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ETHICAL CONSIDERATIONS OF THE FEDERAL LAWYER UPON ENTERING PRIVATE PRACTICE

JOHN P. GRACEFFA*

I. INTRODUCTION

In recent years, government employment has provided the law school graduate with a legal apprenticeship more common to an earlier era. Although such practical experience is advantageous, there are some unseen aspects of government employment that should be considered by the neophyte lawyer. The lawyer entering government service should look not only to the present but also to the future, when he will be entering or reentering private practice. The purpose of this article is to explore the ethical considerations facing the government lawyer about to enter private practice. Similar considerations apply to the new lawyer presently contemplating government service. Particular attention will be given to the conflicting public policies that arise whenever courts consider the ethical problems encountered by a government lawyer entering private practice. The article then will examine the approaches frequently employed to maintain a balance between these conflicting policies.1

The undercurrent in this area is one in which ethical standards

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1. Armstrong v. McAlpin, 606 F.2d 28, 32 (2d Cir. 1979), vacated en banc, 625 F.2d 433 (2d Cir. 1980), vacated on other grounds mem., 101 S. Ct. 911 (1981) ("[t]he formula-
generally applicable to the private attorney also regulate the government lawyer. Additionally, the federal lawyer is a representative of the federal government, the composite of the people, and thus has an even greater responsibility. The government lawyer rises from his obligation to the bar ultimately to constitute a symbol of government itself. The government attorney, in addition to being a symbol of government, also is charged with the awesome responsibility of maintaining the integrity of government bodies. That responsibility must not be taken lightly, as it forms the ethical foundation of the government from which the moral fabric of our society is partially sewn. No government, however, is capable of defining the limits of right and wrong conduct. The terms are relative to the particular context of historical movement and the meanings shift as the subjective needs of the individual and the objective needs of society evolve. In more practical terms, the government attorney must work within the ethical framework of justice and reflect the ethical conscience of society. Nevertheless, government service also provides the attorney with the unique opportunity to be an instrument of constructive change.

Before considering the detailed ethical problems, it also is important to remember that ethical rules are largely a function of historical developments and changing social mores. Thus, ethical standards should not be etched in stone. Rather, ethical standards should remain flexible so that they can conform to prevailing societal values.

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II. PROFESSIONAL RESPONSIBILITY CONSIDERATIONS

The standards reflecting current thought on ethical problems are found in the American Bar Association (ABA) Code of Professional Responsibility (the Code). The structure of the Code is comprised of canons, which are axiomatic norms; ethical considerations (EC's), which are aspirational in nature; and disciplinary rules (DR's), which are mandatory. This conceptual framework illustrates the essential thrust of the Code: The drafters, recognizing the difficulty in formulating concrete ethical rules, provided both general statements of conduct and aspirational guidelines. Conversely, the drafters, cognizant of the need for minimum standards, designed certain mandatory rules. The interplay within this system gives the lawyer sufficient room to exercise his professional judgment without undue fear of violating the Code. Generally, the Code is given great weight by the courts and is fully applicable to government lawyers.

A. DR 9-101(B)

DR 9-101(B), the most relevant section of the Code concerning the former government lawyer, provides that "a lawyer shall not accept private employment in a matter in which he had substantial re-

7. ABA CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1980). The American Bar Association currently is circulating for comment the ABA MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft, Jan. 30, 1980). Where appropriate, citations to the proposed rule and comment will be given if the proposed rule constitutes a variation from the Code.


9. Jordan, Ethical Issues Arising From Present or Past Government Service, in PROFESSIONAL RESPONSIBILITY 171, 172 (1978) (suggesting the Code may apply to both purely private matters and matters connected with government service since problems of conflicting interests, of switching sides, of abuse of client confidences, and of appearances of impropriety exist in the private as well as in the public context).

The Model Rules contain a "Government Lawyer Conflict of Interest" section as well as a reference to "the legal department of a government agency" within the definition of "law firm." ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (Discussion Draft, Jan. 30, 1980). The comments to this section explicitly state that the government lawyer is subject to the Rules of Professional Conduct. Id. Definitions.
responsibility while he was a public employee." The applicable rule under the ABA Model Rules of Professional Conduct (Model Rules) is termed differently but substantially is similar in meaning to DR 9­-101(B).

The complexity of problems that DR 9-101(B) creates for the government attorney and the difficulties confronting a court in resolving ethical issues under DR 9-101(B) are compounded by the presence of strongly conflicting public policies. A strict disqualification standard under DR 9-101(B) will both deny the client his choice of counsel and impair the government's ability to attract qualified attorneys by imposing an overbroad restriction upon former government lawyers entering private practice. The public undoubtedly will suffer if qualified attorneys are dissuaded from public service by the imposition of a rigid and overbroad disqualification standard under DR 9-101(B). These considerations, therefore, implicate strong public policies concerning both the availability of professional services and competence in government. Balanced against these policies is the interest in preventing, through the enforcement of DR 9-101(B), the government attorney from "wield[ing] Government power with a view toward subsequent private gain." In light of these conflicting public policies, an attempt to formulate a rule of general application regarding disqualification under DR 9-101(B) is inappropriate. Instead, "[t]he formulation of standards concerning the future employment of government attorneys involves a careful weighing of competing concerns.

10. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(B) (1980).
11. "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." Id. Rule 1.11(a). The major difference between DR 9-101(B) and Rule 1.11(a) is the "participated personally" language in the new rule. Id. This language effectively narrows the rule to matters in which the government lawyer was directly involved and eliminates the problem of outright disqualification of an entire department.
12. Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 HARV. L. REV. 657, 668 (1957). Judge Kaufman suggests that the government, as a former client, must be protected. If the restrictions, however, are too broad, professional sterilization will develop, ultimately discouraging government service.
16. Id. at 32.
Realizing the necessity to strike a balance between the policy of preventing abuse of government employment on the one hand and the public interest in attracting qualified attorneys for government service and preserving a client's choice of counsel on the other, the courts have applied DR 9-101(B) only after careful and thorough consideration of all the facts and circumstances of the case. For example, in *Telos, Inc. v. Hawaiian Telephone Co.*, the court was faced with a motion to disqualify an attorney from representing an interconnect company that was suing a telephone company for antitrust violations. The court noted that plaintiff's attorney, a former deputy attorney general for the State of Hawaii, previously had been involved in a state action against the telephone company for antitrust violations. The court, however, did not automatically disqualify the attorney. Instead, the court made a painstaking examination of the memoranda and affidavits from both actions and concluded that the present action paralleled the earlier state action. The importance of *Telos* lies in the careful analysis made by the court. Implicit in the court's decision was a recognition of the competing policy considerations of ensuring ethical conduct on the part of lawyers, on one hand, and the litigant's right to freely chosen counsel on the other. This recognition is a necessary step in making the Code work. In addition, a balancing approach will sharpen the focus of the problem and point to the solution.

Many of the solutions proposed to reconcile the inherent conflicts underlying disqualification of an attorney under DR 9-101(B)

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18. Id. at 1315.
19. Id. at 1316.
20. Id. at 1315-16.
21. Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976) (the more frequently litigant is delayed or disadvantaged by disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion). See also Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 227 (2d Cir. 1977) (painstaking analysis of facts and precedents necessary); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 196 (N.D. Ohio) (ethical problems cannot be resolved in the abstract and decisions require a thorough consideration of the facts), aff'd, 570 F.2d 123 (6th Cir. 1977), cert. denied, 435 U.S. 996 (1978).
22. Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to That of Former Client*, 55 B.U.L. Rev. 61, 77-78 (1975). The disqualification of a former government attorney not only protects government secrets, but also ensures that government positions will not be utilized for private gain. Certain theories of disqualification, however, such as "access to related information", may prevent an attorney from ever practicing in his area of expertise. In this context, the doctrine of "vertical responsibility" acts as a counterweight which limits the "access" theory. Id.
are neither well formulated nor frequently used. In *United States v. Standard Oil Co.*, the court perceived the problem as an identification of the matters in which the attorney previously was involved rather than as an identification of the government as the former client. The test is whether it was likely that the attorney previously would have attained factual knowledge of the matter in controversy. This test, developed by Judge Kaufman, is a compromise between the harshness of absolute attorney disqualification and the need to protect the former client. The difficulty with the Kaufman approach is the degree of proof required to show factual involvement by the attorney while employed by the government. One solution offered to overcome this difficulty is simply to presume the existence of attorney-client confidentiality between all former government attorneys and the federal government.

The second inquiry under DR 9-101(B) is whether the attorney involved in the potential appearance of impropriety actually is employed by the present plaintiff or defendant. Several disqualification motions have been defended on the basis that no private employment existed between the former government lawyer and the present plaintiff. Private employment, however, has been broadly interpreted. It has been held that there is private employment irrespective of the side chosen in private practice and that no fee arrangement is necessary in order to establish a private employment relationship. The courts, then, have given little credence to the lack of private employment defense. Private employment should be defined narrowly only if there is an actual appearance of

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23. Woods v. Covington County Bank, 537 F.2d 804, 814 (5th Cir. 1976) (two kinds of misconduct most prevalent are situations in which private representation calls into question a lawyer's conduct while a public official and those in which a lawyer's association with the government gives him an improper advantage).
25. *Id.* at 350-51.
26. *Id.* at 361-62. The comments to the Model Rules echo this factual approach to “matter” and distinguish between direct involvement in a specific transaction and recurrent involvement with the same issue for a client. ABA *Model Rules of Professional Responsibility* Rule 1-10 comment (Discussion Draft, Jan. 30, 1980).
28. *Id.* at 353-55.
29. *Id.*
30. Note, *supra* note 22, at 72. This presumption is better suited to the preliminary stages than to an indepth factual showing.
32. General Motors Corp. v. City of New York, 501 F.2d 639, 650 (2d Cir. 1974).
A third question in the disqualification analysis addresses the problem of identifying precisely the matters within the knowledge of the former government lawyer. The obvious situation arises when the former government lawyer personally handled the government’s case. The situation, however, is less obvious when knowledge of the government’s case is imputed to the attorney due to the basic configuration of the government legal office. When an attorney is responsible for a government office or subdivision, knowledge of the proceedings undertaken by his juniors is imputed to him. Along with this vertical standard of imputed knowledge, there also exists a horizontal standard of imputed knowledge. This standard is applied when two or more government attorneys of equal rank are involved. The doctrine of imputed knowledge has been accepted readily by some courts, and its application has resulted in the disqualification of former government lawyers. One federal district court suggested that the doctrine is relevant in large law firms in the private sector.

There has been an undercurrent of dissent regarding adoption of the imputed knowledge doctrine. The basis of dissent concerns the public policy consideration against imposing undue restrictions upon former government lawyers entering private practice. The potential severity of restrictions resulting from an application of this

34. But see Note, Legal Ethics—The ABA Code of Professional Responsibility—Disciplinary Rule 9-101(B)—Former Government Attorneys and the Appearance of Evil Doctrine—General Motors Corp. v. City of New York, 16 B.C. INDUS. & COM. L. REV. 651, 656-57, 662 (1975) (phrase “private employment” should be interpreted so as to prevent government lawyers from concentrating on cases which might provide future gain, which DR 9-101(B) was intended to prevent).

