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TOWARD A NEW ETHICAL STANDARD REGULATING THE PRIVATE PRACTICE OF FORMER GOVERNMENT LAWYERS

I. INTRODUCTION

Since the adoption of the Model Code of Professional Responsibility (MCPR) in 1969 by the American Bar Association (ABA), its ninth canon's admonition of avoiding the appearance of impropriety has been used to regulate the private practice of former government attorneys.¹ Because of the uncertainty of the actual prohibitions of the Disciplinary Rules of Canon 9, the federal common law on the disqualification of those attorneys is in a state of confusion and the bar has been unable to adequately clarify the applicable code provisions for the courts and members of the bar.²

In 1978 Congress identified conflict of interest situations for former government lawyers by passing the Ethics in Government Act (the Act).³ The Act imposed criminal sanctions against former government lawyers⁴ and created the Office of Govern-

1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9, DR9-101(B) (1981).

2. *Armstrong v. McAlpin*, 606 F.2d 28 (2d Cir. 1979), *vacated en banc*, 625 F.2d 433 (2d Cir. 1980) *vacated on other grounds*, 449 U.S. 1106 (1981). See also Comment, *Conflicts of Interest and the Former Government Attorney*, 65 GEO. L.J. 1025 (1977); Note, *Firm Disqualification and the Former Government Attorney: Armstrong v. McAlpin*, 42 OHIO ST. L.J. 579 (1981); Comment, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677 (1980).

3. Pub. L. 95-521, 92 Stat. 1824 (1978) as amended, Pub. L. 96-019, 93 Stat. 37 codified in the following sequence: Title I-Amendments to 28 U.S.C. Special Prosecutor, 28 U.S.C. ch. 39, §§ 591-598; Title II-Congressional Legal Counsel, 2 U.S.C. ch. 9D, § 288; Title III-Financial Disclosure, 5 U.S.C. ch. 18, §§ 701-709; Title IV-Office of Government Ethics, 5 U.S.C. App. I, §§ 401-405; Title V-Restrictions on Post-Service Activities by Officials and Employees of the Executive Branch, 18 U.S.C. ch. 11, § 207 and 28 U.S.C. § 528, Disqualification of officers and employees of the Department of Justice. See for complete synopsis of the Act, 2 U.S.C. § 701 n. Short Title.

4. 18 U.S.C. § 207 (Supp. 1983).

ment Ethics⁵ to enforce a newly-drafted set of federal regulations.⁶

This comment advocates the elimination of the "appearance of impropriety" as a legal and ethical standard governing the disqualification of former government lawyers and urges the ABA to adopt Rule 1.11⁷ of the proposed Model Rules of Professional Conduct.⁸ Model Rule 1.11, *Successive Government and Private Employment*, provides a comprehensible, precise ethical rule regulating the post-government practice of lawyers in conformity with federal statute and regulation.⁹

II. BACKGROUND

The "revolving door" is a derisive term used to describe the practice of lawyers passing back and forth between government service and private practice.¹⁰ After a number of years with the government, and having gained expertise in a field, the revolving door lawyer represents clients before the agency in which the lawyer previously worked.¹¹ Some revolving door lawyers begin

5. 5 U.S.C. App. I § 401 (Supp. 1983).

6. Regulations Concerning Past Employment Conflict of Interest, 5 C.F.R. § 737 (1982).

7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (Final Draft 1982), *infra* note 97.

8. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (Final Draft 1982).

9. *Id.*

10. Lacovara, *Restricting the Private Law Practice of Former Government Lawyers*, 20 ARIZ. L. REV. 369 (1978) [hereafter *Restricting Private Practice*.]

This comment focuses on federal government lawyers, but similar ethical policies and rules apply to state and local lawyers. For state cases so holding, see *City of Hoquiam v. Public Employment Relations Commission*, 628 P.2d 1314 (1981) (involving DR9-101(B) and DR5-105(D)); *State v. Nipps*, 419 N.E.2d 1128 (1979) (upholding an Ohio criminal statute restricting private practice of a former Chief of the Department of Public Welfare).

In 1980, there were approximately 17,300 lawyers employed in the executive agencies and departments of the federal government. U.S. OFFICE OF PERSONNEL MANAGEMENT, OCCUPATIONS OF FEDERAL WHITE COLLAR WORKERS, October 31, 1981 (Washington, D.C.; American Statistical Index 82 (1981) at 26). The lawyer turnover rate in federal agencies is more than twice that of the national average for private law firms. See Jenkins, *Working for Uncle Sam; The Flyway Problem of Federal Attorneys*, STUDENT LAW., Apr. 1977, at 51. The government does not keep exact statistics on the federal turnover rate. However, the various agencies do record the percentages of attorneys who resign each year. *Id.*

11. *Restricting Private Practice*, *supra* note 10, at 371; G. HAZARD, ETHICS IN THE PRACTICE OF LAW (1978). Professor Hazard discusses the advantages of entering the government at the beginning of a legal career at competitive salaries and with opportunities for more responsibility than lawyers in the private sector. *Id.* at 107.

their careers in the private sector and later move to the executive branch to serve for a period of time in the government.¹²

The ethical rule that evolved over the years forbids a former government lawyer from being involved in a matter for a private client, for which the attorney had responsibility while working for the government.¹³ The problem of the revolving door practice occurs when an apparent conflict of interest arises. This may warrant the disqualification of a former government lawyer or the firm with which the lawyer has become associated.¹⁴

The ABA regulates the conduct of former government lawyers in Disciplinary Rule 9-101(B): "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."¹⁵ The admonition of Canon 9, "A lawyer should avoid even the appearance of professional impropriety,"¹⁶ coupled with the prohibition of DR9-101(B), fail to provide clear ethical guidelines for the private practice of former government attorneys.¹⁷

The federal courts employ DR9-101(B) of the MCPR¹⁸ to

12. Mundheim, *Conflict of Interest and the Former Government Employee: Rethinking the Revolving Door*, 14 CREIGHTON L. REV. 707 (1981) [hereafter *Rethinking the Revolving Door*.]

13. G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 109 (1978).

14. *Id.* at 110. There is a problem with identifying on what matter the former government lawyer worked. It may have been a lawsuit, contract negotiation, a policy or regulation, drafting the administration's legislative program, or lobbying a legislative program. Factors considered are the duration of the lawyer's responsibility and type of office held.

The problem becomes severe when disqualification takes the revolving door lawyer out of the job market or when the threat of disqualification forces the lawyer to become a lifetime career servant. Either possibility would prevent the government from attracting competent lawyers. *Id.* at 112-114.

15. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR9-101(B) (1981).

16. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1981). All states except California and Georgia have adopted MCPR Canon 9 and DR9-101(B). See *ABA Code of Professional Responsibility by State*, NAT'L CENTER FOR PROF. RESPONSIBILITY (1980). Two articles present detailed analyses of federal cases on point: O'Toole, *Canon 9 of the Code of Professional Responsibility: An Elusive Ethical Guideline*, 62 MARQ. L. REV. 313 (1979); Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 MINN. L. REV. 243 (1980).

