PANEL VII:

ETHICAL DILEMMAS FACING LAWYERS
PRACTICING NATIONAL SECURITY LAW
(GOVERNMENT AND PRIVATE PRACTICE)

MODOERATOR:
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Model Rules of Professional Conduct

Client-Lawyer Relationship
Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Client-Lawyer Relationship
Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

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

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a
tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

**Client-Lawyer Relationship**

**Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

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

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

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material
disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

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

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

**Client-Lawyer Relationship**

**Rule 1.13 Organization As Client**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if
(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.
Client-Lawyer Relationship

Rule 1.7 Conflict Of Interest: Current Clients - Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.10. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).
Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to
an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predicates the formation of the client-lawyer relationship. See Rule 1.8(b).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(b). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.
[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client’s position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer’s multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a “tribunal” under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of ensuring separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client’s interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns.

Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer’s representation at any time. Whether revoking consent to the client’s own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.
Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.
[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

**Nonlitigation Conflicts**

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consensable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

**Special Considerations in Common Representation**

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.
[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client’s interests and the right to expect that the lawyer will use that information to that client’s benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client’s informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client’s trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer’s role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client’s affiliates, or the lawyer’s obligations to either the organizational client or the new client are likely to limit materially the lawyer’s representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer’s resignation from the board and the possibility of the corporation’s obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer’s independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation’s lawyer when conflicts
of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at
board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and
that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's
firm to decline representation of the corporation in a matter.

Client-Lawyer Relationship
Rule 1.10 Imputation Of Conflicts Of Interest: General Rule - Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional
corporation, sole proprietorship or other association authorized to practice law, or lawyers employed in a legal services
organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers
constitute a firm within this definition can depend upon the specific facts. See Rule 1.10, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to
lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one
lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the
obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers
currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and
1.10(a)(2) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation whether neither questions of client loyalty nor protection of
confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong
political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially
limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case
were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty
to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from
involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if
the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did
as a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid
communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect.
See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to
those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the
formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to
those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the
matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (a), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(a). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer’s prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client’s material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client’s material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.
Client-Lawyer Relationship

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees - Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.
[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

**Client-Lawyer Relationship**

**Rule 1.13 Organization As Client - Comment**

**The Entity as the Client**

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.
When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if
their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as
such in the lawyer’s province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to
be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in
violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest
of the organization. As defined in Rule 1.0(l), knowledge can be inferred from circumstances, and a lawyer cannot ignore the
obvious.

In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the
violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the
policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher
authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to
reconsider the matter; for example, if the circumstances involve a constituent’s innocent misunderstanding of law and subsequent
acceptance of the lawyer’s advice, the lawyer may reasonably conclude that the best interest of the organization does not require
that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer’s advice, it will be
necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of
sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be
necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable,
minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances
where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including
its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best
interest of the organization.

Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a
timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances,
the highest authority that can act on behalf of the organization under applicable law. The organization’s highest authority to whom
a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe
that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other
Rules. In particular, this Rule does not limit or expand the lawyer’s responsibility under Rules 1.8, -16, 3.3 or 4.1. Paragraph (c)
of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the
representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may
reveal such information only when the organization’s highest authority insists upon or fails to address threatened or ongoing action
that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably
certain substantial injury to the organization. It is not necessary that the lawyer’s services be used in furtherance of the violation,
but it is required that the matter be related to the lawyer’s representation of the organization. If the lawyer’s services are being
used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to
disclose confidential information. In such circumstances Rule 1.2(c) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

**Government Agency**

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

**Clarifying the Lawyer's Role**

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

**Dual Representation**

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.
Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer’s client does not alone resolve the issue. Most derivative actions are a normal incident of an organization’s affairs, to be defended by the organization’s lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer’s duty to the organization and the lawyer’s relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.
Formal Opinion 11-460  
August 4, 2011
Duty when Lawyer Receives Copies of a Third Party’s E-mail Communications with Counsel

When an employer’s lawyer receives copies of an employee’s private communications with counsel, which the employer located in the employee’s business e-mail file or on the employee’s workplace computer or other device, neither Rule 4.4(b) nor any other Rule requires the employer’s lawyer to notify opposing counsel of the receipt of the communications. However, court decisions, civil procedure rules, or other law may impose such a notification duty, which a lawyer may then be subject to discipline for violating. If the law governing potential disclosure is unclear, Rule 1.6(b)(6) allows the employer’s lawyer to disclose that the employer has retrieved the employee’s attorney-client e-mail communications to the extent the lawyer reasonably believes it is necessary to do so to comply with the relevant law. If no law can reasonably be read as establishing a notification obligation, however, then the decision whether to give notice must be made by the employer-client, and the employer’s lawyer must explain the implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision.

This opinion addresses a lawyer’s ethical duty upon receiving copies of e-mails between a third party and the third party’s lawyer. We explore this question in the context of the following hypothetical scenario.

After an employee files a lawsuit against her employer, the employer copies the contents of her workplace computer for possible use in defending the lawsuit, and provides copies to its outside counsel. Upon review, the employer’s counsel sees that some of the employee’s e-mails bear the legend “Attorney-Client Confidential Communication.” Must the employer’s counsel notify the employee’s lawyer that the employer has accessed this correspondence?

When an employer’s lawyer receives copies of an employee’s private communications with counsel, which the employer located in the employee’s business e-mail file or on the employee’s workplace computer or other device, the question arises whether the employer’s lawyer must notify opposing counsel pursuant to Rule 4.4(b). This Rule provides: “A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”

Rule 4.4(b) does not expressly address this situation, because e-mails between an employee and his or her counsel are not “inadvertently sent” by either of them. A “document [is] inadvertently sent” to someone when it is accidentally transmitted to an unintended recipient, as occurs when an e-mail or letter is misaddressed or when a document is accidentally attached to an e-mail or accidentally included among other documents produced in discovery. But a document is not “inadvertently sent” when it is retrieved by a third person from a public or private place where it is stored or left.

The question remains whether Rule 4.4(b) implicitly addresses this situation. In several cases, courts have found that Rule 4.4(b) or its underlying principle requires disclosure in analogous situations, such as when “confidential documents are sent intentionally and without permission.” Chamberlain Group, Inc. v. Lear Corp., 270 F.R.D. 392, 398 (N.D. Ill. 2010). In Stengart v. Loving Care Agency, Inc.,

1 This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

2 For a discussion of the employee’s lawyer’s obligation to take reasonable steps to prevent a situation such as this from arising, see ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 11-439 (2011) (Duty to Protect the Confidentiality of E-Mail Communications With One’s Client).

990 A.2d 650, 665 (N.J. 2010), the court found that the employer's lawyer in an employment litigation violated the state's version of Rule 4.4(b) by failing to notify the employee's counsel that the employer had downloaded and intended to use copies of pre-suit e-mail messages exchanged between the employee and her lawyers.  

Since Rule 4.4(b) was added to the Model Rules, this Committee twice has declined to interpret it or other rules to require notice to opposing counsel other than in the situation that Rule 4.4(b) expressly addresses. In ABA Formal Op. 06-442 (2006), we considered whether a lawyer could properly review and use information embedded in electronic documents (i.e., metadata) received from opposing counsel or an adversary party. We concluded, contrary to some other bar association ethics committees, that the Rule did not apply. We reasoned that "the recent addition of Rule 4.4(b) identifying the sole requirement of providing notice to the sender of the receipt of inadvertently sent information [was] evidence of the intention to set no other specific restrictions on the receiving lawyer's conduct." Likewise, in ABA Formal Op. 06-440, this Committee found that Rule 4.4(b) does not obligate a lawyer to notify opposing counsel that the lawyer has received privileged or otherwise confidential materials of the adverse party from someone who was not authorized to provide the materials, if the materials were not provided as "the lawyer of receipt as matter of compliance with ethics rules)."

The New Jersey rule provided: "[a] lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender." New Jersey Rule of Professional Conduct 4.4(b) (2004).

The Stengart court found that the employee "had an objectively reasonable expectation of privacy" in the e-mails based on the fact that the employee "could reasonably expect that e-mail communications with her lawyer through her personal account would remain private, and that sending and receiving them via a company laptop did not eliminate the attorney-client privilege that protected them." 990 A.2d at 655. In contrast, other decisions arising in different factual situations have found that the attorney-client privilege did not protect client-lawyer communications downloaded by an employer from a computer used by its employees. These other decisions have not suggested that the employer's lawyer had a notification duty when the employer provided copies of the employee's attorney-client communications to the employer's lawyer. See, e.g., Long v. Marubeni Am. Corp., No. 05-CIV-639(GEL)(KNF), 2006 WL 2998671, at *4 (S.D.N.Y. Oct. 19, 2006); Kaufman v. SunGard Inv. Sys., No. 05-CV-1236 (JLL), 2006 WL 1307882, at *3 (D.N.J. May 9, 2006); Scott v. Beth Israel Medical Center, Inc., 847 N.Y.S.2d 426, 444 (Sup. Ct. 2007).

One might argue, for example, that the lawyer is prohibited from reading or using the e-mails by any of several other rules. These include Rule 4.4(a), which requires lawyers to refrain from using "methods of obtaining evidence that violate [a third person's] legal rights," and which, according to the accompanying comment, forbids "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." These also include Rule 8.4(c), which forbids "conduct involving dishonesty, fraud, deceit or misrepresentation," and Rule 8.4(d), which forbids "conduct that is prejudicial to the administration of justice."

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442 (2006) (Review and Use of Metadata). Prior to the adoption of Rule 4.4(b) in February 2002, this Committee had issued opinions addressing a lawyer's obligations upon receiving materials of an adverse party on an unauthorized basis when the lawyer knew that the materials were privileged or confidential, and addressing a lawyer's obligations when the opposing party inadvertently disclosed privileged or confidential materials. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-382 (1994) (Unsolicited Receipt of Privileged or Confidential Materials), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (ABA 2000) at 233; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-368 (1992) (Inadvertent Disclosure of Confidential Materials), id. at 140. The Committee concluded that the lawyer's obligations implicitly derived from other law and from provisions such as Rule 8.4 (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation" and conduct "prejudicial to the administration of justice") that did not expressly address these situations. Id. at 144-49, 234. However, the Committee withdrew both of these opinions following the adoption of Rule 4.4(b). See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-440 (2006) (Unsolicited Receipt of Privileged or Confidential Materials: Withdrawal of Formal Opinion 94-382); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005) (Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368).
result of the sender’s inadvertence."\(^8\) We noted that other law might prevent the receiving lawyer from retaining and using the materials, and that the lawyer might be subject to sanction for doing so, but concluded that this was "a matter of law beyond the scope of Rule 4.4(b)."\(^9\)

To say that Rule 4.4(b) and other rules are inapplicable is not to say that courts cannot or should not impose a disclosure obligation in this context pursuant to their supervisory or other authority. As Comment [2] to Rule 4.4(b) observes, "this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person."\(^10\) Pursuant to their supervisory authority, courts may require lawyers in litigation to notify the opposing counsel when their clients provide an opposing party's attorney-client confidential communications that were retrieved from a computer or other device owned or possessed by the client. Alternatively, the civil procedure rules governing discovery in the litigation may require the employer to notify the employee that it has gained possession of the employee’s attorney-client communications. Insofar as courts recognize a legal duty in this situation, as the court in Stengart has done, a lawyer may be subject to discipline, not just litigation sanction, for knowingly violating it.\(^11\) However, the Model Rules do not independently impose an ethical duty to notify opposing counsel of the receipt of private, potentially privileged e-mail communications between the opposing party and his or her counsel.

When the law governing potential disclosure is unclear, the lawyer need not risk violating a legal or ethical obligation. The fact that the employer-client has obtained copies of the employee's e-mails is "information relating to the representation of [the] client" that must be kept confidential under Rule 1.6(a) unless there is an applicable exception to the confidentiality obligation or the client gives "informed consent" to disclosure. Rule 1.6(b)(6) permits a lawyer to "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to comply with other law or a court order." Rule 1.6(b)(6) allows the employer's lawyer to disclose that the employer has retrieved the employee's attorney-client e-mail communications to the extent he or she reasonably believes it is necessary to do so to comply with the relevant law, even if the legal obligation is free from doubt. On the other hand, if no law can reasonably be read as establishing a reporting obligation, then the decision whether to give notice must be made by the employer-client. Even when there is no clear notification obligation, it often will be in the employer-client's best interest to give notice and obtain a judicial ruling as to the admissibility of the employee's attorney-client communications before attempting to use them and, if possible, before the employer's lawyer reviews them. This course minimizes the risk of disqualification or other sanction if the court ultimately concludes that the opposing party's communications with counsel are privileged and inadmissible. The employer's lawyer must explain these and other implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision. See Rules 1.0(e) (Terminology, "informed consent"), 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"), and 1.6(a) ("lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is implicitly authorized in order to carry out the representation or the disclosure is permitted by [the exceptions under Rule 1.6(b)]").

\(^8\) Supra n. 7.
\(^9\) Id. A recent article suggests that Rule 1.15(d) imposes a notification duty in the analogous situation in which a lawyer comes into possession of physical documents that appear to have been wrongly procured from another party. Brian S. Faughan & Douglas R. Richmond, "Model Rule 1.15: The Elegant Solution to the Problem of Purloined Documents," 26 ABA/BNA LAW. MAN. PROF. CONDUCT 623 (Oct. 13, 2010). Rule 1.15(d) provides, in pertinent part: "Upon receiving ... property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person." The provision arises out of the lawyer’s fiduciary duty to safeguard money and property belonging to another and entrusted to the lawyer. Regardless of whether this rule may apply when stolen physical items come into a lawyer’s possession, we do not believe it applies when an organizational client gives its lawyer copies of documents that were on a computer in the client’s lawful possession for the lawyer’s potential use in litigation. What is at stake is not the third party’s proprietary interest in the copies of e-mails but the third party’s confidentiality interest, which Rule 1.15(d) does not address.
\(^11\) See, e.g., Rule 3.4(c) ("A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.").
Formal Opinion 11-459
Duty to Protect the Confidentiality of E-mail Communications with One’s Client

August 4, 2011

A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party. ¹

Introduction

Lawyers and clients often communicate with each other via e-mail and sometimes communicate via other electronic means such as text messaging. The confidentiality of these communications may be jeopardized in certain circumstances. For example, when the client uses an employer’s computer, smartphone or other telecommunications device, or an employer’s e-mail account to send or receive e-mails with counsel, the employer may obtain access to the e-mails. Employers often have policies reserving a right of access to employees’ e-mail correspondence via the employer’s e-mail account, computers or other devices, such as smartphones and tablet devices, from which their employees correspond. Pursuant to internal policy, the employer may be able to obtain an employee’s communications from the employer’s e-mail server if the employee uses a business e-mail address, or from a workplace computer or other employer-owned telecommunications device on which the e-mail is stored even if the employee has used a separate, personal e-mail account. Employers may take advantage of that opportunity in various contexts, such as when the client is engaged in an employment dispute or when the employer’s monitoring employee’s e-mails as part of its compliance responsibilities or conducting an internal investigation relating to the client’s work. ² Moreover, other third parties may be able to obtain access to an employee’s electronic communications by issuing a subpoena to the employer. Unlike conversations and written communications, e-mail communications may be permanently available once they are created.

The confidentiality of electronic communications between a lawyer and client may be jeopardized in other settings as well. Third parties may have access to attorney-client e-mails when the client receives or sends e-mails via a public computer, such as a library or hotel computer, or via a borrowed computer. Third parties also may be able to access confidential communications when the client uses a computer or other device available to others, such as when a client in a matrimonial dispute uses a home computer to which other family members have access.

In contexts such as these, clients may be unaware of the possibility that a third party may gain access to their personal correspondence and may fail to take necessary precautions. Therefore, the risk that third parties may obtain access to a lawyer’s e-mail communications with a client raises the question of what, if any, steps a lawyer must take to prevent such access by third parties from occurring. This opinion addresses this question in the following hypothetical situation.

An employee has a computer assigned for her exclusive use in the course of her employment. The company’s written internal policy provides that the company has a right of access to all employees’ computers and e-mail files, including those relating to employees’ personal matters. Notwithstanding this

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.
² Companies conducting internal investigations often secure and examine the e-mail communications and computer files of employees who are thought to have relevant information.
policy, employees sometimes make personal use of their computers, including for the purpose of sending personal e-mail messages from their personal or office e-mail accounts. Recently, the employee retained a lawyer to give advice about a potential claim against her employer. When the lawyer knows or reasonably should know that the employee may use a workplace device or system to communicate with the lawyer, does the lawyer have an ethical duty to warn the employee about the risks this practice entails?

Discussion

Absent an applicable exception, Rule 1.6(a) requires a lawyer to refrain from revealing “information relating to the representation of a client unless the client gives informed consent.” Further, a lawyer must act competently to protect the confidentiality of clients’ information. This duty, which is implicit in the obligation of Rule 1.1 to “provide competent representation to a client,” is recognized in two Comments to Rule 1.6. Comment [16] observes that a lawyer must “act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.” Comment [17] states in part: “When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.... Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.”

This Committee has recognized that these provisions of the Model Rules require lawyers to take reasonable care to protect the confidentiality of client information, including information contained in e-mail communications made in the course of a representation. In ABA Op. 99-413 (1999) (“Protecting the Confidentiality of Unencrypted E-Mail”), the Committee concluded that, in general, a lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating Model Rule 1.6(a) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The opinion, nevertheless, cautioned lawyers to consult with their clients and follow their clients’ instructions as to the mode of transmitting highly sensitive information relating to the clients’ representation. It found that particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters.

Clients may not be afforded a “reasonable expectation of privacy” when they use an employer’s computer to send e-mails to their lawyers or receive e-mails from their lawyers. Judicial decisions illustrate the risk that the employer will read these e-mail communications and seek to use them to the employee’s disadvantage. Under varying facts, courts have reached different conclusions about whether an employee’s client-lawyer communications located on a workplace computer or system are privileged, and the law appears to be evolving. This Committee’s mission does not extend to interpreting the substantive law, and

3 See, e.g., ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451 (2008) (Lawyer’s Obligations When Outsourcing Legal and Nonlegal Support Services) (“the obligation to ‘act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision’” requires a lawyer outsourcing legal work “to recognize and minimize the risk that any outside service provider may inadvertently -- or perhaps even inadvertently -- reveal client confidential information to adverse parties or to others who are not entitled to access ... [and to] verify that the outside service provider does not also do work for adversaries of their clients on the same or substantially related matters.”).

therefore we express no view on whether, and in what circumstances, an employee’s communications with counsel from the employee’s workplace device or system are protected by the attorney-client privilege. Nevertheless, we consider the ethical implications posed by the risks that these communications will be reviewed by others and held admissible in legal proceedings. Given these risks, a lawyer should ordinarily advise the employee-client about the importance of communicating with the lawyer in a manner that protects the confidentiality of e-mail communications, just as a lawyer should avoid speaking face-to-face with a client about sensitive matters if the conversation might be overheard and should warn the client against discussing their communications with others. In particular, as soon as practical after a client-lawyer relationship is established, a lawyer typically should instruct the employee-client to avoid using a workplace device or system for sensitive or substantive communications, and perhaps for any attorney-client communications, because even seemingly ministerial communications involving matters such as scheduling can have substantive ramifications.

The time at which a lawyer has an ethical obligation under Rules 1.1 and 1.6 to provide advice of this nature will depend on the circumstances. At the very least, in the context of representing an employee, this ethical obligation arises when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party. Considerations tending to establish an ethical duty to protect client-lawyer confidentiality by warning the client against using a business device or system for substantive e-mail communications with counsel include, but are not limited to, the following: (1) that the client has engaged in, or has indicated an intent to engage in, e-mail communications with counsel; (2) that the client is employed in a position that would provide access to a workplace device or system; (3) that, given the circumstances, the employer or a third party has the ability to access the e-mail communications; and (4) that, as far as the lawyer knows, the employer’s internal policy and the jurisdiction’s laws do not clearly protect the privacy of the employee’s personal e-mail communications via a business device or system. Unless a lawyer has reason to believe otherwise, a lawyer ordinarily should assume that an employer’s internal policy allows for access to the employee’s e-mails sent to or from a workplace device or system.

The situation in the above hypothetical is a clear example of where failing to warn the client about the risks of e-mailing communications on the employer’s device can harm the client, because the employment dispute would give the employer a significant incentive to access the employee’s workplace e-mail and the employer’s internal policy would provide a justification for doing so. The obligation arises once the lawyer has reason to believe that there is a significant risk that the client will conduct e-mail communications with the lawyer using a workplace computer or other business device or via the employer’s e-mail account. This possibility ordinarily would be known, or reasonably should be known, at the outset of the representation. Given the nature of the representation—an employment dispute—the lawyer is on notice that the employer may search the client’s electronic correspondence. Therefore, the lawyer must ascertain, unless the answer is already obvious, whether there is a significant risk that the client will use a business e-mail address for personal communications or whether the employee’s position entails using an employer’s device. Protective measures would include the lawyer refraining from sending e-mails

inapplicable to communications with counsel using workplace computer); Scott v. Beth Israel Medical Center, Inc., 847 N.Y.S.2d 436, 440-43 (N.Y. Sup. Ct. 2007) (privilege inapplicable to employer’s communications with counsel via employer’s e-mail system); Long v. Marubeni Am. Corp., No. 05CV.639(GEL)(KMF), 2006 WL 2598671, at *3-4 (S.D.N.Y. Oct. 19, 2006) (e-mails created or stored in computer companies were not privileged, notwithstanding use of private password-protected e-mail accounts); Kaufman v. SunGard Inv. Sys., No. 05-CV-1236 (JLL), 2006 WL 1307882, at *4 (D.N.J. May 10, 2006) (privilege inapplicable to communications with counsel using employer’s network).

For a discussion of a lawyer’s duty when receiving a third party’s e-mail communications with counsel, see ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 11-460 (2011) (Duty when Lawyer Receives Copies of a Third Party’s E-mail Communications with Counsel).

This opinion principally addresses e-mail communications, which are the most common way in which lawyers communicate electronically with clients, but it is equally applicable to other means of electronic communications.
to the client's workplace, as distinct from personal, e-mail address, and cautioning the client against using a business e-mail account or using a personal e-mail account on a workplace computer or device at least for substantive e-mails with counsel.

As noted at the outset, the employment scenario is not the only one in which attorney-client electronic communications may be accessed by third parties. A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, to which a third party may gain access. The risk may vary. Whenever a lawyer communicates with a client by e-mail, the lawyer must first consider whether, given the client's situation, there is a significant risk that third parties will have access to the communications. If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client.

7 Of course, if the lawyer becomes aware that a client is receiving personal e-mail on a workplace computer or other device owned or controlled by the employer, then a duty arises to caution the client not to do so, and if that caution is not heeded, to cease sending messages even to personal e-mail addresses.
Recent ABA ethics opinions: Email communications

By Peter H. Geraghty
Director, ETHICSearch

In August of 2011, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinions 11-459, Duty to Protect the Confidentiality of Email Communications with One's Client and 11-460, Duty When Lawyer Receives Copies of a Third Party's Email Communications with Counsel.

Formal Opinion 11-459

Formal Opinion 11-459 addresses a lawyer's obligation to warn his client about potential breaches of confidentiality when the lawyer knows that the client is using a computer for email correspondence with the lawyer that a third party may have access to. The committee observed that this is a possibility in many instances; such as when the client uses his business email account to communicate with his lawyer, where he uses his employer-supplied work computer, smart phone or tablet device to access his private email account, or where he uses a public computer at a library or hotel.

The committee stated that under such circumstances, the client may not be aware that a third party may potentially have access to his computer, and may therefore not take the necessary precautions to protect the confidentiality of his email communications.

The committee examined this issue in the context of a hypothetical situation involving a client who becomes involved in an employment dispute with the employer. The client is assigned a workplace computer by his employer, and the employer has a written internal policy whereby it has the right to access all of the employee's business and personal email files that the employee generated on the workplace computer. Under these facts, the committee considered the circumstances under which a lawyer should warn the client about the risks of communicating with the lawyer via a workplace supplied computer or other communications device.

Citing Comments [16] and [17] to Model Rule 1.6 Confidentiality of Information, the committee noted that a lawyer has an obligation to ensure that confidential client information is protected:
Comment [16] observes that a lawyer must "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Comment [17] states in part: "When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. ... Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement." Formal Opinion 11-459 at page 2.

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The committee noted that clients may not have a reasonable expectation of privacy when they use an employer's computer or other device and the lawyer should advise the client at the outset of the representation to avoid using such devices to communicate with him. This obligation attaches when the lawyer should reasonably know that the client intends to communicate with him via email, the client has access to a workplace computer, the employer's policies permit the employer to access the client's e-mail, and the employer's internal policy and local law does not clearly protect the confidentiality of the client's communications.

The committee also observed that a lawyer should also take protective measures to prevent third parties from accessing confidential client communications. These include avoiding sending emails to the client's business email account and warning the client about the dangers of sending emails from a business or personal account from a workplace computer.

Formal Opinion 11-460

In Formal Opinion 11-460, the committee addressed in effect the "mirror image" of Formal Opinion 11-459; a lawyer's ethical obligations when he receives copies of a third party's email correspondence with his lawyer.

As in Opinion 11-459, the committee based its discussion of this issue on a hypothetical situation involving an employee who files an employment discrimination suit against his employer. The employer subsequently copies all of the employee's emails and forwards them to the lawyer. The lawyer reviews them and finds some that are correspondence between the employee and the employee's lawyer and that are marked "Attorney-client Confidential Information."

Model Rule 4.4
At the outset of the opinion, the committee referred to Model Rule 4.4, *Respect for Rights of Third Persons* that states as follows:

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

The committee noted that under the facts of the hypothetical, Rule 4.4(b) would be inapplicable, since the emails in question were not inadvertently sent; they were deliberately copied by the employee's employer. The committee stated:

A "document [is] inadvertently sent" to someone when it is accidentally transmitted to an unintended recipient, as occurs when an email or letter is misaddressed or when a document is accidentally attached to an email or accidentally included among other documents produced in discovery. But a document is not "inadvertently sent" when it is retrieved by a third person from a public or private place where it is stored or left.

Formal Opinion 11-460 at page 1.

Citing to ABA Formal Opinions 06-442, *Review and Use of Metadata* (2006) and 06-440, *Unsolicited Receipt of Privileged or Confidential Materials: Withdrawal of Formal Opinion 94-382* (July 5, 1994) (2006) the committee noted that it had twice decided that a lawyer did not have an obligation to provide notice to opposing counsel that it had received documents that were not inadvertently produced.

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**Does applicable law require disclosure?**

The committee observed, however, that some court decisions have imposed a duty to notify opposing counsel when "confidential documents are sent intentionally and without permission" in analogous employee-employer contexts. Furthermore, applicable rules of civil procedure regarding discovery may also impose disclosure obligations on the lawyer, and the lawyer may be subject to discipline for noncompliance.

The committee cited to paragraph [2] of the Comment to Rule 4.4 that states as follows:

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures.
Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. (emphasis added) For purposes of this Rule, "document" includes email or other electronic modes of transmission subject to being read or put into readable form.

The committee stated that under circumstances where the law of the jurisdiction is not clear whether the lawyer has a duty to disclose, the lawyer “need not risk violating a legal or ethical obligation.”

The employee’s emails received by the employer’s lawyer must be kept confidential since they would be “information relating to the representation” unless there is an exception under Rule 1.6(b) or if the client gives his informed consent. Rule 1.6(b)(6) permits a lawyer to “reveal information relating to the representation of a client to the extent that a lawyer reasonably (emphasis added) believes necessary….to comply with other law or a court order.” Therefore, under Rule 1.6(b)(6) the committee stated that the lawyer could disclose that he had received the emails even if the law of the jurisdiction was in doubt.

Under circumstances where there is no clear legal precedent in the jurisdiction that would require the lawyer to notify the court or the opposing party that he has received the employee emails, the lawyer may not do so unless the client consents. The committee observed that it still may be in the client’s best interests to disclose since obtaining a court ruling on the email’s admissibility before the lawyer attempts to use them, and preferably before the employer’s lawyer reviews them would help to avoid having the employer’s lawyer from being either sanctioned or disqualified if the court were to rule that the email communications were privileged and inadmissible. Under these circumstances, the lawyer must clearly explain the possible consequences of disclosure and also any available alternatives to disclosure so that the client can make an informed decision under Rules 1.4 Communication and 1.6.