35. See, e.g., United States v. Trafficante, 328 F.2d 117, 118-20 (5th Cir. 1964) (attorney, formerly employed by the Internal Revenue Service who handled income tax claims against defendants, disqualified from representing defendants in suits for foreclosure of liens for balance due on unpaid taxes); Allied Realty, Inc. v. Exchange Nat’l Bank, 283 F. Supp. 464, 465-66 (D. Minn. 1968), aff’d, 408 F.2d 1099, 1100-01 (8th Cir.) (attorney, formerly employed as Assistant United States Attorney who had participated in the investigation and trial of three former employees of defendant bank, disqualified from representing plaintiff in a subsequent action against the bank because he was utilizing information previously acquired in subsequent receivership action), cert. denied, 396 U.S. 823 (1969).


37. Id.

38. Porter v. Huber, 68 F. Supp. 132, 134 (W.D. Wash. 1946) (attorneys employed by defendants in Price Administrator’s suit disqualified under imputed knowledge doctrine because they had been employed by the Office of Price Administration).

doctrine is obvious.\textsuperscript{40} Therefore, continued use of the imputed knowledge doctrine will depend on whether the possibility of harsh results can be minimized through compromise. Perhaps realizing this, Judge Kaufman delineated a more precise standard of imputed knowledge that depends on the test of substantial responsibility as determined by a quantum of connecting factors.\textsuperscript{41} The substantial responsibility analysis is two-pronged: It requires an examination of the lawyer's activities as a government attorney and a determination of what knowledge may be imputed to him.

Determining a lawyer's activities as a government attorney and what knowledge may be imputed to him are inseparable considerations; both concern the nature of the work performed while employed by the government. Judge Kaufman addressed this issue in \textit{General Motors Corp. v. City of New York}.\textsuperscript{42} In \textit{General Motors}, New York City brought an action alleging that General Motors had attempted to monopolize trade and commerce through the manufacture and sale of city buses in violation of the antitrust laws.\textsuperscript{43} New

\textsuperscript{40} See generally Comment, \textit{Business as Usual: The Former Government Attorney and ABA Disciplinary Rule 5-105(D)}, 28 \textit{HASTINGS L.J.} 1537, 1540-43 (1977) (because vertical responsibility test glosses over difference between the involvement and responsibility of a subordinate versus that of a supervisor, a more precise test should examine the former employee to determine whether his responsibility in a matter in conjunction with his personal involvement constitutes substantial responsibility). Rule 7.1 deals with the problem of changing associations and subsequent vicarious disqualification due to client confidence and/or adverse representation problems. The comments discuss the disadvantages of per se rules of disqualification and endorse a "functional analysis." ABA \textit{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 7.1 comment (Discussion Draft, Jan. 30, 1980). The two functions are to preserve client confidences and to avoid positions adverse to a client. Although Rule 1.11(e) specifically addresses disqualification of the firm of an already disqualified former government attorney, the comments to Rule 7.1 also are relevant since a "law firm" within this rule includes a government legal department. These comments echo three significant points which recur throughout the Model Rules. First, preservation of client confidences is paramount. Second, switching sides in any sense is forbidden. Third, in any analysis under these rules, the approach will be thorough and factual.

\textsuperscript{41} Kaufman, \textit{supra} note 12, at 665-66. Employees must be determined on an ad hoc basis because whether information reached the attorney will vary from agency to agency and job to job. Moreover, horizontal imputation of knowledge between department heads also must be determined by an ad hoc test based upon the likelihood of the attorney receiving the information. Finally vertical imputation from subordinates to supervisory officials of work done by subordinates is absolutely essential to avoid the appearance of evil. \textit{Id.} The Model Rules incorporate the substantial responsibility standard by requiring both personal and substantial participation of a public lawyer before he may be disqualified. ABA \textit{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 1.11(a) (Discussion Draft, Jan. 30, 1980).

\textsuperscript{42} 501 F.2d 639 (2d Cir. 1974).

\textsuperscript{43} \textit{Id.} at 641.
York City retained George D. Reycraft as its attorney. A former employee of the Antitrust Division of the Department of Justice, Reycraft had worked on a government suit against General Motors alleging monopolization of the city bus business. General Motors moved to disqualify Reycraft from the case under DR 9-101(B).

Judge Kaufman found that Reycraft had substantial responsibility in initiating the government's antitrust claim against General Motors. Judge Kaufman reasoned that because Reycraft had been assigned to the case, had signed the complaint, and ultimately had become Chief of Section Operations of the Antitrust Division, he held technical responsibility for the case.

Judge Kaufman then sought to determine whether the present action was sufficiently similar to the former government action so as to be considered the same action. He found that the two actions were the same because almost every act of attempted monopolization alleged in the private complaint also was alleged in the earlier Justice Department complaint. Although Judge Kaufman's analysis was relatively solid, simply comparing the allegations in the respective complaints is insufficient to determine whether the actions are similar. To establish an antitrust cause of action, well defined

