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Marlene Miller Haskell
University of Nebraska College of Law

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The Disqualification Dilemma: DR 5-105(D) of the Code Of Professional Responsibility

I. INTRODUCTION

A controversy is brewing between the American Bar Association Committee on Ethics and Professional Responsibility and the Legal Ethics Committee of the District of Columbia Bar Association over the proper interpretation to be given to the new version of DR 5-105(D) of the Code of Professional Responsibility.¹ This provision was amended in February, 1974, to widen the coverage of the rule on vicarious disqualification. Before amendment, the rule disqualified all affiliates of a lawyer who was required to decline or withdraw from employment because of the restrictions of DR 5-105. The new version calls for the disqualification of affiliates when *any* Disciplinary Rule prevents a lawyer from accepting a case.

The broad language of the amendment has potential application to lawyers all over the country, but probably will have its greatest impact in the District of Columbia. The typical career pattern for a Washington lawyer is to enter a government agency or department as a young law school graduate, then join a firm specializing in government dealings, then move back into the government as, perhaps, an agency general counsel, and finally rejoin the firm as a senior partner.² This "Washington revolving door for lawyers"³ could be shut by DR 5-105(D) if the new language is interpreted literally. It could discourage lawyers from entering government

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1. "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." ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, No. 5, DR 5-105(D) (1976) [hereinafter referred to as DR 5-105(D)].
 2. Moskowitz, "Can D.C. Lawyers Cut the Ties that Bind?," JURIS DOCTOR, Sept. 1976, at 34.
 3. *Id.*

service and make firms extremely wary of hiring ex-government lawyers.

The controversy over the new rule arose because the two bar associations most interested in the rule developed opposing interpretations of it. The American Bar Association, apparently persuaded by arguments that the rule could greatly hinder career mobility, hedged on the clear language of the rule.⁴ It decided that certain policy considerations outweigh a strict disqualification rule and that, therefore, it will allow the rest of the firm members to handle a case if the disqualified partner is adequately "screened" from the others. The D.C. Bar Association, in contrast, stuck to a literal construction of the new rule and would disqualify the whole firm without exception.⁵

This article will provide a brief background on the disqualification issues involved in DR 5-105(D), examine the two different opinions, and then offer some comments on the debate over the proper interpretation of the new rule.

II. THE DISQUALIFICATION RULES

The amendment to DR 5-105(D) involves two disqualification issues: first, the vicarious disqualification of an entire firm when one of its members is prevented by ethical considerations from handling a case; and second, the disqualification of former government lawyers from becoming involved in matters with which they dealt while in government service. These two closely related issues sprang from the same three basic policy considerations.⁶ The first is the protection of a client's confidential communications.⁷ Unless a client can be sure that the information he gives to his attorney will not be used against him without his permission, he will not speak freely and honestly. Open disclosure is essential to enable a lawyer to prepare a case adequately. The second policy is that an attorney should avoid even the appearance of impropriety.⁸ Even though there may not be an actual conflict of interest, it is not desirable for the public to see a lawyer appear both for and against

4. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 342 (1975).

5. D.C. BAR COMM. ON LEGAL ETHICS, OPINIONS, INQUIRY No. 19 (Tent. Draft, May 18, 1976).

6. See Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657, 659-60 (1957).

7. This policy was recognized by the common law. See Note, *Disqualification of Attorneys for Representing Interests Adverse to Former Clients*, 64 YALE L.J. 917, 918-19 (1955). See also ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, No. 4 (1976).

8. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, No. 9 (1976).

a client. The client should be able to rely on the fact that his lawyer will not help the opposition later, whether or not confidential information was exchanged. A third policy, the avoidance of conflicts of interest,⁹ works to prevent violations of the first two policies. It reflects the belief that a man cannot serve two masters.¹⁰ Only by completely disregarding the interests of every other person, including himself, can an attorney give his client the best possible representation and counseling.