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Ethics

Read All Over: Two New Opinions Describe Need to Keep Email from the Wrong Hands

Posted Nov 1, 2011 2:00 AM CST
By James Rodgers

Illustration by Stuart Bradford

With all due respect to basic paper and direct conversation, email and other electronic vehicles are becoming the dominant forms of communication in today's world.

But while email, text messaging and cellphones offer speed, efficiency and convenience that are hard to resist, they can have downsides. One is the fact that electronic communications never really go out of existence. And as two recent ABA ethics opinions point out, that can raise important confidentiality issues for lawyers when they communicate with clients.

Formal Opinions 11-459 (Duty to Protect the Confidentiality of Email Communications with One’s Client) (PDF) and 11-460 (Duty When Lawyer Receives Copies of a Third Party’s Email Communications with Counsel) (PDF) were issued Aug. 4 by the ABA Standing Committee on Ethics and Professional Responsibility.

A COMPANY COMPUTER

Both opinions use the same hypothetical fact pattern as a starting point.

An employee of a company retains a lawyer to advise her on a potential workplace claim against the employer. The company provides the employee with a computer for her exclusive use in the course of her employment, but it's customary for employees to occasionally use their computers for personal reasons. A written policy of the company states that it has a right of access to all employee computers and email correspondence, including those relating to personal matters. Despite that policy, the employee has used her computer at work to communicate with her lawyer about her possible claim against the company.

Opinion 11-459 discusses what steps a lawyer must take to prevent third parties from gaining access to email communications between the lawyer and a client.
"Whenever a lawyer communicates with a client by email, the lawyer must first consider whether, given the client's situation, there is a significant risk that third parties will have access to the communications," the opinion states. "If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client."

The "significant risk" factor should not be underestimated. There are many reasons why companies monitor computer—and employer-issued smartphone—use by employees, including productivity, security and protection of reputation. Companies may scrutinize employee emails as part of their compliance obligations or in the course of internal investigations. Moreover, email sent or received through a company's network is captured on servers, and can be read and copied by third parties, even if the employee thinks she has deleted it.

The opinion notes that the law is evolving on the question of whether an employee's client-lawyer communications located on an employer's server are privileged. But it focuses on ethics implications of the risk that such communications may be seen by others and held admissible in legal proceedings.

"Given these risks," the committee concludes, "a lawyer should ordinarily advise the employee-client about the importance of communicating with the lawyer in a manner that protects the confidentiality of email communications."

A lawyer's duty to warn the client about the risk of using workplace devices to communicate with the lawyer is grounded in Rules 1.1 and 1.6 of the ABA Model Rules of Professional Conduct. (The Model Rules are the direct basis for lawyer conduct codes in every state except California.)

Model Rule 1.1 requires that a lawyer provide competent representation to a client, and Model Rule 1.6 requires a lawyer to refrain from revealing "information relating to the representation of a client unless the client gives informed consent."

Comments to Rule 1.6 state that the duty requires lawyers to "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure" and to "take reasonable precautions to prevent the information from coming into the hands of unintended recipients."

The opinion says a lawyer should address the issue promptly with the client. "In particular, as soon as practical after a client-lawyer relationship is established, a lawyer typically should instruct the employee-client to avoid using a workplace device or system for sensitive or substantive communications, and perhaps for any attorney-client communications, because even seemingly ministerial communications involving matters such as scheduling can have substantive ramifications."

**LET THE COURT DECIDE**

Formal Opinion 11-460 picks up the hypothetical with the employee filing a lawsuit against the company. The company then copies the contents of her workplace computer and gives it to outside counsel. In reviewing the material, the outside counsel notices that some of the emails are marked **attorney-client confidential communication**. Does the company’s counsel have an obligation to notify the employee's lawyer that the employer has accessed this information?

Although courts may recognize a legal duty under these circumstances, Opinion 11-460 concludes that "the Model Rules do not independently impose an ethical duty to notify opposing counsel of the receipt of private, potentially privileged e-mail communications between the opposing party and his or her counsel."

ABA Model Rule 4.4 states, "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." But the opinion makes the rule inapplicable to emails because they are not "inadvertently sent" when they are retrieved by a third person from a public or private place where they are stored or left. Documents are "inadvertently sent" when they are "accidentally transmitted to an unintended recipient, as occurs when an email or letter is misaddressed or when a document is accidentally attached to an email or accidentally included among other documents produced in discovery."

Ultimately, the decision on what to do with communications that one party thought were confidential might best be made by a court, states the opinion. "Even when there is no clear notification obligation, it often will be in the employer-client's best interest to give notice and obtain a judicial ruling as to the admissibility of the employee's..."
attorney-client communications before attempting to use them and, if possible, before the employer's lawyer reviews them," the opinion states.

"This course minimizes the risk of disqualification or other sanction if the court ultimately concludes that the opposing party's communications with counsel are privileged and inadmissible."
APPROPRIATE LIMITS ON PARTICIPATION BY A FORMER AGENCY OFFICIAL IN MATTERS BEFORE AN AGENCY*

THOMAS D. MORGAN**

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* This Article is based on a report prepared for the Administrative Conference of the United States. The views expressed herein are personal opinions of the author and are not necessarily those of persons interviewed, the Administrative Conference of the United States, or the Duke Law Journal.

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

ABA CODE OF PROFESSIONAL RESPONSIBILITY (1978) [hereinafter cited as ABA Code];


THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON THE FEDERAL CONFLICT OF LAWS, CONFLICT OF INTEREST AND FEDERAL SERVICE (1960) [hereinafter cited as BAR REPORT];

COMPTROLLER GENERAL, GENERAL ACCOUNTING OFFICE, WHAT RULES SHOULD APPLY TO POST-FEDERAL EMPLOYMENT AND HOW SHOULD THEY BE ENFORCED?, REP. NO. B-10987, (1978) [hereinafter cited as GAO REPORT];

A. KNIEBER, SERVING TWO MASTERS: A COMMON CAUSE STUDY OF CONFLICTS OF INTEREST IN THE EXECUTIVE BRANCH (1976) [hereinafter cited as COMMON CAUSE STUDY];

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I. INTRODUCTION
In a message to Congress early in his administration, President Carter asserted, "a[ll too often officials have come into government for
a short time and then left to accept a job in private industry, where one of their primary responsibilities is to handle contacts with the former employer." He called for an end to this “misuse of influence acquired through public service.”

In its preadjournment rush, the ninety-fifth Congress granted the President’s request for legislation by passing the Ethics in Government Act. For the ordinary federal employee, the changes were relatively minor: the existing one-year ban on appearing before one's agency with respect to any matter within one's former “official responsibility” was extended to two years.

However, the Act made significant changes regarding persons with “substantial decisionmaking authority,” defined by the legislation as persons paid at level GS-17 or above. Such an official who left government after July 1, 1979, would be guilty of a felony if—even in the privacy of his or her office—he or she aided, counseled, advised, consulted, or assisted in representing “any other person (except the United States)” in connection with a matter that was within his or her “official responsibility” within one year before he or she left the agency. Such an official would be barred from making any oral or written communication to the former agency on behalf of anyone other than the United States, even in matters arising after the official left office, including a later rulemaking proceeding.

This legislation was conservative in comparison to some of the other proposals pending at the time of its passage. The Bar Association for the District of Columbia, for example, was considering proposed amendments to Disciplinary Rule 9-101 of its Code of Professional Responsibility that would have restricted the activities of lawyers licensed

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2. Id.
5. Id. § 207(d). Actually, four types of persons were placed in this category: (1) persons paid a sum equal to or greater than the Federal Executive Salary Schedule, set forth in 5 U.S.C. §§ 5311-5317 (1976); (2) persons paid at or above the basic rate of GS-17, prescribed by 5 U.S.C. § 5332 (1976); (c) active duty commissioned officers paid at level O-7 or above as prescribed in 37 U.S.C. § 201 (1976); and (c) persons with “substantial decisionmaking authority” as defined by the Director of the Office of Government Ethics, a position created by Title IV of the legislation. Pub. L. No. 95-521, §§ 401-405, 92 Stat. 1824 (1978) (codified at 5 U.S.C.A. app. §§ 401-405 (West Supp. 1979)).
7. Id. § 207(b)(6).
8. 18 U.S.C.A. § 207(c) (West Supp. 1979). President Carter had imposed these requirements on his own appointees at the outset of his administration by requiring a letter of agreement to those terms. 35 CONG. Q. S25-57 (1977).
in the District of Columbia even more severely than the federal statute. The Federal Trade Commission, in turn, had proposed to amend its own separate Rules of Procedure to forbid a former employee from participating in any proceeding in which his experience could give him an "unfair advantage."10

Passage of the President's proposal should normally have preempted this other activity and resolved the issues, at least for the present. The new law, however, created problems of its own. In the eight months between passage of the legislation and its effective date, significant numbers of high-level administration officials suggested that they might resign in order to avoid the new strictures.11 Almost immediately after its passage, efforts to amend the law began. The Office of Government Ethics drafted regulations narrowly construing new section 207,12 and members of both houses introduced bills "to clarify" and limit the new law.13 The President signed amendatory legislation in June 1979, less than two weeks before the provisions of the Ethics in Government Act were to have taken effect.14

Even with passage of these clarifying amendments, however, the question of the appropriate limits on activities of former government employees remains a problem of intense interest and practical concern to officials and agencies alike. On some crucially important issues—the attribution of a former government lawyer's disqualification to his or her current law partners, for example—the legislation is still totally silent, and conflicting court decisions render the state of the law on these questions uncertain.15

This Article will discuss the controversy in its historical context, organize specific issues for systematic analysis, evaluate the various

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9. One version of the proposed changes was published in District Law., Winter 1977, at 46. The version pending at the time the legislation was considered appeared in District Law., Aug./Sept. 1978, at 44. The final version submitted for approval to the District of Columbia Court of Appeals in February 1979 is reported in Final Revising Door Proposal Submitted to D.C. Court of Appeals, District Law., Apr./May 1979, at 47-63. See notes 85-94 supra and accompanying text.

10. 16 C.F.R. § 4.1(b) (1979). The proposed changes were published in 43 Fed. Reg. 35,947 (1978). However, their adoption has been deferred pending action of the District of Columbia Court of Appeals on the District of Columbia Bar proposal.


criticisms of postemployment activity, and propose a simpler, more direct way of regulating the truly objectionable features of such activity.

II. THE HISTORICAL DEVELOPMENT OF POST-GOVERNMENT EMPLOYMENT RESTRICTIONS

A. The Pre-1962 Legislation.

In the midnineteenth century, government was a far smaller enterprise than it is today. Much of its business, particularly in the period following the Civil War, consisted of paying "claims" against the government. These claims were often based on evidence that was hard to verify and were frequently processed and paid somewhat informally within the agency, subject only to audit and approval by the Comptroller of the Treasury. Fearful of collusion and fraud, Congress passed legislation designed to prevent active government officials from assisting private claimants in pressing their suits before government agencies, and in 1872 Congress extended the prohibition to former employees. A rider to the post office appropriations bill provided:

[I]t shall not be lawful for any person . . . appointed an officer, clerk, or employee in any of the executive departments to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in said Departments while he was said officer, clerk, or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employee.

This statute, codified as 5 U.S.C. § 99, remained unchanged for ninety years.

The language of this statute, however, created several problems. First, the statute related only to prosecuting claims, an ambiguous and arguably narrow proscription. Second, many government employees were considered exempt from the law because the Attorney General had taken the position that section 99 covered only employees of execu-

17. Act of June 11, 1864, ch. 119, 13 Stat. 123 (codified at 18 U.S.C. § 281 (1958)) (repealed 1962) (compensated assistance); An Act to Prevent Frauds Upon the Treasury of the United States, ch. 18, § 2, 10 Stat. 170 (1853) (codified at 18 U.S.C. § 283 (1958)) (repealed 1962) (uncompensated assistance). These laws forbade assistance by active officials regardless of whether they were compensated and regardless of whether the agency involved was the one for which they worked.
19. Id.
20. However, the terms had been construed to cover an appearance before Congress to obtain special legislation to pay an Indian upon whose land the United States had cut timber. Van Mtre v. Nunn, 116 Minn. 444, 133 N.W. 1012 (1912).
tive departments, not those of independent agencies. In addition, the Attorney General later issued an opinion stating that even Army contracting officers were not considered employees of a "department" of government. Finally, the section did not provide for any penalty. Although prosecution of a claim was not lawful, the penalty often imposed by courts was simply denial of the former employee's fee for his claims collection service.

These problems with section 99 led to the adoption of a second section on postemployment restrictions, section 284 of the Crimes and Criminal Procedure Act, which was incorporated into the revision of the federal criminal code in 1948:

Whoever, having been employed in an agency of the United States, including commissioned officers assigned to duty in such agency, within two years after the time when such employment or service has ceased, prosecutes or acts as counsel, attorney, or agent for prosecuting, any claims against the United States involving any subject matter directly connected with which such person was so employed or performed duty, shall be fined not more than $10,000 or imprisoned not more than one year, or both.

This section was an addition to, not a replacement for, the earlier statute. It substituted the term "agency" for the word "department," included military officers in its coverage, and imposed misdemeanor criminal penalties. At the same time, the coverage of the statute was significantly narrowed to prosecution of claims "involving any subject matter directly connected with which such person was so employed or performed duty . . . ."

B. Recognition of the Need for Reform.

Attorneys are among those persons most affected by restrictions on employment after government service. Not surprisingly, then, the American Bar Association Canons of Professional Ethics took a position on proper behavior of the former government lawyer. Canon 36 provided: "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.

25. Id.
26. Id.
upon while in such office or employ." Further, and more generally, Canon 6 provided: "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." The duty to preserve client confidences—presumably including government-client confidences—was established, in turn, by Canon 37.

Two important cases in the 1950s helped catalyze the belief that the statutes and these Canons needed reexamination. In United States v. Bergson, decided in 1954, the defendant had been the former head of the Antitrust Division of the Department of Justice. Within two years after leaving office, Bergson wrote a letter to the Department seeking clearance for a particular corporate merger. The matter was clearly of the type he had handled while in office. He was prosecuted under section 284 of the then-recently enacted Crimes and Criminal Procedure Act. The district court acquitted Bergson, however, on the ground that a request for premerger clearance was not a "claim against the United States" and thus did not violate the statute. The term "claim," said the court, "is limited to demands against the Government for money or for property."

For those who disapproved of Bergson's conduct, the reach of the statute was obviously inadequate. Even for others, the statute created an anomaly. The narrow construction of "claim" meant that a former Internal Revenue Service agent could help a taxpayer resist claimed taxes, for example, but could not help him seek a refund of taxes paid.

An even more celebrated case was decided the next year. In United States v. Standard Oil Co., the defendant had sold crude oil to European firms at prices allegedly in excess of the maximum permitted by the Economic Cooperation Administration. Counsel for the defend-

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27. ABA Canons of Professional Ethics No. 36 (1937).
28. ABA Canons of Professional Ethics No. 6 (1908).
29. ABA Canons of Professional Ethics No. 37 (1937). Canon 37 provided: "It is the duty of a lawyer to preserve his client's confidences. . . . 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."
32. 119 F. Supp. at 465.
33. An even earlier recognition of the problems in the statutes was in McElwain & Vorenbarg, The Federal Conflict of Interest Statutes, 65 Harv. L. Rev. 955 (1952).
ants included an attorney who had been employed in the Paris office of the Administration from 1949 to 1951. The government moved to have him disqualified pursuant to the Canons of Ethics, which had been adopted as rules of the court in the Southern District of New York. After a lengthy and specific factual analysis, the district court ruled that the former government attorney had not seen any of the documents relevant to the case, passed upon any of the issues in the case, or given legal advice in relation to any of the regulations involved. Thus, the court denied the motion to disqualify.35

Several issues in the case sufficiently troubled District Judge Irving R. Kaufman that he wrote an article in the Harvard Law Review about the case and the ambiguities that he saw in the existing law. He raised such questions as whether the statute required that the knowledge of other attorneys in the government office be imputed to an attorney, even though he had not seen any of the documents; whether the attorney's former client was the entire government, his former agency, his Paris office, or some other entity entirely; and when the "appearance of evil" would be such that an attorney should be disqualified even if there has been no actual abuse of confidential information.37

Judge Kaufman was not complaining that the reach of the Canons and statutes was too narrow. In fact, he felt that the "revolving door" practice should be "encouraged rather than discouraged."38 His concern was with the ambiguities faced by lawyers who were trying scrupulously to be ethical. Particularly troublesome was the problem created for "part-time" government employees such as consultants or members of boards and commissions. Did their public service disqualify them and their law firms from all cases involving the government? Judge Kaufman asserted that "many attorneys are turning down cases they should be free to take because of uncertainty as to the controlling ethical principles."39 He called attention to "the urgency of the problem" and urged the bar to "take measures to alleviate it."40

Publication of Judge Kaufman's commentary led to two further studies. In 1957, Chairman Celler of the House Judiciary Committee ordered a study of all the federal conflict of interest laws, including

35. Id. at 363-67.
37. Id. 662-63.
38. Id. 668. There is a basis for arguing that Judge Kaufman's views may now have changed somewhat. See notes 70-73 infra and accompanying text.
40. Id. 669.
sections 99 and 284, and in 1958 the Association of the Bar of the City of New York created a ten-member committee with a professional staff headed by Professor Bayless Manning. The committee studied the problem for two years, and published its findings in a book that thoroughly analyzed the existing law and proposed draft legislation. The present federal restrictions on postemployment activity, including their complexity and sophistication, can be traced in large part to this Association of the Bar Report.

C. The 1962 Legislation.

When the Kennedy administration took office in 1961, it appointed a three-member advisory panel to recommend changes in the federal conflict of interest laws. Within a few weeks, the panel presented proposals that were a simplified version of the Association of the Bar draft statute. Legislation was passed in the closing days of the eighty-seventh Congress.

Section 207 of the new statute, the Bribery, Graft and Conflicts of Interest Act, reached all government employees, but it created a new category—that of “special Government employee”—to provide exceptions appropriate for certain kinds of consultants and other part-time employees. Former employees were not forbidden from dealing with all subject matters within their prior responsibility. The statute only prohibited subsequent activity with respect to defined “particular matters involving a specific party or parties.” Thus, for example, general policymaking activities of the employee, including participation in rulemaking activities, did not preclude his subsequent representation of a client in that area.

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42. The balanced approach of the report is seen in its opening paragraph:
   This book has two themes. The first is that ethical standards in the United States federal government must be beyond reproach. The second is that the federal government must be in a position to obtain the personnel and information it needs to meet the demands of the twentieth century. These themes are coequal. Neither may be safely subordinated to the other.
   Bar Report 3.
43. The members of the panel were Judge Calvert Magruder of the First Circuit, Dean Jefferson Fordham of the University of Pennsylvania Law School, and Professor Bayless Manning.
46. The term, “special Government employee,” is defined in section 202(a) to mean (in addition to several specially defined cases) any person “employed . . . , with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days . . . .” Id. § 202(a) (1976) (amended 1978).
47. Id. § 207(a), (b) (1976) (amended 1978, 1979).
The legislation differed from the Bar Association's draft statute in several respects. The Association of the Bar proposal would have placed permanent limitations on the employee's activity in matters in which he had "participated" during his government employment.\textsuperscript{48} The concept of "participation" was substantially qualified in the statute to read "participated \textit{personally and substantially} . . . through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise . . . ."\textsuperscript{49}

The Bar Association had also proposed a two-year ban on activities concerning "transactions" that had been under the employee's "official responsibility" while working for the government.\textsuperscript{50} This was a direct reaction to the Standard Oil case.\textsuperscript{51} The concept of "official responsibility" was defined in the proposal as "the direct administrative or operating authority . . . effectively to approve, disapprove, or otherwise direct Government action."\textsuperscript{52} The statute adopted this concept but set the ban at only one year.\textsuperscript{53} In addition, the statute was more specific than the Bar Association draft in describing prohibited subsequent activity. The phrase "assist another person" in the Association of the Bar proposal was changed in the statute to "act as agent or attorney for anyone."\textsuperscript{54} Coupled with the requirement of a "particular matter," the prohibition applied only to persons acting in a representative capacity in a judicial or an administrative proceeding. The language did not prohibit office counseling. As recommended by the Association of the Bar, section 208 expressly prohibited a current federal employee from participating in any matter in which "any person or organization with whom he is negotiating or has any arrangement concerning prospective employment has a financial interest."\textsuperscript{55} That disqualification was, however, subject to waiver by the "official responsible for [the employee's] appointment to his position . . . [upon a showing that the] interest is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect from such officer or

\textsuperscript{48} Bar Report 292.
\textsuperscript{50} Bar Report 292.
\textsuperscript{52} Bar Report 275.
\textsuperscript{53} 18 U.S.C. § 207(b) (1976) (amended 1978, 1979). The term "official responsibility" is defined in section 202(b) in accord with the Bar's definition.
\textsuperscript{54} Id. § 207(a), (b) (1976) (amended 1978, 1979). In addition, the 1962 law, for the first time, made it clear that activities consistent with the government's interest, not just those opposed to it, were prohibited. The law covered any matter "in which the United States is a party or has a direct and substantial interest." Id.
\textsuperscript{55} Id. § 208(a) (1976) (amended 1977).
employee..." 55

In a major departure from the Association of the Bar proposal, 
section 207 failed to require that partnerships in which the former official 
was involved be disqualified. 57 The House bill had provided for 
imputed disqualification, but the Senate rejected that provision. The 
point was controversial, and the legislative history shows that Congress 
rationalized that the only people to whom the issue was of practical 
concern were attorneys. Attorneys had their own standards of legal 
ethics governing disqualification of law firms, Congress reasoned, and 
the issue should be resolved by those standards. 58 The statute 
contained no provision for waiving the former employee’s own 
disqualification, 59 and as a result of the silence on disqualification of 
partnerships, there was also no reference to waiver of imputed disqualifi-
cation.

Finally, the statute upgraded the criminal sanctions to felony sta-
tus, but failed to go further and adopt the Association of the Bar propo-
sal to create civil and administrative penalties as well. 60


The “revolving door” between private life and government service 
was not a subject of significant attention in the years shortly after 1962. 
President Johnson, for example, issued an important Executive Order

55. Id. § 208(b).

57. Indeed the last sentence of section 207 read: “A partner of a present or former officer or 
employee...shall as such be subject to...[Section 207] only as expressly provided in subsec-
tion (c) of this section.” Subsection “c” did not deal with the former employee; it dealt only with 
partners of present employees.

The Bar’s proposed statute would have created a two-year ban on the partnership’s assistance 
in matters in which the former government employee “participated” during government employ-
ment; these were, it will be remembered, matters for which the employee himself would have been 
permanently disqualified. No limitation was to be placed on the law firm’s involvement in matters 

58. See S. Rep. No. 2213, 87th Cong., 2d Sess. 13 (1962). This view is confirmed by the 

59. The Bar had proposed a narrowly drawn waiver procedure. In matters involving federal 
contracts, application could be made to the head of the agency for which the former employee had 
worked to certify that the former employee has “special knowledge” or skills necessary to the 

60. In addition to proposing enforcement by criminal penalties, the Bar Committee proposed 
a civil damage remedy and an administrative remedy that would bar the former employee from 
appearing before, or negotiating business with, the agency if a violation were proved. Id. 299-303. 
This “administrative remedy” reappeared in the 1978 amendments to section 207, and is now 
on Ethics in Government Services in 1965, in which he did not even mention the subject. For many years, of course, critics of military spending had maintained that the practice of recruiting Department of Defense personnel from companies that are defense contractors led to the perceived need for large defense budgets. These critics had also alleged that these companies might be receiving favored treatment from their former employees or from persons wanting positions with these firms upon leaving the government. The only statutory response to these charges, however, was to require former high-level Defense Department and National Aeronautics and Space Administration officials to report any dealing they had with their former agencies during the first three years after their departure from the government. The substantive requirements on such persons were the same as those that section 207 imposed on all other former officials.

Studies by Ralph Nader organizations in the late 1960s and early 1970s apparently were the turning point in perceptions of the "revolving door" phenomenon. These reports helped popularize the view that regulation was going wrong, not because it had been misconceived in the first place but because the process had been "captured" by the regulated firms. One way to explain the occurrence of this alleged capture was to point to the allegedly incestuous relationship between persons working for regulatory agencies and the firms for which they ultimately expected to work.

About the same time as the Nader studies, public-interest organizations—representing groups formerly thought to lack representation in governmental decisionmaking processes—came to national promi-
nence. These organizations claimed that one reason their views had not been considered was that they were excluded from the revolving door process. That is, if all the decisionmakers came from industry and expected to return there, their decisions could not be expected to reflect the general public interest.

For lawyers, one key development was the American Bar Association’s adoption of a new Code of Professional Responsibility in 1969. Disciplinary Rule 9-101(B) of that Code provides: “A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.”68 The related Ethical Consideration, EC 9-3, explains that “to accept employment [under these circumstances] would give the appearance of impropriety even if none exists.”69

No reported disciplinary cases were brought to enforce these provisions, but the provisions did provide a basis for the decision of the Second Circuit in General Motors Corp. v. City of New York.70 In that case, New York City wished to file a class action suit alleging that Gen-

68. ABA Code DR 9-101(B). The term “matter” in this Disciplinary Rule was apparently meant to pick up the distinction made in Allied Realty of St. Paul, Inc. v. Exchange Nat’l Bank, 283 F. Supp. 464 (D. Minn. 1968), aff’d, 408 F.2d 1099 (8th Cir.), cert. denied, 396 U.S. 823 (1969). decided the preceding year. In that case, a young assistant United States attorney had “second chaired” a criminal trial in which it was alleged that the defendant had fraudulently purported to place a mortgage on a piece of property to get a loan for a national bank. After leaving the United States attorney’s office, the lawyer filed a civil fraud suit on behalf of the bank against the former criminal defendant. This later suit was not contrary to the interest of the government; indeed it furthered the deterrent and remedial policy of the criminal law. Yet a motion to disqualify the lawyer was granted. General knowledge about the operation of the government and even the policies applied in a particular office would not constitute the basis for disqualification, the court reasoned, but when the specific subject matter of the private suit was the same as that on which the lawyer worked as a public employee, disqualification had to be ordered. No confidences in the normal sense were compromised by this representation, but the identity of the subject matter was decisive.

Note that the ABA ban, like section 207(a), is permanent. However, the ABA Code applies to all public lawyers equally and does not establish separate rules for part-time employees, former military officers, and the like. Further, the intensity of the relationship to the case is defined as “substantial responsibility.” Presumably that is something more than “official responsibility,” but less than “personal and substantial” participation, although not even the footnotes to the Code indicate why this particular standard was chosen. Finally, while section 207 limits only certain kinds of government contacts, the ABA standard prohibits giving private counsel and acting as an attorney in all forums, presumably including Congress, as long as the “matter” is the same.

69. ABA Code EC 9-3. Under the ABA Code, a Disciplinary Rule is “mandatory” and a violation of it will subject the offender to professional discipline. An Ethical Consideration is “aspirational” and often provides a form of legislative history.

70. 501 F.2d 639 (2d Cir. 1974).
eral Motors had monopolized or attempted to monopolize the national market for city buses. The City hired a private lawyer, George J. Rey-
craft, to represent it on a contingent fee basis. When first approached, 
Mr. Reycraft informed the city corporation counsel that he had worked 
in the Antitrust Division of the Department of Justice on an investiga-
tion of the same issue. Although he had not been “in active charge of 
the case,”\textsuperscript{71} he had participated substantially in preparing a complaint 
against General Motors and had signed the Antitrust Division com-
plaint in 1956. The Justice Department formally advised Mr. Reycraft 
that section 207 did not apply to his case because the government was 
neither involved in nor affected by the results of the private suit. 