17. See *supra* note 2.

18. The 1969 MCPR was essentially a redraft of the 1908 Canons of Professional Ethics. They were modeled from the 1887 Alabama Code of Ethics which was inspired by the 1850 Lectures of George Sharswood, a Philadelphia judge. Kutak, *A Commitment to Clients and the Law*, 68 A.B.A.J. 804, 805 (1982).

disqualify former government lawyers from litigating a matter in private practice.¹⁹ The federal judiciary also applies DR9-101(B) to disqualify by imputation a law firm whose associate is a disqualified former government lawyer under DR5-105(D).²⁰ Case law has developed a prohibition against the "appearance of impropriety" as a rule to discipline former government attorneys in private practice. Since the ABA's adoption of the MCPR in 1969, the "appearance of impropriety" has evolved into an independent standard applied by federal judges to disqualify former government lawyers whether or not they have actually breached

Canon 36 of the 1908 draft was the applicable ethical restriction preceding the Code's Canon 9 and DR9-101(B). Canon 36 stated:

Retirement From Judicial Position or Public Employment

A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity.

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.

AMERICAN BAR ASSOCIATION CANONS OF PROFESSIONAL ETHICS (1908).

19. The genesis of this comment was a Motion for Disqualification in the United States District Court for the Northern District of California, CR-81-205-Misc. In that case, a violation of 18 U.S.C. § 207 was charged in order to disqualify two recently resigned Strike Force attorneys who were hired to represent an unindicted defendant against charges of prostitution which had been under investigation during their tenure in the Department of Justice. These former government attorneys were disqualified for violating DR9-101(B)'s prohibition against the "appearance of impropriety." The evidence showed an actual conflict of interest and potential breach of confidentiality of government information.

This author has found no federal cases disqualifying former government attorneys for violating 18 U.S.C. § 207 (1982) or 5 C.F.R. § 737 (1982).

The Disciplinary Rules of the MCPR are usually enforced by disqualifying an attorney from representing a client. Professor Sutton, the reporter for the ABA Committee that drafted the MCPR in 1969, has said that the MCPR's Disciplinary Rules were drafted for use in disciplinary proceedings and were not intended to be procedural rules in civil or criminal cases. Sutton, *How Vulnerable is the Code of Professional Responsibility*, 57 N.C.L. REV. 497, 514-15 (1979). Nevertheless, the courts have regularly used the disciplinary rules in disqualification motions.

20. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR5-105(D) (1981) states: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, no associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment." See, *United States v. Miller*, 624 F.2d 1198 (3d Cir. 1980). The circuit court upheld the district court's disqualification of a former Strike Force lawyer as well as the disqualification of his entire law firm. The court viewed the "appearance of impropriety" through the eyes of a hypothetical private person. But see *Board of Education v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979) (the court found that the appearance of impropriety was too slender a reed on which to grant a motion to disqualify an entire law firm); *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977) (screening procedures precluded disqualification of an entire law firm).

an ethical consideration of the MCPR or violated DR9-101(B)'s minimal standard of conduct.²¹

After observing the catastrophic ramifications of firm disqualification, the ABA Committee on Ethics and Professional Responsibility (CEPR) issued Formal Opinion 342 (Opinion 342) to interpret and limit the application of DR9-101(B).²² The CEPR concluded that the appearance of professional impropriety was not a "standard, test, or element embodied in DR9-101(B)."²³ The committee said the "'appearance of professional impropriety' was only a policy consideration supporting the existence of the Disciplinary Rule."²⁴ As a practical alternative to firm disqualification, the CEPR recommended screening the disqualified former government lawyer-associate and obtaining the government's waiver of the screening process. Unfortunately, Opinion 342 did not define with precision any test for the appearance of impropriety; rather, the committee gave examples of actual improper conflict of interest situations or of clear breaches of client confidentiality.²⁵

Opinion 342 represents the bar's formal position on ethical restraints of the practice of revolving door lawyers. The opinion addressed two issues: (1) what ethical considerations of the MCPR warrant disqualification of a former government lawyer under DR9-101(B)?; and, (2) should disqualification be imputed to a law firm whose associate is disqualified? Opinion 342 is the sole commentary from the bar on the ethical restrictions prescribed by the MCPR on the private practice of former government attorneys. Despite its limitation on DR9-101(B)'s applica-

21. Judge Kaufman, a leading authority in the field of legal ethics, described the policy in this context: an attorney must seek to avoid even the appearance of evil. See Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657, 659 (1957).

According to the federal courts, the MCPR places an ethical burden of avoiding the appearance of evil uniquely on former government attorneys.

22. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975).

Formal opinions of the ABA's Standing Committee on Ethics and Professional Responsibility are issued as interpretations of the MCPR. Formal Opinion 342 was an attempt to limit the ramifications of strictly applying DR9-101(B) to disqualification of an entire law firm when one of its members was disqualified because of a conflict of interest.

23. *Id.* at 3.

24. *Id.*

25. *Id.* at 9-11. See also Comment, *Conflicts of Interest and the Former Government Attorney*, 65 GEO. L.J. at 1046.

bility to disqualification of former government lawyers and their law firms, the federal courts have generally ignored Opinion 342 and have continued to disqualify on the basis of the "appearance of impropriety."²⁶

In discussing ethical restrictions on the practice of former government lawyers, the CEPR in Opinion 342 briefly discussed the relevance of MCPR Canon 4's²⁷ mandate of preserving confidentiality and Canon 5's²⁸ prohibition against lawyers' representation of differing interests. However, the focus of Opinion 342 was its interpretation of Disciplinary Rule 9-101(B) in its application to the disqualification of former government lawyers and law firms with which they become associated. First, the CEPR found that the drafters of the MCPR did not intend the "ap-

26. *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978) (circuit court disqualified on the possibility of an appearance of impropriety); *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) (trial court did not disqualify, but circuit court reversed on the grounds of an appearance of impropriety).

27. "A Lawyer Should Preserve the Confidences and Secrets of a Client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1981).

Under Canon 4, DR4-101(B) prohibits an attorney from revealing a confidence either to the disadvantage of his client or to his own or a third person's advantage, unless the client consents after full disclosure. An attorney violates DR4-101(B) by knowingly revealing a confidence of a client or by using such a confidence improperly. Judge Kaufman, in *Emle Industries, Inc. v. Patentex Inc.*, 478 F.2d 652, 670 (2d Cir. 1973), described the purpose of Canon 4 to encourage a client to discuss his problem freely and in depth. This prevents a client from fearing that "information he reveals to his lawyer on one day may be used against him on the next." *Emle* emphasized the need to strictly enforce Canon 4 to prevent the possibility, however slight, that confidential information acquired from a client during a previous relationship may be used subsequently to the client's disadvantage. *Id.* at 571.

In the context of the revolving door, Canon 4's disciplinary rules protect the government's need to preserve confidential information acquired by lawyers in federal agencies. The federal courts have enforced Canon 4's disciplinary provisions to disqualify former government lawyers in private practice when the circumstances reveal an apparent or actual conflict of interest violative of the government's privilege of confidentiality. Opinion 342 explained that DR4-101(B) has been the basis for disqualifying former government lawyers not because they actually breached the Rule, but as a prophylactic measure against a possible future violation. Formal Op. 342, *supra* note 22, at 2.