The rule that the disqualification of one lawyer disqualifies all affiliated lawyers is based upon the "close, informal relationship among law partners and associates and upon the incentives, financial and otherwise, for partners to exchange information freely among themselves when the information relates to existing employment."¹¹ It recognizes the fact that lawyers in a firm will discuss a case among themselves and that if a client's confidences are to be protected, it must be assumed that what one firm member knows, all the members know.¹²

Under the Canons of Professional Ethics, the vicarious disqualification rule was based on canons six¹³ and 37,¹⁴ which dealt with conflicts of interests and client confidences, respectively. Canon four, "A Lawyer Should Preserve the Confidences and Secrets of a Client," and canon five, "A Lawyer Should Exercise Independent

9. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, No. 5 (1976).

10. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 342, at 2 (1975).

11. *Id.* at 1 n.2.

12. Kaufman, *supra* note 6, at 662.

13. It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

ABA CANONS OF PROFESSIONAL ETHICS No. 6.

14. It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client

ABA CANONS OF PROFESSIONAL ETHICS No. 37.

Professional Judgment on Behalf of a Client," are the pertinent sections of the Code of Professional Responsibility.¹⁵

Under the vicarious disqualification rule, the receipt of confidential information from a disqualified partner is inferred.¹⁶ This relieves the client of the extremely difficult burden of proving that his confidences actually were exchanged within the firm¹⁷ and preserves the secrecy of the information.¹⁸ However, the presumption is not an irrebuttable one. In one leading case, *Laskey Brothers v. Warner Brothers Pictures*,¹⁹ the Second Circuit held that after dissolution of a partnership, the partner to whom knowledge was imputed could rebut the inference of receipt of information in a case having no relation to the former partnership.²⁰ Malkan, a

15. Canons 6 and 37 of the ABA CANONS OF PROFESSIONAL ETHICS (and, presumably, canons 4 and 5 of the ABA CODE OF PROFESSIONAL RESPONSIBILITY) are complementary. Canon 6 forbids accepting a case the subject of which is substantially related to and in conflict with a former case. Canon 37, on the other hand, prevents accepting a case regardless of its subject matter and the subject matter of a prior case, if it might involve disclosure of a former client's confidences. Kaplan, *Forbidden Retainers*, 31 N.Y.U. L. REV. 914, 915-16 (1956). However, both rules serve to protect the client from his lawyer and to impress upon the attorney the great responsibility he undertakes when he represents that client.
16. See, e.g., *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125 (5th Cir. 1971); *Laskey Bros. v. Warner Bros. Pictures*, 224 F.2d 824 (2d Cir. 1955); *Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954); *Silver Chrysler Plymouth Inc. v. Chrysler Motors Corp.*, 370 F. Supp. 581 (E.D.N.Y. 1973), *aff'd*, 496 F.2d 800 (2d Cir. 1975); *United States v. Standard Oil Co.* 136 F. Supp. 345 (S.D.N.Y. 1955).
But see ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 342 (1975): "Imputation of knowledge from a lawyer to his firm need not be explored where a lawyer is disqualified by reason of prior representation or employment, for DR 5-105(D) specifically makes all associated lawyers disqualified and therefore knowledge vel non is irrelevant." *Id.* at 8 n.25.
17. Because the exchange is likely to take place orally, it would be nearly impossible for an aggrieved client to present convincing evidence of the breach of confidence. See Note, *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest*, 73 YALE L.J. 1058, 1060-61 (1964).
18. It would be self-defeating to require the client to introduce the confidential information into evidence. Such disclosure would "tear aside the protective cloak drawn about the lawyer-client relationship" and destroy any incentive to reveal confidential information. *T.C. & Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 269 (S.D. N.Y. 1953).
19. 224 F.2d 824 (2d Cir. 1955).
20. Apparently the inference is irrebuttable as long as the partnership is in effect. See 68 HARV. L. REV. 1084 (1955); Note, *supra* note 7.

member of the firm representing the plaintiff, had previously been associated with Isacson, who had at an earlier time represented the defendant. In *Laskey*, which was unrelated to any matter handled by the partnership of Malkan and Isacson, Malkan was allowed to counter the presumption that he had obtained privileged information about the defendant.