After Mr. Reycraft filed a complaint on behalf of the City in Octo-
ber 1972, the primary issue became the effect of Disciplinary Rule 9-
101(B) on the propriety of Reycraft’s representation. The district court 
ruled that the 1956 Antitrust Division case and the 1972 private suit 
were not the same “matter,” but the Second Circuit disagreed. In an 
opinion by the same Judge Kaufman who had expressed his concern 
about the overbreadth of the Canons of Ethics in the \textit{Harvard Law Re-
view} nineteen years earlier,\textsuperscript{72} the court reasoned that since the overt 
acts alleged in the private complaint had been lifted directly from the 
Justice Department complaint, the “appearance of impropriety” was 
present and that Mr. Reycraft must therefore be disqualified.\textsuperscript{73}

In this period of growing hostility toward the revolving door phe-
nomenon, the attitudes expressed by American Bar Association Formal 
Opinion No. 342\textsuperscript{74} in 1975 provided a striking contrast. At the time of 
the adoption of the American Bar Association Code in 1969, its prin-

ciple for imputing disqualification of one lawyer to his entire law firm 
was very narrow. Disciplinary Rule 5-105(D) then provided: “If a 
lawyer is required to decline employment or to withdraw from employ-
ment under DR 5-105, no partner or associate, of his firm may accept 
or continue such employment.”\textsuperscript{75} The key was the reference to Disci-
plinary Rule 5-105, which prohibited \textit{simultaneously} representing two 
or more clients with differing interests, but which did not prohibit tak-

\textsuperscript{71} Id. at 642 (quoting affidavit of Mr. Reycraft).
\textsuperscript{72} See notes 36-40 supra and accompanying text.
\textsuperscript{73} The court cited ABA Comm. on Professional Ethics, Opinions, No. 37 (1931) for the 
idea that the rule was to prevent the charge that an employee had acted in “the hope of being later 
employed privately to \textit{uphold or upset} what he had done.” 501 F.2d at 649 (emphasis in original). 
Citing his \textit{Harvard Law Review} article, Judge Kaufman concluded that “what creates an appear-
ance of evil . . . is largely a question of current ethical-legal mores.” \textit{Id.} (citing Kaufman, supra 
note 36, at 660).
\textsuperscript{74} ABA Comm. on Professional Ethics, Opinions, No. 342 (1975), reprinted in 62 
\textsuperscript{75} ABA Code of Professional Responsibility DR 5-105(D) (1969).
ing a case contrary to the interest of a former client.\textsuperscript{76} In 1975, however, Disciplinary Rule 5-105(D) was amended by substituting the words “disciplinary rule” for “DR 5-105.” The effect of this amendment is that whenever a lawyer is disqualified for any reason under the American Bar Association Code, every member of his or her law firm is also disqualified. This rule apparently extends, therefore, to disqualifications required of former government lawyers under Disciplinary Rule 9-101(B).

The explanation of the extension, set forth in Formal Opinion No. 342 of the American Bar Association Committee on Professional Ethics, however, indicates that constraining the revolving door phenomenon was not what the Committee had in mind. After considering the ambiguity and intent of Disciplinary Rule 9-101(B), the Committee reasoned that an “inflexible application of DR 5-105(D) would actually thwart the policy considerations underlying DR 9-101(B).”\textsuperscript{77} According to the Committee, the phrase “substantial responsibility” was used in Disciplinary Rule 9-101(B) to inhibit government recruitment as little as possible and enhance the opportunity for all litigants to obtain competent counsel of their own choosing, particularly in specialized areas. An inflexible extension of disqualification throughout an entire firm would thwart those purposes. So long as the individual lawyer is held to be disqualified and is screened from any direct or indirect participation in the matter, the problem of his switching sides is not present . . . \textsuperscript{78}

The opinion concluded that the purposes of Disciplinary Rule 9-101(B) can be accomplished by requiring disqualification only when the disqualified lawyer “has not been screened, to the satisfaction of the government agency concerned, from participation in the work and compensation of the firm on any matter over which as a public employee he had substantial responsibility.”\textsuperscript{79} Further, the Committee reasoned that since a private client can waive disqualification of a lawyer pursuant to Disciplinary Rule 5-105(C), it would be “unthinkable” not to permit the government to waive the disqualification of the opposing party’s attorney whenever it 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

\textsuperscript{76} The prohibition against taking a case contrary to the interest of a former client is derived by inference from Canon 4, which requires preservation of the confidences and secrets of a client.


\textsuperscript{78} Id. 11, 62 A.B.A.J. 521.

\textsuperscript{79} Id.
interest of the government . . . ."\textsuperscript{80}

At the time of this opinion, however, the nation had just come through the events of Watergate. Concern about ethics and public morality was high, and the American Bar Association's concern about preserving the interchange of persons between public and private life was not universal. Indeed, Common Cause conducted a widely publicized study in 1976,\textsuperscript{81} and found that "numerous public employees leave government to go to work for private interests with which they had direct dealings."\textsuperscript{82} It expressed concern about government employees' "bias toward companies or industries in which future employment is anticipated" and the ability of former officials to have "special access and influence" in their agencies.\textsuperscript{83} Under the Common Cause proposal, agency officials at level GS-15 or above would have been required to sign a contract promising that for two years after leaving the government, they would not accept employment with any company that was party to a "specific agency or proceeding" or "affected by a policy proceeding" in which the employee participated, and promising never to represent any company before the former agency.\textsuperscript{84}

Meanwhile, the Ethics Committee of the District of Columbia Bar had before it Inquiry 19, a request for guidance from two partners, A & B, who had been retained to negotiate a "follow-on" contract between a client and the lawyers' former agency. B had been involved in discussions about the the original contract while still at the agency; A had been administrative head of the agency. The Ethics Committee issued a draft opinion that B was disqualified because of his personal participation in the original contracting process and that his disqualification had to be imputed to A.\textsuperscript{85} However, the storm of protests over this draft caused the Ethics Committee to refer the matter to a subcommittee to propose possible revisions to the District of Columbia version of Disciplinary Rule 9-101 itself. The subcommittee's controversial report\textsuperscript{86} proposed tight restrictions on the postgovernment practice of


\textsuperscript{81} id. 5.

\textsuperscript{82} id. liii.

\textsuperscript{83} id. 64, 71-72.

\textsuperscript{84} id. 64, 71-72.

\textsuperscript{85} The exposure draft was published in \textit{District Law}, Fall 1976, at 39.

\textsuperscript{86} The text of the original proposal is reported in \textit{District Law}, Winter 1977, at 46. A debate on the then new proposal between Lloyd Cutler and Monroe Freedman may be found in 63 \textit{A.B.A.J.} 724 (1977).
latter.

First, the proposed District of Columbia Bar rules would have prohibited a lawyer from counseling or representing a client on any subject, if that client was involved in any matter in which the lawyer participated personally and substantially within one year prior to leaving the government. Thus, if a Securities and Exchange Commission lawyer had dealt with a company on a securities matter while in government, he or she would be barred from assisting that company in any way, even, for example, on tax questions. An alternative proposal would have prohibited a lawyer from being hired by any law firm that had represented any client in a matter in which the attorney had participated personally and substantially within one year prior to his or her leaving government.87

Second, the District of Columbia Bar proposals would have prohibited a lawyer for one year after leaving government from counseling or representing a client

with respect to the validity, interpretation, scope, application or proposed modification or rescission of any provision of a rule or regulation of general applicability, if the lawyer previously participated personally and substantially as a public officer or employee, within one year before leaving public office or employment, in the drafting of or decision to propose or adopt such proposed or effective provision.88

Thus, for one year the lawyer most knowledgeable about the meaning of an agency rule, for example, would be forbidden from providing anyone with the benefit of his or her expertise.

Third, unlike the federal statute, the District of Columbia Bar proposal dealt directly with the question of imputed disqualification. It provided that if one lawyer of the firm was disqualified, then all were disqualified, unless a detailed procedure for waiver was followed.89 Waiver could be obtained, but only from the "lawyer or other official who [had] principal operational responsibility for the matter for the public agency or department upon determination by that official that the waiver [was] not inconsistent with the public interest."90 In order to get such a waiver, the lawyer's firm, at minimum, would have had to provide an affidavit that the lawyer would not "participate in the matter in any way, directly or indirectly, ... [and would not] share, di-

88. D.C. Bar Proposals 54 (proposed DR 9-101(E)).
89. Id. 54-55 (proposed DR 9-102(B)).
90. Id. 55 (proposed DR 9-102(B)(1)(a)).
rectly or indirectly, in any fees of the matter."91 Further, each of the firm's private lawyers working on the matter would be required to provide his or her own affidavit attesting that "he or she [would] not communicate about the matter directly or indirectly with the disqualified lawyer, and . . . that the client or clients [had] been so informed."92 The waiver would have to be in writing and state "clearly the basis for the decision,"93 after which the waiver would immediately be made public. The original version of the proposal even required that the decision of the official to grant the waiver be reviewed in turn by a judge or other "independent official."94


President Carter reached office in the wake of—and partly as a result of—public concern about personal morality in government. It is not surprising, therefore, that the ninety-fifth Congress' H.R. 195 was an "ethics" bill. The groundwork for such legislation had been laid earlier. In the ninety-fourth Congress, Senator Ribicoff and the Government Operations Committee had conducted an extensive study of the process of government regulation.96 The first volume of that study considered appointments to the regulatory agencies and contained an extended, careful examination of existing conflict-of-interest legislation.97 The major focus of H.R. 1 and its earlier drafts, however, was financial disclosure.98 Such disclosure was one of the chief concerns coming out of the Watergate scandal, although the relationship between the two is unclear. The proposals required extensive financial disclosure by members of Congress and federal judges, as well as executive branch officials and certain employees of independent agencies. Although most of the bills contained provisions to amend section 207, these provisions received relatively little attention from congressmen and sena-

91. Id. (proposed DR 9-102(B)(1)(b)(I)).
92. Id. (proposed DR 9-102(B)(1)(b)(2)).
93. Id. (proposed DR 9-102(B)(1)(b)(6)).
94. Id. 55, 57 n.A. The final proposals submitted for approval of the District of Columbia Court of Appeals are reported in District Law., Apr./May 1979, at 47.
96. S. Doc. No. 25.
97. Id. 39-91.
98. In the Senate, the key bill was Senator Ribicoff's Public Officials Integrity Act, S. 555, 95th Cong., 1st Sess. (1977). That bill provided for financial disclosure, but it had additional provisions. One title established a congressional legal counsel to represent Congress in court; another established the machinery for appointing a special prosecutor to deal with executive branch misconduct. Still another provision established an Office of Government Ethics to monitor and regulate the behavior of government officials.
tors or even from most congressional staffs. The Senate bill, S. 555,99 passed the Senate by a wide margin in June 1977,100 and what real debate arose over the legislation occurred in the House and later in the conference committee.

Major opposition to the proposed changes came primarily from two sources. First, the House Armed Services Committee echoed the concern of the Defense Department that stringent restrictions on the postemployment activities of government personnel would inhibit persons from providing valuable advice to the Department. The committee expressed particular concern about “special government employees” such as consultants and other experts. It posed the example of a nuclear scientist who might consult with the Defense Department on complex technical questions and who also does extensive consulting for (or even is employed by) a defense contractor. Committee members argued that such persons are often unique national resources and that free access to their advice, undiscouraged by limitations on their later employability, is essential.101

Second, the Securities and Exchange Commission took great interest in the legislation, fearing its effect on recruiting. The Securities and Exchange Commission pointed out that many young lawyers come to work for the Commission expressly to gain experience in the securities business. After leaving, if these lawyers are to practice securities law at all, they must practice before the Commission. The Commission is not the only agency with this problem, of course, but it was by far the most vocal agency with respect to the bill.102

Despite this opposition, H.R. 1103 passed the House shortly before adjournment.104 After a short but compromising conference, an amended version of S. 555105 passed both houses by a large margin.106 As one individual recalled, “The President wanted it. There was no

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100. The vote was 74 to 5. 123 Cong. Rec. S10,774 (daily ed. June 27, 1977). For the basic legislative history, see [1978] U.S. CODE CONG. & AD. NEWS 4216-4397.
102. E.g., Letter from Chairman Harold M. Williams of the SEC to Chairman Peter W. Rodino of the House Judiciary Committee (Sept. 8, 1977), reprinted in House Hearings, supra note 95, at 598. The SEC has also been a vigorous opponent of the proposed District of Columbia bar rules.
103. H.R. 1, supra note 95.
political benefit to be had in opposing this kind of legislation. Even if members did not believe it was particularly necessary or positive, they did not believe it was sufficiently pernicious that a politically risky vote was called for.\footnote{107}

The compromises achieved in the conference committee highlight the major changes that the legislation made and what Congress saw as the most pressing policy concerns.\footnote{108} First, both bills had purported to extend the prohibition of postgovernment activity to “aiding and assisting” clients as well as directly representing them before an agency. Both houses considered it inappropriate that an individual could do something indirectly through an agent or partner that he or she could not do directly. The Senate bill would have prohibited “aiding and assisting” under section 207(a), and thus would have permanently banned such activity when it related to matters in which the employee had “personally and substantially” participated.\footnote{109} That prohibition would have been consistent, of course, with the traditional rule of legal ethics.\footnote{110} The House bill, on the other hand, would have categorized the “aiding and assisting” prohibition with the broader, but shorter (two-year) prohibition on activities within the former employee’s “official responsibility.” The compromise bill was narrower than either proposal. The prohibition on “aiding and assisting” applied to the two-year, official responsibility cases, but only with respect to employees at level GS-17 or above and the comparable military ranks.\footnote{111}

Second, Congress directed most of its attention to new section 207(c), which prohibits any official contact between the former employee and his or her agency for a period of one year. Both houses saw this one-year ban as a very important “cooling-off period,” but recognized that it would discourage many people from working for the agencies, including the young Securities and Exchange Commission attorneys discussed above.\footnote{112} Because both houses viewed the prohibition as an attempt to limit former employees’ ability to influence action simply through strength of personality and reputation, they were willing to restrict its coverage to high-ranking employees. The House bill would have applied to the more narrow category of persons with a rank of GS-16 and above whose positions are “excepted from the competi-

\footnote{107. Personal interview with the author. In this Article, general observations made by persons interviewed are not attributed to the individuals by name.}
\footnote{108. S. Doc. No. 127 at 73-77.}
\footnote{109. See id. 74.}
\footnote{110. See notes 68-69 supra and accompanying text.}
\footnote{111. See S. Doc. No. 127 at 74.}
\footnote{112. See text accompanying note 102 supra.
tive service by reason of being of a confidential or policy making character."\(^\text{113}\) The compromise bill kept the broader Senate coverage but limited the number of individuals affected by raising the grade level from GS-16 to GS-17. However, the Senate did accede to the House demand for a provision allowing the Director of the Office of Government Ethics to expand the coverage of this prohibition to include any other officer or employee "who has the role in the formulation of agency policy that is substantially similar to that exercised"\(^\text{114}\) by the positions expressly covered.

Third, exceptions to the bill’s coverage were a major issue. Congressman Eckhardt, for example, wanted to except all “licensed professionals”—which presumably would have included lawyers—leaving them subject only to the ethical requirements of their state licensing authorities. The Senate bill proposed to exclude communications that furnished scientific or technical information to the government, and the House bill proposed to permit a former employee to make uncompensated appearances on behalf of himself. The Eckhardt amendment on “licensed professionals” was rejected in conference, but the other two provisions were accepted.\(^\text{115}\)

Fourth, the Senate bill created an “administrative remedy” for violations of section 207 that the House bill had not contained. At first blush, it seems somewhat strange to provide a noncriminal remedy in a criminal statute. However, the Senate committee believed that prosecutions were so few under the “knowing” requirement in the criminal statute that a more readily imposed remedy was desirable.\(^\text{116}\) The House accepted this provision.\(^\text{117}\)

F. The Events of 1979.

Ordinarily, the passage of a major piece of legislation ends discussion, at least temporarily, on the subject on which it was passed. In the case of the revolving door phenomenon, however, legislation marked only the beginning of the debate. Most notably, several high-level officials in the Department of Health, Education, and Welfare threatened to resign before July 1, 1979, the effective date of the statute, in order to

\(^\text{113}\) S. Doc. No. 127 at 75.
\(^\text{114}\) Id.
\(^\text{115}\) The new provisions are codified in 18 U.S.C.A. § 207(e), (f) (West Supp. 1979).
\(^\text{117}\) See S. Doc. No. 127 at 77.

The agencies were required to establish procedures for implementing this procedural remedy within six months of the effective date of the statute, i.e., by Jan. 1, 1980. 18 U.S.C.A. § 207(f) (West Supp. 1979).
avoid its provisions. Similar threats emanated from other agencies.\textsuperscript{118}

Title IV of the new law\textsuperscript{119} created the Office of Government Ethics as a new part of the Office of Personnel Management and charged it with drafting regulations to implement the legislation. On February 16, 1979, less than four months after passage of the statute, the chairman and ranking minority members of both the House and Senate committees responsible for the law wrote a letter to the new Director of the Office of Government Ethics.\textsuperscript{120} In that letter, they referred to a "misunderstanding" regarding the meaning of amended section 207(b)(ii). In spite of that section's use of the term "official responsibility" to describe the scope of the barred activities, they asserted in the letter that "[b]oth the transcript and the report of the House-Senate conference demonstrate that this provision applies only to those matters in which a former high-ranking official had been personally and substantially involved."\textsuperscript{121} They expressed their hope that the Director would find this construction of the statute "helpful" in issuing his regulations.

In addition, more legislation was proposed to deal with the issues. Congressman Moorehead offered a bill to delete not only the "aiding and assisting" language, but also all the other changes directed at high-ranking employees.\textsuperscript{122} Congressman Danielson proposed instead to delay the effective date of the legislation until January 1, 1980, in order to consider more permanent revisions.\textsuperscript{123} On April 3, 1979, the Office of Government Ethics published a detailed set of regulations narrowly construing the "aiding and assisting" provision.\textsuperscript{124} According to these regulations, only "representational" assistance would be prohibited, not assistance in an "oral or written communication made with an intent to influence."\textsuperscript{125} Similarly, the regulations permitted assistance in

\begin{footnotes}
\footnotetext[118]{\textit{E.g.}, Congress Ponders Delaying or Softening New Job Limits Amid Talk of Mass Exodus, 37 CONG. Q. WEEKLY REP. 512-13 (Mar. 24, 1979); NEWSWEEK, supra note 11, at 51. The three HEW officials were former college administrators who feared that if they could not "aid and assist" members of their academic departments in handling government grants, they would have little to do.}


\footnotetext[121]{\textit{Id.} While the legislators were undoubtedly sincere, there is no support in the statute and little support in the legislative record for their construction of the law. All that they could cite for their understanding was the unpublished transcript of the conference deliberations in which Senator Ribicoff had stated his understanding of the legislative intent. \textit{Id.}}

\footnotetext[122]{H.R. 2119, 96th Cong., 1st Sess. (1979).}

\footnotetext[123]{H.R. 2843, 96th Cong., 1st Sess. (1979).}

\footnotetext[124]{Amendments to 5 C.F.R. §§ 737.1 to .29 (1979), 44 Fed. Reg. 19,974 (1979).}

\footnotetext[125]{\textit{Id.} 19,982. Construed more broadly, the statutory language would seem to cover even a}
\end{footnotes}
managing contracts and grants. Less than a week later, the Senate passed "clarifying" legislation proposed by the administration to confirm the new understanding of the "aiding and assisting" provision. Instead of assistance "concerning" an appearance before an agency, the amendment prohibited only assistance "by personal presence at" the appearance. It also made clear that the prohibitions extended to both "official responsibility" and "personal and substantial participation" cases. Finally, the amendment excluded military officers in grades 0-7 and 0-8, brigadier and major general, from automatic coverage.

Members of the House made an unsuccessful effort to delete all of subsection (c) of the original legislation that created the one-year ban on all advocacy contact with the former agency. A proposed six-month extension of the law's effective date was also defeated in committee. However, the House did pass an amendment lifting the one-year ban for former officials working for colleges, universities, and similar nonprofit agencies and retaining the exclusion of one- and two-star generals from automatic coverage. After further consultation between committees, both the House and the Senate passed a compromise bill incorporating the major proposals of each bill only two weeks before the July 1 effective date of the original law.

Even after these legislative "solutions," however, questions concerning the Act's application did not abate. In September 1979, the Second Circuit handed down its decision in Armstrong v. McAlpin. In March 1976, Michael Armstrong, receiver for Capital Growth Company, S.A. (Costa Rica), asked a New York firm to represent him in a suit against Clovis McAlpin, who allegedly had committed a securities

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126. Id. This issue had been of particular concern to the former academic administrators at the Department of Health, Education, and Welfare. See note 118 supra and accompanying text.


129. Id.


132. 606 F.2d 28 (2d Cir. 1979), hearing en banc granted, No. 79-7042 (2d Cir. Dec. 12, 1979). Former government lawyers were disqualified in at least two other cases during 1979. Both cases involved former prosecutors who sought to become defense counsel in cases on which they had worked as prosecutors. United States v. Ostrer, 597 F.2d 337 (2d Cir. 1979), and United States v. Kitchin, 592 F.2d 900 (5th Cir. 1979) (per curiam), cert. denied, 100 S. Ct. 86 (1979).
fraud that cost Capital Growth Company over $24 million. The law firm had recently hired an associate named Theodore Altman, who had spent the previous eight years at the Securities and Exchange Commission and had been personally involved in a Commission proceeding against McAlpin concerning the same alleged fraud.

The firm recognized the possible ethical issues raised by Altman's presence, but concluded that the screening procedures called for in American Bar Association Formal Opinion No. 342\textsuperscript{133} would eliminate the problem. Moreover, the firm consulted the Securities and Exchange Commission and determined that the Commission had no objection to the firm's participation in the matter as long as Altman was not involved. McAlpin, however, moved to disqualify the firm because of Altman's work while at the Securities and Exchange Commission. The district judge denied the motion.\textsuperscript{134}

On review, the Second Circuit acknowledged American Bar Association Formal Opinion No. 342\textsuperscript{133} and Opinion No. 889 of the Association of the Bar of the City of New York,\textsuperscript{136} and recognized that the Board of Governors of the District of Columbia Bar had endorsed screening as an adequate means of protecting the government and the public. It nonetheless reversed the district court.\textsuperscript{137} While noting that "it would be entirely inappropriate to attempt to formulate a rule of general application respecting the law firm of a lawyer disqualified under DR 9-101(B) . . .",\textsuperscript{138} the court found two inquiries relevant in each case. First, it questioned whether "the 'matter' for which the disqualified lawyer had 'substantial responsibility' [was] the kind of matter where the risks against which DR 9-101(B) guards are present."\textsuperscript{139} Second, the court asked if "the 'substantial responsibility' that disqualifies the former government lawyer [resulted] from his active, personal participation in the matter or only from the nominal relationship of a supervisory official, such as an agency general counsel."\textsuperscript{140}

In the view of the Second Circuit panel,
[a] government attorney with direct, personal involvement in a matter involving enforcement of laws that are the basis for private causes of action must understand, and it must appear to the public, that there will be no possibility of financial reward if he succumbs to the

\textsuperscript{133} ABA OPINIONS, NO. 342, supra note 74. See notes 74-80 supra and accompanying text.
\textsuperscript{135} See notes 74-80 supra and accompanying text.
\textsuperscript{136} See note 80 supra.
\textsuperscript{137} 606 F.2d at 28.
\textsuperscript{138} Id at 33.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
temptation to shape the government action in the hope of enhancing private employment. 141 Screening, according to the court, cannot assure that an attorney is not compensated, either now or later, for attracting the business from which he is apparently screened. An "internal arrangement insulating fees from the disqualifying case . . . would most likely be unknown to casual observers and unpersuasive to the more informed." 142 The court acknowledged that there was no suggestion in this case that any improper considerations had actually motivated Altman; however, disqualification was "required as a prophylactic measure to guard against misuse of authority by government lawyers." 143 Since the Court of Claims had reached a result directly contrary to this decision only two years earlier, 144 the law on this extremely sensitive question was left uncertain.

III. PROBLEMS IN ESTABLISHING THE APPROPRIATE LIMITS ON PRIVATE ACTIVITIES AFTER GOVERNMENT SERVICE

The preceding historical record suggests that the concern about the private activities of former government officials has existed for well over a century. The cries of alarm and hints of scandal, however, have emerged during the last decade. After all the discussions and congressional debates, one would think that the subject had been clearly analyzed. However, several difficulties have precluded complete analysis: there seems to be no good information on the extent of the revolving door phenomenon, no clear breakdown of the questions comprising the revolving door issue, and no real consensus on the problems that the phenomenon creates.

A. Difficulty Determining the Nature and Extent of the Revolving Door Phenomenon.

One of the most difficult problems in assessing the significance of the revolving door phenomenon is the lack of empirical data. The General Accounting Office tried to study the issue in 1978, but concluded that no reliable information was available, 145 although it did report that "most agency officials contacted considered such problems at their agencies to be insignificant." 146 The report criticized the lack of

141. Id. at 34.
142. Id.
143. Id. (footnote omitted).
144. Kesselhaut v. United States, 555 F.2d 791 (Cl. Cl. 1977).
145. GAO REPORT 6-7.
146. Id. 6.
data, but recognized that the present law does not require—or even permit—an agency to ask departing employees what their next jobs will be.147 Several agencies have regulations requiring some disclosure by some officials,148 but the General Accounting Office found that even those regulations are largely unenforced.149

The best data available on this question pertains to the activities of former agency commissioners. In 1976, Common Cause studied nine agencies and assembled statistics on the number of commissioners who had come originally from industry and the number of commissioners who had left the government to take jobs in industry.150 According to the report, forty-eight percent of the resigning commissioners joined either a regulated company or a law firm serving regulated clients.151

Using similar data, the Senate Government Operations Committee found that results varied considerably from one agency to another.152 Eleven of the fifteen Securities and Exchange commissioners leaving office between 1961 and 1976 either conducted business or joined a firm that conducted business subject to Securities and Exchange Commission supervision.153 Eleven of the forty-eight Federal Communications and Federal Trade Commission commissioners studied had come from

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147. Id. 11-13.
149. GAO REPORT 14-16.
150.
151.

INTERCHANGE OF PERSONNEL
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*ICC reported not knowing where two of the seven presently worked.

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COMMON CAUSE STUDY 41.
151. Id. 40.
152. S. Doc. No. 25 at 65-68.
153. Id. 67.
regulated industries, and twenty-four of the forty-eight were subsequently employed by these industries.\footnote{154} At the Federal Maritime Commission, on the other hand, "few . . . members came from the regulated industry and few go there afterward."\footnote{155} Further, the committee found, whatever the formal affiliations of any of the former commissioners, "personal appearances by former regulators before the same agency [were] rather unusual."\footnote{156} The Senate committee also scrutinized the circumstances behind the statistics. For example, it cited a New York Times article on the law practice of William Ruckelshaus, former head of the Environmental Protection Agency, as one example of the problem in evaluating the revolving door phenomenon.\footnote{157} According to the Times, nine lawyers in Ruckelshaus' law firm made at least 178 contacts over eighteen months with the Environmental Protection Agency.\footnote{158} Analyzing this data, the committee concluded:

The firm's clients did include powerful trade associations . . . but the lion's share of the contacts appear routine: requests for public lists or reports; information on hearing dates; application for government funding for research and development. . . . It was ample evidence of an active law practice, but what else did it establish?\footnote{159}

The Senate committee also refuted press accounts suggesting improprieties in Manuel Cohen and Miles Kirkpatrick's postagency private practices. Cohen was a career Securities and Exchange Commission official who left when a change of administration forced him to relinquish the Commission chairmanship. Kirkpatrick was a prominent private lawyer who was coaxed into the Federal Trade Commission chairmanship after distinguished service at the head of an American Bar Association committee on the problems of that agency. The Senate committee concluded that the "Cohen and Kirkpatrick illustrations are by no means isolated examples. The private practice of law even in a regulatory specialty is not, ipso facto, an unconscionable culmination to years of public service."\footnote{160}

None of this data, however, related to the probably more important issue of what is happening below the top-level, highly visible agency positions. In trying to answer that question, Common Cause and the Senate committee met with problems similar to those within

\footnote{154} Id. 66 n.113. The committee was relying on J. GRAHAM & V. KRAMER, APPOINTMENTS TO THE REGULATORY AGENCIES: FCC AND FTC (1949-1974) (1976).
\footnote{155} S. Doc. No. 25 at 66.
\footnote{156} Id.
\footnote{158} N.Y. Times, Aug. 23, 1976, at 40, col. 1.
\footnote{159} S. Doc. No. 25 at 65.
\footnote{160} Id. 64.
the General Accounting Office's experience. The Food and Drug Administration told the Senate committee, for example, that of the ninety-nine officials at levels GS-15 or above "who left the agency between 1971 and 1975, only nine either took jobs with regulated firms or served as consultants to those interests." However, Common Cause discovered that such data did not include any Food and Drug Administration lawyers, many of whom had gone to work for law firms with regulated clients.