28. "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1981).

DR5-105(A) states:

A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing different interests, except to the extent permitted under DR5-105(C).

pearance of professional impropriety" to be a standard, test or element embodied in DR9-101(B).²⁹ According to the CEPR, the "appearance of professional impropriety" is only a policy consideration supporting the disciplinary rule.³⁰ The authors acknowledged that: "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."³¹

Why then is DR9-101(B) included under Canon 9's prohibition against the appearance of professional impropriety? The committee listed the policy arguments justifying its position in Canon 9 as: (1) the treachery inherent in switching sides; (2) protection of confidential government information from use in future litigation against the government; (3) the need to discourage government lawyers from structuring their government service to advance their own careers in the private sector; and (4) the benefit to the profession derived from avoiding the appearance of evil.³²

On the other hand, the CEPR recognized weighty policy arguments against having a special disciplinary rule limiting the employment of former government lawyers in conjunction with Canon 9's "appearance of impropriety" standard. The arguments given were that: (1) such a rule restricts the government's ability to recruit young professional and competent lawyers without penalizing them when they subsequently enter private practice; (2) disqualification motions often are a tool to delay

29. Formal Op. 342, *supra* note 22, at 3.

30. "DR9-101(B) is located under Canon 9 because the 'appearance of professional impropriety' is a policy consideration supporting the existence of the disciplinary rule." *Id.*

31. *Id.*

32. *Id.* at 3-4. The CEPR quotes Judge Winestein's comment in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 370 F. Supp. 581 (E.D.N.Y. 1973):

Defendants seem to suggest that the complexities of the factual determination to be made by this court should be avoided by a decision couched in notions of possible appearance of impropriety. On the contrary, the importance of the underlying policy considerations call for careful analysis of the matters embraced by previous and present litigations. Vague or indefinite allegations do not suffice 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. *Id.* at 589.

litigation and enhance counsel's prospects of winning by disposing of an opponent's competent counsel; and, (3) a litigant has a right to have counsel of choice, particularly in specialized areas of law.³³

In balancing the policy considerations of DR9-101(B)'s existence in Canon 9 of the MCPR, the authors of Opinion 342 concluded that the rule should be given a narrow construction by the courts. Such construction would limit neither the government's ability to recruit competent lawyers nor an individual's right to have counsel of his choice.³⁴ The opinion also stated that firm disqualification was adverse to the government's interests to recruit qualified lawyers and the public's interest to obtain counsel of choice, particularly in specialized areas.³⁵ The authors limited the provision which could allow disqualification of an entire firm when one of its attorneys was unable to appear as a representative against a former agency.³⁶

Thus, the CEPR, without further reason, and in direct contradiction to Canon 5's disciplinary rule 105(D), found that screening the disqualified former government lawyer from participation in the matter, and from the firm's compensation generated from the matter, satisfied DR-105(D). The committee also recommended that the government agency should approve or waive the screening of the disqualified former government

33. Formal Op. 342, *supra* note 22, at 4-5.

34. *Id.* at 11.

35. "Only allegiance to form over substance would justify blanket application of DR5-105(D) in a manner that thwarts and distorts the policy considerations behind DR9-101(B)." Formal Op. 342, *supra* note 22, at 11.

36. In 1974, the ABA amended DR5-105(D) to read: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment."

Soon after this amendment, controversy arose as to the imputed disqualification of a law firm which had hired a former government lawyer who had switched sides and was thereby disqualified. See *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977). Evidently, the ABA had given no consideration to the impact of DR5-105(D) on the revolving door lawyer, his partners or associates. *Restricting Private Practice*, *supra* note 10, at 379.

As stated, the CEPR attempted to limit DR5-105(D)'s application to DR9-101(B) in Opinion 342. Opinion 342 found that a disqualified former government attorney's law firm would not be disqualified if: (1) the disqualified former government lawyer was screened from participation in the action and from sharing in fees derived from the client; and (2) the government agency or department were required to waive the screen. Formal Op. 342, *supra* note 22, at 11.

lawyer. Screening and waiver would fulfill the requirements of DR9-101(B) and not mandate an entire firm's disqualification when one of its associates was disqualified.³⁷

In reaching this conclusion, the CEPR circumvented a literal reading of the MCPR.³⁸ The authors did not explain why DR5-105(D) is inapplicable to disqualify a law firm whose member is disqualified by DR9-101(B). In a recent article,³⁹ Professors Finman and Schneyer examined the CEPR's interpretation of the MCPR and criticized the CEPR's unexplained reading of the literal meaning of the disciplinary rules.⁴⁰ They charged that Opinion 342 was an attempt to rewrite the MCPR, not to interpret it.⁴¹ In particular, the article discussed Opinion 342's disregard of the "unambiguous command—the plain meaning—of DR5-105(D)"⁴² in disqualifying an entire law firm whose member is a disqualified former government lawyer. In attempting to justify Opinion 342's failure to apply DR5-105(D), the authors speculate that the CEPR found that: "its gloss on the [Disciplinary Rules] is legitimate, because that gloss will decrease the undesirable consequences of disqualification without reducing the benefits that a literal reading would yield."⁴³

Thus, one must conclude, as did Professors Finman and Schneyer, that "for several reasons not mentioned in Opinion 342, it is doubtful whether the values served by a literal reading [of the MCPR] would be as well protected by the CEPR's gloss."⁴⁴

A literal reading of Opinion 342 also leads one to the con-

37. Formal Op. 342, *supra* note 22, at 11-12.

38. The CEPR's conclusions on the enforcement of DR9-101(B) and DR5-105(D) are realistic and pragmatic, although not justified by reading the MCPR.

39. Finman & Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the ABA Committee on Ethics and Professional Responsibility*, 29 U.C.L.A. L. Rev. 67, 141-144 (1981).

40. *Id.* at 142. Addressing the question of DR5-105(D)'s applicability to the imputed disqualification of a law firm whose member is barred from participation by DR9-101(B), the authors stated: "The Code seems to allow only one answer: DR5-105(D) bars an entire firm if any member is disqualified under 'a Disciplinary Rule'; a firm member barred by DR9-101(B) is disqualified by 'a Disciplinary Rule'; ergo the entire firm is barred." *Id.* at 141.

41. *Id.* at 141.

42. *Id.*

43. *Id.* at 142.

44. *Id.*

clusion that the ABA committee was unable to sustain DR9-101(B)'s inclusion in the MCPR under the maxim of Canon 9's avoidance of the appearance of impropriety. In fact, the committee affirmatively told the courts that the "appearance of professional impropriety" is not a standard embodied in DR9-101(B).⁴⁵ At most, the committee stated, the appearance of impropriety is a policy consideration which should be construed favorably not to disqualify a revolving door lawyer.

