular matters." Thus, the rule is designed to prevent a lawyer from trading, with unseemly haste, upon his special involvement with a rule or regulation in government service. It might reasonably appear that a private lawyer possesses special advantages and insights if, for example, he was instrumental in drafting the regulation applicable to his client. His arguments might carry more force because of his personal involvement than they might otherwise merit. The temporal scope of the ban—one year prior and subsequent to leaving government service—recognizes the evanescence of this concern and reduces the adverse impact the rule may have on the mobility of government lawyers and the right of clients to secure competent counsel.

Potentially serious problems inhere in the sweep of the coverage, however. More out of oversight than design, the amendment would

apply to many common situations that present no serious ethical problem. As drafted, the prohibition would be triggered by a government lawyer's personal involvement in the "review" or "application" of a regulation. In many agencies, however, the government lawyer's basic functions involve considering the application of regulations to different transactions: procurement regulations in the Defense Department, for example, or rule 10b-5 at the SEC. Since it would be essential for the lawyer to consider those rules in private practice, the proposed rule would effectively bar the lawyer from an entire field of law practice—the field in which he is most skilled—for a year. It would be far more sound to confine any new restriction on this subject to substantial personal responsibility for the drafting of a rule or regulation.

5. *DR 9-101(F).*

> For three years after entering public office or employment, a lawyer shall not participate in any matter in which a participating party was a client of the lawyer's personally within three years before the lawyer entered public office or employment, and, for one year after entering public office or employment, a lawyer shall not participate in any matter in which an affected party is represented by a lawyer who was the partner or associate of or had an of counsel relationship to the public officer or employee within one year before the public officer or employee entered public office or employment.

This is a new rule applicable to lawyers who enter government service from private practice. The rule contains two distinct features, each of which is desirable to guard against favoritism or apparent lack of objectivity in situations that are inherently awkward. In light of the relationships likely to have been formed when the lawyer personally represented a client, he ought not to be making decisions in specific matters that would directly affect his former client. For similar reasons, it is appropriate to disqualify the government lawyer in matters being handled by lawyers who were recently his partners or associates. In any event, many lawyers are likely to recuse themselves in such situations, and this provision merely prevents any chance of impropriety.

In weighing the possible disadvantages of this proposal, there is little reason to expect that it would deter the government from hiring private lawyers. Most agencies should easily be able to staff such cases with other attorneys. This provision is also in substantial accord with the congressional policy recently expressed with regard to lawyers in the new Department of Energy.[100] While it is questionable whether or not it is the province of the bar to make rules that control the way the

100. See note 98 *supra.*

government conducts its business, I believe this type of rule is within the bar's legitimate sphere. After all, lawyers retain their professional stature and licenses when they enter public service, and it is generally assumed that they are ethically bound by other directives of the Code of Professional Responsibility—including some that apply expressly to government lawyers.[101]

B. *Imputed Disqualification of Partners, Associates, and Of Counsel Lawyers*

1. *DR 9-102(A) and (B).*

(A) If a lawyer is required to decline or to withdraw from employment under DR 9-101(B), no partner or associate of that lawyer or lawyer with an of counsel relationship to that lawyer may accept or continue such employment, except as provided in (B) below.

(B) The imputed disqualification of one or more lawyers under DR 9-102(A) may be waived by the employing public agency or department only if the following procedures are followed and determinations made.

(1) The waiver shall be made in writing by the lawyer who has principal operational responsibility for the matter for the public agency or department, shall state clearly the basis for the decision, and shall immediately be made public insofar as publication is not inconsistent with Canon 4 or provisions of law.

(2) The waiver shall be reviewed and approved by a judge or other official who is independent of the agency or department involved.

(3) Prerequisites to granting the waiver shall include, but not be limited to:

(a) an affidavit by the former public officer or employee attesting (i) that he or she will not participate in the matter in any way, directly or indirectly, and (ii) that he or she will not share, directly or indirectly, in any fees in the matter;

(b) an affidavit by each private lawyer who would be participating in the matter but for the imputation of the disqualification of the disqualified lawyer, attesting (i) that he or she will not communicate about the case directly or indirectly with the disqualified lawyer, and (ii) that the client or clients have been so informed;

(c) an affidavit by the agency or department lawyer who has principal operational responsibility for the matter, attesting that waiver of the imputed disqualification is not inconsistent with the public interest, and setting forth the factual basis for that conclusion.