The inherent lack of data has remained a problem in the preparation of this Article. Only two new, tangential pieces of information can be added. First, in an analysis done for this Article, the Securities and Exchange Commission determined that between January 1, 1974, and December 31, 1978, 604 employees left the agency who were or will be required to file "Section 6(b) reports" if they appear in a proceeding before the agency within two years from the date of their departures. The number of persons filing such reports thus far has been 182, about thirty percent of the total. Assuming everyone has complied with the law, approximately seventy percent of the Securities and Exchange Commission employees have not appeared before the agency within two years since their departures.

Second, in 1976 the Federal Trade Commission employed a management consulting firm to study turnover at the agency. That study indicated that the agency loses, on average, about one-sixth of its attorneys each year, a proportion almost equal to the attrition rate at the Antitrust Division of the Department of Justice and the Securities and Exchange Commission, but much higher than that of most private law firms. A further breakdown of the figures indicates that, of the 120 attorneys who left the Federal Trade Commission during the eighteen-month study period, thirty-one percent had been employed there less than two years, another thirty-one percent were in their third year, and

161. See text accompanying note 145 supra.
162. S. Doc. No. 25 at 66 n.114.
163. COMMON CAUSE STUDY 48, 60-62. Technically, FDA lawyers are paid by the Department of Health, Education, and Welfare.
164. The study was done by Mr. William E. Ford, Assistant Director, Office of Personnel, Securities and Exchange Commission. His help is gratefully acknowledged.
165. Letter from William E. Ford to Thomas D. Morgan (Feb. 26, 1979). This filing requirement, set forth in 17 C.F.R. §§ 200.735-8(b) (1979), states that a former SEC commissioner or employee must, for two years after leaving the SEC, file a statement with the Secretary of the Commission explaining the nature of any appearance he or she contemplates making before the Commission. The requirement is numbered "6(b)" in the Commission's Code of Conduct Regulations.
thirty percent were in their fourth year. Thus, approximately two-thirds of the departing attorneys had less than three years experience, and ninety percent had less than four years experience at the Federal Trade Commission. Two-thirds of these departing attorneys were found to have gone into private practice, and, perhaps significantly, forty percent of them reportedly were recruited by counsel for respondents in Federal Trade Commission proceedings. 168

Of course, even if sufficient information were available, there would still be disagreement about its correct interpretation. A major problem might exist if a large number of former employees were to appear before their respective agencies, and the problem would be expensive to eliminate. However, without such data there is no way to analyze the costs and benefits of present or proposed rules in other than general terms.

The preparation of this Article has necessarily required reliance on interviews and the published writings of present and former government officials, as well as of critics and defenders of the “revolving door” phenomenon. Ultimately, however, one must candidly recognize that anyone’s conclusions on this issue are unlikely to be based on concrete data.

B. Issues To Be Addressed in Formulating Restrictions on Post-Employment Activity.

To organize the revolving door phenomenon for analysis, one must break it down into several specific issues. There are at least fifteen issues that can be grouped under three general headings: the role of the employee while in government, the private role of the former employee, and the more general issues of enforcement and policy.

1. The Role of the Employee While in Government. Should the law distinguish between the several types of jobs in which a governmental official might be employed? For example, should lawyers be treated differently from persons administering federal contracts? Should either or both be distinguished from technical personnel such as scientists or test pilots? The Ethics in Government Act makes special

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168. Id. 9-17. The Common Cause study also contains several other attempts to estimate the extent of the revolving door phenomenon. Of 28 former government employees reported in the press to have gone to work for regulated companies or their law firms, at least 20 had personally contacted officials in their former agencies. COMMON CAUSE STUDY 53-54. Of 1406 former military officers who took jobs with defense contractors, at least 379 became employed by firms within their former official jurisdiction. Id. 58. Further, of 1712 “senior employees” in government studied, 349 had come from private industry or law firms. Id. 41.
provision for scientific and technical personnel, while the regulations promulgated by the Office of Government Ethics treat contracting personnel differently from lawyers in some situations. Are these distinctions arbitrary, or do they make sense?

Should the law distinguish between activities in which a former official was personally involved and those that fell only within his or her official responsibility? As discussed earlier, the federal statute draws this distinction and provides different rules for each case. The American Bar Association Code of Professional Responsibility, for example, does not.

Should the former employee's salary level or the nature of his or her job be a decisive factor, as distinguished from his or her relationship to the particular decision or issue in question? Even after the 1979 modifications, the federal statute draws important distinctions based on the former characteristics, while, again, the American Bar Association Code and even the proposed District of Columbia Bar rules do not.

2. *The Lawyer's Role in Private Life.* Should the law distinguish between a former official's personal intervention before a governmental agency and his giving private advice to another about how to approach the government? The present federal statute prohibits only the former;

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169. *Section 207(f) provides:*  
The prohibitions of subsection (a), (b), and (c) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under procedures acceptable to the department or agency concerned, or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee.


170. Compare, for example, the way the regulations treat the issue of what constitutes the same "particular matter" in 5 C.F.R. § 737.5(c)(4) (1979):

**Example 1:** A government employee was substantially involved in the award of a long-term contract to Z Company for the development of alternative energy sources. Six years after he terminates Government employment, the contract is still in effect, but much of the technology has changed as have many of the personnel. The Government proposes to award a "follow on" contract, involving the same objective, after competitive bidding. The employee may represent Q Company in its proposals for the follow-on contract, since Q Company's proposed contract is a different matter from the contract with Z Company. He may also represent Z Company in its efforts to continue as contractor, if the agency determines on the basis of facts referred to above, that the new contract is significantly different in its particulars from the old: The former employee should first consult his agency.

**Example 2:** A Government employee reviewed and approved certain wiretap applications. The prosecution of a person overheard during the wiretap, although not originally targeted, must be regarded as part of the same particular matter as the initial wiretap application. The validity of the wiretap may be put in issue and many of the facts giving rise to the wiretap application would be involved.
the 1978 amendments, on the other hand, followed the suggestion of Common Cause and prohibited both.\textsuperscript{171}

Should it matter whether the former employee's private role before the agency consists of advocacy, inquiry, or some other role? In other words, should it matter whether the employee is seeking to get something more than information from the government? The federal statute seems to be construed to forbid only advocacy,\textsuperscript{172} but inquiry is often at least as valuable an activity for private clients.

Should it matter whether the former employee's private role is related to a specific case he handled, cases similar to those he handled, or a more general rulemaking proceeding in which he was involved? Again, the federal statute prohibits only the first situation, but the District of Columbia Bar proposal would regulate the last situation as well.\textsuperscript{173}

Should the bar to the former employee's activity extend only to his or her own former agency or should it extend to the entire government? Should a former Air Force contracting officer, for example, be barred from subsequent dealings with the Air Force, the Department of Defense, all "aerospace" agencies (such as the National Aeronautics and Space Administration), or the entire federal government? The nine-

\textsuperscript{171} This was the significance of adding the words "by personal presence at" to the "aiding and assisting" language of section 207(b)(ii). Common Cause had not been the only proponent of the broader approach; the 1962 report by the Association of the Bar of the City of New York had also called for it. \textit{Bar Report} 292.

\textsuperscript{172} Subsections (a), (b), and (c) of section 207 prohibit "any formal or informal appearance before" as well as any "intend to influence . . . any oral or written communication." 18 U.S.C.A. § 207(a)-(c) (West Supp. 1979), as amended by Pub. L. No. 96-28, 93 Stat. 76 (1979). 5 C.F.R. § 737.5(a)(3) (1979) treats these concepts together.

\textsuperscript{173} The Board of Governors went beyond the proposal of its Ethics Committee, which had favored a one-year ban. DR 9-101(E) of the present proposal provides:

For five years after leaving public office or employment, a lawyer shall not personally participate in counseling or otherwise representing any client

\textbullet\ with respect to the adoption of any provision of a proposed rule or regulation of general applicability, if the lawyer previously participated personally and substantially as a public officer or employee in the drafting of or the decision to propose such proposed provision, or

\textbullet\ in challenging the validity of any provision of a rule or regulation of general applicability, if the lawyer previously participated personally and substantially as a public officer or employee in the drafting of or the decision to propose or to adopt such provision.

\textit{Final Revolving Door Proposal, supra} note 9, at 51.
teenth century statutes had the broadest possible sweep, and, in theory, the present statute does as well. Because the bar is limited to specific matters, however, the practical effect is that the former employee will not be barred beyond his or her own agency.

What restrictions should be placed on dealings with potential future employers while the employee is still in government service? Traditionally, this question has not been deemed a postemployment issue, but there may be a subtle interplay between an employee's decisions while in government service and his hope for a job at the end of that service. If no absolute bar is placed on accepting a job in the industry affected by one's former government agency, for example, should negotiations for that subsequent job be prohibited prior to resigning from federal service?

Should all activity that is related to the former employee's government service be prohibited or only activity that is contrary to the government's interest? For example, should a former employee be permitted to take advantage of information that a private party submitted to the government in confidence? Again, the federal statute appears to limit only actions contrary to the government's interest, although the American Bar Association Code of Professional Responsibility prohibits both.

3. General Procedural and Enforcement Issues. How long should

174. See text accompanying notes 17-23 supra.
175. Indeed, the question did not come up in the 1978 and 1979 congressional deliberations. The changes proposed were to section 207, while the pressures on present government officials are governed by section 208.
176. The statutory language in subsections (a)(2) and (b)(2) refers to "particular matter[s]... in which the United States... is a party or has a direct and substantial interest..." 18 U.S.C.A. § 207(a)(2), (b)(2) (West Supp. 1979), as amended by Pub. L. No. 96-28, 93 Stat. 76 (1979). That language has been construed in 5 C.F.R. § 737.5(c)(5) (1979) not to reach subsequent private actions, but "[t]he importance of the Federal Interest in a matter can play a role in determining whether two matters are the same particular matter." Id.

Example 1: An attorney participated in preparing the Government's antitrust action against Z Company. After leaving the Government, she may not represent Z Company in a private antitrust action brought against it by X Company on the same facts involved in the Government action. The interest of the United States preventing inconsistent results and the appearance of impropriety in the same factual matter involving the same party, Z Company, is direct and substantial. However, if the Government's antitrust investigation or case is closed, the United States no longer has a direct and substantial interest in the case.

Example 2: A member of a Government team providing technical assistance to a foreign country leaves and seeks to represent a private contractor in securing a contract to perform the same service. The proposed new contract may or may not be considered a separate matter, depending upon whether the United States has a national interest in maintaining the original contract. The agency involved must be consulted by the former employee before the representation can be undertaken.

177. ABA Code DR 9-101(B). See note 68 supra.
the bar to postemployment activity extend? Should the answer vary for
different kinds of activity? What is the justification, if any, for making
the ban permanent? The federal statute establishes a permanent ban
for matters in which the employee was "personally and substantially"
involved, and a two-year ban for matters within his "official responsi-

Should the disqualification of a former government employee ex-
tend to his partners, associates, or the organization for which he works?
If attribution is possible, should it or the employee's own disqualifica-
tion be subject to waiver by the government? What kind of procedure
for waiver should be adopted? Who should be empowered to grant a
waiver—the agency involved, the Office of Government Ethics, an in-
dependent federal judge? May conditions be placed on the waiver?
These considerations constitute a major portion of the difference be-
tween the positions of the American Bar Association and the District of
Columbia Bar. The federal statute has tended to skirt the issues,

(1979).
179. See text accompanying notes 89-94 supra. The text of the present District of Columbia
Bar proposal is as follows:

(A) If a lawyer is required to decline or to withdraw from employment under DR 9-
102(B), on account of personal and substantial participation in a matter other than as a
law clerk, no partner or associate of that lawyer, or lawyer with an of counsel rela-
tionship to that lawyer, may accept or continue such employment except as provided in (B)
below.

(B) The prohibition stated in DR 9-102(A) shall not apply if the personally disqualified
lawyer is screened from any form of participation in the matter or representation as the
case may be, and from sharing in any fees resulting therefrom. In order to ensure such
screening,

(1) the personally disqualified lawyer shall file with the public department or agency
and serve on each other party to any pertinent proceeding an affidavit attesting that
during the period of his or her disqualification the personally disqualified lawyer
will not participate in any manner in the matter or the representation, will not dis-
cuss the matter or the representation with any partner, associate, or of counsel law-
yer, and will not share in any fees for the matter or the representation; and that the
personally disqualified lawyer will file and serve, promptly upon final disposition of
the matter or upon expiration of the period of personal disqualification, whichever
occurs sooner, a further affidavit describing his or her actual compliance with these
undertakings.

(2) At least one affiliated lawyer shall file with the same department or agency and
serve on the same parties an affidavit attesting that all affiliated lawyers are aware
of the requirement that the personally disqualified lawyer be screened from participat-
ing in or discussing the matter or the representation and describing the proce-
dures being taken to screen the personally disqualified lawyer; and that at least one
affiliated lawyer will file and serve, promptly upon final disposition of the matter or
upon expiration of the period of personal disqualification, whichever occurs sooner,
a further affidavit describing the actual compliance by the affiliated lawyers with
the procedures for screening the personally disqualified lawyer.

(C) If a personally disqualified lawyer or an affiliated lawyer has stated in accordance
with DR 9-102(B) that further affidavits describing compliance with screening proce-
dures will be filed and served upon final disposition of the matter or upon expiration of
and the cases are split.\textsuperscript{181}

What should be the sanctions for violating any of the restrictions on postemployment activity? Should there be criminal penalties? Should the government be able to prevent an offending official from participating in the particular matter in question? Should the penalty extend to future dealings with the former agency?\textsuperscript{182} What procedures should be devised for enforcing any sanctions?\textsuperscript{183}

Should the rules adopted deal only with the departure of employees from government, or with their entrance to government as well? Are the concerns sufficiently similar that they should be treated together? Only the proposed District of Columbia Bar rules deal with government entry;\textsuperscript{184} under other rules the door only revolves out.

Who can establish rules relating to the activities of former govern-

\textsuperscript{180} The 1962 version of section 207 seemed to provide expressly that a former employee's disqualification would not be imputed to his or her partners and associates. See note 57 supra. That express disclaimer was deleted in the 1978 amendments. It can thus be argued that imputation is now an open issue. However, nothing in the legislative history suggests that this deletion of the last sentence of former section 207 was more than editorial license or that it was intended to have substantive effect.

\textsuperscript{181} Compare Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977) (a decision disqualifying the former employee but not attributing disqualification to the law firm) with Armstrong v. McAlpin, 606 F.2d 28 (2d Cir. 1979), rehearing en banc granted, No. 79-1042 (2d Cir. Dec. 12, 1979), United States v. Kitchin, 592 F.2d 900 (5th Cir. 1979) (per curiam), cert. denied, 106 S.Ct. 86 (1979), Telos, Inc. v. Hawaiian Tel. Co., 397 F. Supp. 1314 (D. Hawaii 1975) (former deputy attorney general), and Hamburger v. Weiss, 368 F. Supp. 258 (S.D.N.Y. 1973) (disqualified partner reformed firm) (decisions disqualifying law firm because of the presence of a disqualified partner or associate).

\textsuperscript{182} 18 U.S.C.A. § 207(j) (West Supp. 1979) provides in part:

If the head of the department or agency in which the former officer or employee served finds, after notice and opportunity for a hearing, that such former officer or employee violated subsection (a), (b), or (g) of this section, such department or agency head may prohibit that person from making, on behalf of any other person (except the United States), any informal or formal appearance before, or, with the intent to influence, any oral or written communication to, such department or agency on a pending matter of business for a period not to exceed five years, or may take other appropriate disciplinary action. Such disciplinary action shall be subject to review in an appropriate United States District Court.

\textsuperscript{183} Section 207(j) continues: "No later than six months after the effective date of this Act, departments and agencies shall, in consultation with the Director of the Office of Government Ethics, establish procedures to carry out this subsection." \textit{Id.} Basic guidelines are set out in the regulations. 5 C.F.R. § 737.27 (1979).

\textsuperscript{184} Proposed DR 9-101(C) for the District of Columbia Bar provides: "A lawyer serving as a public officer or employee shall not participate in any matter in which he or she participated personally and substantially while in private practice or nongovernmental employment." \textit{Final Revolving Door Proposal, supra} note 9, at 49.
ment officials? Should Congress adopt a uniform policy? Should individual agencies be permitted to go beyond the requirements Congress has established? 185 Should bar associations or other professional groups be permitted to establish enforceable ethical standards that are more restrictive than the rules imposed by the statute? 186

Should a grandfather principle be applied? That is, should the rules that are adopted apply to all former government employees, regardless of when they were employed, or should the rules be enforced only with respect to persons leaving (or entering) government service hereafter? 187

IV. THE COSTS AND BENEFITS OF REGULATING THE ACTIVITIES OF FORMER GOVERNMENT OFFICIALS

As shown in the preceding section, little is known about the nature and extent of the private work of former government officials. Further, the breadth and variety of specific questions that underlie the "revolving door" debate lead to the recognition that even more basic questions must be answered. What is it that former government employees offer subsequent private employers? In what ways, if any, might the government and the public be damaged by a lack of restrictions on the private activities of such former employees? What are the costs, if any, to the government itself when it seeks to regulate these activities?

A. WHAT FORMER GOVERNMENT OFFICIALS BRING TO PRIVATE EMPLOYERS

Asking what former government employees have to offer private employers is a particularly useful way to approach the question of what limitations should be imposed. Questions about the experience or other attributes that make former officials desirable employees can never be answered definitively, because every hiring decision is in some

185. Nothing in the statute appears to permit agencies to demand more, although in interviews with this author, staff members charged with drafting the legislation stated that there was no intent to limit the agencies. See S. Res. No. 170, 95th Cong., 2d Sess. 155 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4216, 4371.

186. The Justice Department has specified that it does not believe that the District of Columbia Bar, or any other local bar, should establish its own principles beyond those established by Congress. Letter from Associate Attorney General Michael J. Élan to William H. Allen, Chairman, Legal Ethics Committee of the District of Columbia Bar (Feb. 15, 1978).

187. The District of Columbia Bar proposal recognized the issue but dealt with it as follows:

Proposed Text of Order Adopting The Amendments

The amendments to Canon 9 made by this order are effective as of the date hereof, except that they shall not be construed to require a lawyer or firm to terminate or withdraw from professional employment with respect to any particular matter to which disqualification would otherwise apply if the employment with respect to such matter is in progress at the date hereof.

Final Revolving Door Proposal, supra note 9, at 60.
way unique. Interviews with Washington lawyers, however, indicate that there are three characteristics of former government officials that stand out as most important.

First, the former official will normally have acquired considerable expertise with the subject matter of his or her agency. For example, a former official of the Antitrust Division of the Department of Justice will tend to be relatively expert in antitrust law. Although it is possible to obtain comparable expertise working for a private firm, subject matter expertise is nonetheless a primary reason why former government officials are considered attractive and employable. This is especially true in the case of lower level government employees.

Second, former government officials often have a better than usual sense of process. That is, they tend to understand how the government bureaucracy works and how decisions are made. They may know, for example, when it is appropriate and effective to intervene or challenge, and how to prepare the appropriate pleadings or documents. They also tend to be able to sense whether the agency will grant their new employer’s desired relief, or whether legislative change will be required.

Third, some former government employees appear to be retained at least partly because they are celebrities. Persons who have been in the public eye may attract clients by their very visibility.\textsuperscript{188} It is difficult to say whether using a reputation attained through government service to gain private employment is inherently improper. An accumulation of experience, understanding, and recognition is almost inevitable for a successful government employee, and is something no reasonable system would seek to prevent.

B. \textit{Problems the “Revolving Door” is Thought to Present.}

Looking beyond these seemingly innocuous reasons for hiring former government employees, one is struck by the lack of consensus on what problems are raised by the revolving door phenomenon. The same Senate committee responsible for the extensive 1978 revisions of section 207, for example, had concluded after careful examination just a year earlier that the problems were relatively slight, and that “we should be cautious in adopting new, more stringent restrictions.”\textsuperscript{189}

One factor that has confused analysis of the “revolving door” issue has been the tendency to treat it as a question of personal honesty and

\textsuperscript{188} The process is not necessarily as shallow as it may appear. In the case of lawyers, a company’s regular counsel often selects Washington counsel. Thus, professional fame may be more controlling than celebrity status in the usual sense.

\textsuperscript{189} S. Doc. No. 25 at 67.
morality. Certainly the government is entitled to scrupulously honest employees, but most of the revolving door concerns do not involve actual honesty or dishonesty at all. Although morality is one dimension of "ethical" behavior, many ethical issues, including the revolving door phenomenon, can best be understood as accommodating a number of values or concerns about the operation of given institutions—in this case, government agencies. A few of these concerns relate to honesty, others to public confidence, and others to perceptions of fairness. To the extent that appearances of impropriety are more or less widely perceived and are the subject of real concern, they too are appropriate for consideration. Arguments about morality in government, however, can often cloud rather than clarify these issues.

No single critic has set forth all the objections raised to service with an industry one has previously regulated, but six basic objections seem to recur. Perhaps because many of the critics are lawyers, several of the concerns have their roots in general principles of legal ethics.

1. Protection of Client Confidences. The concern is sometimes expressed that a former government employee will compromise confidential official information. If a prosecutor has been in the grand jury room interviewing witnesses under oath and in secret, for example, it obviously would be inappropriate for that prosecutor to resign his position and become defense counsel. Likewise, it might be thought improper if a government health official were hired by a drug company.

190. This treatment of ethical issues as a question only of morality is a recurring problem in the discussion and analysis of legal ethics issues. See T. Morgan & R. Rotunda, Problems and Materials on Professional Responsibility 1-5 (1976); Comment, The Lawyer's Moral Paradox, 1979 Duke L.J. 1335, 1335-49.

191. The present ABA Code of Professional Responsibility deals expressly with the former government lawyer in DR 9-101(B) and EC 9-3. The Code, however, does not address directly the general question of when an individual may take a case that puts him in a position contrary to that of a former client. Such representation is not a traditional conflict of interest. The concern represented by the conflict prohibitions of the ABA Code is that the lawyer's independent professional judgment in a present case might be affected by an existing conflict. See, e.g., ABA Code DR 5-102(A), (B) and EC 5-14 to 5-19. There is usually no reason to believe that the lawyer will be less loyal to his present clients because of his representation of a prior client. Indeed, the only reason why the "former client" problem seems to be called a "conflict of interest" is because the old ABA Canons of Professional Ethics included this problem with traditional conflicts in its Canon 6. See text accompanying notes 28 supra.

192. See, e.g., the FTC's proposed amendment to 15 C.F.R. § 41.2(b)(ii)(iii), which refers to "nonpublic documents or information pertaining to a matter ... that came to the attention of the ... employee or would be likely to have come to his attention in the course of his duties." 43 Fed. Reg. 35,949 (1978). See also the SEC's rule set forth in 17 C.F.R. § 200.735-8 (1979), which bars participation in a matter by anyone "gained knowledge of the facts" of a case while at the Commission.

and revealed to the company current thinking about changes in testing standards. The obligation of any attorney not to "use the confidences or secrets of a client for the advantage of a third person" is continuous; termination of the lawyer-client relationship does not end the obligation. Anytime a lawyer takes a case against a former client, there is at least the possibility that confidential information supplied to the attorney in the prior case will be used contrary to the former client's interests.

The concern that former government employees may compromise confidential government information, however, is not a valid concern in many situations. Certainly in most contract and research relationships, exchange of information is to be desired, not restricted. Even in more adversary situations, the Freedom of Information and Government in the Sunshine Acts have significantly reduced the secrecy in government functions. Further, even if something is confidential one day, it will rarely be so forever, or even for one or two years. Of course, there is certainly still some residue of valid government secrecy, and confidentiality might be one justification for some limits on the actions of former government employees. However, one should be wary about too glib an assertion that protection of client confidences necessitates imposing significant restrictions on future employment.

2. Switching Sides. It is often argued that there is something inherently and fundamentally wrong when a former governmental official "switches sides" and moves into the private sector. This argument is another adaptation of a longstanding rule of legal ethics—

194. ABA Code DR 4-101(B)(3).
195. Id. EC 4-6.
199. Perhaps the most serious potential abuse of confidence is one over which section 207 expresses little concern. It is the possibility that a government employee might, in a subsequent private case, exploit inside information that the government obtained by compulsion. The concern is not the compromise of the government's own secret; rather, the fear is that a former government lawyer might use information against a private defendant who was compelled to disclose that information under circumstances in which the information would not be normally available to other than a government employee. For example, an Internal Revenue Service agent may acquire information from a tax return that is useful in a subsequent private suit against the taxpayer. Cf. Armstrong v. McAulpin, 461 F. Supp. 622 (S.D.N.Y. 1978), rev'd, 606 F.2d 28 (2d Cir. 1979), rehearing en banc granted, No. 79-7042 (2d Cir. Dec. 12, 1979) (former SEC employee had investigated firm not being sued on behalf of private client).
200. See, e.g., S. Doc. No. 25 at 68 ("a deep, public uneasiness with officials who switch sides"); Committee on Legal Ethics, D.C. Bar, Tentative Draft Opinion for Comment in Response to
the rule that prohibits a lawyer from switching sides in a particular case. A defense lawyer, for example, may not move over to the prosecution table in the middle of the trial. In this situation, the reason for the rule seems obvious: communication of confidential information between attorney and client has likely occurred. The client may believe that this information has been used against him, even if, in fact, the attorney had somehow ignored or not disclosed that information.

Obviously, the argument has little application to former officials other than lawyers. It is not disloyal for a cancer researcher to return to an academic or an industrial laboratory after working at a government laboratory. A retired military officer is not a traitor for continuing his work on a development program after being hired by a contractor. In such situations one could argue that no “sides” are involved or that the government and the private employers are on the same “side.” Disqualification should be limited to situations in which there is truly a danger that confidential information will be abused. The general concern about “switching sides” is much too broad to use as a basis for analyzing the propriety of former officials’ activities.

Further, even for lawyers, the argument is narrower than it first appears. While the lawyer traditionally may not appear on the other side of the same case, he is not barred from taking another case against the former client unless the cases are “substantially related” or the representation would abuse the confidence or secrets of the former cli-
ent. It is not disloyalty to the government client that should be the subsequent private action were not the “same case,” so that the rule of automatic disqualification should not apply.

Judge Weinfield rejected Cooke’s contentions:

I hold that the former client need show no more than that the matters embraced within the pending suit . . . are substantially related to the matters or cause of action wherein the attorney previously represented . . . the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of representation. It will not inquire into their nature and extent. Only in this manner can the lawyer’s duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained . . . . Lawyers should not put themselves in the position “where, even unconsciously, they might take, in the interest of a new client, an advantage derived or traceable to, confidences reposed under the cloak of a prior, privileged relationship.” In cases of this sort the Court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation. If so, then the relationship between the two matters is sufficiently close to bring the later representation within the prohibition of Canon 6. In the instant case I think this can be said.


At least two cases illustrate that courts may expand the “substantial relation” rule far beyond its reasonable scope. For example, in Chugach Elec. Ass’n v. United States Dist. Court, 370 F.2d 441 (9th Cir. 1966), the disqualified attorney had been general counsel for the defendant corporation. After some years in that position, the attorney resigned. Later, he brought suit on behalf of a new client charging his former employer with attempting to destroy the client. All alleged acts occurred after the attorney had left the corporation.

The court’s rationale for disqualifying the attorney was that “knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events in an antitrust context and offer a promising source of discovery.” Id. at 443. Further, the court held that he “was in a position to acquire knowledge casting light on the purpose of later acts and agreements.” Id.

The attorney in Chugach Electric had no inside information as to the events underlying the specific suit. Further, while working for the defendant, he had no way to subvert its position and make his present suit any more likely to succeed. In short, this appears to be a case in which the attorney was improperly disqualified and forbidden to use his background and experience to benefit a plaintiff who allegedly had been wronged.

An even more celebrated example of improper disqualification is Eule Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973). David Rabin, a textile patent attorney, represented licensees of patents held by Burlington Industries and its subsidiary, Patentex, in a challenge to another firm’s patent for Supp-hose stockings. Burlington and Patentex were interested in the result of this litigation, because a successful result would allow their licensees to use their patent without fear of infringement of the Supp-hose patent. When Burlington and Patentex intervened in the suit, a counterclaim was filed by the owner of the Supp-hose patent alleging that Burlington and Patentex were attempting to monopolize the field and destroy the defendant’s competing patent. Rabin won this first case on behalf of the licensees and Burlington-Patentex.