The court reasoned that if the presumption were irrebuttable, young lawyers could jeopardize their careers by affiliating with large law firms. They would be unattractive to other employers because their mere presence in a firm could require the disqualification of that firm from a substantial amount of business. The problem was especially acute in highly specialized areas of the law, as was the case in *Laskey*. Not only would firms be cutting off their source of business by hiring lawyers with confidential information; it would also be much more difficult for clients to find competent attorneys in the field who weren't disqualified.

A later case, *Silver Chrysler Plymouth v. Chrysler Motors Corp.*,²¹ dealt with a slightly different fact situation from that in *Laskey*, but came to the same result by using similar reasoning. Schreiber, a member of the firm representing the plaintiff, had once been associated with the firm of Kelley Drye, which represented the defendant in the instant case and at the time Schreiber had been affiliated with the firm. In deciding whether or not to disqualify Schreiber, the court took a balancing approach, weighing the need to preserve client confidences against the possible effects on an attorney's career and the right to obtain counsel. It concluded that the presumption could be rebutted because Schreiber had not himself represented the defendant in a substantially related case. Another important factor which the court seemed to rely on was Kelley Drye's size²² and high turnover rate. The court assumed that a junior associate, especially one in such a large law office, would not know as much about a case as a senior partner would. It was therefore not logical to presume that the associate had received confidential information from another firm member. The court was also fearful of making young lawyers overcommitted to their initial employers by placing potential limits on their later practices. It construed the vicarious disqualification rule as a restriction on the right to compete against a former employer, which could restrict free trade.

21. 370 F. Supp. 581 (E.D.N.Y. 1973), *aff'd*, 496 F.2d 800 (2d Cir. 1975).

22. The Kelley Drye Firm had approximately 80 members.

The other issue relevant to the new version of DR 5-105(D) is the disqualification of former government employees. This restraint is merely a specialized application of the rule disqualifying any attorney in order to protect client confidences and prevent a conflict of interest.²³

The ethical problems caused when a former government lawyer enters private practice have been approached in several different ways. Under the Canons of Professional Ethics, canon 36²⁴ made it unethical for a former government lawyer to handle a matter he had "investigated or passed upon" while he was employed by the government. The "passed upon" test, however, was too broad to be applied satisfactorily. For instance, a lawyer could be disqualified because of a "rubber stamp" approval of work done by another.²⁵ It was also necessary to disregard the language of canon 36 in order to avoid holding that a lawyer who was a former governor was barred from litigation involving any laws he had passed upon while he was governor.²⁶

The present section on disqualification of former government employees, DR 9-101(B),²⁷ is under canon nine, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." The im-

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23. The disqualification rules of the ABA CODE OF PROFESSIONAL RESPONSIBILITY are not the only restrictions on former government attorneys; 18 U.S.C. § 207 (1970), bars an individual from ever representing an interest adverse to the government on matters in which he was substantially and personally involved while employed by the government. It also forbids him, for one year, from personally appearing before any court or government department or agency in regard to any matter that was under his official responsibility as a government official. The statute deals only with individual disqualification. Apparently Congress meant to leave the problem of firm disqualification to the legal profession itself. See Note, *supra* note 17, at 1064-66.
 24. ABA CANONS OF PROFESSIONAL ETHICS No. 36, provides that: "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."
 25. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 342, at 7 (1975). The Opinion cites ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 37 (1931), in which it was held that a lawyer could not accept employment relating to a land title simply because title reports had been made in his name as assistant chief title examiner. This formality was enough to satisfy the "passed upon" test.
 26. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 342, at 7 (1975) (citing ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 26 (1930)).
 27. "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

portant test now is whether the former official had "substantial responsibility" in the matter while he was a public employee. This language looks for more than just a mechanical approval or disapproval of the matter;²⁸ there must be "a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question."²⁹ It is not necessary that the official substantially and personally handle the matter, but it is enough if "he had such a heavy responsibility for the matter in question that it is unlikely he did not become personally and substantially involved in the investigative or deliberative processes regarding that matter."³⁰ If he did become so closely involved while

ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, No. 9, DR 9-101 (B) (1976) [hereinafter referred to as DR 9-101(B)].

28. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 342, at 9 (1975) (citing ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 1129 (1969)).

If a former government attorney were charged with knowledge of every document that passed through his department, his career would be unnecessarily restricted. Instead, a doctrine of vertical responsibility has been used to determine whether the attorney had substantial responsibility for a matter. Under this theory, only knowledge of information obtained by subordinates in the attorney's office or subdivision is imputed to him. See *United States v. Standard Oil Co.*, 136 F. Supp. 345, 362 (S.D.N.Y. 1955); Kaufman, *supra* note 6, at 665-67.

29. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 342, at 9 (1975). This accords with the view expressed by Judge Irving Kaufman:

A former government attorney cannot be held to the same rules of imputed knowledge and inferences of receipt of confidences arising from access to related data which bind attorneys in private practice, who have easily definable clients and law firms. In place of those automatically disqualifying inferences, a test which requires a factual showing of actual knowledge or strong likelihood of receipt of knowledge should be substituted, except in the situations where the attorney had a duty to perform a specific task and did not perform it and where the supervisor had ultimate responsibility for all the work of his office, despite the fact that he was not informed about some of it. If there is a close question as to whether particular confidences of the former client will be pertinent to the pending controversy an attorney should be disqualified in order to avoid the appearance if not the actuality of evil. But where an attorney has worked for a vast government agency it is unreasonable to hold that an appearance of evil can be found in his undertaking a case against the Government if there is not some closer factual relationship between his former job and the pending litigation than that the same vast agency is involved.

Kaufman, *supra* note 6, at 667.

30. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 342, at 9 (1975).

a public employee, his representation of a client in the same matter as a private attorney would be regarded as "switching sides," could endanger confidential government information, and would appear improper in that it creates suspicion that the lawyer used his government employment in order to create future legal work for himself.³¹

III. THE ABA OPINION

When the ABA Committee on Ethics and Professional Responsibility first was called upon to interpret the new version of DR 5-105(D),³² its tentative decision was that a firm would be disqualified if one partner, a former government employee, were prohibited from handling a case.³³ This initial opinion merely followed the language of the new rule. However, it also alerted some Washington lawyers to the possible effects the new rule could have on private firms that hired former government lawyers. This effect appeared to require a choice between not hiring the lawyer and dropping a client who might pose a disqualification problem. The government was sympathetic. It feared that a literal interpretation of the rule would cause government lawyers to leave the civil service earlier than usual so that they could avoid becoming involved in matters that might later lead to disqualification. The ABA committee apparently was persuaded by these arguments when it wrote its final opinion in November 1975.

The committee found four policy reasons behind DR 9-101(B): the duplicity of switching sides;³⁴ the protection of confidential government information from use against the government;³⁵ the prevention of government lawyers working on matters so as to create employment for themselves after leaving government service; and the desirability of avoiding the appearance of evil.³⁶

In *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974), it was held that an attorney who had not had actual supervisory responsibility over a case but had played an important part in preparing the case did have substantial responsibility.

31. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 342, at 9 (1975).
32. The case involved a former Navy lawyer who had become a government contracting specialist with a Washington firm. *JURIS DOCTOR*, Sept. 1976, at 35-36.
33. *Id.* at 36-37.
34. The committee found that "canon 5 and DR 9-101(B) are based at least in part on the same considerations of ethics." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 342, at 3 n.10 (1975).
35. This indicates a link between DR 9-101(B) and canon 4 of the ABA CODE OF PROFESSIONAL RESPONSIBILITY. *Id.* at 4 n.11.
36. *Id.* at 3-4 (footnotes omitted).