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44. Id.
45. Id. at 642.
46. Id. at 643.
47. Id. at 649.
48. Id. at 642. Compare Telos, Inc. v. Hawaiian Tel. Co., 397 F. Supp. 1314, 1316 n.11 (D. Hawaii 1975) (signing a complaint constitutes the exercise of substantial responsibility, except in rare circumstances) and Note, supra note 34, at 661-62 (as general rule an attorney on the trial staff level who signs a complaint should be irrebuttable presumed to have substantial responsibility for the matters contained therein) with Jordan, supra note 9, at 201 (the appropriate perspective is the "rule of reason" which considers such factors as office size, office location, and nature of the working relationships in evaluating "substantial responsibility"). According to the Model Rules, the question would be whether Reycraft had "personally and substantially participated" in the government suit. ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a) (Discussion Draft, Jan. 30, 1980). It seems clear from the facts that he had so participated and, therefore, would be disqualified. See note 41 supra.
49. 501 F.2d at 650. But see Control Data Corp. v. IBM, 318 F. Supp. 145, 147 (D. Minn. 1970) (computer industry changed so completely in fifteen years that disqualification was not warranted); Westinghouse Elec. Corp. v. Rio Algon Ltd., 448 F. Supp. 1284 (N.D. Ill.), rev'd in part on other grounds sub nom. Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978), and rev'd in part on other grounds and aff'd in part sub nom. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978) (when disqualification is ordered, the lines between the two lawsuits are "patently clear" and the action usually involves the same documents or a continuation of the same lawsuit); Telos, Inc. v. Hawaiian Tel. Co., 397 F. Supp. 1314, 1316 (D. Hawaii 1975) (finding present action to parallel earlier action because defendants were the same in both actions and the complaints were repeated verbatim).
statutory elements must be satisfied by the plaintiff. Consequently, the causes of action, the complaints, and the discovery in antitrust lawsuits will appear to be similar in comparable factual circumstances. This holds true for most lawsuits brought under any closely worded statute. Thus, Judge Kaufman examined the actual contents of the documents, rather than their mere facial similarities.

In any DR 9-101(B) analysis, the final inquiry is whether there appears to be any incidence of impropriety. The appearance of impropriety that concerned Judge Kaufman in General Motors was the possibility that, as a former government lawyer, Reycraft's actions as a public official might have been influenced, or appear to have been influenced, by the hope of eventual private employment wherein he could uphold or upset that which he had done while a government attorney. Thus, the ethical problem raised was "the possibility that a lawyer might wield Government power with a view toward subsequent private gain." Judge Kaufman concluded that the appearance of impropriety was created because there existed not only substantial responsibility, but also a plain overlap of issues and a direct involvement by Reycraft in a similar suit while he was a government employee. Based upon this analysis, Reycraft was disqualified.

Courts have found that an appearance of impropriety may be created in several other situations: When a former government attorney gains an otherwise unobtainable advantage over an adversary in a private suit; when an attorney who drafted or amended ordinances later attacks the constitutionality or validity of those ordinances; when a former government attorney, while still in

50. 501 F.2d at 650-51.
51. Id. at 651-52.
52. Id. at 652-55.
53. Id. at 649.
54. Id. at 648-49.
55. Id. at 650 n.20.
56. Id. at 642. See notes 40 & 48 supra.
57. See, e.g., Woods v. Covington County Bank, 537 F.2d 804, 817 (5th Cir. 1976) (information advantage); Allied Realty, Inc. v. Exchange Nat'l Bank, 408 F.2d 1099, 1102 (8th Cir.) (court affirmed disqualification of attorney concluding that purpose of Canon 36 was to prohibit attorney from gaining financial advantage through use of information obtained as a public official), cert. denied, 396 U.S. 823 (1969). The Model Rules emphasize that the risk in this area is that public power and discretion will be used to benefit the private client. ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 comment (Discussion Draft, Jan. 30, 1980).
58. See, e.g., Traylor v. City of Amarillo, 335 F. Supp. 423, 425 (N.D. Tex. 1971)
government employ, investigated or had access to confidential materials dealing with the lawsuit in which, as a private attorney, he has become involved; 59 and, finally, when a former government attorney attacks either a contract that he drafted or the soundness of a legal position that he asserted while in government employ. 60

The focus of the courts has been toward factfinding in any question of appearance of evil. Even the series of tests outlined above are factual inquiries. The only question of law is whether the factual circumstances amount to the appearance of evil. This question can be answered only when the courts look to the purpose of DR 9-101(B): the maintenance of public confidence in the integrity of the legal profession.

The Model Rules eliminate all questions of law and concentrate solely on a factual approach. If there is "personal and substantial participation" in a matter by a former government lawyer, that lawyer and all members of his firm are disqualified. 61 Although this approach has the virtue of simplicity, it has not yet been shown whether the addition of the term "personal" to Judge Kaufman's substantial responsibility analysis will be fruitful. If the result is a routine pro forma analysis to determine whether the former government lawyer, for example, had signed the complaint, then nothing has been gained. 62

B. DR 4-101(B)

The attorney-client relationship necessitates the exchange of private thoughts; only then can the professional relationship truly flourish and grow. Accordingly, most good attorneys demand com-

59. See, e.g., Allied Realty, Inc. v. Exchange Nat'l Bank, 283 F. Supp. 464, 467 (D. Minn. 1968), aff'd, 408 F.2d 1099 (8th Cir.), cert. denied, 396 U.S. 823 (1969) (court disqualified former government lawyer who had investigated and passed upon subject matter of real estate transaction in prior criminal trials from acting as attorney for plaintiff in subsequent civil action seeking to set aside claimed fraudulent mortgage); Hilo Metals Co. v. Learner Co., 258 F. Supp. 23, 27 (D. Hawaii 1966) (court disqualified former government employee of the Antitrust Division of the Department of Justice from acting as counsel for corporation which sought damages for antitrust violations because attorney had access to documents related to the present case, had seen relevant confidential material, and actually had investigated the subject matter).

60. See generally Kaufman, supra note 12, at 660.

61. ABA MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.11(a) & (e) (Discussion Draft, Jan. 30, 1980). See also note 40 supra.