In the second case, Rabin filed a suit against Burlington-Patentex on behalf of essentially the same licensees when Patentex sought to impose a tougher licensing agreement. Patentex’s response was a motion to disqualify Rabin. The district court granted the motion, and the court of appeals affirmed. The court held that the situation required

[a] strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client or a previous relationship may subsequently be used to the client’s disadvantage.

Moreover, the court need not, indeed cannot, inquire whether the lawyer did, in fact, receive confidential information during his previous employment which might be
subject of concern.

The switching sides argument appears to reflect a suspicion that lawyers should not defend one side of an issue one day and the other side the next. To do so "appears improper" to some observers, especially if the movement is between government regulator and private practice. Although "appearance of impropriety" is an ambiguous phrase, it apparently refers to the situation in which the lawyer is in a position to be disloyal if he so chooses. Even if an individual lawyer is of the highest moral character, the appearance of impropriety concept seeks to prevent his creating situations in which he cannot demonstrate that he was not dishonest.

Ultimately, this argument is unanswerable because the lack of integrity and fairness, if any, is largely in the eye of the beholder. Almost anything might look suspicious to someone. The Fifth Circuit, however, has put the appearance of impropriety in perspective: "It does not follow . . . that an attorney's conduct must be governed by standards which can be imputed only to the most cynical members of the public. . . . [T]here must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur."204

204. Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976). The Senate Government Operations Committee proposed to add to the text the language "or. . . . might occur." S. Doc. No. 25 at 43.
Switching sides, in general, does not raise problems of either honesty or specific impropriety. While the interest in preserving client confidences and confidence is critical, the interest of a lawyer in the ability to file a suit to redress real wrongs, and the interest of a client in not having his or her lawyer disqualified, should also be respected. Even the appearance of impropriety concern should not extend beyond taking a private party's side on a particular matter that was the same as or substantially related to one on which the employee worked while in government.

3. Contacts or Clout. Recently the most dominant concern arising from the revolving door phenomenon has been the excessive influence of former officials—what in the vernacular is called "clout." The 1979 amendments to section 207 focused on the evil thought to be posed by former employees who were believed to be highly influential within an agency by reason of their personality, knowledge, or contacts.205

It is intriguing that no private firm seems to make these assumptions about its employees. That is, if a General Motors officer or employee takes a job with a General Motors supplier, General Motors does not refuse to deal with the supplier out of fear that its remaining employees will not defend General Motors' interest. One might ask, then, why the government should expect less of its employees. One answer may be that, particularly after Watergate, the public is unusually suspicious and concerned about its leaders. This concern may go deeper than Watergate, however, and reflect public knowledge that governmental decisions are frequently important and yet fundamentally arbitrary. Even technical decisions often rest on personal judgments. The decision whether a given contractor is "responsible," for example, will never be wholly free from the judgment of responsible contracting officials. Even choosing winners of research grants involves subjective judgment of very specific criteria. The wisdom of dropping a charge or settling a lawsuit can rarely be reviewed on the merits. Because of the impossibility of judging the ultimate wisdom of some decisions, the structure of the decisionmaking process becomes even more significant.

Once again, however, this idea must not be extended too far. Influence takes many forms. Much of what appears to be an employee's

205. See, e.g., S. Doc. No. 25 at 68 ("concern that former officials may have and exert special influence over agency personnel"); GAO Report 2 ("informal contacts with former colleagues still at the agency"); COMMON CAUSE STUDY 52-53 (ability to hire former officials perpetuates "undue industry influence in federal agencies"); Tentative Draft Opinion, supra note 200, at 41.
influence may actually be the power or authority of his or her position, power that evaporates quickly upon departure from government. Other people are influential, not so much for the job they once held, but for the next job they may hold. That is, some former officials are influential because they still have political connections and may return to another government position. Even if one were critical of that type of influence, restrictions oriented toward the former government position would be an odd way of dealing with it.

Still other influence is based on the former official’s fame. Henry Kissinger, for example, could probably get through on the telephone to most current government officials—whether or not in the foreign policy field—because they would be flattered or curious that he called. But Johnny Carson or Raquel Welch could probably get through equally well. The point is that name recognition, as a form of influence, may be associated with government service, but it is neither limited to such service nor readily amenable to rules related to former officials generally.

Most commonly, clout is viewed in terms of the former employee’s personal friendships with people still at the agency. This argument, of course, tends to demean all federal employees. The idea that present officials make significant decisions based on friendship rather than on the merits says more about the present officials than about their former coworker friends. It implies a lack of will or talent, or both, in federal officials that does not seem justified or intended, and it ignores the possibility that the officials will tend to disfavor their friends in order to avoid even the appearance of favoritism. Further, contacts within an agency are not the only way people in government positions form friendships. In addition to neighbors and classmates, people also form friendships in professional organizations and even in adversarial situations. Employment contacts are only part of the friendship problem, if such a problem exists.

4. **Unfair Advantage.** Another complaint is that government service gives some people an inherent and unfair advantage over others.206 For example, a lawyer who has recently worked for the Federal Trade Commission may be considered better able to represent clients with trade regulation problems than someone without such

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206. This is the centerpiece in the proposed revision of 16 C.F.R. § 4.1(b) (1980) (section 4.1(b) of the Federal Trade Commission Rules of Conduct). See also S. Doc. No. 25 at 68 (“information, influence and access . . . [may be used] to improper or unfair advantage”); GAO Report 2 (“undue industry advantage . . . due to the former employee’s knowledge of agency procedures and the decisionmaking process”).
experience. If the objection is that the advantage is unfair to the government, then it is little more than a restatement of the previous three objections. If, on the other hand, the argument is that former government officials will prove more attractive to clients or employees than is “fair” to their contemporaries without a government background, then the argument is really a call for economic protection of existing firms or individuals.

To the extent that this argument is a serious objection to general experience and understanding, every person has an “unfair advantage” over every other person because of his or her unique experiences. Persons who went to the Harvard Law School have an advantage over those who attended other schools for some kinds of jobs in some locations. Persons who attend state law schools frequently have a similar advantage over others, including Harvard graduates, for employment and even “influence” in certain other locations. In an efficient economic system, the individual’s comparative advantage is put to best use by consumers of the services offered. It is usually cheaper for the client and more efficient for society if the person hired knows the government agency and can perform a service without first having to become educated about the subject. Of course, to the extent that real confidences (or impermissible contacts) are involved, then the “unfair advantage” concern should be recognized as a part of those objections. It does not, however, seem to be an objection that should have much independent significance.

5. Conflict of Loyalties. Another concern, also rooted in legal ethics, is that a government employee might be subject to a conflict of loyalties while still in government service. For example, a lawyer who plans to work for the company that he or she is currently charged with prosecuting might be tempted to prosecute less vigorously or to allow error into the trial record in order to allow attack of the judgment on appeal. Similarly, a contracting official might award a contract to the future source of his or her income, or a person seeking an academic job might overlook the weaknesses in a university’s accounting for government funds.

207. This was of particular concern to the Association of the Bar Committee in 1960: “[T]he greatest public risks arising from post-employment conduct may well occur during the period of government employment, through the dampening of aggressive administration of government policies.” Bar Report 234. See also GAO Report 1 (“vested interest in acting favorably toward certain companies while with an agency”); id. 2 (“appear that the employee . . . is being rewarded for his participation while regulating the industry”); Common Cause Study 52 (“Those who anticipate future employment . . . have a vested interest in acting in behalf of certain companies while in office, or at least in behalf of the industry in general”).
This concern about conflicts of interest while an official is employed by the government seems more legitimate than the concerns previously described. Furthermore, this is the only concern that is consistent with traditional notions of conflicts of interest: it is a fear that decisions made now will be influenced by the personal interests of the decisionmaker. However, this conflict of loyalties issue is itself more complex than first appears.

Government employees, except perhaps those who entered the government immediately upon graduation from school, also have former private employers. When those firms have dealings with the government, it may be convenient to screen the former employees from those dealings. Sometimes, however, screening will not be convenient. In those cases, the government must recognize that the risk of disloyalty is not great enough to justify impeding the agency's ability to act efficiently.

Likewise, because of the skills developed and the experience gained, a person ending a government career is likely to be employed by a firm that deals with the government. Thus, the risk that a present decision will affect a future employer is inherent in acting as a government official. Further, because job negotiations inevitably precede hiring, the possibility of affecting a firm with which one is negotiating may be to some extent unavoidable. Disqualification from acting in such situations is the obvious solution in many cases. Again, however, the costs of such disqualification may in some cases be greater than the benefits.

Further, the concern about dishonesty and disloyalty is probably excessive. It is hard to imagine that a private firm would feel secure hiring someone who had just been disloyal to his or her last client—the government. Interviews with lawyers consistently confirm that law firms want the "best" government lawyers—the ones who were hardest to beat—not the least qualified or least vigorous advocates. Government employees probably sense this. Viewed in this light, the conflict of loyalties concern, while not necessarily eliminated, seems less significant.

6. **Imputed Knowledge of Partners and Associates.** Finally, even

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208. This, of course, is the requirement of section 208, unless the employee gets a waiver from the "Government official responsible for appointment to his position." 18 U.S.C.A. § 207(b) (West Supp. 1979).

209. See Wiley, Speaking Out Against Ethics Committee Inquiry 19, DISTRICT LAW., Winter 1976, at 37. The counter argument is that in doing so, the law firms are "buying the government's best people." Tentative Draft Opinion, supra note 200, at 41.
if former government employees avoid direct personal association with cases or issues involving their former agencies, the danger exists that they could act indirectly through their partners and associates. Consequently, some have argued that the disqualification of the former official should extend to law partners or business associates. Again, the argument is derived from principles of legal ethics. Traditionally, the actual knowledge of an attorney was attributed by agency principles to the lawyer's partners. \footnote{See also Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1316-18 (7th Cir.), cert. denied, 439 U.S. 955 (1978); Laskey Bros. v. Warner Bros. Pictures, Inc., 224 F.2d 824, 826-27 (2d Cir. 1955); Note, Attorney's Conflict of Interests: Representation of Interest Adverse to that of Former Client, 55 B.U.L. Rev. 61, 70-71 (1971); Note, Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest, 73 Yale L.J. 1058, 1059-64 (1964).}

Recently, the rule has been expanded to associates of the attorney; the rationale for this extension was the relatively open access to case files prevailing in law firms. \footnote{See Consolidated Theatres v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 927 (2d Cir. 1954). In that case an attorney was disqualified after he moved from the defendant's firm to the plaintiff's firm. The court dismissed his assertion that he had been "a mere law clerk" at the first firm, noting that he had had access to the files and had performed other services that "might well have" exposed him to confidential information. \textit{Id.}} Both traditional case law and the American Bar Association Code require disqualification regardless of whether the firm "walls off" the attorney from participation in the case and excludes him or her from legal fees derived from it. \footnote{Id.; see Schloetter v. Railo of Ind., Inc., 546 F.2d 706, 710 (7th Cir. 1976); Fund of Funds, Ltd. v. Arthur Andersen & Co., 435 F. Supp. 84, 96 (S.D.N.Y.), aff'd in part and rev'd in part, 561 F.2d 225 (2d Cir. 1977).}

In some cases, however, the courts seem willing to modify the rigid traditional rules to deal with the realities of law practice by large firms. In Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975), one of the plaintiff's attorneys, Dale Schreiber, had worked for an eighty-person firm for three years following his graduation from law school. That firm was general counsel to Chrysler and was representing Chrysler in the suit filed by plaintiff Silver. Schreiber had worked on various Chrysler matters while an associate in the large firm, but he had not been involved in the suit filed by Silver or in any case substantially related to that suit.

The court acknowledged that disqualification is appropriate when an attorney may use confidential client information against that client. However, contrary to the usual rule, it found that the inference that any attorney received confidential client information from former law associates would be rebuttable. It was important, the court argued, that the law "not unnecessarily [constrict] the careers of lawyers who started their practice of law at large firms simply on the basis of their former association..." \textit{Id.} at 754. The court found the relevant distinction to be between lawyers heavily involved in a matter and those "who enter briefly on the periphery for a limited and specific purpose relating solely to legal questions. ... Under the latter circumstances the
Whether these rules permit a waiver of this disqualification is not entirely clear. The applicable American Bar Association Code provision is Disciplinary Rule 4-101(C)(1), which allows a lawyer to "reveal: . . . Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them." If a lawyer seeks to represent a new client in a suit against a former private client, he needs the former client's consent after full disclosure. Full disclosure would arguably require the attorney to advise the former client of the seriousness of the consequences of his taking the present case. That advice could be self-serving, however, and indeed it might compromise the interests of the present or proposed client if the attorney has to explain to the potential defendant the details of the proposed represent-
tation. Further, the former client has no obvious incentive to give his consent. Almost certainly, the former client will be worse off if the former lawyer takes the case than if the potential plaintiff has to find and pay to educate someone new. It seems unreasonable, then, to expect that the withholding of consent by a former client—private party or government agency—will be a valid indication that disqualification is really necessary.

Recognizing that an entire firm should not necessarily be disqualified because a former client refuses consent, many observers have concluded that the principle of Disciplinary Rule 5-105(D) should not be extended to government employees. The proposals of the American Bar Association, the Association of the Bar of the City of New York, and the District of Columbia all concurred with this position. The Court of Claims, as well, in *Kesselhaut v. United States*,217 recognized the impropriety of disqualifying an entire firm when screening procedures would be effective.

Should an attorney . . . ineluctably infect all the members of any firm he joined with all his own personal disqualifications, he would take on the status of a Typhoid Mary, and be reduced to sole practice under the most unfavorable conditions. . . . [T]he withholding of consent by the Government, as here, [should not] be binding on us if, as here, it appears now to be unjustified.218

*Kesselhaut* was not the last word. As previously discussed,219 the Second Circuit in *Armstrong v. McAlpin*220 adopted a rule barring the entire firm—at least whenever a partner or associate had been personally and substantially involved in a matter while in government employment—because “it must appear to the public, that there will be no possibility of financial reward if [the employee] succumbs to the temptation to shape the government action in the hope of enhancing private employment.”221

Any opinion such as that of the Second Circuit that is based on the appearance of impropriety is extraordinarily difficult to analyze. That such an appearance may exist to the judges deciding the case is a point that no observer can challenge. However, one can ask whether such an

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216. See notes 80, 89-94 supra and accompanying text. The Senate Government Operations Committee agreed with the ABA position, see S. Doc. No. 25 at 87, and the approach was also adopted by the Office of Personnel Management in 5 C.F.R. § 737.21(b) (1979).
217. 555 F.2d 791 (Ct. Cl. 1977).
218. Id. at 793-94. On the other hand, eight of the nineteen members of the D.C. Bar Ethics Committee believed no waiver should be permitted at all. D.C. Bar Proposals 48.
219. See notes 132-44 supra and accompanying text.
220. 606 F.2d 28 (2d Cir. 1979), rehearing en banc granted, No. 79-7042 (2d Cir. Dec. 12, 1979).
221. 606 F.2d at 34.
appearance is reasonable and in this case it seems clear the court should have reached a different result.

First, the same factors that convinced the court that there was no actual impropriety could have led just as easily to the conclusion that there was no appearance of impropriety. The law firm was retained six months after its new associate, Altman, had left the government, and it was retained by the receiver with full knowledge that Altman could not play any role in the matter. The receiver who hired the law firm had been named well over a year before Altman left the government, and there was at least no overt suggestion that Altman had had any role in the selection of that receiver.

Second, the court rested its decision in part on the premise that Altman might have seemed tempted to work less vigorously for the government because he wanted a job with this private firm. However, even assuming a firm would hire him on this basis, the interest of the private firm and its client were consistent with that of the government. Because there was no confidentiality issue involved, it is difficult to understand what Altman could have done that would have actually or apparently compromised his work for the Securities and Exchange Commission.

Third, it seems inappropriate to allow a private litigant to raise an objection that purports to protect only the interest of the government. There is no suggestion that Altman would be able to use contacts he had at the Securities and Exchange Commission to abuse McAulpin’s rights. Instead, the Second Circuit relied on a government interest that was already redressable by the government under section 208, and created a remedy that does little more than make it more time-consuming and expensive for the plaintiff to pursue his private action against someone the government has already determined to be a wrongdoer.

In sum, the Court of Appeals for the Second Circuit in Armstrong, in its concern about the possibility of impropriety, established a rule whose arbitrary application seems likely to create significantly more costs for litigants, including the government, than benefits. The position taken by the Court of Claims in Kesselhaut, the Fifth Circuit in Woods v. Covington County Bank, and all of the bar associations that

222. Id. at 32-33.
223. See note 209 supra and accompanying text.
224. Section 208 prohibits a government employee from participating in any matter in which his future employer has a financial interest. See text accompanying note 55 supra.
225. See notes 217-18 supra and accompanying text.
226. 537 F.2d 804 (5th Cir. 1976). See note 204 supra and accompanying text.
have considered the question\textsuperscript{227} seems clearly preferable.

C. Costs Imposed By An Overly Restrictive Rule.

Although none of the six bases used here for restricting the private activities of former government employees should be discounted completely, the apparent significance of each seems to fade rapidly upon analysis. A further consideration in creating these revolving door rules is the costs created by an overly restrictive approach. One of the problems in analyzing the revolving door issue has been that the rules frequently have been drafted by lawyers to address lawyers' problems. Even in our regulated society, the majority of government employees are nonlawyers, and the rules fail to accommodate the problems faced by these nonlawyers.

Contracting officials, for example, are often a crucial interface between the private sector and the government. The government official distributing grants for cancer research and the private researcher are not opponents. They both have the same motivation: to conquer cancer. In this sense, there is no analogy to the lawyer who moves from one client to another. On the other hand, in the award and funding of cancer research contracts, the private contractor (whether or not nominally a not-for-profit institution) may be expected to want an increase in the funds available for the work, while to some extent, it will be in the government's interest to constrain the level of funding\textsuperscript{228} The contracting area, then, is a peculiar combination of teamwork and conflict, but in very few senses is it amenable to rules developed for lawyers.

Further, even to the extent that the lawyer analogy is helpful, the assumption that rules relating to private lawyers can be transposed to the government setting is questionable. For example, there is an extensive body of case law concerning the private lawyer's obligation not to take a case contrary to the interest of a former private client, at least when to do so might abuse the confidences and secrets of that private client\textsuperscript{229} Such a rule is understandable and imposes relatively few costs on the private sector. If one law firm is obliged to turn down a case under the rule, many other firms are available. In general, the number of such cases is likely to be relatively small and of relatively little consequence to any given firm. The government, on the other

\textsuperscript{227} See note 216 supra and accompanying text.

\textsuperscript{228} The 1977 changes to section 207 essentially eliminate the barriers to university officials moving from federal jobs to nonprofit or university positions administering contracts they granted. This analysis suggests that "not-for-profit" organizations may in fact present many of the same concerns that Congress was worried about.

\textsuperscript{229} See authorities cited in note 210 supra.
hand, preempts many fields. If a tax lawyer were barred from all tax cases because he or she had worked on regulations for the Internal Revenue Service, the sanction would not be the denial of a few cases; it would be the inability to practice the profession for the prescribed period. In addition, the government obviously employs many times more people than any individual firm. Thus, the consequences of any of its rules are substantially more widespread and pervasive. Neither of these observations demonstrates that the private lawyer analogy is never useful. They do suggest, however, that an assessment of the appropriate rules to be ultimately adopted must also take into account the countervailing costs created by an overly restrictive policy.

The Congressional Budget Office estimated that the cost of the 1978 amendments to section 207 was zero. 230 As an estimate of budget impact, that was perhaps optimistic; as an estimate of social cost, it was clearly wrong. Unfortunately, no realistic estimate of social impact has even been attempted, but an understanding that there is such an impact is essential. The social costs take at least four forms: problems created for government recruitment, inhibitions on the independence and creativity of persons in government service, a reduction in freedom of choice for former employees and the persons consulting them, and a loss to society through a balkanization of government service and thus a lessening of the perception of public service as a desirable part of a broad career.

1. Problems for Government Recruitment. "To make government service more difficult to exit can only make it less appealing to enter." 231 A professional person usually has only one commodity for sale—his or her skill and judgment. Economists call this "human capital," and one of its primary components is experience. The fact that an attorney worked on the assembly line of an automobile company while in law school, for example, may give him or her unusual insights into the way cars are made. Indeed, any individual builds up a store of experiences and information during a lifetime, and it makes economic sense, for both the individual and the economy, for that human capital to be expended in the most effective way.

Human capital is not only of great personal value to the professional; it is, taken collectively, a national asset. Government employees develop experience and understanding during their periods of service

that later make them valuable to private clients. These insights and experiences are often unavailable in the private sector except from other former government employees, and, if private clients cannot call upon these former officials, they may get poor advice or more expensive advice, or both. Reliance on this experience in the private sector is no more inappropriate than is the former auto worker's handling a case against an auto company.

Depreciating the value of the human capital that a government employee accumulates will discourage people from seeking government employment. Although individuals do not enter government service solely to have something to sell when they leave, as individuals evaluate careers and consider whether to accept a government position, they see the ability to gain experiences they can use later as a part of the compensation for the position. Restraints placed upon their subsequent employment will reduce this apparent compensation, and eventually will affect the number and type of people willing to enter government service.

It is useful to break down professional life into at least three periods. First, most professions have an apprenticeship phase lasting from five to ten years. During that period, the individual does some professional work, but an equally important aspect of this period is gaining experience that allows him or her to move on to the next stage. The next stage, also generally lasting about ten years, is the "junior partner" level. At this stage more independence is possible, and during this period most people achieve the levels within their profession that they are likely to sustain throughout their careers. The third and longest phase is one in which individuals continue working at their careers, but frequently supervise others and act in a managerial or "senior partner" capacity.

These distinctions are important because the government needs people at all three levels. Although individuals pass through all three stages within the government, even those who make the government a "career" usually do not commit their entire professional lives to government service. Instead, they retire after twenty-five to thirty years and have a significant number of productive years remaining.

As the rules on postemployment activities become more restrictive, it inevitably will be more difficult to get people to accept government positions during one or more of these phases of their careers. Suppose two students graduate from law school in the same year. One goes to a law firm and the other to the Federal Trade Commission. After five years, the private lawyer may expect to be close to a partnership in his firm, having been educated in that firm's procedures and in the sub-
stantive problem areas in which he will concentrate. The Federal Trade Commission attorney, with no position in a private firm, will only have received experience that might make her equally attractive to private clients. If that experience is deemed comparable by the job market, then her time with the agency will have been well spent. However, if the experience that she has obtained may not be used in her subsequent career, then her time in government service may well have been wasted. Indeed, if she is prohibited as a private attorney from working on cases involving the government, then her period of government service will have been a significant detriment to her career. One does not have to be committed to the view that all human decisions are economically motivated to see that, if postemployment activity is more severely restricted, the experience gained in government service will become less valuable and, therefore, such service will become less attractive.

Perhaps even more significant is the probable effect on the recruiting of senior people for short-term government service. People in the second and third phases, the junior partner and senior partner levels, are likely to be earning large incomes. They must make significant financial sacrifices in order to take government positions. Consider a person making $120,000 a year in securities law, for example, who is offered a seat on the Securities and Exchange Commission paying $60,000. If the $60,000 annual sacrifice is compounded by the knowledge that his practice of securities law will be restricted when he returns to private life, he may conclude that the sacrifice is too great.

The number of desirable public servants who would accept government employment but for postemployment restrictions is unknown. The Carter Administration reportedly found that no one declined a Cabinet position for the stated reason that he or she would not be willing to comply with postemployment restrictions.\textsuperscript{232} However, the experience of recruiting individuals for highly prestigious, visible positions is not necessarily analogous to the experience of recruiting for thousands of other responsible but less glamorous government positions.\textsuperscript{233}

2. Effects on Official Independence. The second and less fre-

\textsuperscript{232} For commitments made by the appointees, see 35 Cong. Q. Weekly Rep. 56-57 (Jan. 8, 1977).

\textsuperscript{233} At one point in the debate over the District of Columbia Bar proposals, the chief legal officers of nine Cabinet departments objected to the effect the proposals would have on recruitment. Bar's "Roving" Door Plan Attacked, Washington Post, Oct. 10, 1978, A 3, at 3, col. 3. See also Internal Revenue Service Chief Counsel's Advisory Committee on Rules of Professional Conduct, 41 Fed. Reg. 41,105, 41,113 (1976).
quently discussed cost of restrictions on postemployment activities is their potential impact on employees' freedom and flexibility while in government. As one interviewee said, "A bureaucracy is only as good as the market value of the bureaucrats on the outside." An individual who has the security of knowing he or she can find private employment upon leaving the government is free to work vigorously, challenge official positions when he or she believes them to be in error, and resist illegal demands by superiors. An employee who lacks this assurance of private employment does not enjoy such freedom.

By unfortunate coincidence, Congress adopted federal civil service reform measures at the same time that it tightened restrictions on postemployment activity. According to the Civil Service Reform Act of 1978, certain federal officials in grades GS-16, GS-17, and GS-18, or Levels IV and V of the Executive Salary Schedule are eligible for the Senior Executive Service. While these senior executives are afforded substantial civil service protection, a system of performance ratings, incentive pay, and nonconsensual reassignments was established that considerably increased the power of top-level agency administrators. The object of these changes was to establish in the administration of government agencies some of the standards of performance accountability utilized by private business. That, in itself, is not objectionable. However, government's postemployment restrictions leave no private analogy. Thus, the combined effect of the new laws does not create a situation of comparability with private business, but rather a situation in which senior government executives are substantially more locked in and dependent upon their superiors' rating. The restraints thus imposed on independence and honesty in government service may be significant. Any system that affects the right to take a new job affects the ability to quit the old job, and any limit on the ability to quit inhibits official independence.

3. The Effect on Personal Freedom of Employees and Those Who Employ Them. Typically, cost-benefit analysis focuses primarily on costs that can be expressed in dollars or in losses of government efficiency. That is understandable, given the way most cost-benefit issues are posed, but in a free society some other costs are also relevant.


Many individuals, while not wishing to work permanently for the government, would like to spend some time in public service. Restrictions that deter these persons from fulfilling their desire for government positions represent a significant cost affecting the freedom of those individuals to plan their careers.

Similarly, these restrictions impose costs on potential employers of the former government official. A university that cannot hire an experienced government research scientist must hire someone less experienced. A client who cannot hire a lawyer experienced in commodities law must, in effect, pay to educate a lawyer less experienced. A company that cannot rehire its vice-president because he or she worked as a presidential appointee has lost a major investment in that man or woman. Although these illustrations suggest a less fundamental loss of personal freedom than the examples involving employees, losses to potential employers can be real and significant.

4. Dangers of Creating a Class of Professional Civil Servants. The final cost follows from the first three. As the “door” is constrained from “revolving,” fewer people will pass through it. The result will be a more complete separation of government lawyers from those who engage in private practice. At a minimum, it will tend to make the academic community the only source of persons free to take relatively short-term government positions.

Such a result creates at least three problems. First, government will be denied the influx of views from outside the government. It is one thing to hear the view that the agency’s policies need change expressed by advocates; it is quite another to have to deal with insiders who want change. Barriers to government service entry created by severe problems upon exit will likely lead to more rigid attitudes within the agencies and tend to create a Mandarin class less consistent with the democratic ideal.

Second, such barriers often block those who could receive the most benefit from government experience. Among the opponents of revolving door limitations have been minority groups who have seen government service as an important route to private sector jobs. Black law students, for example, have avoided discrimination by taking federal positions and then used their experience and demonstrated skill to secure jobs in law firms that might otherwise have been reluctant to hire them. It is not only the wealthy and powerful that move through the

236. E.g., Comments of the Washington Bar Association before the District of Columbia Court of Appeals in connection with the proposed amendment to Canon 9 and ancillary amendments to its Disciplinary Rules (July 9, 1979).
revolving door.

Third, on a practical level, the interchange of persons often works directly in the government’s interest. Government alumni often help communicate policies and attitudes of their agencies better than books or speeches. After retiring to a private role, the former government official may retain some of the attitudes and insights acquired while in government. A former Justice Department or Securities and Exchange lawyer may set a tougher compliance program for his or her client than a nonalumnus of those agencies.237 Because former alumni of an agency may prove to be some of its best friends, the closing of the revolving door may prove more harmful than helpful to the agency.