101. *E.g.*, ABA CODE, *supra* note 9, at DR 7-103 (establishing duties of public prosecutor).

This new provision embodies the committee's formal application of the principle of imputed disqualification to the firm of a former government lawyer, and codifies a screening and waiver procedure intended to eliminate the need for a rule of absolute disqualification. The basic principle of imputed disqualification is reasonable if it can be displaced by reasonable alternative safeguards. The safeguards included in the proposed amendment, however, seem more than adequate to avoid the appearance of impropriety.

The requirement of effective screening of the former government lawyer is the key. Virtually all of the ethical problems that occasion the imputed disqualification of the firm will be solved by adequate screening. Nor should there remain an "appearance" of impropriety, since the relevant kind of appearance is one that a reasonable person, informed of the facts, would suspect. The companion feature in the proposal, an elaborate mechanism for waiver, is basically redundant, despite the broad support for the concept. It is essentially a procedure for monitoring the effectiveness of the screening, not a true waiver of an actual impropriety.

As the New York City Bar Committee explained in its Opinion 889, the imposition of a waiver requirement introduces new problems, perhaps encouraging the exclusion of law firms when there is no genuine justification for the disqualification.[102] There is also an inherent problem with any bar proposals that attempt to involve government agencies in the disqualification waiver process. There is no way that a local or even national bar association can force agency action, and there remains the prospect that agencies will decline to comply with procedures of the type proposed by the committee.[103] This problem is not merely hypothetical. The Department of Health, Education, and Welfare recently refused either to waive or not waive disqualification of the law firm of a former government official when a request was made pursuant to the formula set out in ABA Opinion No. 342.[104] The Department merely questioned whether it should be involved in these determinations and expressed doubts as to its ability to make these case by case decisions.[105]

102. *See* OPINION No. 889, *supra* note 28.

103. Obviously when a matter is pending before a court, the disqualification decision can be made by the court, as in Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977). A court order disqualifying, or refusing to disqualify an attorney, is appealable immediately. *See* Woods v. Covington County Bank, 537 F.2d 804, 809 (5th Cir. 1976); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800, 805-06 (2d Cir. 1974).

104. *See* Letter of William H. Taft, IV, General Counsel, Department of Health, Education and Welfare, to the ABA Committee on Ethics and Professional Responsibility (Dec. 23, 1976).

105. *Id.* at 3. A desirable proposal which was not adopted by the D.C. Bar Legal Ethics Committee would have allowed agencies to adopt any waiver procedures they wished to, in lieu of those provided by the Code. *See* DISTRICT LAW., Fall 1977, at 46, 53.

Even assuming agency cooperation with the process, the waiver mechanism drafted by the D.C. Bar committee is disproportionately and impractically complex. Subsection (B)(2), for instance, providing for outside review seems particularly unnecessary and unwise. The provision for outside review of every agency waiver determination is bound to hamper and delay the whole decisionmaking process, and should not be necessary unless the agencies are incapable of fair determinations. As illustrated above, there is no reason to believe the agencies are unable to perform this function fairly and adequately, since they have in fact done so in the past.[106] Furthermore, the agency's personnel are obviously in the best position to make these decisions. They are aware of the issues in any given case, and they are familiar with how much information the former government lawyer may possess on those issues. It is also unclear who the independent screener would be, and on what basis he would review the agency decision. One basic flaw in any system designed to provide an effective alternative to disqualification is its failure to pin down the answers to those questions. To the extent that it is beyond the power of the bar to deputize a court or agency with the duty to serve as outside monitors of an agency's grant of waivers, this simply confirms the inappropriateness of the requirement itself. The principal responsibility for the integrity of the governmental process rests with the agencies themselves, and that is where the decisions affecting that integrity should be made—subject of course to public oversight and political accountability.

Under all the circumstances, the better course would be to replace the waiver process with a procedure for certifying to the affected agency the terms of the screening safeguards being used.[107] The agency could then follow its own regulations—if it concludes any are necessary—in deciding whether to disqualify the firm from further participation in a matter pending before it or to apply to the court for disqualification in a matter pending in court. This procedure would be more efficient and equally protective of the public interest.