Despite Opinion 342's narrow construction of DR9-101(B) and conclusion that the appearance of impropriety is no standard for its enforcement, the courts have relied on Canon 9 to disqualify former government lawyers and their law firms. The federal courts have enforced DR9-101(B) on a case by case basis. This has produced a broad, vague standard of the meaning of "appearance of professional impropriety," enforced with imprecision, subjective decisions.⁴⁶ This subjective method of interpretation of the "appearance of impropriety" gives government lawyers, former government lawyers, and law firms wishing to hire government lawyers no reliable standard to guide post-government conduct.⁴⁷

A leading case, *General Motors Corp. v. City of New York*,⁴⁸ demonstrates the dilemma of the revolving door lawyer. A former Department of Justice attorney who had prosecuted an antitrust suit against General Motors was hired by the City of New York and assigned to represent it in a similar suit against General Motors. The court acknowledged that the attorney had not

45. Formal Op. 342, *supra* note 22, at 3.

46. Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 MINN. L. REV. 243 (1980); O'Toole, *Canon 9 of the Code of Professional Responsibility: An Elusive Ethical Guideline*, 62 MARQ. L. REV. 313 (1979).

47. Kramer, *supra* note 46, at 244. Donald A. Farmer was formerly Director of the Bureau of International Aviation, United States Civil Aeronautics Board and prior to that Special Assistant to the Assistant Attorney General, and Trial Attorney, Antitrust, United States Department of Justice. He entered private practice in 1979 after ten years of government service. When questioned about the present rules and restrictions on the private practice of revolving door lawyers Mr. Farmer wrote that he believed them to be out of touch with reality and becoming further detached rather than less. His opinion is that the unfortunate result of all this is that many lawyers going through the revolving door do not even know what the rules are, much less comply with them. Letter of Donald A. Farmer, Jr. to Barbara Mance (August 27, 1982).

48. 501 F.2d 639 (2d Cir. 1974).

changed sides, but still held that his representation in opposition to the defendant corporation violated the ethical precepts of Canon 9 and DR9-101(B). The court stated that the impropriety involved the "possibility that a lawyer might wield government power with a view toward subsequent private gain."⁴⁹ As a result, the court disqualified the former justice department lawyer even though he had not switched sides or sought employment with the City of New York while working as a federal prosecutor. The standard which evolved from this case was the "possibility" of impropriety, one even more nebulous and ephemeral than "appearance of impropriety."

The Ninth Circuit, in *In Re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*,⁵⁰ held that Canon 9 would be stripped of its meaning and significance if it were not separately enforced to disqualify former government attorneys in private practice.⁵¹ The court determined that since it is instructed to safeguard the integrity of the judicial process in the eyes of the public,⁵² Canon 9 must be a sufficient ground for disqualification. The Ninth Circuit further reasoned that its responsibility of controlling the conduct of attorneys who appeared before the court justified its ability to disqualify attorneys for actual conduct that impugns the integrity of the court or for conduct that appears to be improper.⁵³

49. *Id.* at 650 n. 20. The court believed that this violation of Canon 9 and DR9-101(B) was justified because "there lurks great potential for lucrative returns in following into private practice the course already charted with the aid of government resources." *Id.* Cf. *United States v. Standard Oil Co.*, 136 F. Supp. 345 (S.D.N.Y. 1955) where in a similar fact situation no appearance of evil was found.

50. 658 F.2d 1355 (9th Cir. 1981).

51. *Id.* at 1360.

52. See *United Sewerage Agency, Etc. v. Jelco*, 646 F.2d 1339 (9th Cir. 1981).

53. 658 F.2d 1360-61. The Ninth Circuit's decision is in direct conflict with the bar's official position in Opinion 342. According to O'Toole, *Canon 9 of the Code of Professional Responsibility: An Elusive Ethical Guideline*, 62 MARQ. L. REV. 313 (1979), three basic issues are raised by Canon 9's application to disqualify former government attorneys:

First, is Canon 9 intended to be used within the context of litigation or is it only intended to serve as an axiomatic guideline to the practicing attorney? Second, from whose perspective is the propriety of appearances measured? Third, can improper appearances alone suffice to trigger disqualification of opposing counsel?

Id. at 318. The author terms the application of Canon 9 a murky subject of legal ethics and raises the example of a court's disqualifying an attorney even in an instance when Canon 9 had not been explored in briefs addressing the motion. *Id.* citing *Richardson v.*

A recent case from the Second Circuit, *Armstrong v. McAlpin*,⁵⁴ demonstrates the state of confusion that exists when federal courts enforce DR9-101(B) of the present MCPR. In *McAlpin*, Theodore Altman, a former Assistant Director of the Division of Enforcement of the Securities and Exchange Commission (SEC) became a partner in a private law firm, the Gordon Firm. At the SEC Altman had had supervisory and "direct, personal involvement"⁵⁵ in the investigation of Clovis McAlpin. The SEC filed a complaint against McAlpin for securities violations. Subsequently, Altman left the SEC to join the Gordon firm. At that time the Gordon firm was not involved in the prosecution of McAlpin.

Armstrong was appointed receiver in the action, and the SEC made its investigatory files available to him. Armstrong was forced to seek new counsel in the action and consulted one of the partners of the Gordon firm about his retaining the firm. The court approved the appointment of the Gordon firm, provided that Altman, who was clearly disqualified,⁵⁶ was properly screened. The SEC waived any objection. Armstrong filed an action against McAlpin for fraud and damages of \$24,000,000. The defendant moved to disqualify the Gordon firm on the ground that Altman's disqualification should be imputed to the entire Gordon firm. The district court denied the motion.⁵⁷

The Second Circuit Court reversed and found that disqualification of the firm necessary "as a prophylactic measure to guard against misuse of authority by government lawyers."⁵⁸ Upon rehearing, the court reversed because there had been no

Hamilton International Corp., 469 F.2d 1382 (3d Cir. 1972).

A number of courts have held that Ethical Consideration 9:3 and DR9-101(B) apply even where a former government lawyer's representation of a private client does not impugn the position she took in a particular matter while in public employment. This was the court's belief in *General Motors*, *supra* note 50.

Ethical Consideration 9:3 states: "After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."

54. 625 F.2d 433 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981).

55. 606 F.2d 28, 29 (2d Cir. 1979), *vacated and remanded*, 449 U.S. 1106 (1981).

56. The trial court disqualified him under DR9-101(B). 625 F.2d at 442.

57. *Id.* at 443.

58. 606 F.2d at 34.

threat to the integrity of the trial process⁵⁹ due to: (1) the screening of Altman;⁶⁰ (2) the routine turnover of SEC files to Armstrong before he retained the Gordon firm; and, (3) the absence of any indication that the receiver came to the firm through or because of Altman's connection.⁶¹

The circuit court concluded that disqualification of the firm could only be based on the appearance of impropriety stemming from Altman's association with the firm. The court balanced the appearance of impropriety against the plaintiffs' interest in proceeding and redress of the alleged frauds and concluded that the Gordon firm must not be barred from the action.⁶² The court followed a practical, narrow construction of the appearance of impropriety by finding that: "[u]nder the circumstances, the possible 'appearance of impropriety is simply too slender a reed on which to rest a disqualification order . . . particularly . . . where . . . the appearance of impropriety is not very clear.'"⁶³

In *Greitzer & Locks v. Johns-Manville*,⁶⁴ a case involving a former government lawyer who specialized in asbestosis litigation, a majority of the Fourth Circuit found the particular firm's shielding provisions to be adequate. These included prohibiting the former justice department lawyer "from working, advising or participating, indirectly, by discovery, analysis or otherwise [in the actions in dispute] . . . He was to be denied access to the files and prohibited from sharing profits derived from the . . . cases."⁶⁵ The majority relied on Opinion 342, rejecting a literal

59. 625 F.2d at 445.