V. Proposed Approach to the Problem of Deciding When Participation by a Former Agency Employee Is Inappropriate

A. Some General Concerns.

This Article has suggested that—because rules may limit the attractiveness of government positions and may reduce employee creativity in those positions—individuals, government, and the public all have something to lose from the imposition of arbitrary rules upon the activities of former government employees. The rules, therefore, should be tailored to limit only those situations that pose problems of real abuse of the public trust. In most cases, theoretically and practically, the former government employee should be afforded the opportunity to develop and exploit his or her “human capital.”

In addition, the rules should be explicit, an objective not met by section 207. Several interviewees echoed the observation made by Judge Kaufman over twenty years ago that an accusation of unethical conduct can be as serious to a person’s career as a conviction of misconduct.238 If rules are vague or if regulations are necessary to ensure that certain activities are permissible, the risks of being exposed to possible press or public allegations of violations may be too great for many people to assume. Inevitably, complex problems do not admit of easy solutions, but clarity and certainty as to what the applicable rules require in a given case seem essential objectives.

B. The Analytical Questions Revisited.

1. The Role of the Employee While in Government. First, it seems that law should draw distinctions based on the nature of the govern-

238. See notes 36-40 supra and accompanying text.
ment job. Technical personnel who provide information in a common undertaking with the government present problems different from those raised by persons who negotiate the financial or other relationships between the government and private sector firms. Lawyers should not be distinguished from contract negotiators and administrators, for example, but these persons should be distinguished from researchers whose private work can be almost identical to the work they were doing for the government.

The distinction between personal involvement and official responsibility does seem to be an important one. Indeed, the concept of official responsibility pertains to little of real substance. An official cannot know confidences about matters in which he or she was not involved, nor can he or she abuse the government's interest regarding decisions that were not his or hers to make. Likewise, whether or not a matter was within one's official responsibility has little impact on a person's actual influence. In this respect, the approach taken by the American Bar Association Code of Professional Responsibility is better than that taken in the federal statute.

The "official responsibility" concept was a reaction of the Association of the Bar report in 1960 against the Standard Oil decision. It went too far. Interestingly enough, none of the interviewees contacted in the course of this study seemed troubled at being excluded from matters within their official responsibility. Ideally, however, if one were rewriting the law and regulations, one should make disqualifying only those matters in which the individual was personally involved.

For the same reasons, the employee's salary level or job title should not be a basis for imposing restrictions. These factors do not necessarily determine the specific types of decisions or information for which the employee is responsible. Moreover, the cost of such rules is extremely high, because they affect people being recruited for the hard-to-fill jobs in the senior ranks of the civil service and the less visible executive level appointments—people who are likely to refuse government service out of concern about these restrictions—rather than affecting the high-level presidential appointees.

2. The Lawyer's Role in Private Life. Turning to the official's role after leaving government service, the distinction between personally appearing before an agency and privately advising a client is more complex than it may seem. Participants in the congressional deliberations apparently assumed that influence was the only major concern of

239. See notes 50-53 supra and accompanying text.
240. See notes 232-33 supra and accompanying text.
the statute, and, therefore, that personal intervention should be the only matter of concern. On the other hand, if the abuse of confidential information or insights is also a concern, then private advice would be at least as serious an evil as personal appearance. As argued earlier, it does not seem that either concern is likely to present a serious problem in most cases. Further, agencies vary in the extent of their truly confidential information and the extent of their relatively unreviewable or "arbitrary" discretion. Thus, it seems that the issue of barring personal intervention or private advice, or both, is appropriate for individual agency regulation subject to the approval of the Office of Government Ethics.

The distinction between a former employee seeking information and one pleading a cause is also often far from clear. Judicious questions will often move a matter ahead in the agency decisionmaking process, a result that may be as effective as any advocacy. Abuse of confidential information could occur in either role, but possession of improper influence is less dangerous in the information-seeking role than in the advocate role. Thus, the provision in section 207 limiting the prohibition on high level employees to actual attempts to influence the former agency, while broadening the prohibition on persons with substantial personal involvement, seems the sensible approach.

On the other hand, distinctions should be made on the basis of whether the private role is related to a specific case the person handled, a later similar case, or a later rulemaking proceeding. The first should be highly restricted, while the last two require very little or no restriction. In a rulemaking proceeding, the range of interests expressed is normally so great and the questions are usually at such a high level of policy that no one individual could distort the results. Likewise, while later similar but unrelated cases may be the subject of less public attention, only the concern about undue influence could have any validity. Only in cases or projects actually handled by the employee could the abuses of both confidential information and undue influence pose a threat. Thus, the approach taken by the American Bar Association Code and the federal statutes seems far superior to that of the proposed District of Columbia Bar rules.

The bar to postemployment activity certainly should not be extended beyond the employee's former agency. Indeed, the authority in section 207 to limit the bar only to actions before a part of the former

241. See, e.g., S. Doc. No. 127 at 73-77.
243. See notes 172-73 supra and accompanying text.
employee's agency or department should be retained. Of course, the prestige that an individual has at a given department may extend to other government agencies, so that if prestige is to be condemned, agency boundaries have little meaning. However, because postemployment restrictions must end at some point, the lines drawn in section 207(c) seem a reasonable compromise.

The government clearly should be interested in the conduct of employees in job negotiations before leaving government service. However, it is particularly difficult to formulate specific rules to regulate this conduct without excessively restricting the government official's ability both to handle day-to-day business and to establish a smooth transition to private life. Perhaps the best solution would be to require the individual to inform his or her agency superiors of any job negotiations that might affect his public responsibilities. If possible and consistent with the government's needs, he or she could be removed from cases involving those firms. If, from the government's position, it is not convenient to remove the official, then he or she should not be barred from such dealings. A record should be made of any such incident and filed with the Office of Government Ethics both to verify that the employee openly reported his or her actions and to document why he or she was not removed from the dealings.\footnote{Section 208 already requires notification by the employee. This proposal seeks to clarify how the agency is to deal with that notice.}

Finally, prohibition of conduct consistent with the government's interest may seem one of the subjects of least concern, but further reflection suggests that it may be one of the most important. For example, if the government receives confidential information from a private firm, the government official who has had access to that information may indeed have an unfair advantage that will be detrimental to both the private firm, which has been effectively misled, and the government, when it seeks further information. In such a case, it may be shortsighted for the government to prevent, as it does in section 207, only subsequent activity affecting the immediate interest of the government.

3. General Procedural and Enforcement Issues. The length of the bar to postemployment activity is, again, a function of the objectives to be served. In this connection a useful concept is that of the half-life, which scientists apply to atomic particles. While radioactivity lasts for a long time, half of it is dissipated within a specific, relatively short time. Similarly, influence and confidential information are wasting assets as former friends leave the agency and as new policies are formu-
lated by succeeding administrations. To formulate a cooling off period for former employees, one must attempt to calculate the rate of decay of influence and confidences. That is obviously difficult to do, but the interviews done for this Article suggest that the half-life of such assets is indeed short. The one-year "cooling off period" provided now by section 207(c) is probably a realistic one. The permanent bar against participation in matters with which an individual was personally and substantially involved is derived from the traditional rule for attorneys in private cases and may be realistic in long, protracted lawsuits, but its application to the general issues of government is questionable.

The problems of attribution have been among the most difficult. The decision in Armstrong v. McAlpin\textsuperscript{245} prevents ignoring the problem any longer. Because a statute probably cannot address all possible cases, the courts should be able to require disqualification when there is some showing of actual impropriety. However, contrary to the court's approach in McAlpin, the agency's view of when its interests need protecting should be given significant weight in the court's decision. The position taken in American Bar Association Formal Opinion No. 342,\textsuperscript{246} therefore, seems appropriate.\textsuperscript{247}

Of course, nothing is sacrosanct about the size of large Washington law firms, the chief beneficiaries of the American Bar Association's approach. Lawyers could practice in smaller organization units, as in England.\textsuperscript{248} However, it does not seem reasonable to require, in effect, such smaller units through a broad attribution rule unless something affirmative is to be gained. The interviews done for this Article suggest that waiving off disqualified firm members can and does work. Furthermore, a formal waiver approach does not appear desirable.\textsuperscript{249} As the court realized in Kesselhaut v. United States,\textsuperscript{250} the issue really ought not be discretionary; screening is either effective or ineffective.\textsuperscript{251} At most, requiring a firm to file an affidavit about the screening might be necessary to assure all persons that the firm and the former official

\textsuperscript{245} 606 F.2d 28 (2d Cir. 1979), rehearing en banc granted, No. 79-7042 (2d Cir. Dec. 12, 1979). See notes 219-27 supra and accompanying text.

\textsuperscript{246} ABA Opinion, No. 342, supra note 74.

\textsuperscript{247} See notes 74-80 supra and accompanying text.

\textsuperscript{248} Barristers in England do not form any partnerships at all, largely to avoid the possibility of imputed disqualification. See generally W. Boultou, A Guide to Conduct and Etiquette at the Bar 58-63 (6th ed. 1975).

\textsuperscript{249} See note 214 supra and accompanying text.

\textsuperscript{250} 555 F.2d 791 (Cl. Ct. 1977). See notes 217-18 supra and accompanying text.

\textsuperscript{251} The prevention of indirect benefit to the former employee is difficult if the employee works for a corporation, because the security of his paycheck is enhanced if the company makes money instead of losing it. However, the concern about attribution is a traditional concern about lawyers rather than about people in business.
recognize the obligation. The injury to reputation and the potential financial loss from a failure to screen properly are probably sufficient incentives to guarantee that the required separation will be maintained.\textsuperscript{252}

The criminal penalties for violating the restrictions on postemployment activity are largely archaic and should be eliminated. Criminal penalties were instituted in 1948 when the prohibition was still aimed at preventing fraud in the narrow activity of prosecuting specific claims against the government.\textsuperscript{253} However, most of the restrictions of concern today do not involve fraud. Instead, they involve appearances or theoretical possibilities for abuse, and thus the criminal penalties have not often been enforced.\textsuperscript{254} If the statutory rules were narrowed—for example, if they prohibited only the switching of sides in a specific case, or the failure to screen a disqualified former official, or overt acts of favoritism to a potential future employer—then some criminal sanction might be appropriate. For most violations, such as the appearance of impropriety, however, the type of administrative remedy created by the 1978 amendments to section 207 should be the sole remedy for enforcement.

The revolving door turns into the government, as well as out of it, and the rules adopted should deal with both phenomena. Only the District of Columbia Bar proposal currently does so.\textsuperscript{255} As with restrictions applicable to persons leaving the government, restrictions applicable to persons entering the government should be narrowly drawn.

Congress and individual agencies, rather than bar associations, courts, or professional groups, should establish rules relating to postemployment activity of federal officials. Whatever rules are adopted have important costs associated with them, both for the individuals involved and for the effective operation of government programs. Thus, it is inappropriate for an outside professional association to create or impose such costs for the government.\textsuperscript{256} As the earlier statistics showed,\textsuperscript{257} some individual agencies face unusual problems; Congress, therefore, should expressly grant agencies the authority to modify or

\textsuperscript{252} Violation of the representations in the affidavit presumably would also make at least one member of the firm guilty of perjury.

\textsuperscript{253} See notes 24-26 supra and accompanying text.

\textsuperscript{254} Between 1970 and 1976, the Justice Department brought five cases and obtained one conviction. GAO Report 9.

\textsuperscript{255} See note 184 supra.

\textsuperscript{256} This position was vigorously defended by the Department of Justice in its Memorandum to the Ethics Committee of the District of Columbia Bar (Feb. 15, 1978). A copy of this memorandum is in the files of the District of Columbia Bar.

\textsuperscript{257} See notes 150-56 supra and accompanying text.
even to go beyond the basic restrictions imposed. However, in the interest of simplicity, careful evaluation of the competing costs and benefits, and maximum practical uniformity, even agency rules should be subject to the approval of the central Office of Government Ethics.

Finally, people base decisions about their lives and careers on the types of rules discussed in this Article. Thus it seems unfair to impose any new restriction upon people who have already made such decisions. If more restrictive rules are adopted, they should be applied only to persons subsequently entering government; they should not apply to persons who have already left government or to persons currently in the government, unless a reasonable transition period is established in which people may resign if they do not wish to be bound by the restrictions. If the recommendations of this Article were adopted, of course, the new restrictions on government employees would not be as great as they are currently.

C. Specific Proposals.

The two years of frustrating legislation and the partial repeal of section 207258 have probably left Congress with little interest in addressing the revolving door issues again in the near future. However, the remaining controversy and counter proposals such as that of the District of Columbia Bar make the taking of some concrete steps to simplify and clarify the law in this area seem desirable.

First, the problem of postemployment activities of former federal employees is too complicated and the distinctions between permissible and impermissible conduct are too fine to be handled by a criminal statute. The current federal law259 should be replaced with a new statute providing for civil or administrative enforcement and penalties.

Second, although the concern frequently expressed about the problem of switching sides seems excessive, the present permanent bar on representation of a private party in any "particular matter involving a specific party or parties" in which the employee participated "personally and substantially" on behalf of the government260 should be retained in the new statute. However, no restriction should be placed on representation with respect to other matters, such as those that were pending under the employee's official responsibility but in which he had no personal and substantial participation.261

259. Id.
260. Id. § 207(a).
261. This concern seems exaggerated because one can be involved "personally and substan-
The present one-year cooling off period on personal advocacy by former high-level personnel before their former agencies, set forth in section 207(c), is a reasonable compromise and should be retained. The one-year ban should only reach personal attempts to influence the agency, and not acts of aiding or advising private colleagues or clients or obtaining information from the agency.

Congress should authorize agencies to impose, with the concurrence of the Office of Government Ethics, additional restrictions based on their particular needs. The proposed legislation, however, should preempt the rules of professional organizations and courts dealing with the subject of postemployment restrictions.

Finally, regardless of the action Congress takes on the above proposals, a former employee's disqualification ordinarily should not extend to his law firm or organization. Instead, Congress should bar the former employee both from personal participation in the matter and from receiving compensation for anyone else's participation. A partner in the firm should submit an affidavit stating that the former employee has been so screened, not as a basis for government approval, but to assure that the firm has in fact recognized the issue and taken steps to deal with it. Courts should retain authority to decide that the circumstances in a particular case require a broader disqualification. In considering whether to do so, courts should give special weight to the agency's view as to whether the screening arrangement affords adequate protection to its interests.262

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262. The proposals in this Article were adopted by the Administrative Conference of the United States as Recommendation 79-7 (Dec. 14, 1979), except that the Administrative Conference called for retaining the possibility of criminal sanctions for "clearcut and egregious violations" of section 207.
Suing a Current Client

THOMAS D. MORGAN*

INTRODUCTION

THE ISSUE STATED

General Manufacturing Co. is a diversified producer of consumer items. It has a storage and distribution facility in suburban Capital County. Each year, General Manufacturing asks the law firm of Able & Baker to file a written protest of the property tax assessment on the facility. Able & Baker has done no other kind of legal work for General Manufacturing. This year’s protest has been submitted but has not yet been resolved.

Marlene Wilson has now consulted Able & Baker. Ms. Wilson was seriously injured by a defect in a hair dryer made by General Manufacturing. She has asked Able & Baker to bring a product liability suit against that company on her behalf and has agreed to pay a contingent fee. Over 100 similar suits are usually pending against General Manufacturing at any given time. Another local firm, Young & Zeller, has defended such cases against General Manufacturing in Capital County.

The example is simple, but it poses the issue of this paper. If Able & Baker undertook to file Ms. Wilson’s cause of action, the firm would be in a position of filing suit against a company that is its client in a completely unrelated matter.1

If General Manufacturing were a former client of Able & Baker, the firm clearly could take the case. The test would be whether a product liability case is a matter “substantially related” to protesting a tax assessment.2 The answer clearly would be no.3

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1. As used in this Article, two matters are “unrelated” when no work done for, or information learned in, one representation would be relevant to the other. In the illustration, none of the facts learned or arguments used in protesting the tax assessment on a local building would have any relevance whatsoever to the proposed product liability action.

2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1995) [hereinafter MODEL RULES]. The standard did not appear in the American Bar Association’s canons or codes, but it has been widely applied in the cases since being first used by Judge Weinfeld in T.C. Theater Corp. v. Warner Bros. Pictures, Inc. 113 F. Supp. 265, 268 (S.D.N.Y. 1953).

3. The Restatement explains the “substantially related” test:

A matter is substantially related if it involves the work the lawyer performed for the former client. For example, a lawyer may not on behalf of a later client attack the validity of a document that the lawyer drafted if doing so would materially and adversely affect the former client. . . . The substantial
However, in our illustration, Able & Baker is handling a pending matter for General Manufacturing, making it a current client. In Formal Opinion 93-372, the ABA Committee on Ethics and Professional Responsibility articulated — only somewhat apologetically — what now seems to be widely thought as the governing rule in such current client cases:

[W]hen corporate clients with multiple operating divisions hire tens if not hundreds of law firms, the idea that, for example, a corporation in Miami retaining the Florida office of a national law firm to negotiate a lease should preclude that firm's New York office from taking an adverse position in a totally unrelated commercial dispute against another division of the same corporation strikes some as placing unreasonable limitations on the opportunities of both clients and lawyers. [However,]... the Model Rules quite correctly treat such a situation as presenting a conflict.

The Committee was alluding to ABA Model Rule 1.7(a) which provides:

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless ... the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and ... each client consents after consultation.

One Committee member was even more definitive about the meaning of Model Rule 1.7(a) in his recent dissent to Formal Opinion 95-390:

All members of this Committee agree that a lawyer may never take a position directly adverse to a client ... no matter how minor the matter and no matter how distant geographically, by industry, or by personnel, the new proposed representation is from the original one the lawyer is handling. Not only is that the rule, but that is what the rule should be.

relationship standard is employed most frequently to protect the confidential information of the former client. A subsequent matter is substantially related to an earlier matter if there is a substantial risk that the subsequent representation will involve the use of confidential information of the former client.


4. Under the cases, General Manufacturing is likely to be considered a current client of Able & Baker even in the absence of an assessment protest currently pending. The fact that General Manufacturing regularly uses Able & Baker for this kind of work is likely to make it a current client unless that relationship had been clearly terminated. See, e.g., IBM v. Levin, 579 F.2d 271, 281 (3d Cir. 1978) (concluding that a pattern of repeated retainers was sufficient to find a continuing relationship where law firm had no specific assignment from the company on hand on the day it filed an antitrust suit and performed services for the company at different time on a fee for service basis rather than pursuant to a retainer arrangement); Manoir-Electroalloys Corp. v. Amalloy Corp., 711 F. Supp. 188, 195 (D.N.J. 1989) (disqualifying an attorney who filed a third-party action against Iacono on behalf of Borin Group while Iacono was a firm client on unrelated matters).


6. MODEL RULES RULES 1.7(a) (1) & (2).

Suing a Current Client

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It has long seemed to me that such a categorical prohibition on bringing suit on behalf of one client against another of the lawyer’s present clients is based on a superficial reading of the relevant cases, a reading out of context of a poorly-drafted model rule, and a seeming disregard of the arbitrary costs imposed on lawyers and litigants by such a rule. I suggest, in short, that the proposition “a lawyer may never take a position directly adverse to a client” is both not the rule and not what the rule should be.

WHO CARES WHAT THE RULE IS?

Filing suit against one current client on another’s behalf might seem so rare as not to matter. It has not been treated extensively in law school teaching materials. However, at least one hundred cases and ethics opinions have addressed the issue in a significant way. Indeed, bringing claims that raise the issue has become something of a cottage industry.

The issues discussed here have also deeply divided members of the ABA

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8. I will not pause to develop here the fact that enforcement of conflict of interest standards is costly for lawyers, clients, and the courts. The Restatement explains:

First, conflict avoidance can make representation more expensive. To the extent that conflict of interest law prevents multiple clients from being represented by a single lawyer, one or both clients will be required to find other lawyers. That may entail uncertainty concerning the successor lawyers’ qualifications, usually additional cost, and the inconvenience of separate representation. . . . Second, limitations imposed by conflicts rules can interfere with client expectations. At the very least, one of the clients might be deprived of the services of a lawyer whom the client had a particular reason to retain, perhaps on the basis of a long-time association with the lawyer. In some communities or fields of practice, there might be no lawyer who is perfectly conflict-free. Third, obtaining informed consent to conflicted representation itself might compromise important interests. . . . The process of obtaining consent is not only potentially time-consuming; it might also be impractical because it would require the disclosure of information that the clients would prefer not to have disclosed, for example, the subject matter about which they have consulted the lawyer. Fourth, conflicts prohibitions interfere with lawyers’ own freedom to practice according to their own best judgment of appropriate professional behavior. It is appropriate to give significant weight to the freedom and professionalism of lawyers in the formation of such rules.

Restatement, supra note 3, § 201 cmt. b.

9. The Restatement’s attempt to deal with this question has been very general, but the Preliminary Final Draft is quite categorical. It states:

[A] lawyer may not sue a current client on behalf of another client, even in an unrelated matter, unless consent is obtained under the conditions and limitations of § 202.

Restatement, supra note 3, § 209 cmt. e.

10. See, e.g., Gillers, Regulation of Lawyers: Problems of Law and Ethics (4th ed. 1995) (devoting approximately 4 pages to the subject); Hazard, Konak & Cramton, The Law of Lawyerly (2d ed. 1994) (treating the subject in about a page and a half); Rhode & Lurian, Legal Ethics (2d ed. 1995) (not addressing the issue); Morgan & Rotunda, Problems and Materials on Professional Responsibility (devoting one problem to the rule in each of its six editions).

11. In the interest of full disclosure, I should acknowledge that I have been retained from time to time to testify as an expert witness on some of the issues addressed in this Article. My testimony has been consistent with the views expressed here, and my position on the issues antedated being asked to serve as an expert.
Committee on Ethics and Professional Responsibility, Formal Opinion 95-390, dealing with application of the rule in the corporate context, was over two years in the drafting and produced four impassioned dissents from a committee that traditionally issues unanimous opinions. Clearly, an issue that divisive deserves closer analysis.

Furthermore, the rule now has become federalized. In re Dresser Industries was a class action antitrust case brought against makers of oil well drill bits. Susman Godfrey was counsel for the plaintiffs, while concurrently representing Dresser in two unrelated cases. The Texas Disciplinary Rules of Professional Conduct are different from Model Rule 1.7(a) and provide that a lawyer is only prohibited from representing one client against the other if the matters are “substantially related.” The district court followed the Texas Rules and found no substantial relationship between the cases. However, the Court of Appeals for the Fifth Circuit said the Texas Rules were not controlling in federal court; a uniform federal rule applies, and “[u]nquestionably, the national standards of attorney conduct forbid a lawyer from bringing a suit against a current client without the consent of both clients.”

Finally, the issue became even more focused for me during drafting of the conflict of interest chapter of the Restatement of the Law Governing Lawyers. Putting the issue in the terms of our example:

The same facts as in the original illustration, but this time Martene Wilson is not an injured consumer but someone who periodically sells $1,000 or so worth of office supplies to General Manufacturing. GM has redrafted its purchase

13. 972 F.2d 540 (5th Cir. 1992).
14. Texas Rule 1.06(b) provides that, except with client consent, “a lawyer shall not represent a person if the representation of that person: (1) involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm.” Tex. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.06(b). In short, the Texas Rule adds two requirements to Model Rule 1.7(a); the matters must be “substantially related” and the adversity must be “material” rather than simply “direct.”
15. That decision was not obviously correct. The court of appeals noted that the Susman lawyers had access to Dresser’s in-house counsel and manufacturing, accounting, and finance data. Dresser Indus., 972 F.2d at 541-42. However, because the standard of review in the proceeding for a writ of mandamus was clear error, rather than take on that finding, the court of appeals transformed the case into a question of federalism that had not directly been decided below.
16. Id. at 545. The court noted that it is largely impossible to get consent from each of the members of a class, but it did acknowledge:

We are mindful, however, that the Texas rules’ allowance of some concurrent representation . . . may be necessary either to prevent a large company, such as Dresser, from monopolizing the lawyers of an area or to assure that certain classes or unpopular clients receive representation. Although we do not now reach the matter, our consideration of social benefit to offset the appearance of impropriety might allow such a representation if the balance clearly and unequivocally favored allowing such representation to further the ends of justice.

Id. at 545 n.12.
order and Ms. Wilson has called her regular lawyers, Able & Baker, to explain the new terms to her. Able & Baker realizes it may have to call General Manufacturing itself for clarification or to propose terms Ms. Wilson would prefer. Does Ms. Wilson’s call present Able & Baker with a conflict of interest? Does Able & Baker have to get the consent of both General Manufacturing and Ms. Wilson before responding to her question?

My own view is almost certainly not; in the example, no suit has been filed against a current client, and it is inconceivable that the adverse effect on General Manufacturing of Ms. Wilson’s preferred terms would be material. But some of my colleagues 17 vigorously disagreed; in their view, the same logic that condemns filing suit against a current client also condemns even giving advice about business dealings with General Manufacturing in spite of the fact that Able & Baker’s representation of General Manufacturing is in a completely unrelated matter and General Manufacturing has other counsel with respect to the terms of the purchase order. Where there is that much debate about what concededly would be an extension of the basic rule, the rule itself seems in need of reexamination.

**Some Preliminary Issues**

Before developing my thesis, three obvious objections to it should be articulated and addressed so as to highlight what my thesis is and is not.

1. *Suing a current client is foolish.* Any client has an absolute right to fire its lawyer and to tell others how badly the client was treated. The client who is sued by its lawyer is likely to exercise that right.

I agree. Nothing in this paper will advocate that lawyers file suit against one of their clients on behalf of another. The problem typically arises, however, in a case like our illustration. The lawyer represents a client with a significant and apparently meritorious claim against a client for whom the lawyer’s work is episodic, modest in amount, and wholly unrelated to the issues in the litigation. Or, the issue may even arise when the client to be sued is a third-party defendant in a case not initiated by the suing client at all. The situation is simply one in which competence requires filing the third-party action to protect the defendant against liability and the question is whether new counsel must be retained to bring that action.

The bottom line question in such cases is whether one — often long-time — client who seeks the lawyer’s help in bringing or defending a matter must always be required to retain another lawyer because an adverse party is also a client of

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17. I do not believe it is appropriate in this setting to attribute views to particular individuals. The occasion for the discussion, however, was a meeting of the reporters with a distinguished committee of members of the ALI Council and Advisors to the Restatement. Among those at the meeting were Charles Wolfram, Geoffrey C. Hazard, Jr., Roger Cramton, Robert Mundheim, Lawrence Fox and Susan Martyn.
the preferred lawyer in some other matter. A categorical prohibition says "yes"; I say that answer is nonsense.

2. **Clients may consent to waive the prohibition.** The rule should present no practical problem. The effect of the rule should only be to require a lawyer's communicating with his or her clients to avoid giving any of them an unexpected surprise.

   Again, I agree in theory. Except when warning is not an option — such as when seeking an emergency restraining order — a lawyer would be well advised to tell both the client seeking action and the client against whom the lawyer plans to proceed about the proposed representation and the lawyer's relation to each litigant. Good client relations are important, as is compliance with the ethical requirement of communication with clients about matters material to the respective representations.18

   On the other hand, the problem discussed in this Article typically arises because the client threatened with suit refuses to grant consent, often solely out of a desire to make life difficult for the opponent. Indeed, it is widely suspected that clients in the position of General Manufacturing routinely give small portions of their legal work in a community to each of several law firms, precisely to be able later to invoke the categorical prohibition on those firms' later filing suit against it. I argue here that this tactic should not always be successful.

3. **Bright line rules are desirable to reduce the need for collateral litigation.** Although clear rules might create anomalous results in a few cases, in the vast majority of cases, they prescribe what a lawyer may and may not do and thus reduce costs by permitting issues to be resolved more expeditiously.

   Again, that seems sensible in the abstract. The problem, however, is that the arguably categorical prohibition has not provided clarity after all.19 A number of questions arise such as: Is "current client" status determined as of the time the suit is filed, or is the relevant time when the lawyer was first consulted?20 Suppose the named client is not being sued but the defendant is the client's

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18. **Model Rules**, Rule 1.4(a). An ABA formal opinion even permits lawyers to get waivers of conflicts in advance of the time they arise. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-372 (1993). The opinion notes that a client may waive a *current* conflict if the client knows: (1) the subject matter of the adverse representation, and (2) what confidential information the client has disclosed that might be at risk, if any. The lawyer also must reasonably believe there will be no adverse effect on the representation. As for *future* conflicts, the client must be able to know the nature of the conflicts being waived. Further, consent to waive the basic conflict does not automatically include waiver of protection of the client's confidential information, and it still must be reasonable to conclude there will be no adverse effect on the representation. *Id.*

19. In the course of researching this paper I have discovered that, depending on exactly what one counts in the universe of related issues, over 100 cases and ethics opinions have addressed the questions raised in this Article. See supra note 11. One of the functions of this Article will be to collect these cases and opinions and organize them roughly by subject matter. No one can know how many cases have been resolved without opinion, of course, but the number is likely to be several hundred.