However, the committee also found "weighty policy considerations" favoring an interpretation of the rule that would not restrict a former government lawyer's private practice: the inability of the government to attract competent people if future employment is restricted and the great sacrifice of lawyers who would enter government service; the possibility that the rule could become a "mere tool" for litigants to use to deprive opponents of capable attorneys; and the denial of the right to competent counsel, particularly in specialized areas.³⁷

The committee found that although none of these policy considerations was a part of DR 9-101(B), the rule should be construed to conform with them. The most difficult facet of the rule to interpret was the idea of "substantial responsibility." After examining the language of former canon 36, the committee looked at the new approach of DR 9-101(B). It concluded that a former government lawyer must be disqualified if he had so much responsibility in a matter that he became involved in the investigative or decision-making process. But it immediately set out this caveat: "The element of 'substantial responsibility' as so construed should not unduly hinder the government in recruiting lawyers to its ranks nor interfere needlessly with the right of litigants to employ technically skilled and trained former government lawyers to represent them."³⁸

According to the ABA committee, DR 5-105(D) was amended to include the disqualification of all affiliated lawyers so that lawyers could not circumvent the Disciplinary Rules. In the case of former government lawyers, however, "inflexible application of DR 5-105(D) would actually thwart the policy considerations underlying DR 9-101(B)."³⁹ The automatic disqualification of a whole firm would tend to impede government recruitment and make it more difficult to obtain competent representation.⁴⁰ To prevent such undesirable side effects, the ABA committee ruled that DR 9-101(B)'s application does not necessarily bring DR 5-105(D) into operation. Instead, the vicarious disqualification rules should be construed in a way that would effectuate all the factors behind DR 9-101(B).

37. *Id.* at 4-5 (footnotes omitted).

38. *Id.* at 9.

39. *Id.* at 10.

40. Judge Kaufman has argued that if the government is unable to attract competent attorneys because of narrow interpretations of ethical rules, it will be an unfavorable reflection on the legal profession and its "public-service traditions." Kaufman, *supra* note 6, at 668.

The committee felt that ethical standards would be fully complied with if the individual lawyer were disqualified *and* screened from participating in the case either directly or indirectly. The application of DR 5-105(D) was limited to the firm, partners, and associates of a disqualified lawyer who, in the opinion of the government agency involved, has not been screened from participation in and compensation for any work on a matter over which he had substantial responsibility while employed by the government.⁴¹ It was the committee's opinion that

whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interests of the government, the government may waive the disqualification of the firm under DR 5-105(D).⁴²

If there is a waiver, and the firm itself also determines that there will be no significant appearance of impropriety, the firm may accept or retain the case.⁴³

IV. THE D.C. BAR OPINION

Not long after the ABA's stand on the new rule was made known, the D.C. Bar Committee on Legal Ethics came to the opposite conclusion. It interpreted DR 5-105(D) to mean that the disqualification of one member *does* disqualify the whole firm.⁴⁴ It took a different approach to the problems and policies involved in the disqualification question.

The D.C. committee agreed with the ABA committee that the policy reasons behind DR 9-101(B) were helpful in construing the rule, but complained that those reasons were too vague and unspecific to be of much use. It criticized the ABA opinion for failing to explain the policy considerations it thought were impor-

41. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 342, at 11 (1975).

42. *Id.* at 12.

43. *Id.*

44. As of December 8, 1976, D.C. BAR COMM. ON LEGAL ETHICS, OPINIONS, Inquiry No. 19 (Tent. Draft, May 18, 1976), had not been adopted because a majority of the full membership of the Committee had not voted in favor of the opinion (the vote was 9 to 7 in favor, with 3 abstentions; 10 votes were required to adopt the opinion). However, the Committee is 11 to 5 in support of a Code amendment that would impute disqualification to other firm members and provide no screening exception. Therefore, although the draft opinion has not been formally adopted, it is clear that a substantial majority of the Committee is in support of the policies set out in the opinion. Letter from Monroe H. Freedman to the author (Dec. 8, 1976).

tant (appearance of evil, switching sides, guarding confidential government information, and discouraging government lawyers from self-dealing) or to show what relation they had to a correct solution.⁴⁵

According to the D.C. committee, the basic error in the ABA opinion was that it glossed over the problem of the appearance of professional impropriety.⁴⁶ While the ABA opinion treated that as merely one of the factors behind DR 9-101(B), the D.C. committee felt that since avoiding the appearance of professional impropriety had been given the status of an "axiomatic norm" as one of the canons of the Code of Professional Responsibility, it should be accorded much more weight than it had been given by the ABA committee.⁴⁷ It was also important to remember that whether or not a lawyer's conduct may be improper is to be judged through the eyes of an unsophisticated public that might not recognize subtle distinctions that are clear to a lawyer's eye.⁴⁸ At the same time, though, there must be "some rational basis for objection to particular conduct[;] the mere fact that the conduct might be misinterpreted through malice or ignorance should not in itself be grounds for a determination of professional impropriety."⁴⁹