60. *Id.* The case, therefore, is entirely distinguishable from *General Motors*, 501 F.2d 639. The court did not scrutinize the screening provisions since the SEC had found them satisfactory.

61. *Id.*

62. *Id.* at 446.

63. *Id.* at 445, quoting *Board of Education v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979). The court also said that absent a threat of taint to the trial, ethical conflicts are better addressed by the disciplinary machinery of the state and federal bar or by legislation such as 18 U.S.C. § 207. 625 F.2d at 441.

64. No. 81-1379, slip op. (4th Cir. March 5, 1982).

65. No. 81-1379, slip op. at 6-7 (4th Cir. March 5, 1982). The courts are more amenable to finding that a "Chinese Wall" was erected in the screening mechanism in Canon 9 cases than in situations where a possible violation of Canon 4 or Canon 5 has or will occur. Courts will consider policy arguments for not disqualifying a law firm that has hired a former government attorney. See *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977) (The court held that a former government lawyer would take on the status of Typhoid Mary and be reduced to sole practice under the most unfavorable condi-

interpretation of the MCPR. The majority opinion deferred to the justice department's approval of the disqualified former government lawyer's firm's screening measures and stated that the "affected client agencies of the government are the best judges of the suitability of screens erected to protect them from disclosures of confidences and secrets."⁶⁶ More importantly, the majority cited Rule 1.11 of the ABA Proposed Final Draft of the Model Rules of Professional Conduct which eliminates the "appearance of professional impropriety" standard governing the disqualification of former government lawyers.⁶⁷

III. FEDERAL LAW GOVERNING THE PRIVATE PRACTICE OF FORMER GOVERNMENT LAWYERS

Congress has enacted legislation to regulate the private practice of former government lawyers. As stated in the legislative history, the purpose of the 1978 Ethics in Government Act was to enforce and reform the ethical standards governing the post-government employment of present and former federal officials in the executive branch of the government.⁶⁸ Federal offi-

tions.). Comment, *Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 693 (1980).

66. No. 81-1379, slip op. at 10 (4th Cir. March 5, 1982).

67. *Id.*

68. For the legislative history and purpose of the Act, see S. REP. NO. 170, 95th Cong., 2d Sess., reprinted in part in 1978 U.S. CODE CONG. & AD. NEWS 4216 and H.R. REP. NO. 115, 96th Cong., 1st Sess., reprinted in 1979 U.S. CODE CONG. & AD. NEWS 328. According to S. REP. NO. 170 at 4217: "The purpose of this legislation [Ethics in Government Act] is to preserve and promote the accountability and integrity of public officials and of the institutions of the Federal Government and to invigorate the Constitutional separation of powers between the three branches of government."

The Act originated as the Public Officials Integrity Act of 1977, S. 403-7, sponsored by the eleven-member Senate Committee on Government Affairs. The Act consists of five sections, but only sections four and five regulate the revolving door lawyer/employee problem. Section four, Title IV, created the Office of Government Ethics.

According to the UNITED STATES GOVERNMENT HANDBOOK, THE OFFICE OF GOVERNMENT ETHICS, 1981-82 at 600, Title IV has the responsibility to develop and to recommend, to the Office of Personnel Management and the Attorney General, rules and regulations concerning conflicts of interest and ethics in the executive branch. These rules and regulations are promulgated by the Office of Personnel Management and codified at 5 C.F.R. § 737 (1982).

The Office also was established to monitor, investigate, and enforce compliance with the conflict of interest and public financial disclosure laws and regulations. 1978 U.S. CODE CONG. & AD. NEWS at 4264. (S. REP. NO. 170 at 148.) See *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979), cert. denied, 449 U.S. 1076 (1981). (Upholding the constitutionality of 28 U.S.C. app. §§ 301-309 (*Judicial Personnel Financial Disclosure Requirements*)).

The Office also has the responsibility to promote an understanding of the ethical

cially covered by the Act are lawyers and other professionals, including military personnel, who serve in executive departments and agencies.

Title 5 of the Code of Federal Regulations section 737 prohibits a former government lawyer's representation of a private client involving a conflict of interest. Section 737.5(a) prohibits a former government attorney from *ever* representing a person in any informal or formal appearance before the United States courts in connection with any particular government matter involving a specific party in which matter he or she participated personally and substantially as a government employee.⁶⁹ "Personal" participation means direct involvement and includes the participation of a subordinate when actually directed by the former government employee.⁷⁰ "Substantial" means that the attor-

standards in the executive agencies so that employees will know of the procedures involved and of any changes in the laws or regulations. 1978 U.S. CODE CONG. & AD. NEWS at 4263. The Director refers problems to the Department of Justice for disciplinary proceedings. S. REP. No. 170 at 146-48.

The President, with the advice and consent of the Senate, appoints the Director of the Office of Government Ethics. 5 U.S.C. app. I § 401 codifies his functions. According to the *San Francisco Chronicle*, August 14, 1982, at 8 Col. 3 "The first director of the Office of Government Ethics, J. Jackson Walter, is resigning because of the wide-ranging controversies involving the enforcement of the financial disclosure regulations of the Act. High-level officials, members of Congress, and federal judges have refused to forthrightly comply with the Act's provisions." The *Chronicle* pointed out that the director does not have the power to impose sanctions if he does not approve an incumbent official's financial statement. Also the director has no authority to audit financial forms. According to Walter, his main role was to write advisory opinions for companies on the propriety of former government employees' passage through the revolving door.

Section five, Title V, of the Act, sets forth the laws restricting the post-service activities by officials and employees of the executive agencies and departments. The Act amended and expanded the criminal penalties imposed on disqualified former government lawyers in 18 U.S.C. § 207 (1979). "But Title V does more than establish a crime and provide for administrative discipline: it is also a general standard for what is to be considered proper ethical conduct by former government officials In short it is a statement of federal policy on this aspect of conflict of interest." S. REP. No. 170 at 31-32.

69. 5 C.F.R. § 737.5(a) (1982). Section 737.5(b) explains the prohibition with an illustration:

The target of this provision is the former employee who participates in a particular matter while employed by the Government and later "switches sides" by representing another person on the same matter.

Example 1: A lawyer in the Department of Justice personally works on an antitrust case involving Q Company. After leaving the Department, he is asked by Q Company to represent it in that case. He may not do so.

70. 5 C.F.R. § 737.5(d)(1) (1982).

ney's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance.⁷¹ While a series of peripheral involvements may be insubstantial, a single act of approval or participation in a critical step may be a substantial act.⁷²

Further, one's governmental (official) responsibility may contribute to the substantiality of an employee's participation. If an employee has responsibility for review of a matter "and action cannot be undertaken over his or her objection, the result may be different. If the employee reviews a matter and passes it on, his or her participation may be regarded as 'substantial' even if he or she claims merely to have engaged in inaction."⁷³

The rules of the Office of Government Ethics specifically define "the same particular matter" as one involving the "same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continued existence of an important Federal interest."⁷⁴ The particular matter must be one in which the United States is a party or has an interest in, and the importance of the federal interest is a determining factor.⁷⁵

71. *Id.* "Example 2: A Government lawyer is not in charge of, nor has official responsibility for a particular case, but is frequently consulted as to filings, discovery, and strategy. Such an individual has personally and substantially participated in the matter."