20. See, e.g., Jeffry v. Pounds, 136 Cal. Rptr. 373 (Ct. App. 1977) (stating that the relevant date is when the lawyer agrees to take the case).
spouse or child, parent or subsidiary? When is representation "directly" adverse rather than only "indirectly" so, and should anybody care? Suppose different lawyers are involved in the various cases, but the lawyers are partners in offices far distant from each other? Suppose the lawyers share office space but are not otherwise related?

These questions are not imaginary; each has required costly litigation. Further, I believe that because the categorical rule appears both simple and arbitrary, it represents an apparently low-cost way for a party to delay proceedings or impose a burden on an opponent. Thus, litigation tactics alone likely have dictated trying to stretch the number of cases that fit within the principle.

**MY PROPOSAL**

This Article will argue that the rule should stop short of a categorical prohibition against a lawyer's filing suit against a current client.

A "substantial relation" between the cases should not be required. That test goes primarily to protection of confidential information and more than that is at stake in these cases. However, I believe a single rule is being used today to deal with two quite different issues.

First, in the case of the client being sued by "its" lawyer, the question should be whether a reasonable client in the circumstances of the case would perceive a breach of loyalty, "loyalty" being understood as more than exclusively a financial concept.

Second, in the case of the client on whose behalf suit is brought, the test should be whether there is a credible basis for believing the lawyer may not represent that client wholeheartedly out of a desire to preserve good relations with the client being sued.

At a minimum, courts should require a showing that the proposed suit against a

21. See, e.g., Estates Theaters, Inc. v. Columbia Pictures Indus., Inc., 345 F. Supp. 93 (S.D.N.Y. 1972) (treating the adverseness to a subsidiary as if the adverseness were to the parent corporation being represented by a lawyer in an unrelated matter).

22. See, e.g., Model Rules Rule 1.7(a) ("A lawyer shall not represent a client if the representation of that client will be directly adverse to another client"); Gleeck v. Jonathan Logan, Inc., 653 F.2d 746 (2d Cir. 1981) ("Disqualification will ordinarily be required whenever the subject matter of a suit is sufficiently related to the scope of the matters on which a firm represents an association as to create a realistic risk either that the plaintiff will not be represented with vigor or that unfair advantage will be taken of the defendant"); Formal Op. 95-390, supra note 7 ("A lawyer should not strain to conclude that a proposed representation will not adversely affect his relationship with [a] client").


24. See, e.g., In re Sexson, 613 N.E.2d 841 (Ind. 1993) (presenting a case where the lawyers being sued shared office space).
current client will have a “material” adverse effect on representation of one or both current clients before prohibiting or sanctioning the representation.

The approach suggested here would require an exercise of judgment that might seem to provide less certainty and predictability than a categorical prohibition would produce, but I believe that the opposite would prove true.

DEVELOPMENT OF THE PRESENT RULE

THE YEARS BEFORE 1964

One of the first things to understand about filing suit against one's present client is how relatively recent the prohibition is. In the 1950's, for example, Henry Drinker noted few ethics opinions criticizing the practice, and no reported cases.25 The conflict of interest concerns of the ABA’s ethics canons then applicable26 were simply that: (1) the lawyer not misuse a client's confidential information, (2) work on behalf of one client not “cause the lawyer to contend for that which duty to another client requires him to oppose,” and (3) clients should know whatever facts might cause them to select a different lawyer. Thus, when the partner of a Kentucky prosecutor asked if he could represent civil claimants against a city, the court said: “Laying side by side the canon's definition of conflict of interest and the statute prescribing the prosecutor’s duties to the city we are unable to see any conflict.”27

25. HENRY S. DRINKER, LEGAL ETHICS 111-13 (1953). The issue is taken up largely in passing. Drinker cites N.Y. COUNTY BAR ASSOC. OPINIONS ON PROFESSIONAL ETHICS, Op. 232 (1925) [hereinafter N.Y. COUNTY BAR], for example, saying it was improper for a lawyer representing an executor in administration of an estate to accept a retainer from the executor's wife to sue the executor for divorce. See also N.Y. COUNTY BAR, Op. 292 (1932) (opining that a lawyer may not represent a client who is an adverse party in a separate concurrent action, and that a lawyer may not represent one client in an action against another client while he is also representing both clients in actions against third parties).

In 1934, Formal Opinion 112 had “advise[d] against” a lawyer filing a breach of contract action on behalf of a terminated agent against an insurance company that regularly asked the lawyer to defend workers' compensation cases. Even with the company's consent, the lawyer was told not to accept "employment for a new client in a case where fidelity to the new client may require examination of the motives and the good faith of the insurance company." ABA Comm. on Professional Ethics and Grievances, Formal Op. 112 (1934).

26. Canon 6 provided:

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

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 Canon 6 (1908) [hereinafter 1908 CANONS].

27. In re Advisory Op. of Kentucky State Bar Ass'n, 361 S.W.2d 111, 112 (Ky. Ct. App. 1962). But see, e.g.,
THE YEARS 1964-1976: ROTTNER to CINEMA 5

The principal case establishing the rule against suing a current client seems to have been Grievance Committee v. Rottner. Stewart Twible, Jr., had first consulted the firm of Lessner, Rottner, Karp & Jacobs in 1959 when he sought to sue a doctor and two state policemen who had temporarily confined him to a mental institution. It seems he had been in a fight and was accused of assaulting his son. The firm declined to represent him. Indeed, the lawyer (George Lessner) noted that he thought Twible probably was mentally ill.

Shortly thereafter, however, another lawyer in the firm (Ronald Jacobs) did represent Twible in two collection matters and talked with him about compensation for the death of his dog. The work was done virtually pro bono; Twible paid a total fee of $25. In June, 1962, Twible asked Jacobs to collect $200 from a 19-year-old with no apparent assets. The complaint was filed, but after Jacobs prepared papers needed to get a default judgment, Twible neglected to come in to sign the papers.

This last collection matter was still “open” when on July 31 Thomas O’Brien contacted lawyer Paul Sullivan of the same firm to sue the aggressive Mr. Twible for assault and battery. Lawyer Sullivan did so with a vengeance. He alleged willful, vindictive conduct by Twible, sought punitive damages and attached Twible’s home. That led Twible to complain to the bar association. 29

The firm’s defense was that the O’Brien case had nothing to do with Twible’s collection matter. 30 No confidential information would be compromised, no legal arguments used on Twible’s behalf would now be used against him, and neither O’Brien’s nor Twible’s choice of counsel would reasonably be affected by knowing that Twible’s pending claim was still being handled by the office. However, the Superior Court convicted the firm’s lawyers of a violation, reprimanded them, and ordered them to take no fees for either matter. It held that the conduct violated the “preamble to the canons of professional ethics . . . even apart from any consideration of the existence of a conflict of interest.” 31 Citing a

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28. 203 A.2d 82 (Conn. 1964).
29. Although John Rottner’s name will be forever associated with this case, he was involved only as a senior partner of the firm. He apparently had nothing to do with the underlying facts. Id. at 83-84.
30. Twible could have argued that the original consultation about the fight with his son was “substantially related” to the O’Brien complaint, but apparently did not do so.
31. The preamble to the 1908 Canons provided in part:

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be . . . so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration . . . . It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

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need to maintain "public confidence in the Bar," the court concluded that "a firm may not accept any action against a person whom they are presently representing even though there is no relationship between the two cases." 32

The Connecticut Supreme Court agreed, finding that the rule as stated should be:

rigidly followed by the legal profession. When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion. If, as in this case, he is sued and his home attached by his own attorney, who is representing him in another matter, all feeling of loyalty is necessarily destroyed, and the professional is exposed to the charge that it is interested only in money. 33

Although it found little or no authority to cite in support of its result, the Court was undaunted:

The almost complete absence of authority governing the situation ... clearly indicates to us that the common understanding and the common conscience of the bar is in accord with our holding that such a suit constitutes a reprehensible breach of loyalty and a violation of the preamble to the Canons of Professional Ethics. 34

Rottner, then, turned on the appearance of impropriety, the perceived breach of loyalty to the client being sued. Four years later, in Kelly v. Greason, 35 the principle was invoked again to suspend law partners Kelly and Whalen from the practice of law for two years. In addition to practicing law, Whalen worked as an outside adjuster for Nationwide Insurance. The partnership had filed medical claims with Nationwide on behalf of Nationwide insureds and had brought personal injury cases against defendants insured by Nationwide. The New York Court of Appeals noted:

Potentially, a claimant against an insurance company is adverse in interest to the carrier, which would most often seek to minimize any liability. Thus, it was prima facie evidence of professional misconduct for the partnership to represent claimants, whether assureds of Nationwide or not, in their claims against the carrier, while at the same time Whalen was the carrier's employee. 36

The problem with that theory in this case was that Nationwide had consented

1908 Canons pmbl.
32. Rottner, 203 A.2d at 84 (citing N.Y. COUNTY BAR Op. 450 (1956)).
33. Id. at 84.
34. Id. at 85. A case it did not cite but might have was Memphis & Shelby County Bar Ass’n v. Sanderson, 378 S.W.2d 173 (Tenn. Ct. App. 1963) (discussing how a lawyer simultaneously represented a man in a workers’ compensation case and the man’s wife in their divorce proceedings).
35. 244 N.E.2d 456 (N.Y. 1968).
36. Id. at 944.
to the lawyers’ filing such claims. Thus, the question became whether the lawyers had violated any duty to the claimant clients. The court said such a violation was indeed possible. “[L]oyalty to Nationwide, and concern for Whalen's continued employment by the carrier, could have influenced the effectiveness and vigor with which claims against the carrier were prosecuted.”

Because the disciplinary charge had not focused on whether those clients had also consented, the matter was remanded to take evidence on that issue. The principle established, however, was one that I believe is central to analysis of the rule: The interests of either or both the client being sued and the client on whose behalf suit was brought could be at risk in such a case.

It was yet another four years until the decision in Estates Theaters, Inc. v. Columbia Pictures Industries, Inc., the first case to consider these issues in terms of the new Model Code of Professional Responsibility, came down. The plaintiff was a theater owner in Queens who sued distributors and other theater

37. Id. at 945; see also In re Kushinsky, 247 A.2d 665 (N.J. 1968) (reprimanding a lawyer for representing a corporation in a stockholder action and an individual in a criminal case before a third case against both the corporation and the individual had ended).
39. Relevant parts of the Model Code included:

**Model Code of Professional Responsibility** DR 5-105(A) (1983) [hereinafter Model Code].

In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

**Model Code, supra, DR 5-105(C).**

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

**Model Code, supra, EC 5-1** (citations omitted).

Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

**Model Code, supra, EC 5-14.**

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he ... should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests ... On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his
owners for allegedly conspiring to discriminate against him in availability of films. He was represented by Joseph Ruskay. Ruskay also had another client, United Artists Theater Circuit (UATC), whom he was defending in similar antitrust claims brought by other plaintiffs. UATC was not a defendant in this case, but a UATC subsidiary was alleged to be a beneficiary of the discrimination. Thus, if Ruskay’s client won this case, that subsidiary would lose its alleged advantage.  

Responding to a motion to disqualify Ruskay, Judge Weinfeld reasoned that Ruskay would be tempted not to bring out all the details of the conspiracy because that might give aid to the plaintiffs in the case in which he defended UATC. Following the insight of *Kelly v. Greason*, the court said:

A lawyer should not be permitted to put himself in a position where, even unconsciously he will be tempted to 'soft pedal' his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another.  

Ruskay then said that if he was required to withdraw from one of the cases, he would prefer that it be the other case, the one in which he was defending UATC. That would eliminate any incentive to 'soft pedal' his arguments on behalf of the plaintiffs, the stated ground for his disqualification. However, the court went ahead and disqualified him in the plaintiffs' case instead, saying:

The Rule itself does not vest the choice of withdrawal in the lawyer — to so construe it would do violence to its spirit and purpose. Mr. Ruskay has represented UATC for many years in the consolidated actions, long prior to his retainer by plaintiff herein. To permit him to choose to withdraw from his representation of his first client and to continue as attorney for the second, whose interests are antagonistic to the first, would nullify the objective of the Rule.  

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independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

MODEL CODE, supra, EC 5-15.

In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflicts and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. . . .

MODEL CODE, supra, EC 5-16 (footnote omitted).

40. If that wasn’t confusing enough, if the plaintiff won, it might have disadvantaged UATC by helping the government win yet another case against UATC in which Ruskay also was not involved.

41. *Estate Theater*, 345 F. Supp. at 99. Judge Weinfeld specifically saw the cases as "substantially related," the concept he had earlier initiated even though Ruskay disagreed. See supra text accompanying note 2.

42. Id. at 100; see also Hawk Indus., Inc. v. Bausch & Lomb, Inc., 59 F.R.D. 619 (S.D.N.Y. 1973) (concluding that a firm may not serve as class counsel against a company when it is already counsel for plaintiffs in a derivative action involving the company because in the latter action the corporation was a nominal plaintiff); State v. Galati, 319 A.2d 220 (N.J. 1974) (concluding that a lawyer could not handle a criminal
Then, twelve years after *Rottner* began this short line of cases, *Cinema 5, Ltd. v. Cinerama, Inc.* 43 confirmed and defined the rule. Manly Fleischmann was a partner in both a Buffalo firm and a New York City firm. The Buffalo firm represented Cinerama in two private antitrust cases in Western New York that alleged discriminatory and monopolistic practices in licensing and distribution of films. Later, but while that case was still pending, the New York City firm brought suit *against* Cinerama on a similar charge.

In the district court, Judge Brieant found the cases were "substantially related." He believed Cinerama's ability to trust the confidentiality of what it told its Buffalo defenders required disqualification of the New York City firm from appearing for the plaintiff. If that were the end of the story, the case would not have been memorable. In affirming disqualification, however, the Court of Appeals for the Second Circuit held that the "substantial relationship" test applied to cases involving *former* clients, but not to cases like this one that involved *current* clients.

The propriety of this conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients. . . . When Cinerama retained Mr. Fleischmann as its attorney in the Western District litigation, it was entitled to feel that at least until that limitation was at an end, it had his undivided loyalty as its advocate and champion. . . . [W]hen Mr. Fleischmann and his New York City partners undertook to represent Cinema 5, Ltd., they owed it the same fiduciary duty of undivided loyalty and allegiance. 44

The court went on to define the test to be applied in such cases:

Whether such adverse representation, without more, requires disqualification in every case, is a matter we need not now decide. We do hold, however, that the "substantial relationship" test does not set a sufficiently high standard by which the necessity for disqualification should be determined. . . . Where the relationship is a continuing one, adverse representation is prima facie improper and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation. We think that appellants have failed to meet this heavy burden. 45

defense on behalf of an officer belonging to the Policemen's Benevolent Association if the officer was called to testify, because the lawyer represented the PBA and had a trust relationship with its members); Sokoloff v. Sokoloff, 371 N.Y.S.2d 106 (Fam. Ct. 1975) (denying a petition for fees by a wife's divorce lawyer to be paid by the husband, because the lawyer was concurrently representing the husband in connection with the sale of a business).

43. 528 F.2d 1384 (2d Cir. 1976).

44. Id. at 1386 (citation omitted).

45. Id. at 1387 (citation omitted). Even though the court was confident Fleischmann would avoid being personally involved in either case, it stated that it could not "impair this same confidence to the public by court order." Id. at n.1. *Cinema 5* was soon followed in *Rubinstein v. Foster Bros. Mfg. Co.*, 382 N.Y.S.2d 111 (App.
I believe the prima facie standard of *Cinema 5* was the correct standard and that reading it as a virtual per se prohibition has been a serious mistake. To see how that mistake happened, however, requires a look at yet more cases.

**The Years 1977 to 1983: Cinema 5 to the Model Rules**

The cases decided in the critical period after *Cinema 5* but before adoption of the *Model Rules* exhibit no single pattern. Some courts tended to be more sensitive than others to the need to strike a balance between the clients’ interest in free choice of counsel and their interest in avoiding the adverse consequences of dealing with a lawyer who has conflicting loyalties.

*Jeffry v. Pounds,* the leading California case, for example, was a suit for attorney’s fees. Pounds was injured in an auto accident and retained Jeffry’s firm to sue for damages. Meanwhile, Pounds retained a different firm to represent him in his divorce. At that point, Mrs. Pounds hired the Jeffry firm as her divorce counsel. When he learned that, Pounds fired the Jeffry firm as his lawyers in the accident case, but when that case settled, the firm claimed $500 for work it had
done before it was fired. It argued that it had not misused any client confidences or failed to vigorously pursue Pounds' interest in the case as long as it was representing him. Citing both *Cinema 5* and *Rottner*, the court stated:

Professional responsibility rules seek the objective of public confidence, as well as internal integrity. A lay client is likely to doubt the loyalty of a lawyer who undertakes to oppose him in an unrelated matter... [The basis of the conflict] is the client's loss of confidence, not the attorney's inner conflicts.49

A categorical approach to these issues was found to be even less justified where what was challenged was not the act of filing suit against a current client, but rather some other kind of work the lawyer did for the client. *City Council v. Sakai*50 was part of a series of events in which the city council had investigated the mayor of Honolulu. It had hired a law firm to conduct the inquiry and it had to file suit to get the firm paid. The law firm had other clients on whose behalf it had filed suit against the city, so the city treasurer said the firm was entitled to no fee.51 The Court, however, found no conflict of interest:

The critical question is whether... [the firm's] independent professional judgment would be or was likely to be adversely affected by the existence of their professional obligations to their private clients. There is nothing to suggest that the investigation with respect to which they were employed would touch in any way upon the subject matter of the pending actions... As is pointed out in EC 5-15, a lawyer may properly serve multiple clients having potentially differing interests more freely in matters not involving litigation.52

The court thus distinguished cases like *Cinema 5, Rottner*, and *Jeffry v. Pounds* and awarded the firm the agreed upon fee.53

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49. *Jeffry*, 136 Cal. Rptr. at 376-77 (footnote omitted). However, suggesting some sensitivity to the competing interests involved, the court allowed fees for the period before the lawyers agreed to handle the divorce rather than imposing a punitive fee forfeiture. *Id.* at 377; see also, *In re Hansen*, 536 P.2d 413 (Utah 1978) (ordering a lawyer to refund the first client's retainer because the lawyer represented the new owner of an auto dealership against a suit for an accounting by the former owner and also represented former owner on an unrelated criminal charge of receiving stolen property).

50. *See also Perillo v. Advisory Comm. on Professional Ethics*, 416 A.2d 801 (N.J. 1980) (prohibiting a city's law department from bringing cases against municipal employees, including police officers, with whom they worked with regularity on other cases); *City of Little Rock v. Cash*, 644 S.W.2d 229 (Ark. 1982) (holding that a lawyer who successfully sued to have the city's privilege taxes declared unconstitutional should be denied fees because, at the same time, he was representing the city in a suit against the police); *In re Lantz*, 442 N.E.2d 989 (Ind. 1982) (finding that a part-time prosecutor deserved a public reprimand for not objecting to the release of a defendant, whom prosecutor had previously represented in a private civil suit, and who had been jailed for disorderly conduct and failed to appear later in court).

51. See also supra note 26.


53. The distinction between suing a present client and handling other kinds of transactions is also seen in *In re Ainsworth*, 614 P.2d 1127 (Or. 1980). There, a lawyer represented a lienholder in the sale of a parcel of land to
In other cases, however, the rhetoric was substantially more inflamed. Indeed, courts sometimes seemed to stretch to impose a categorical principle in cases that could have been decided more simply. In 1977, the same year Jeffry and Sakai were decided, the Court of Appeals for the Second Circuit considered Fund of Funds, Ltd. v. Arthur Andersen & Co.\textsuperscript{54} There, Morgan, Lewis & Bockius represented Fund of Funds in a suit alleging that King Resources fraudulently sold assets to the Fund at inflated prices. Arthur Andersen had been Fund of Funds' auditor and it allegedly had negligently failed to warn its client. Morgan, Lewis had been long-time counsel to Arthur Andersen and one could have argued that this case was "substantially related" to work it had done for Andersen.\textsuperscript{55}

Morgan, Lewis concluded that it could not be the one to file suit against Andersen on the Fund's behalf, and it tried to erect a "Chinese Wall" between its Andersen lawyers and those working for Fund of Funds. Morgan, Lewis got a lawyer named Robert Meister to serve as its "understudy" in the case and when a suit against Andersen became inevitable, Meister filed it. The district court had refused to disqualify Meister, but the appellate court reversed, stating in sweeping dicta:

It is clear that ... Morgan Lewis would have been disqualified had it sued or attempted to sue Andersen. As a current and actual client at the time Morgan Lewis accepted the retainer from Fund of Funds, Andersen had an absolute right to the firm's undivided loyalty.\textsuperscript{56}

Asserting that Morgan, Lewis may not "violate by indirection those very strictures it cannot directly contravene,"\textsuperscript{57} the court concluded that Meister should be disqualified as well.

\textsuperscript{54} 567 F.2d 223 (2d Cir. 1977).

\textsuperscript{55} See also Kentucky Bar Ass'n v. Roberts, 379 S.W.2d 107 (Ky. 1979) (concluding that two cases arose from common facts and competed for a doctor's limited funds where the doctor contracted to build an office building and the contractor and building supervisor engaged in separate disputes with the doctor); Sapienza v. N.Y. News, 481 F. Supp. 676 (S.D.N.Y. 1979) (finding great commonality of facts in two cases and disqualifying lawyer from representing plaintiffs where lawyer had represented individual in a distribution contract with the New York News and then filed an antitrust action against the individual on behalf of newboys with whom the individual dealt); In re Hershberger, 606 P.2d 623 (Or. 1980) (reprimanding lawyer who, while representing a couple in bankruptcy proceedings, filed suit to foreclose property from which it conducted its business); People ex rel. Cortez v. Calvert, 617 P.2d 797 (Colo. 1980) (finding multiple conflicts where lawyer had become involved in disputes involving three people, two of whom wanted to marry the third); Financial Gen. Bankshares, Inc. v. Metzger, 523 F. Supp. 744 (D.D.C. 1981) (finding that lawyer breached fiduciary duty by helping one client secretly buy a twenty percent interest in a second client).

\textsuperscript{56} Funds of Funds, 567 F.2d at 232 (emphasis added).

\textsuperscript{57} Id. at 233.
The principle was also extended to criminal cases. Zuck v. Alabama, for example, was a case seeking habeas corpus for a prisoner sentenced to forty years for murder. The law firm Zuck had retained to represent him was simultaneously representing the prosecutor in an unrelated civil matter. The prosecutor and trial judge both knew about the other matter, but no one thought to tell Zuck or get his consent to what was said to be a conflict of interest. The court rejected the argument that the Cinema 5 principle was not involved because the prosecutor was not a "party" to the criminal case.

The prosecutor and the defense attorneys here were adversaries for the purpose of this trial. It is sufficient to establish a constitutional violation that the defense attorneys owed a duty to Zuck to endeavor to refute the prosecutor's arguments and impeach his witnesses. The defense attorneys were subject to the encumbrance that the prosecutor might take umbrage at a vigorous defense of Zuck and dispense with the services of their firm.

An appellate record would be insufficient to detect an actual conflict, the court said.

For this reason, the mere existence of a temptation in the abstract is sufficient to preclude duality of representation. A defense attorney must be free to use all his skills to provide the best possible defense for his client. Despite the noblest of intentions, the defense attorneys here may have been tempted to be less zealous than they should have been in the presentation of Zuck's case. This possibility is sufficient to constitute an actual conflict of interest as a matter of law.

58. 588 F.2d 436 (5th Cir. 1979).
59.  Id. at 439.
60.  Id. at 440. In another case, a lawyer who advised his client to plead guilty was found to have been representing the victims of the robbery in an unrelated civil matter. The court granted habeas corpus, stating:

It takes no great understanding of human nature to realize that the individuals who had been burglarized might be less than happy and might go so far as to remove the attorney from their good graces if this defendant were acquitted or received a light sentence or were placed on probation. Moreover, if the case had gone to trial it might have meant an investigation involving the Carpenters and even cross-examination of them on the stand. The entire situation could be very embarrassing for the lawyer who is naturally interested in having the legal business of the Carpenters, especially when they are much more able to compensate him for his services than the defendant. The circumstances here are such that an attorney cannot properly represent two masters.

United States ex rel. Miller v. Myers, 253 F. Supp. 55, 57 (E.D. Pa. 1966); see also People v. Stovall, 239 N.E.2d 441 (Ill. 1968) (finding that not even consent by defendant, a burglar, could overcome conflict where defendant's lawyer had long represented the victim of the crime in civil matters); People v. Castro, 657 P.2d 932 (Colo. 1983) (reversing murder conviction because appointed defense counsel was also acting as lawyer for the district attorney in a challenge to a recall petition and a criminal prosecution accusing him of overspending his budget); In re Garber, 472 A.2d 566 (N.J. 1984) (holding that eyewitness to alleged gangland murder and accused where "adversaries" creating a conflict of interest for lawyer who represented eyewitness in this case and the accused in unrelated matters); Okeani v. Superior Court, 871 P.2d 727 (Ariz. 1993) (holding that public defender's office could not represent both perpetrator and victim where one public defender represented the
However, the key case helping to develop the perception of a categorical principle against suing a present client was certainly *IBM v. Levin*. It was an antitrust case filed in 1972 by Carpenter, Bennett & Morrissey (CBM) on behalf of Levin Computer Corp. (LCC) who wanted to compel IBM to deal with LCC. Five years later, in 1977, IBM moved to disqualify CBM. It turned out that in 1970, IBM had asked CBM to write an opinion letter for it in a labor matter; CBM got two other assignments in 1970 & 1971. In 1972, when the fourth request came in, CBM says it told IBM of the pending antitrust case and was told IBM would waive the conflict. IBM denied the conversation. CBM clearly did get consent from LCC and it filed the case a week after writing the fourth opinion letter. Even after the case was filed, IBM sent CBM four more requests for opinion letters to CBM without raising an objection to its representation of LCC.

CBM tried to rebut the prima facie approach taken in *Cinema 5*. It argued that no adverse effect on its independent professional judgment in its opinion letters for IBM could possibly arise from its work for LCC, nor would the fees generated from a few letters cause the firm to soft pedal its prosecution of the antitrust claim. The Court’s response, however, treated the prima facie test as if it were an irrebuttable prohibition.

We think . . . it is likely that some ‘adverse effect’ on an attorney’s exercise of his independent judgment on behalf of a client may result from the attorney’s adversary posture toward that client in another legal matter. For example, a possible effect on the quality of the attorney’s services on behalf of the client being sued may be a diminution in the vigor of his representation of the client in the other matter. A serious effect on the attorney-client relationship may follow

defendant in a sexual assault case, another represented the victim in a juvenile matter, and the first public defender wanted victim’s file to impeach her testimony at the sexual assault case). *But see State v. Carpenter*, 405 F.2d 460 (Ariz. Ct. App. 1965) (disapproving of lawyer’s conduct but declining to set aside conviction of husband and wife for abuse and neglect of their child, where lawyer represented both during child abuse case and wife in seeking divorce from husband). *Cf. In re Cohn*, 216 A.2d 1 (N.J. 1966) (suspending lawyer for representing both underage drunk driver in accident case and the tavern that sold him the liquor in a license revocation case).

61. 579 F.2d 271 (3d Cir. 1978).

62. Other cases during this period found waiver or lack of standing. In *Melamed v. ITT Continental Baking Co.*, an antitrust action filed by Winston & Strawn on behalf of Laub Baking Co., Continental alleged Winston & Strawn also represented two of Continental’s competitors that it should also have sued but could not because of this ethics rule. 592 F.2d 290 (6th Cir. 1979). Thus, in the interest of Laub (who was not complaining), it asked that Winston & Strawn be disqualified so that the competitors could be sued as well. The court found full disclosure to Laub, plus consent, and refused to disqualify on the complaint of someone who was not a client in the proceeding.