The D.C. Bar proposals do not enumerate the criteria that should be applied when an agency makes its determination whether to issue a waiver under the committee's proposal, or to contest the sufficiency of screening under a notice procedure. Perhaps this is best because each agency and each factual situation will warrant its own determination. It is possible, however, to identify several factors that can aid an agency in making its decision in addition to the requirements contained in pro-

106. *See* text & notes 90-93 *supra.*

107. This is exactly what the committee proposed in DR 9-102(C), discussed below, when the individual lawyer's disqualification is occasioned by prior official involvement with a party or with a rule, rather than involvement in the specific matter.

posed DR 9-102(B)(3):[108]

1. How adequate are the firm's screening procedures and records on those procedures?

2. Can the remaining members of the firm handle the matter at issue competently?

3. Did representation of this client predate the hiring of the disqualified attorney?

4. Did this client come to this firm on this matter expecting the disqualified attorney to handle it?

5. Did the disqualified attorney take any action in the matter before the need for disqualification was recognized?

6. Is there a close personal relationship between the disqualified attorney and the attorney who will handle the case?

7. How much does the disqualified attorney actually know about the case?

8. Does another private party desire that the firm be disqualified?

9. Has the firm ever been found in violation of any screening requirements in the past?

One interesting, and necessary, omission from the proposed amendment on imputed disqualification is that the principle would have no application when a *government* lawyer is prohibited from serving on a particular matter because of prior activity in private practice. Obviously, a government agency such as the SEC or the FTC cannot be expected to refrain from enforcing the law when one of its lawyers is disqualified from the case.[109]

2. *DR 9-102(C).*

(1) If a lawyer is required to decline or to withdraw from employment pursuant to DR 9-101(D) or (E), the partners and associates of the disqualified lawyer and lawyers having an of counsel relationship to him or her are not similarly disqualified, if (i) the disqualified lawyer files with the public department or agency an affidavit attesting that, during the period of his or her disqualification, the disqualified lawyer will not participate in any manner in the representation, will not discuss the subject of the representation with any partner, associate or of counsel lawyer and will not share in any fees related to the representation, and (ii) at least one affiliated lawyer files with the same government agency an affidavit attesting that all affiliated lawyers are aware of the limitations on the disqualified lawyer's activity and will adhere to such limitations.

108. *See generally* OPINION NO. 889, *supra* note 28, at 36-39.

109. *See* United States v. Standard Oil Co., 136 F. Supp. 345, 363 n.34 (S.D.N.Y. 1955). *See generally* State v. Brown, 274 So. 2d 381, 382-83 (La. 1973) (*per curiam*).

(2) Affidavits filed pursuant to (1) above shall be made public insofar as publication is not inconsistent with Canon 4 or provisions of law.

This simplified provision for overcoming an imputed disqualification embodies a judgment that the grounds for disqualification in the situations covered are more tenuous than where a formal waiver would be demanded. Hence, the risks of genuine impropriety are smaller. There is a real distinction, but as discussed above these simpler procedures should be adequate, even for the more serious ethical imperatives.

CONCLUSION

The conflict of interest problems of the former government attorney are complex and require a careful balance between the need to prevent potential conflicts and the need to preserve the rights of lawyers to work where they wish and of clients to choose counsel freely. Perhaps most importantly, excessively stringent ethical rules should not defeat their own purposes by severely hampering the government's ability to obtain competent legal counsel. The movement of attorneys in and out of government service is a virtue of the present system, as long as adequate safeguards against abuse are applied.

A strict disqualification rule has not been proven necessary. Until it is, the disadvantages of such a rule cannot be ignored. A well-devised and carefully monitored screening procedure will prevent virtually all abuses, if the bar and the government agencies will work cooperatively. If an appearance of impropriety still remains, the proper answer is to inform the public of the steps being taken to prevent abuses, not to act in a manner actually contrary to the public interest.

One final comment on the D.C. Bar proposals is necessary. Any strict disqualification or waiver proposals that are adopted by only one bar will work substantial injustices to the members of that bar and will create disparities among lawyers who are similarly situated in every respect except geography. Thus, the more novel and unusual the approach, the more reluctant an individual bar should be in adopting the approach, unless it is genuinely satisfied that the ethical objectives that would be promoted substantially outweigh the cost of the discordance. Leadership should come from the American Bar Association on this subject, since its sponsorship of the Code of Professional Responsibility gives it a unique opportunity to foster high, fair, and practical ethical standards for former government lawyers and their law firms.