62. See note 48 supra.
plete candor from their clients. With this "baring of the soul," however, there is a corresponding danger of abuse. It is within this context that DR 4-101(B) was designed to function. DR 4-101(B) provides:

Except when permitted under DR 4-101(C), a lawyer shall not knowingly: (1) Reveal a confidence or secret of his client. (2) Use a confidence or secret of his client to the disadvantage of the client. (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure. 63

The purpose of DR 4-101(B) is to protect a client from the misuse of information acquired in a confidential attorney-client relationship. The various canons and rules of the Code, however, cannot be read in isolation. The ethical problems facing the former government attorney, therefore, require an indepth consideration of both Canon 9 and Canon 4. 64

An obvious appearance of impropriety is evidenced by the possible misuse of confidential information. 65 It is reasonable to assume that one of the functions of DR 9-101(B) is to prevent the appearance of a Canon 4 violation. This function poses a particular problem for the former government attorney entering private practice. If there is an appearance that confidential information was disclosed to a government attorney during the course of his public service, he runs the risk of being disqualified from handling a case in private practice in which disclosure of such confidences will be harmful to the government as a former client and as a party in the pending

63. ABA Code of Professional Responsibility DR 4-101(B) (1980). Under the Code there are four situations in which a lawyer may reveal confidences and secrets of a client: (1) When the lawyer has received the consent of the client affected after full disclosure; (2) when disclosure is permitted under the Code or required by law or court order; (3) when the confidence or secret involves an intention on the part of a client to commit a crime; and (4) when disclosure is necessary to establish or collect a fee or to defend the lawyer, his employees, or associates against an accusation of wrongful conduct. Id. DR 4-101(C).

64. See Note, supra note 34, at 655 (most significant reason for existence of both DR 9-101(B) and DR 4-101(B) is to prevent a breach of trust established to promote total disclosure in the professional relationship).

65. See Jordan, supra note 9, at 191-92 (DR 9-101(B) founded substantially on the principles of Canon 4 since the principal reason for disqualifying lawyers with respect to former government matters is to prevent the misuse of client confidences); Comment, supra note 40, at 1552. The comment to Rule 1.11 endorses this view and cites Rule 1.7 ("Confidential Information") and Rule 1.10 ("Representation Adverse to a Former Client") as the significant factors in determining whether a conflict of interest exists for the former government lawyer. See also ABA Model Rules of Professional Conduct Rule 7.1 comment (Discussion Draft, Jan. 30, 1980).
suit.\textsuperscript{66}

While protecting attorney-client confidentiality and the appearance of a Canon 4 violation are strong public policies, they must be balanced against the interest in avoiding interference with the client's choice of counsel. Once again, an equitable balance is necessary to retain public confidence in the bar. This confidence, for example, may be eroded if disqualification of a chosen attorney deprives a litigant of competent counsel needed for a just trial.\textsuperscript{67} The solutions proposed to reconcile the competing interests in this area are nothing more than forms of balancing that reflect the underlying tension between the attorney-client privilege and the litigant's right to freely chosen counsel.\textsuperscript{68}

It is logical to start an analysis of a client confidence problem by determining whether the attorney-client relationship ever existed. In the case of a former government lawyer this becomes an interesting question, as the United States \textit{in toto} was his former client.\textsuperscript{69} The commonsense solution offered by the commentators requires the court to ask: Was the attorney a government employee and, if so, what were his exact responsibilities?\textsuperscript{70}

This question, however, is only the threshold inquiry. A party moving for disqualification of an attorney under DR 4-101(B) also must show that: (1) The previous attorney-client relationship is adverse to the present representation; (2) the subject matter of the two relationships is substantially related; and (3) the attorney acquired

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\textsuperscript{67} Note, \textit{Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualifications?}, 1977 Duke L.J. 512, 514 (attorney disqualification does not increase public confidence in the bar when the primary effect of disqualification is to interfere with choice of counsel or to deprive litigant of competent counsel in complex area of law). \textit{See also} Woods v. Covington County Bank, 537 F.2d 804, 812 (5th Cir. 1976) (Canon 9 does not require absolute disqualification of every privately retained attorney in a matter in which attorney had substantial responsibility as a government employee).
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\textsuperscript{69} See Kaufman, \textit{supra} note 12, at 665.
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\textsuperscript{70} See Note, \textit{supra} note 22, at 68, 72.
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confidential information from the former client. Although this appears to place an extremely heavy burden of proof on the former client, the presumptions working against the attorney are difficult to overcome.

The central question in a DR 4-101(B) motion to disqualify is whether the attorney involved in the present suit had access to confidential information in a prior, related matter. The classic case on this point is *T.C. Theatre Corp. v. Warner Bros. Pictures.* The motion by defendant, Universal Pictures, to disqualify Mr. Cooke from acting as counsel for plaintiff T.C. Theatre Corp. The motion stemmed from the prior representation of defendant by Cooke in an antitrust suit brought by the United States. In support of its motion to disqualify Cooke, defendant claimed that Cooke's prior representation of defendant in the suit brought by the United States and the present lawsuit both were based on the same charges. Defendant further alleged that Cooke, as plaintiff's attorney in the present case, would be proving the same charges against which he had defended Universal. In this situation a presumption

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(a) A lawyer who has represented a client in a matter shall not thereafter:

(1) Represent another person in the same or a substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client; or

(2) Make use of information acquired in service to the client in a manner disadvantageous to the client, whether or not the information is confidential as provided in Rule 1.7, unless the information has become generally known or accessible.

ABA Model Rules of Professional Conduct Rule 1.10(a) (Discussion Draft, Jan. 30, 1980). This rule is narrower than DR 4-101(B) in two respects: First, it requires the client's adverse interest to be material; second, it opens up information once it is generally known. These are constructive changes, especially the second point regarding the government lawyer who works mostly with documents that are public under state and federal freedom of information acts. See generally 5 U.S.C. § 552(b) (1976); Mass. Gen. Laws Ann. ch. 4, § 7 (West 1976).