72. *Id.*

73. *Id.* at § 737.5(d)(3) (1982).

74. *Id.* at § 737.5(c)(4) (1982). One example illustrative of the "same particular matter" given here is:

A Government employee reviewed and approved certain wiretap applications. The prosecution of a person overheard during the wiretap, although not originally targeted, must be regarded as part of the same particular matter as the initial wiretap application. The reason is that the validity of the wiretap may be put in issue and many of the facts giving rise to the wiretap application would be involved.

Id.

75. *Id.* at § 737.5(c)(5) Example 1 (1982):

Example 1: An attorney participated in preparing the Government's antitrust action against Z Company. After leaving the Government, she may not represent Z Company in a private antitrust action brought against it by X Company on the same facts involved in the Government action. Nor may she represent X Company in that matter. The interest of the United States in preventing both inconsistent results and the appearance of impropriety in the same factual matter involving the same party, Z Company, is direct and substantial. However, if

In addition to the life-time ban on a matter in which the government lawyer participated personally and substantially, section 737.7(a) imposes a two year prohibition on a former government lawyer's participation in a matter in private practice which was pending *under his or her responsibility* one year before leaving government service.⁷⁶ For any possible violation of these regulations, the Office of Government Ethics may initiate disciplinary proceedings.⁷⁷

Title V of the Ethics in Government Act amended 18 U.S.C. section 207, the criminal statute proscribing unlawful appearances or conduct of former government lawyers representing private clients on a matter in which they participated as a government employee.⁷⁸ Amended section 207 penalizes former government lawyers for participating in three specific conflict of interest contexts.⁷⁹ Professor Mundheim has summarized the re-

the Government's antitrust investigation or case is closed, the United States no longer has a direct and substantial interest in the case.

76. 5 C.F.R. § 737.7(a)(1982).

77. 5 U.S.C. app. I § 401.

78. Disqualification of former officers and employees; disqualification of partners of current officers and employees. 18 U.S.C. § 207, as amended, Pub. L. No. 95-521, Title V, § 501(a), (1978), Pub. L. No. 96-28, §§ 1, 2 (1979). First, the 1978 amendments to § 207 expanded the lifetime ban to formal or "informal appearances" or "with the intent to influence" or make "any oral or written communication" in a matter in which an official participated personally and substantially involving a specific party or parties with whom the United States or the District of Columbia has a direct and substantial interest. Second, subsection (b) was amended from a one year to a two year ban on activity (formal or informal, or with the intent to influence, make any oral or written communication) actually pending under the official's responsibility within a period of one year prior to the termination of his responsibility. Third, subsections (c) and (d) place a new one year restriction on former high level officials from appearing before the department or agency in which they served. 1979 U.S. CODE CONG. & AD. NEWS, *supra* note 31, at 330.

79. The pertinent sections of 18 U.S.C. § 207 are as follows:

(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for, or otherwise, represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to—

(1) any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

vised statute as follows:

First, it bars a former Government employee from ever making an appearance before or a communication to a court or agency on behalf of a party in a particular matter in which he participated personally and substantially while in government service. Under the Act the former government employee can advise, counsel or assist in a matter on which he switched sides so long as he himself avoids appearing or communicating.

Second, the Act places a two-year ban on appearing before or communicating with a court or agency on behalf of a party in a particular matter which was pending under the employee's official responsibility in his last year of government service. Like the first ban, it does not ban advising,

(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed; or

(b) Whoever, (i) having been so employed within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) having been so employed and as specified in sub-section (d) of this section, within two years after his employment has ceased, knowingly represents or aids, counsels, advises, consults, or assists in representing any other person (except the United States) by personal presence at any formal or informal appearance before—

(1) any department, agency, court, court-martial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) in connection with any judicial, rule-making, or other proceeding, application, request for a ruling or other determination contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and

(3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

assisting, counseling or consulting behind the scenes.

Third, the Act also imposes a one-year ban on senior government officials from appearing before their former agencies on any matter, including new matters

. . . .

It does not preclude the senior officials from giving advice behind the scenes, because it is not his knowledge, but the possible undue influence associated with use of his name which is sought to be restricted.⁸⁰

The statute's effects are to eliminate official corruption, to insure that former government lawyers will not exercise undue influence over former colleagues, and to encourage officials to scrutinize their subsequent activities as private citizens with a higher degree of caution.⁸¹ Although section 207 is a criminal statute, it was passed to provide a general standard for proper ethical conduct for former government officials and as a model for agency and department regulations.⁸²

At the time of its enactment in 1978, the Senate Report conceded that public confidence in government had been weakened "by a wide-spread conviction that federal officials use federal office for personal gain, particularly after they leave government service."⁸³ The Senate committee stated that the public suspiciously viewed the revolving door between industry and government thereby eroding confidence in the integrity of the federal government.⁸⁴

On the other hand, the legislative history of the statute reveals that Congress recognized weighty public policy reasons mandating the government's ability to attract and hire qualified, talented individuals for executive service. In 1979, when section 207 was amended,⁸⁵ heads of various executive departments tes-

80. Mundheim, *Rethinking the Revolving Door*, *supra* note 12, at 714. Reference is made to §§ 207(a), 207(b)(3), 207(b)(i), 207(c). See 1978 U.S. CODE CONG. & AD. NEWS 4216, 4263ff, for a detailed explanation of 18 U.S.C. § 207(a)(b) & (c).

81. 1978 U.S. CODE CONG. & AD. NEWS at 4247.

82. *Id.* at 4248.

83. *Id.*

84. *Id.*

85. H.R. REP. NO. 115 cited in 1979 U.S. CODE CONG. & AD. NEWS 328, 330-333.

tified that: (1) movement back and forth from private industry to government is valuable to the individual and allows the government to recruit talented employees;⁸⁶ (2) if such movement were restricted by an ambiguous and harsh statute, the civil service would become a stagnant bureaucracy isolated from the energy of outsiders and fresh competition;⁸⁷ and, (3) the government must balance its interest with those of affected individuals whose career options upon leaving government service would be severely restricted.⁸⁸

IV. PROPOSED ABA REGULATION OF THE PRIVATE PRACTICE OF FORMER GOVERNMENT LAWYERS

The ABA Commission on Evaluation of Professional Standards (the Kutak Commission)⁸⁹ has recommended the bar's adoption for the Proposed Model Rules of Professional Conduct (MRPC)⁹⁰ including proposed Rule 1.11, entitled *Successive Government and Private Employment*.⁹¹ The Kutak Commis-

86. *Id.* at 331. Testimony of former Deputy Secretary of Defense Charles W. Duncan, Jr.:

Moreover, a law which discourages movement between the private and public sector would further isolate dedicated career civil servants from other citizens at a time when alienation between Government and the tax-paying public is eroding faith in our national institutions. Our Government has long benefited from the mix of career and short-term employees in its service, and this committee believes that the interchange this provides with the private sector must be preserved.