The opinion then dealt with the various ethical concerns that arise in connection with situations that may present an appearance

45. D.C. BAR COMM. ON LEGAL ETHICS, OPINIONS, Inquiry No. 19, at 7-8 (Tent. Draft, May 18, 1976).

46. *Id.* at 8.

47. *Id.* at 8-9. The Second Circuit expressed a similar view in *Emle Industries, Inc. v. Patentex, Inc.*, 470 F.2d 562 (2d Cir. 1973):

Nothing in the Code of Professional Responsibility or in the teaching of prior cases warrants . . . ethical relativity, for the Code . . . "set[s] up a high moral standard, akin to that applicable to a fiduciary. . . . Without firm judicial support, the Canons of Ethics would be only reverberating generalities." *Empire Linotype School v. United States*, 143 F. Supp. 627 (S.D.N.Y. 1956). We have said that our duty in this case is owed not only to the parties . . . but to the public as well. These interests require this court to exercise its leadership to insure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process. The stature of the profession and the courts, and the esteem in which they are held, are dependent upon the complete absence of even a semblance of improper conduct.

Id. at 575.

48. D.C. BAR COMM. ON LEGAL ETHICS, OPINIONS, Inquiry No. 19, at 9 (Tent. Draft, May 18, 1976). It has been held that even proof that no confidential information was revealed by a former client will not remove the appearance of a breach of confidence; hence disqualification is still required in such cases. See *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975); *Marketti v. Fitzsimmons*, 373 F. Supp. 637, 639 (W.D. Wisc. 1974).

49. D.C. BAR COMM. ON LEGAL ETHICS, OPINIONS, Inquiry No. 19, at 9A (Tent. Draft, May 18, 1976).

of impropriety, and whether those concerns could be resolved by disqualifying only one member and not the whole firm. The most commonly cited policy reason, confidentiality, was not thought to be significant in itself when a former government lawyer is concerned.⁵⁰ But unfair advantage may be given to one private party if he were to obtain inside information from an attorney who had previously worked for the government. Even if the attorney had no secrets to divulge, it could appear to the public that he did.⁵¹ There is also the potential problem of the appearance of favoritism when an ex-government lawyer deals with his former colleagues even though, again, that may not be true.⁵² It may seem to the public that a lawyer is uncommitted, opportunistic, and scheming if he shifts from one side of a matter to the other when he leaves the government to enter private practice.⁵³ A private firm might be accused of "buying" government lawyers in order to improve its position with an agency.⁵⁴ The lawyers themselves may try to help their own careers by gaining the favor of potential future employers, by using the government's power to gain information or other advantages against future defendants in private suits, and by starting government litigation in order to create future private employment.⁵⁵

Taking into account all these policy considerations, the D.C. committee concluded that while the problems of "switching sides" and using government power to further an attorney's career could be handled by individual disqualification, the whole firm must be disqualified if there is any question of favoritism to former colleagues or of giving unfair advantages to a client by revealing government secrets. In those cases, merely barring one attorney would not eliminate the appearance of improper conduct. Therefore, if an attorney is disqualified because he had substantial responsibility in a matter while he was employed by the government, his partners and associates must also be disqualified.⁵⁶

The D.C. committee disapproved of the ABA's creation of the screening exception as an ineffective and unauthorized solution for several reasons. Screening cannot prevent favoritism or effectively regulate lawyers who attempt to give clients an unfair advantage, nor is it relevant to the problems of "stealing" away key government attorneys or the lawyer's ingratiating himself with a future

50. *Id.* at 10-11.

51. *Id.* at 11-12.

52. *Id.* at 12.

53. *Id.* at 13.

54. *Id.*

55. *Id.* at 14.