Rule 1.7 is the confidential information section most directly analogous to DR 4-101. Rule 1.10(2), however, applies directly to the use of client information in a subsequently disadvantageous manner. See note 65 supra.

73. Id. at 266.
74. Id.
75. Id. at 267.
76. Id. at 268.
arose that matters of confidence had been disclosed to Cooke. No showing of actual disclosure was necessary. Cooke's argument against the motion to disqualify was that defendant was required to indicate the precise matters that had been disclosed to him. The court agreed with defendant, stating that the former client need only show that the matters involved in the two representations were substantially related. If the former client can show substantially related matters, the court will assume that there was a prior disclosure of confidential matters relating to the present representation.

The substantially related test has been used in both the private context and in cases involving government attorneys returning to private practice. The analysis in T.C. Theatre has been merely transplanted, with little doctrinal change, into a different context in the government cases. This shift of the standard, with no real dis-
The real controversy, however, involves the substantially related test itself.

One particularly valid criticism of the substantially related test is that a presumption of disclosure of confidences based upon mere proof of a former attorney-client relationship in a substantially related matter is too stringent. A strict application of the substantially related test not only will result in a presumption of disclosure of confidences to the lawyer involved in the former attorney-client relationship, it also will give rise to a presumption of disclosure that is then imputed to that lawyer's present colleagues. For example, if the former Chief of the Antitrust Division is presumed to have had access to matters considered substantially related to the suit in question, this presumption of knowledge may then be imputed to other members of his firm. Some courts have rejected this strict approach. In addition, recently there have been suggestions regarding alternatives, such as an in camera proceeding in which the court determines the content of the prior disclosures.

A need for an alternative to this trap of presumption and imputation clearly exists. A former government lawyer may view himself as nothing more than a white elephant capable of disqualifying his

83. See Kaufman, supra note 12, at 667. Judge Kaufman suggests that different standards be used for government and private attorneys. Former government attorneys cannot be held to the same rules of imputed knowledge from access to data which bind private attorneys having definable clients and law firms. Rather, there should be a factual showing of actual receipt of knowledge or a strong likelihood of receipt of knowledge. Id.

84. But see Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc., 607 F.2d 186, 191-92 (7th Cir. 1979) (once a substantial relationship is found, it will be irrebutably presumed that attorney had access to confidential information).

85. Id.

86. Id. at 192-93.

87. In City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 210-11 (N.D. Ohio), aff'd, 570 F.2d 123 (6th Cir. 1977), cert. denied, 435 U.S. 996 (1978), the court noted that recent legal precedent has rejected the hard line approach of irrebutably imputing confidential disclosures, actual or presumed, between members of a law firm. Moreover, the court rejected the mechanical application of the doctrine of vertical responsibility.

The Model Rules effectively narrow imputation by rejecting per se rules of disqualification and requiring that the participation of the former government lawyer have been "personal." See notes 40 & 41 supra. If this prerequisite is satisfied, however, the lawyer's entire firm is disqualified. See ABA Model Rules of Professional Conduct Rules 1.11(e), 7.1 (Discussion Draft, Jan. 30, 1980).

88. Note, supra note 22, at 76.
entire firm. The likelihood of this occurring becomes especially strong when the language of DR 5-105(D) and Model Rule 1.11(e) are considered.

C. Special Problems Related to the Application of Both DR 9-101(B) and DR 5-105(D)

DR 5-105(D) provides: "[I]f 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."89

The problem that DR 5-105(D) creates for the government attorney is the automatic disqualification of a firm if one of the firm's attorneys is disqualified under DR 9-101(B).90 The ABA Commission on Professional Ethics recognized that the automatic disqualification of a firm under DR 5-105 could discourage the recruitment of former government lawyers by private firms because of the possibility of subsequent firm disqualification.91 To prevent this, the ABA Committee decided that the court, or any other reviewing body, can allow a waiver of the firm's disqualification if the facts do not constitute an appearance of impropriety and the government is convinced that the firm will isolate the disqualified attorney.92

The success of the solution proposed by the Commission, therefore, depends on the efficacy of the firm's screening procedure. The courts will focus more on the firm's screening procedure than on the facts themselves.93 For example, in Kesselhaut v. United States94 the court was faced with a request for review of an order disqualifying a private law firm because a member of the firm was a former attorney for the government who had been disqualified.95 The court noted at the outset that the disqualification of an entire law firm because one

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89. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1980).
90. Rule 1.11(e) handles firm disqualification in a similar manner and disqualifies the entire firm of a disqualified former government lawyer. "If a lawyer is required by this rule to decline representation on account of personal and substantial participation in a matter, except where the participation was as a judicial law clerk, no lawyer in a firm with the disqualified lawyer may accept such employment." ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(e) (Discussion Draft, Jan. 30, 1980). Rule 7.1 prohibits a lawyer who has left a law firm, including a government legal department, and his subsequent associates from adverse representation or disclosing confidences. Id. Rule 7.1.
91. ABA COMM. ON PROFESSIONAL ETHICS, FORMAL OPINIONS, No. 342 (1975).
92. Id.
93. Id.
94. 555 F.2d 791 (Ct. Cl. 1977) (per curiam).
95. Id. at 792.
of its members had been disqualified was too harsh and should be mitigated by an appropriate screening procedure. The court then focused on the screening procedure, which provided that the disqualified attorney would have no connection with the case through discussions or documentary evidence. Further, the procedure stated that the files would be locked and the keys would only be given out on a "need to know" basis. Because the disqualified attorney was isolated from the case, the trial court’s order mandating firm disqualification was vacated.