Id. at 332.

87. *Id.* at 331. The House Committee noted the importance of attracting individuals from the private sector for limited periods of time who would challenge the conventional wisdom of their superiors, knowing that they can readily find private employment if necessary. *Id.* at 332.

88. *Id.* Testimony of former chairman Charles Curtis of the Federal Energy Regulatory Commission.

89. The ABA Commission of Evaluation of Professional Standards is chaired by Robert J. Kutak. It should be noted that Mr. Kutak chairs a commission, not a standing committee of the ABA, and the commission includes non-lawyers. The commission was appointed in 1977 by the then ABA President William B. Spann, Jr. It was charged with undertaking a comprehensive rethinking of ethics of the profession of law. MODEL RULES OF PROFESSIONAL CONDUCT Proposed Final Draft 1981, Chairman's Introduction.

90. American Bar Association, *Materials on Model Rules of Professional Conduct*, v. I, ANNUAL MEETING 1982, San Francisco, California. See also Kutak, *A Commitment to Clients and the Law*, 68 A.B.A.J. 804 (1982).

91. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 *Successive Government and Private Employment* (Final Draft 1982) reads:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter

sion's draft has eliminated Canon 9's ethical dominion over the private practice of former government lawyers and has streamlined the rules governing disqualification imputed to a law firm

in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer who has knowledge, acquired as a public officer or employee, of confidential government information about a person, may not represent a private client whose interests are adverse to that person in a matter in which the information is material. No lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the adverse party to enable that person to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyers is participating personally and substantially.

(d) As used in this rule, the term "matter" includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this rule, the term "confidential government information" means information which, at the time this rule is applied, the government is prohibited by law from disclosure to the public or has a legal privilege not to disclose.

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where members are disqualified former government lawyers. Proposed Rule 1.11 is based substantially on the federal law of the Ethics in Government Act and recognizes the controlling regulations proscribing conflicts of interest.⁹²

Rule 1.11 is designed to integrate in organization and substance with other rules defining the duties of the client-lawyer relationship, specifically Rule 1.9, *Conflict of Interest: Former Client*, and Rule 1.10, *Imputed Disqualification: General Rule*.⁹³ As stated by Chairman Robert Kutak: "The overriding objective of the Commission on Evaluation of Professional Standards during these past five years has been to develop professional standards that are comprehensive, consistent, constitutional, and, most important, congruent with other law of which they are a part."⁹⁴

With no admonition of avoiding the appearance of professional impropriety, Rule 1.11(a) begins: "Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee"⁹⁵

This prohibition is similar to DR9-101(B)'s prohibition that a "lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."⁹⁶ Rule 1.11 specifically stated "personal" participation by the former government lawyer and offers a more concrete standard consistent with federal statute and regulation. The requirement of personal participation enables a former government lawyer to know when post-government representation

92. Proposed Rule 1.11 defers to law regulating the private practice of former government lawyers. The 1969 MCPR did not parallel federal statutes. See *Proposed Rule 1.11 Comment*, 68 A.B.A.J. 1331, 1410 (1982).

93. Kutak, *The New Model Rules of Professional Conduct, A Report to the Bar*, 68 A.B.A.J. 1019, 1023 (1982). Mr. Kutak has pointed out that the organizational format of the rules is a legislative one rather than one composed of canons, ethical considerations and aspirations. See also Kutak, *The Next Step in Legal Ethics: Some Observations about the Proposed Model Rules of Professional Conduct*, 30 CATH. U.L. REV. 1, 5 (1980).

94. See note 93 *supra*, Kutak, *The New Model Rules of Professional Conduct, A Report to the Bar* at 1023.

95. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (Final Draft 1982).

96. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR9-101(b) (1981).

is barred.

The term "matter" is defined in subsection (d)(1) as a judicial proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; or in (d)(2) any other conflict of interest matter covered by the appropriate government agency.⁹⁷ Rule 1.11(a) is a comprehensive improvement of DR9-101(B) since the old rule never addresses the specifics of the term.

The proposed rule provides for a permanent ban on an individual lawyer's participation on a matter in which he was personally and substantially responsible unless the appropriate government agency consents to the participation. The rule also disqualifies firms if: (1) the disqualified former government lawyer is not screened from participation in the matter or from any part of the fees; and, (2) written notice is not given promptly to the appropriate government agency to enable it to ascertain compliance with the screening mechanism.⁹⁸ The Rule adopts the screening device sanctioned by Opinion 342 to bar firm disqualification, but does not mandate agency waiver, rather agency "compliance." Thus, Rule 1.11 fulfills the *Greitzer* majority's belief that a government agency is the best judge of the suitability of screens erected to protect it from disclosure of confidential information.⁹⁹

These proposed provisions governing disqualification imputed to a law firm are important additions to the ABA ethical code. Subsections (a)(1) and (a)(2) remedy the 1969 Code's failure to deal with the realities of modern law practice.¹⁰⁰ It is essential that the ABA establish clear, workable rules for the re-

97. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (Final Draft 1982).

98. *Id.* at (a)(1), (a)(2). The screening and agency approval provisions are in conformity with the recent order of the District of Columbia Court of Appeals of April 30, 1982, which also eliminated the waiver requirement of the federal agency but required filings by firm associates. (Memorandum of David B. Isbell to D.C. Bar Board of Governors: The Final Spin of the "Revolving Door": The D.C. Court of Appeals' Order of April 30, 1982, at 6.) (Letter of Philip A. Lacovara to Barbara Mance, (July 26, 1982)).

99. See notes 93-95, *supra*.

100. Kutak, *The Next Step in Legal Ethics, Some Observations about the Proposed Model Rules of Professional Conduct*, 30 CATH. U.L. REV. at 3. Mr. Kutak characterized the 1969 Code as conceiving of the practice of law as it was in downstate Illinois of the 1860's.

volving door lawyer and prospective law firms which hire revolving door lawyers. The legislative history of the 1978 Ethics in Government Act reveals that Congress refrained from addressing this issue of disqualification imputed to a law firm and implicitly left it to the legal profession to self-regulate.¹⁰¹

The proposed rule will provide the courts with standards to measure the conflict of interest inherent in the revolving door situation, give agencies the opportunity to maintain confidentiality, and give private firms a way to determine when one of their attorneys who has been hired from the government will be able to operate without fear of disqualification. No longer will the federal courts have the "appearance of professional impropriety" as a standard to disqualify a law firm whose member is personally disqualified.¹⁰²

The comment to Rule 1.11 discusses the policy arguments in support of the screening and agency approval provisions of the proposed rule.¹⁰³ Not only is the government's need to attract highly qualified lawyers legitimate, it is necessary to sustain a democratic government system which competes with private industry. For that reason, the comment determines that it would

101. S. REP. No. 170, *supra* note 68, at 149.

102. Letter from Philip A. Lacovara to Barbara Mance (August 16, 1982). Mr. Lacovara predicted that, even though the proposed Model Rules have eliminated the "appearance of impropriety" as a textual basis for disqualification of former government lawyers, that standard may yet survive in disqualification motions. The argument will be that the "appearance of impropriety" standard is a general principle of professional behavior which the courts have inherent power to administer. To support his contention, see *Gas-a-tron v. Union Oil Co.*, 534 F.2d 1322, 1324 (9th Cir. 1976) quoting *Richardson v. Hamilton International Corp.*, 469 F.2d 1382, 1385-86, (3d Cir. 1972):

Whenever an allegation is made that an attorney has violated his moral and ethical responsibility, an important question of professional ethics is raised. It is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar. The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession. This means that a court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance of impropriety.