56. *Id.* at 16-17.

employer.⁵⁷ The screening procedure also poses a serious conflict of interest problem in that the government lawyers who judge the procedure have much to gain from a decision that the firm is not disqualified. This might preserve employment for themselves should they later enter private practice. Finally, screening does not avoid the appearance to the public of conflict of interest, but aggravates and complicates it.⁵⁸

V. CONCLUSION

The debate over the disqualification of lawyers under DR 5-105(D) is by no means over; in fact, there are indications that it has just begun.⁵⁹ But it has not yet advanced beyond the stage where each side is flinging its own pet policy reasons at the other without also supporting those policies with facts. Before the disqualification problem can be satisfactorily resolved, those involved in the debate must assess the validity of the arguments they are making. There are certain questions that must be answered first.

The foremost fear in the minds of those who oppose a strict interpretation of the disqualification rule is that the "revolving door" will be shut. But they apparently have failed to ask some basic questions about the likelihood of such an occurrence. First of all, does the "revolving door" really exist even now? Everyone seems simply to have assumed that it does, without trying to verify that belief. If there is a real "revolving door," it might take more than a strictly construed Disciplinary Rule to shut it. A private employer would undoubtedly consider the possibility that an ex-government lawyer may be disqualified from handling a case and could thereby "taint" the whole firm. Does that necessarily mean that the employer would decide against hiring that lawyer, or that lawyers would avoid entering government service? Those in favor of an interpretation like the ABA's assume that the door should be kept open. But would closing it actually be as disastrous as they

57. *Id.* at 18-19.

58. *Id.* at 19-20.

59. In December 1976, the ethics committee of the New York City Bar Association issued an opinion that opposes automatic disqualification of firms employing former government attorneys as long as the latter are "effectively isolated." The United States Court of Appeals for the District of Columbia has made its conflict of interest rules stricter and the Securities and Exchange Commission plans to make public the names of lawyers who are granted or denied waivers. In addition, President Carter is considering banning short-term job shifts between government and private employment by his appointees in order to prevent conflicts of interest. *Conflict of interest: the debate heats up*, 63 A.B.A. J. 16 (1977).

suppose it would be? Couldn't a strict interpretation of DR-5-105(D) help to improve the quality of government lawyers by discouraging self-interested people from seeking employment with the government? Is government employment the only way to gain experience in dealing with the government? Are there not firms specializing in such matters that would give a lawyer the opportunity to develop a certain amount of expertise in the area?

The ABA argues that a strict construction of the rule would drastically reduce the number of lawyers available to clients. How likely is it that this would happen in fields of law that are not concentrated in the hands of a few practitioners? Just how great an effect do the restrictions of the Code of Professional Responsibility have on an attorney's willingness to take a case? Does the chance that he may risk committing an ethical violation really deter him from representing a client?

Can a member of a law firm effectively be screened from participating in a case? The ABA seems to assume that he can.⁶⁰ But this view might overlook the realities of the close relationships that exist between law partners. Can every casual comment be monitored? Can a disqualified attorney so isolate himself from the rest of the firm that there will be no leakage of confidential information? In short, is screening a practical solution?

How important is the appearance of impropriety in deciding what a lawyer may or may not do? The D.C. Bar gives it top priority while the ABA merely balances it against other factors. Is it the ultimate restriction on a lawyer's conduct or is it only part of a sliding scale?

These are by no means all of the questions that must be asked and answered by everyone espousing a view on the disqualification issue. Every factor and policy argument should be subjected to this type of close scrutiny. In the final analysis, the "relevant considerations" are the facts and not necessarily what those with an authoritative voice in the matter say they are. Only by taking a close, hard look at those facts can a realistic, workable, and satisfactory solution to the disqualification dilemma be reached.

Marlene Miller Haskell, '77

60. Although the New York Bar Association's opinion suggested screening as a solution to the disqualification problem, it conceded that there may be situations in which "the disqualified lawyer's relationship with the subject matter while in government was so close, and the significance of his role was so great, that no degree of screening . . . will suffice to remove the appearance of impropriety." *Id.*