The Kesselhaut court recognized that the purpose behind screening is to establish and maintain a balance between freedom and necessity. The right of an attorney to practice law and the right of a client to his choice of counsel are weighed against the need to uphold and maintain the ethical integrity of the profession. The inherent flaw in screening, however, is that its success depends upon the honesty and moral principles of individuals. Although this self-policing frequently is successful, the efficiency of screening might not be apparent to the public eye. Nevertheless, the idea behind screening is an appropriate alternative to the harsh result of disqualification of an entire firm. As the public becomes increasingly aware of this, a more sophisticated form of screening will appear.

D. Other Matters of Concern to the Lawyer Leaving Government Service

The former federal attorney should be aware of considerations

96. Id. at 793.
97. Id.
98. Id. at 793-94.
99. Id. at 794. But see Cheng v. GAF Corp., 631 F.2d 1052 (2d Cir. 1980), vacated on other grounds and remanded mem., 101 S. Ct. 1338 (1981). In Cheng, complainant alleged that a member of the defense firm was a former attorney in the legal services firm presently representing him and had participated in case discussions with other members of the staff. Id. at 1053-54. The court noted the existence of a "Chinese Wall," but nevertheless disqualified the attorney because of the small size of the firm and the possibility of inadvertent disclosures. Id. at 1057-58.
100. 555 F.2d at 794.
101. Id. at 793.
102. For a useful analysis of the relationship between DR 5-105(D) and DR 9-101(B), see Comment, Professional Responsibility—Disqualification of Law Firm Under DR 5-105(D) Unnecessary Where Partner Who Had Formerly Been A Government Attorney Was Effectively Screened From Participation—Kesselhaut v. United States, 12 SUFFOLK L. REV. 189 (1978) (screening generally is effective but cannot eradicate every form of impropriety because it depends on the integrity of the individuals involved and will become ineffective if those individuals choose to disregard its constraints).
other than those that have evolved, either directly or indirectly, from the Code. First, there is the Federal Conflict of Interest Law,\textsuperscript{103} of which three sections are of particular importance to the former federal lawyer. Section 203(a) of the Act prohibits government employees from receiving compensation of any kind for services rendered in any matter in which the United States is a party or has a direct and substantial interest.\textsuperscript{104} Although this section is more relevant to current government attorneys than to former employees, it reflects the general thrust of the law and foreshadows the relevant Code sections. Section 207(a) of the Act prohibits former government attorneys from representing private parties in any matter in which the attorney substantially participated while in government employ.\textsuperscript{105} The same problems that apply in substantial responsibility under DR 9-101(B) are encountered when trying to determine substantial participation under section 207(a).\textsuperscript{106}

The last relevant section is section 208(a) of the Act. Section 208(a) provides that an employee of the executive branch of the government or a governmental agency may not participate in a matter in which a prospective employer has a financial interest.\textsuperscript{107} Finally, the former federal lawyer should be aware that federal agencies have promulgated rules governing the appearance by former employees before those agencies.\textsuperscript{108} Federal courts have similar rules pertaining to justices and law clerks.\textsuperscript{109}

\section*{III. PROCEDURAL ASPECTS OF A MOTION TO DISQUALIFY}

A motion to disqualify should be made immediately after discovery of the facts that warrant apparent disqualification. Unless such a motion is made, a party should be held to have waived the

\textsuperscript{104} Id. § 203(a).
\textsuperscript{105} Id. § 207(a).
\textsuperscript{106} See generally Jordan, supra note 9, at 197-202. (the objectives of the two provisions are almost identical, and courts and ethics committees have produced compatible interpretations).
\textsuperscript{107} 18 U.S.C. § 208(a) (1976); see B. Manning, Federal Conflict of Interest Law (1974); Jordan, supra note 9, at 174-89.
\textsuperscript{109} E.g., Sup. Ct. R. 7 (law clerks to justices may not practice before the Supreme Court for two years upon leaving clerkship); 1st Cir. R. 4 (one-year appearance ban). See also Pilkington v. Bevilacqua, 632 F.2d 922, 924-25 (1st Cir. 1980) (attorney's fee award by district court vacated and remanded for further scrutiny under a more rigorous standard because attorney was former law clerk to awarding judge).
right because allowing a motion to disqualify to be brought at a significantly later time would cause a great deal of anxiety to both parties. Another general consideration is the Code itself. The Code establishes the guidelines for the proper conduct of attorneys. Contrary to popular notion, however, a violation of these guidelines does not automatically result in attorney disqualification; this sanction results solely at the discretion of the judge. The party moving to disqualify for an alleged conflict of interest must prove the following facts: (a) That a past attorney-client relationship existed; (b) that the subject matter of the attorney's former employment is substantially related to that of his present employment; (c) that the information received in the prior relationship was privileged; and (d) that he has not waived his right to object to the present employment.

Proving these elements imposes a heavy burden on the moving party. The courts frequently consider the subject matter relation to former employment in disqualification motions. Most courts hold that all circumstances must be examined. A necessary corollary to this demand by the courts is the heavier burden of proof placed on the moving party. Certain inferences simultaneously are available to the party bringing a disqualification motion. For example, he may use the inference that an attorney, formerly associated with a law firm, has received confidential information that was transmitted by a client to the firm. This inference, however, is capable of rebuttal.

110. Central Milk Producers Coop. v. Sentry Food Stores, Inc., 573 F.2d 988, 992 (8th Cir. 1978) (appellants moving to disqualify opponent's counsel waived right to object because the motion was made more than two years after appellants knew that the former government attorney, who had worked on a closely related case, had been hired by plaintiff's law firm).

111. Id. at 992. For example, it may result in one party sitting on his rights while the other plunges ahead with trial preparation.

112. Id. at 991. See also Lefrak v. Arabian Am. Oil Co., 527 F.2d 1136 (2d Cir. 1975).

113. See note 110 supra and accompanying text as to waiver of right to object. For a discussion of the evidentiary hurdles that must be met by the party moving to disqualify, see Note, supra note 22, at 66.