. . . [T]he regulation of attorneys appearing before the district court in these matters will be disturbed only when, on review of the record, we can say that the district court abused its permissible discretion.

535 F.2d at 1324-25 (footnotes omitted).

103. *Proposed Rule 1.11 Comment*, 68 A.B.A.J. 1331 (1982).

be against public policy to restrict the private practice of former government lawyers, except in circumstances of actual conflicts of interest or potential breaches of the privilege of confidentiality.

Removing the "appearance of impropriety" from the ethical code governing the private practice of former government lawyers equates their duties with the ethical responsibilities of all lawyers.¹⁰⁴ There is no legitimate reason why the ABA Code should stigmatize former government lawyers and essentially jeopardize their careers after leaving government service. The "appearance of impropriety" is an unjustifiable standard that creates the assumption that "government lawyers" cannot be trusted to discharge their public responsibilities faithfully while in office, or to abide fully by screening procedures afterwards.¹⁰⁵ Subsection (a) of proposed Rule 1.11 permits lawyers who have served the government to practice in another capacity. The proposed rule allows the revolving door lawyer to pursue a post-government service career cognizant of his ethical and legal duties, rather than confused by the undefined standard of impropriety conceived by a court.

Subsection (b) of MRPC Rule 1.11 is a unique addition to the final draft which incorporates MCPR Canon 4's protection of client-attorney confidences. The subsection prohibits a former government lawyer who has gained knowledge of confidential government information about a person from representing a private client whose interests are adverse to that person in a matter in which the information is material.¹⁰⁶

Subsection (c) of the proposed rule incorporates MCPR Ca-

104. Letter from Donald A. Farmer to Barbara Mance (August 27, 1982). Mr. Farmer expressed his opinion that former government lawyers often are called upon to deal with ethical constraints arising out of conflict of interest principles because of their past involvement in important public responsibilities.

105. Brief of Certain Lawyers as Amici Curiae on Rehearing *En Banc*, *Armstrong v. McAlpin*, No. 79-7042, at 2 (1980).

106. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(b)(e) (Final Draft 1982). This ban on the use of confidential government information in private practice disqualifies an individual lawyer; likewise, a firm is disqualified unless the lawyer is screened and given no share of the fees generated. These measures must be approved by the adverse party. Confidential information is defined in subsection (e) as information which the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose.

non 5's proscription of a former government lawyer "switching sides" or representing adverse interests in a matter. The rule is carefully drafted to prohibit a government lawyer's: (1) participation in a matter in which he or she participated personally and substantially while in nongovernment employment unless under the law no one may act in the lawyer's place; and, (2) negotiation for private employment with any person involved in a matter in which the lawyer is participating personally and substantially.¹⁰⁷

This study of proposed Rule 1.11(b) and (c) demonstrates that the Kutak Commission has preserved the Code's Disciplinary Rules of Canon 4 and Canon 5 in the proposed regulation of the ethical restraints on the private practice of former government lawyers. First, the rule prohibits a former government lawyer from revealing or using, to his private client's advantage, information he acquired while a government employee. The prohibition of subsection (b) is clear and focuses on the preservation of the client-attorney privilege which is the emphasis of the proposed Model Rules.¹⁰⁸ A lawyer has a duty to a client or former client of utmost loyalty and confidentiality, now recognized in the ABA proposed regulation of the private practice of former government lawyers.¹⁰⁹

Second, the prohibition of subsection (c) enforces MCPR Canon 5's application when former government lawyers "switch sides" in passing through the revolving door. The proposed rule protects the public from former government lawyers' "structuring their government service to advance their own careers in the private sector and . . . [incurring] the appearance of evil."¹¹⁰ If approved by the ABA House of Delegates, this section will serve to protect the integrity of government decisionmaking,¹¹¹ as a prophylactic measure to guard against misuse of authority by government lawyers."¹¹²

107. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(c) (Final Draft 1982).

108. Kutak, *The New Model Rules of Professional Conduct, A Report to the Bar*, 68 A.B.A.J. at 1020: "No fundamental professional value assumed larger importance in the commission's work than that of client-lawyer confidentiality."

109. Kutak, *A Commitment to Clients and the Law*, 68 A.B.A.J. 804, 805 (1982).

110. Formal Op. 342, *supra* note 22, at 3.

111. Amici Curiae Brief, *supra* note 105, at 5.

112. 606 F.2d at 34.

V. CONCLUSION

In light of Congress' passage of the Ethics in Government Act and the ABA's failure to justify DR9-101(B) under the standard of avoiding "the appearance of impropriety," the bar needs to adopt a clear conflict-of-interest ethical precept to regulate the private practice of former government attorneys. The vague standard of "appearance of professional impropriety" should not govern the private practice of former government lawyers. Nor should that standard serve to impute the disqualification of a former government attorney to an entire law firm when there is no evidence of actual impropriety. The bar should articulate with precision conflicts of interest. Proposed Rule 1.11 clearly establishes for the individual lawyer what will constitute unethical activity relating to post-government employment. The entry of government attorneys into private practice has become an occurrence of significant magnitude to warrant the bar's and federal courts' recognition of its facility unfettered by an out-dated and unrealistic ethical standard incomprehensible to lawyers.

MRPC Rule 1.11 fulfills the Kutak Commission's goals to identify clearly the ABA's ethical objectives in the practice of law that guided the drafting of the Model Rules. Rule 1.11 is comprehensible, consistent with other rules in the proposed Model Rules, and compatible with current law. The rule is drafted clearly to prescribe the disqualification of an individual lawyer and a firm when the former government lawyer's disqualification is imputed to that firm. The rule extols the ethical principles of client confidentiality which are upheld consistently in the MRPC. Rule 1.11 is also consistent with the MCPR's disciplinary rules and Opinion 342's rejection of the appearance of impropriety as a standard, test or element embodied in the disqualification of revolving door lawyers. It parallels federal law and regulation and, therefore, is congruent with the federal system. Moreover, Rule 1.11 provides for a firm's disqualification, an issue Congress reserved for regulation by the bar itself.

The most compelling reason for adoption of Rule 1.11 is its elimination of the "appearance of professional impropriety" governing the practice of former government lawyers. Removal of this vague and arbitrary standard will allow lawyers to pass through the revolving door with reasonable certainty of proscribed conduct which could result in personal or firm disqualifi-

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cation. The proposed Rule 1.11 preserves the highest ethical standards of confidentiality and loyalty to a client or former client. Its provisions embody the policy considerations of the government's need to employ qualified attorneys who are not penalized professionally and financially when they exit the revolving door to private practice. Adoption of Rule 1.11 will be an efficacious reform to the body of ethics governing the employment of former government lawyers.

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