114. See notes 17-21 supra. See also Armstrong v. McAlpin, 625 F.2d 433, 434 (2d Cir. 1980) (en banc) (motions to disqualify involve factual determinations, such as whether there is a threat of taint, whether screening is adequate, and whether a substantial relationship existed between past and present representations), vacated on other grounds and remanded mem., 101 S. Ct. 911 (1981).

An order by a federal district court granting or denying a motion to disqualify an attorney is final. This final order may be appealed pursuant to 28 U.S.C. § 1291. Although the actual appeal procedure is relatively straightforward, the scope of appellate review has been the subject of some disagreement. *Aetna Casualty and Surety Co. v. United States* is an example of the controversy. Plaintiffs in *Aetna* argued that the scope of review of the appellate court was limited to a determination of discretionary abuse by the district court. The court rejected this argument on the ground that the district courts are not necessarily better suited than appellate courts to formulate and apply ethical norms. The court concluded that an appellate court could determine whether the district court's disqualification order was based on proper ethical considerations.

It is clear that the appellate courts are dissatisfied with their usual limited review in the area of attorney disqualification. This may be a healthy attitude, considering the serious public policies at stake. It is a dangerous practice, nevertheless, to have an appellate tribunal second-guess the factual findings of a trial court. A review of the facts in the district court record is no substitute for the

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The issue of whether an order refusing to disqualify counsel is immediately appealable under the "collateral order" doctrine was recently addressed by the Supreme Court. In *Firestone Tire & Rubber Co. v. Risjord*, 101 S. Ct. 669, 676 (1981), the Court held that orders denying a motion to disqualify opposing party's counsel in civil cases are not appealable under § 1291 prior to a final judgment in the underlying litigation.

117. 570 F.2d 1197 (4th Cir. 1978).

118. *Id.* at 1200. But see *Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976) (appellate court rejected the limited review of "abuse of discretion" and applied the "clearly erroneous" test to issues of fact while carefully examining the ethical standards applied by the district court judge).

119. 570 F.2d at 1200.

120. *Id.* See also *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 188-89 (7th Cir. 1979).

121. 570 F.2d at 1200.

122. *Id.* at 1202.
findings of the district court judge *in primis*. The best approach is one whereby the appellate court gives special consideration to the factual findings of the district court, but still reviews the facts and the legal tests under the "clearly in error" standard. Finally, if substantial doubt exists as to the possible creation of an appearance of impropriety, these questions should be answered in favor of disqualification. This approach is crucial because its application will help to maintain the integrity of the bar.

IV. Conclusion

Former government lawyers may be accused of three different kinds of improper behavior: The misuse of confidential information; the treachery of switching sides; and the abuse of governmental power for personal gain. Balanced against these improprieties are: The possible restraints on the government's ability to recruit; the restrictions on the government lawyer's employment mobility; and the possible deprivation of a client's choice of counsel. These factors are the common threads that run through consideration of the ethical problems involving former government lawyers. All factors must be weighed in light of the situation at hand and all the tests are merely tools to aid in this process. The attorney involved in a possible conflict situation should not always force the issue: Early withdrawal from representation is preferable to a later, court-ordered disqualification.

A more hard line solution can be found by resorting to DR 9-101(B). The approach under DR 9-101(B) suggests that no former government attorney may accept private employment in cases that were pending before his agency during his years of service. DR 5-101(D) would extend the attorney's disqualification to include all the partners in his firm. As previously discussed, however, this ultimately would injure the public because qualified applicants would


124. *Id.* at 757.

125. *Id.*


127. *Id.* at 1556.

128. Note, *supra* note 22, at 83 (early withdrawal always is preferable to later disqualification because disqualification implies impropriety).
be discouraged from entering government service. 129

The solution proposed by this article considers the facts of each case before applying the rules of the Code. Unlike the hard line approach, the final decision under these standards generally depends upon certain factual inquiries made by the court. The balance that this approach brings to the inquiry is preferable to an absolutist view. As is the case in any factual determination with subsequent application of legal tests, divergent results, however, are bound to occur. 130

One pragmatic approach taken concerning ethical problems is that of screening under DR 5-105(D). Under this procedure a government agency would screen former employees before they would be allowed to practice before that agency. Most commentators favor screening over absolute disqualification, 131 but with the caveat that the screening decision be made by a judge or an independent committee. 132 This is the preferable approach and it recently has been endorsed by one federal court. 133 The problem of creating an independent review committee without also creating a burdensome administrative procedure still exists.

In the final analysis, a balanced approach that gives careful and thorough consideration to all the facts and circumstances represents the best solution to the problem of attorney disqualification. This inquiry is difficult, but the courts will do everything in their power to be meticulous in this regard. Courts have always demanded, and will continue to demand, lucid and cogent arguments from both parties. The courts then will apply the current ethical mores developed to embody well proven judicial tests. There will be an inevitable tension between the courts' traditional tendency to use well demonstrated and well proven precedent and their conscious attempts to

129. See Note, supra note 67, at 525-26 (exploring the possibility of total disqualification and noting that this approach would greatly hamper government recruitment and would impose substantial hardships on past and present government attorneys). See also Comment, supra note 40, at 1547-48.

130. E.g., Comment, supra note 5, at 1043 (courts and agencies have difficulty assessing the substantial responsibility of a former employee because the party moving for disqualification usually has difficulty producing the extensive facts regarding agency procedure and events necessary to ascertain the former employee's responsibility in a matter). See generally Jordan, supra note 9, at 193-201.

131. Note, supra note 67, at 529.


keep the ethical standards current. If a correct decision is humanly possible, it has the best chance of occurring in such surroundings.