In *United Nuclear Corp. v. General Atomic Co.*, an antitrust suit against, among others, Gulf Oil Co., some of the charges claimed that Gulf allegedly delayed production from its reserves in New Mexico. 629 F.2d 231 (N.M. 1980). For ten months of the case United Nuclear’s counsel was representing Gulf perfecting mining rights and settling title claims there. The court found the simultaneous representation raised an “ethical question of serious dimensions.” 629 F.2d at 319. However, delay in filing the disqualification motion warranted denying it.
if the client discovers from a source other than the attorney that he is being sued in a different matter by the attorney. The fact that a deleterious result cannot be identified subsequently as having actually occurred does not refute the existence of a likelihood of its occurrence, depending upon the facts and circumstances, at the time the decision was made to represent the client without having obtained his consent. 63

Indeed, the Court noted approvingly, some have said "doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification." 64

63. IBM, 579 F.2d at 280. The court found that CBM had failed to get IBM's consent; the fact that IBM knew about the representation was not enough. "[F]ull and effective disclosure of all the relevant facts must be made and brought home to the prospective client." Id. at 282.

The Restatement calls for an abbreviated requirement of informing the client in most cases within the subject of this Article:

Where the conflict arises solely because a proposed representation will be adverse to an existing client in an unrelated matter, disclosure of the general nature and scope of the work being performed for each client will normally suffice to enable both clients to decide whether or not to consent.

RESTATEMENT, supra note 3, § 202 cmt. c(1).

The impossibility of getting consent doomed the lawyer in Chateau de Ville Productions, Inc. v. Toms-Witmark Music Library, Inc., an antitrust class action brought by theatrical theaters against a multiple copyright licensor. 474 F. Supp. 723 (S.D.N.Y. 1979). A member of the class was also a general partner in the owner of one of the key copyrights at issue. Thus, the class represented a co-conspirator and potential defendant. The court held the representation improper, since a class was in no position to consent to a conflict.

In United Sewerage Agency v. Jelco, prime contractor Jelco was represented in a dispute with one subcontractor by the law firm that long had represented a second subcontractor. 646 F.2d 1339 (9th Cir. 1981). A dispute arose between Jelco and the second subcontractor. Jelco argued that the firm should be disqualified. The court found that Jelco knew about and consented to the firm's representation of the second subcontractor in any such litigation. The question became whether it was "obvious" the firm could adequately protect the interest of each client:

In determining whether it is obvious that an attorney can represent adverse parties, the court should look at factors such as: the nature of the litigation; the type of information to which the lawyer may have had access; whether the client is in a position to protect his interests or know whether he will be vulnerable to disadvantage as a result of the multiple representation; the questions in dispute (e.g., statutory construction versus disputes over facts) and whether a government body is involved.

Id. at 1350. The court held that the substance of these cases was completely different and there was no danger of a leak of confidential information, so the motion to disqualify was denied.

64. 579 F.2d at 283. A much different view of disqualification was taken in Board of Educ. v. Nyquist, a case filed by the city to determine whether it had to maintain separate seniority lists for male and female teachers. 590 F.2d 1241 (2d Cir. 1979). Female teachers retained their own counsel, while male teachers retained the teacher's union firm, which represented male and female teachers in collective bargaining. Female teachers sought to disqualify the firm on grounds that it represented them in collective matters while opposing them in this matter. The court said disqualification was required only if "necessary to preserve the integrity of the adversary process." Id. at 1246. "With rare exceptions" those were two kinds of cases: "(1) where [the conflict] . . . undermines the court's confidence in the vigor of the attorney's representation of his client [citing Fund of Funds & Cinema], or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation . . . thus giving his present client an unfair advantage." Id. The "appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases." Id. In this case, the appearance "is not very clear" so disqualification was not ordered. Id. at 1247. See also Whiting Corp. v. White Machinery Corp., 567 F.2d 713
Just a year later, in *Pennwalt v. Plough*, the suit was not against the lawyer's client, but a member of the client's corporate family. Dechert, Price & Rhoads' long-time client Pennwalt made DESENEX. Defendant Plough made AFTATE, a competing product whose advertisements were allegedly unfair. A year after presenting Pennwalt's initial complaint about the advertising to Plough, Dechert undertook to defend Scholl, Inc., in a clearly unrelated antitrust action alleging resale price maintenance in shoe sales.

Ten months after assuming that defense, Scholl became a wholly-owned subsidiary of Schering-Plough; Plough already was such a subsidiary, so Plough and Scholl had become sister corporations. The month after Scholl's acquisition, Pennwalt (through Dechert) filed suit against Plough on the unfair competition claim. Dechert made no disclosure to and sought no consent from Pennwalt, Scholl or Plough. Thereupon, Schering-Plough asked Dechert to withdraw from representing Pennwalt and to continue representing Scholl. Because it had represented Pennwalt much longer, Dechert sought to withdraw from representing Scholl instead. The court appropriately approached the case "with caution".

The proliferation of national or multi-national public corporations owning or partially owning subsidiaries which may also be national or multi-national, the spawning of varied types of corporate affiliates, and the creation of joint ventures yield an infinite variety of potential disqualification problems. The potential for inadvertent unethical conduct is exacerbated by the pronounced trend toward national and international law firms. . . . The urged prophylactic rule for disqualification where there is concurrent dual representation of sister corporations cannot be accepted for the simple factual reason that [Dechert] has never represented Plough or Schering-Plough."

The fundamental issue, in the court's view, was the risk to confidential information. It found no such risk. However, it stated that loyalty to one's clients is also an important value. Thus,

the court properly may examine the relationship between the sister corporations. The object of this inquiry is not to determine whether Plough can be affixed with the label "client." Rather, it is to gauge the degree, if any, to which

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(7th Cir. 1977) (per curiam) (declining to disqualify a law firm from representing the plaintiff, or from representing the Hendrickson Co., a twenty percent shareholder in defendant, who elected forty percent of defendant's board).


66. In fact, at the time the cases were pending, Scholl was itself considering marketing an athletes' foot powder similar to the AFTATE which was the subject of Dechert's complaint in the Pennwalt suit, but Dechert was not involved in that work.

67. *Pennwalt*, 85 F.R.D. at 267-68. The court acknowledged, however, that representation "has been prohibited . . . even though the attorney-client relationship never existed." *Id.*

68. "[I]t is unrealistic to conclude that any of the confidential information provided by Scholl is relevant to any issue in this Lanham Act litigation involving the relative merits of athlete's foot remedies." *Id.* at 270-71.
DP&R’s representation of either Pennwalt or Scholl may be influenced by a regard for the alternate client’s welfare.\(^\text{69}\)

The court found no such effect and refused to second-guess the firm’s choice which client to represent.\(^\text{70}\)

Finally, a combination of a relatively broad reading of the Cinema 5 prohibition but substantial caution before invoking disqualification is seen in *Glueck v. Jonathan Logan, Inc.*\(^\text{71}\) The defendant sought to disqualify Phillips Nizer from representing the plaintiff in an action for wrongful termination of an executive with primary emphasis on Nizer’s violation of Canon 5.\(^\text{72}\) Phillips Nizer also represented the Apparel Manufacturers Association, of which the defendant was a large member, so the issue was whether a lawyer could file suit against a member of an incorporated association. The district court noted that the Association’s principal function was negotiation of a collective bargaining agreement. In that work, the firm clearly represented the interests of the defendant, Jonathan Logan, and possibly worked with Logan’s confidential information.\(^\text{73}\)

The issue is not solely whether Phillips Nizer has acquired confidential information concerning defendant, but . . . whether defendant’s representatives (even if simultaneously acting as AMA officials) must be on guard in their discussions with Phillips Nizer to avoid disclosures having any possible consequence in this action. Such is not the environment contemplated for an attorney-client relationship by the drafters of Canon 5.\(^\text{74}\)

The Court of Appeals for the Second Circuit agreed that Phillips Nizer must be disqualified on these facts, but drew an important distinction.

We do not believe the strict standards of Cinema 5 are inevitably invoked whenever a law firm brings suit against a member of an association that the firm represents. If they were, many lawyers would be needlessly disqualified because the standards of Canon 5 impose upon counsel who seeks to avoid disqualification a burden so heavy that it will rarely be met. That burden is

\(^{69}\) *Id.* at 272.

\(^{70}\) The court expressly found that Dechert had not been merely "choosing to represent the more favored client and withdrawing its representation of the other. Such conduct is expressly disfavored." *Id.*

\(^{71}\) Representation of sister corporations is a subject with which this Article does not deal directly, but some examples of cases include Original Appalachian Artworks, Inc. v. May Dep’t Stores, 649 F. Supp. 751 (N.D. Ill. 1986); *In re Wingspread Corp.*, 152 B.R. 861 (Bankr. S.D.N.Y. 1993); Apex Oil Co. v. Wickland Oil Co., 1995 WL 292944 (E.D. Cal. 1995).

\(^{72}\) *512 F. Supp. 223 (S.D.N.Y.), aff’d, 653 F.2d 746 (2d Cir. 1981).*

\(^{73}\) *Id.* at 225 (proving that under Canon 5 of the Model Code of Professional Responsibility "[a lawyer should exercise independent professional judgment on behalf of a client]").

\(^{74}\) *Glueck*, 512 F. Supp. at 228.
properly imposed when a lawyer undertakes to represent two adverse parties, both of which are his clients in the traditional sense. But when an adverse party is only a vicarious client by virtue of membership in an association, the risks against which Canon 5 guards will not inevitably arise. A law firm that represents the American Bar Association need not decline to represent a client injured by an automobile driven by a member of the ABA. Moreover, if Canon 5 were applicable to all suits against association members, there would be a temptation to water down the strict standards of Canon 5 and find them met more easily than in cases where the adverse parties are really clients of the same lawyer. . . . We think the standards of Canon 5 should be left as strict as Cinema 5 announced them. We also believe those standards should apply to suits against association members only when the risks against which Canon 5 protects are likely to arise.75

Scholarly articles on these developments were of little significance in the law's development.76 An important exception may have been the Developments Note published by the Harvard Law Review in 1981.77 The Developments Note ignored the prima facie language of Cinema 5 and spoke instead of a "prophylactic rule." It saw two quite different rationales for prohibiting "serving two masters in two matters" that had not sufficiently been distinguished.

The primary danger is that an attorney who represents adverse interests may develop a 'sense of loyalty' to one client that will 'undermine' his representation of the other. . . . [In other cases, however, the prohibition should instead be viewed as reflecting in addition the need to protect certain client expectations and thereby to promote a trusting and harmonious attorney-client relationship. 78

Putting the Developments Note's argument in terms of our original illustration, Able & Baker might be tempted to "outright betray[]" Marlene Wilson so as to stay in General Manufacturing's good graces. "More likely," the firm might represent her "less vigorously in order to avoid antagonizing" the larger client.79 General Manufacturing would not fear a loss of vigor, but it could fear that concurrent representation "jeopardizes the good will and trust that are vital to the proper functioning of the attorney-client relationship."80

This Article agrees that the distinction drawn by the Developments Note is very

75. Glueck, 653 F.2d at 749.
76. Indeed, excellent articles on conflicts of interest written during this period seem not to have acknowledged the issues at all. See, e.g., Robert H. Aronson, Conflict of Interest, 52 WASH. L. REV. 807 (1977) (ignoring the issue); Nancy J. Moore, Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy, 61 TEX. L. REV. 211 (1982) (overlooking the subject).
78. Id. at 1297-98.
79. Id. at 1298-99.
80. Id. at 1303.
important, but its application to the illustration suggests why a per se prohibition makes no sense. Able & Baker's incentive to pursue Ms. Wilson's contingent fee case to a large settlement or verdict is obvious and unlikely to be affected by its representation of General Manufacturing. And, the "relationship" Able & Baker has had with General Manufacturing has been so modest as to leave almost nothing to impair.

THE SURPRISE APPEARANCE OF MODEL RULE 1.7(a)

The next major development of these principles, however, came not from the courts but from adoption of the Model Rules. Although case law involving filing suit against a present client had developed under both the language of Canon 6 of the 1908 Canons81 and Canons 5 & 9 of the Code of Professional Responsibility, it was not until adoption of Model Rule 1.7(a) and its prohibition against taking a position "directly adverse" to a present client that a categorical prohibition seemed to be officially endorsed. That impact of Model Rule 1.7(a) has been unfortunate, because far from reflecting a careful choice to create a categorical standard, Model Rule 1.7(a) seems largely to have been a last-minute, backdoor addition to the Model Rules.

The first discussion draft of the Kutak Commission's proposed Model Rules was dated Jan. 30, 1980.82 At that time, present Model Rule 1.783 took a very traditional, general approach to conflicts.

In circumstances in which a lawyer has interests, commitments, or responsibilities that may adversely affect the representation of a client, a lawyer shall not represent the client unless ... the services contemplated in the representation can otherwise be performed in accordance with the rules of professional conduct; and ... the client consents after adequate disclosure of the circumstances.84

Suits against current clients were addressed solely in the Comment to the Rule:

Ordinarily a lawyer may not act as advocate against a person the lawyer represents in some other matter, even if the litigation is wholly unrelated. For example, a lawyer could not properly prosecute a breach of contract action against a person for whom the lawyer is preparing an estate plan. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer engaged in a suit against a large corporation may accept

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81. 1908 CANONS, supra note 26.
82. The commission was universally known by the name of its energetic chairman, Robert J. Kutak. Its official name was the Commission on Evaluation of Professional Standards. It began work in the late 1970s and the Model Rules were adopted in February 1983.
83. At the time this rule was proposed, it was numbered Rule 1.8. Shortly thereafter, it was renumbered Rule 1.7 and remains so today.
84. MODEL RULES Rule 1.7 (1980).
employment by the corporation in an unrelated matter if doing so will not affect
the lawyer’s conduct of the suit and if both the litigant and the corporation’s
counsel consent upon adequate disclosure. Whether concurrent representation
is proper can depend upon the nature of the litigation. For example, a suit
charging fraud entails conflict to a degree not involved in a suit for declaratory
judgment concerning statutory interpretation. 85

In short, the Commission recognized the general principle embodied in the
earlier cases, but it did not take a position in the black letter. Indeed, even the
Comment said only that “ordinarily” the prohibition applied, and that a lawyer
should be able to consider the “nature of the litigation,” the effect on “the
lawyer’s conduct of the suit,” and whether there was “consent upon adequate
disclosure.” 86

In the extensive, often intense, debates over adoption of the Model Rules, few
issues escaped public contention. However, one that largely escaped serious
challenge was Model Rule 1.7 on conflicts of interest. The text did become more
elaborate, but even as late as June 1982, in the first draft sent for debate by the
ABA House of Delegates, Model Rules 1.7(a) & (b) taken together read almost
exactly as Model Rule 1.7(b) does today:

(a) A lawyer shall not represent a client when the representation will be
adversely affected by the lawyer’s responsibilities to another client or to a third
person, or by the lawyer’s own interests.

(b) When the courses of action on behalf of the client may be materially
limited by the lawyer’s responsibilities to another client or to a third person, or
by the lawyer’s own interests, the lawyer shall not represent the client unless:
(1) The lawyer reasonably believes the representation will not be adversely
affected; and
(2) The client consents after consultation. 87

Model Rule 1.7 was not debated at the August 1982 annual meeting. However,
the Commission’s final version for consideration at the February 1983 meeting,

85. Model Rules Rule 1.7 cmt.
86. Id.
87. Model Rules Rule 1.7 (1982). The unrelated matter issue remained a subject for the comment, which
largely tracked the original version quoted above, except for some differences:

Ordinarily a lawyer may not act as advocate against a person the lawyer represents in some other
matter, even if the other matter is wholly unrelated. However, there are circumstances in which a
lawyer may act as advocate against a client. For example, a lawyer engaged in a suit against an
enterprise with diverse operations may accept employment in an unrelated matter if doing so will not
affect the lawyer’s conduct of the suit and if both clients consent upon disclosure. By the same token,
government lawyers in some circumstances may represent government employees in proceedings in
which a government agency is the opposing party. The propriety of concurrent representation can
depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree
not involved in a suit for declaratory judgment concerning statutory interpretation.

Model Rules Rule 1.7 cmt (1982).
published in the November 1982 ABA Journal, was quite different. Model Rule 1.7(a) as proposed and ultimately adopted without amendment read:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation. 88

The reason for the change was not explained. 89 One might suspect that it reflected a compromise with ATLA, 90 but ATLA's own proposal had not addressed the issue at all.

88. What was in the earlier drafts as Rules 1.7 (a) and (b) became Rule 1.7(b):

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after disclosure. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES Rule 1.7(b) (1983).

89. There seems to be no published explanation about the change in language, and even members of the House of Delegates were apparently puzzled. Some people believed the new language authorized representing plaintiff and defendant in the same case. Instead, delegates were told:

[T]he provision was intended to cover a situation of "technical adversity." The rule was not intended to generally allow a lawyer to represent both sides of a particular matter. Rather, it was intended to allow a lawyer to represent a client in one matter and be engaged in representation adverse to that client in a different matter, if both clients consent. It was observed that this kind of situation most often arose in small communities where the choice of lawyers was more limited.


Not cited by the commission, but a parallel and possibly related development within the ABA, was Informal Opinion 1495. A lawyer wanted to file suit on a commercial claim against a corporate client the lawyer represented in a personal injury case. The committee held that representation would be improper even if the corporation had employed the services of every firm in town in minor matters.

The Committee views [DR 5-105(A) and EC 5-1] as clearly prohibiting a lawyer from representing one client in litigation against another client the lawyer simultaneously represents, without, at the least, the consent of both the clients after a full and frank disclosure of the possible consequences of the dual representation. . . . The duty of loyalty . . . demands that the client not be concerned about who in the business organization the lawyer may come into contact with, what the lawyer may learn or be told, or whether the lawyer may subconsciously be influenced by the differing interests of another.

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1495 (1982); see also McCourt Co., Inc. v. FPC Properties, Inc., 434 N.E.2d 1234 (Mass. 1982) (citing the cases discussed earlier in this Article to reverse trial court's decision not to disqualify; trial court had found that there was no adverse effect on the lawyer's independent judgment, the interests represented were different but not "differing" and there was no showing that either client would fail to get good service).

Additional language in the Comment purported to reflect the new text.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interest are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients . . . . \(^{91}\)

The "legal background" memorandum that accompanied the final proposal reflected most of the policy and history discussed earlier in this Article, \(^{92}\) but the actual text of Model Rule 1.7(a) tried to sum everything up in the words "directly adverse." I respectfully suggest that "directly adverse" does not communicate the relevant policies well at all. "Directly" implies that the question should be how the parties are aligned; in fact, the issues should be whether the breach of loyalty is real or the impact on professional judgment substantial. \(^{93}\) Both of those

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91. Model Rules Rule 1.7 cmt (1982). The rest of the relevant comment was changed only slightly from the previous draft:

Ordinarily a lawyer may not act as advocate against a person the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for declaratory judgment concerning statutory interpretation.\(^{Id.}\)

92. That memorandum was later published as the "legal background" in Model Rules of Professional Conduct Ann. (1984).

93. In an excellent treatise on the Model Rules, Hazard and Hodes try bravely to explain Model Rule 1.7(a), but the discussion largely serves to demonstrate how poorly the "directly adverse" language works. The writers suggest that the terms "direct" and "indirect" adversity as used in the rule and comment describe the ends of a spectrum:

The prohibition in Rule 1.7(a) against representation of client whose interests are "directly" adverse implies that concurrent representation of clients whose interests are only "indirectly" or "generally" adverse is not prohibited (at least by this subsection). The Comment adopts this interpretation, and gives as an example the case of clients whose "adversity" is simply that they are competing businesses. At the other end of the spectrum, there is no more direct a conflict than between plaintiff and defendant in the same lawsuit . . . . Many intermediate levels of "directness" of conflict are possible, quite apart from the level of animosity involved. A manufacturer and its supplier are in more direct relationship with each other than two competing businesses, for example, but their relationship is normally one of reciprocity rather than conflict . . . . The direct-remote distinction . . . calls attention not simply to the clients' general economic interests, but specifically to the transactions in which the clients employ the lawyer's services . . . . The question is always whether the same lawyer may serve both clients loyally. At one end of the continuum of conflict situations are those where the lawyer may serve the respective clients without their individual consent because the transactions are quite distinct.
genuine concerns were already the subject of Rule 1.7(b). Thus, Rule 1.7(a) is not only surplusage; it is distracting and misleading.

THE PERIOD SINCE ADOPTION OF THE MODEL RULES: 1983 TO 1995

For better or worse, we have to live with Model Rule 1.7(a) until it is amended. At the very least, however, we should not make its effects worse by reasoning primarily from the words “directly adverse” to apply the rule to concrete cases. We should try to keep the focus on the rule’s underlying purposes.

Approximately seventy reported cases and ethics opinions have been issued on the subjects of this Article since adoption of the Model Rules. Some show hopeful signs of being decided on the right grounds. Others, however, represent the kind of wooden application of the principles to which I believe the ambiguity of Model Rule 1.7(a) contributes.

Harte Biltmore Ltd. v. First Pennsylvania Bank, for example, disqualified counsel for the bank that was defending a suit brought by some borrowers who alleged interest had been improperly calculated and charged on their loans. Bank counsel was a Pittsburgh firm. Because of an error in its index of client names, the firm failed to discover that its Florida office was concurrently representing one of the plaintiff borrowers in a completely separate malicious prosecution action against the condominium where he lived. When the firm realized the situation, it tried to withdraw from the malicious prosecution case. The court said disqualification from representation of the bank could not be mooted by the withdrawal; otherwise, the firm could “always convert a present client into a ‘former client’ by choosing when to cease to represent the disfavored client.” The court did not find any significant sense of “betrayal” of the individual client, Mr. Harte; there was no possibility of misuse of the confidential information of either client and no likelihood the firm would “soft pedal” its defense of the bank’s interest. Nevertheless, the court found a “likelihood of public suspicion or obloquy” from failing to represent Mr. Harte and continuing to represent the firm’s bank client.

At an intermediate point are situations where the lawyer may represent both clients only with the consent of each because the legal aspects of the transactions are substantially related and entail client interests that are adverse. At the other end of the continuum are situations where concurrent representation is impermissible even with client consent.


Even after working through the above explanation, I respectfully suggest one is left with no real clue when and why a per se conflict should or should not be found and consent must or need not be sought.

95. Id. at 421 (quoting Unified Sewerage Agency v. Jelco, Inc. 646 F.2d 1339, 1345 n.4 (9th Cir. 1981)).
96. The patent field has produced a number of cases where the representation seems wholly unrelated and the “loyalty” demanded by corporate clienets seems unreasonable, particularly in a field where costs imposed by the rule are high because the number of available patent firms is relatively less than in other fields of law. See, e.g., Ransburg Corp. v. Champion Spark Plug Co., 648 F. Supp. 1040 (N.D. Ill. 1986) (finding an adverse effect on Champion where the Chicago office of the William firm represented Ransburg, while as of counsel of the law firm’s new Toledo office prosecuted unrelated patents on behalf of Champion); Kabl Pharmacia AB v. Alcon
Stratagem Development Corp. v. Heron International N.V. was a suit for alleged breach of a contract to form a joint venture to erect a building. Defendant moved to disqualify plaintiff's counsel because the firm also represented a wholly-owned subsidiary of the defendant in a dispute with security guards at another building. The plaintiff's firm had been dealing with defendant in all the negotiations over the new project; no one suggested there was anything wrong with that. The objection came when litigation was threatened. The firm offered to withdraw from handling the guard dispute for the subsidiary, but that was not accomplished before the breach of contract suit was filed. The court held the duty of loyalty extended to subsidiaries of a client, and citing Fund of Funds, it said:

Because Epstein Becker had not clearly terminated its representation of FSC and fixed the parameters of its representation of FSC by the time preparations for the instant litigation were begun, Epstein Becker is per se ineligible to represent Stratagem in this matter... Epstein Becker may not undertake to represent two potentially adverse clients and then, when the potential conflict becomes actuality, pick and choose between them. Nor may it seek consent for dual representation and, when such is not forthcoming, jettison the uncooperative client.

Truck Insurance Exchange v. Fireman's Fund Ins. Co. was a suit for contribution from insurers to be paid into a central fund in settling asbestos claims. It was discovered that the lawyer for the central fund (TIF) also represented Fireman's Fund's Credit Union in wrongful termination cases. The

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Surgical, Inc., 803 F. Supp. 957 (D. Del. 1992) (disqualifying counsel primarily "as a vindication of the integrity of the bar" because it continued to advise one of the plaintiffs in an infringement case involving other parties and a completely different patent).

Conversely, in Henry Fithers, Inc. v. Peabody Barnes, Inc., the court disqualified a lawyer who had represented two firms pursuing a single patent application which had not been previously denied. 611 N.E.2d 873 (Ohio Ct. App. 1992). The court recognized that disqualification would cost one client increased attorney's fees and that the confidential information exchanged during the application process had not been intended to be confidential or used against either client, but nonetheless found that "the issue here is not attorney fees but attorney ethics." Id.

98. Id. at 793-94. The court accepted the defendant's characterization of such a withdrawal as dropping a client "like a hot potato." Id. at 794.

In Manoir-Electroalloys Corp. v. Amalloy Corp., the Borin Group, represented by the Hanooh firm, acquired U.S. assets and sold eighty percent of them to a French company. 711 F. Supp. 188 (D. N.J. 1989). Iacono, president of a company being acquired and sold, was present during part of the negotiations. He noted that the attorneys at Hanooh firm "are my lawyers." Indeed, they had done his will and tax planning, and advised him with respect to his employment contract. Charges of seller deception later surfaced when the buyer filed suit. The answer included a count against Iacono alleging fraud and conspiracy. Iacono moved to disqualify the Hanooh firm. Citing "the well-established rule that an attorney may not represent one client in a lawsuit against another," the court said, "the conflict of interest was anything but subtle." Id. at 195. Accusing one's own client of fraud and conspiracy and seeking substantial damages from him is disloyal. The court also noted that Hanooh had offered to drop the claim against Iacono and said that the offer illustrated the need for the rule: lawyers would sell out one client to stay in the case. Id.

99. 8 Cal. Rptr. 2d 228 (Ct. App. 1992).
firm sought consent to pursue the contribution claim, but the insurance company denied consent. There clearly was no relevant confidential information at stake. There was no threat of any failure to pursue the separate claims of both clients vigorously and the idea of "disloyalty" in the Rotmer sense seems nonsense. The real concern seemed to be Fireman's Fund's desire to delay the inevitable day when it would be ordered to pay into the asbestos claims fund. Nevertheless, the court said a per se rule of disqualification had to be applied and despite the bad faith of the denial of consent, the law firm could not continue to represent TIF. 100

Image Technical Services v. Eastman Kodak Co. 101 tested the limits of physical and substantive separation of cases subject to the rule. Coudert Brothers had represented Eastman Chemical, a division of Eastman Kodak, in commercial sales of fibers in China. The firm then appeared on behalf of plaintiffs appealing an antitrust case against Eastman Kodak to the Supreme Court, which concerned the repair of sophisticated Kodak microphotography equipment. Consent to involvement in the Supreme Court case was obtained from Kodak representatives in Hong Kong — the persons whose sense of "loyalty" was apparently at risk — but not from Kodak's home office. The District Court held on remand from the Supreme Court that California law applied. The court found that consent had neither been "informed" nor in writing as required by the California rules 102 and barred Coudert from further participation in the matter. 103

100. See also Ettinger v. Cranberry Hill Corp., 665 F. Supp. 358 (M.D. Pa. 1986) (holding that an attorney, who was retained by a land developer's insurance company that was pursuing reimbursement from an employee of the land developer who had embezzled funds, owed a fiduciary duty to the land developer after having seen confidential records of the developer and was prima facie disqualified from filing suit against the developer); Blythe v. Baumann-Furrie & Co., 448 N.W.2d 865 (Minn. 1989) (engaging in a balancing of the equities and denying motion to disqualify plaintiff's attorney after determining that the attorney seeking to collect a judgment against an insurance carrier worked in a different office of a law firm that also represented the insurance carrier on unrelated matters and was not privy to any aspect of the firm's representation of the insurer); Florida Ins. Guar. Ass'n v. Carey Canada, Inc., 749 F. Supp. 235 (S.D. Fla. 1990) (disqualifying law firm's representation of Carey Canada, an asbestos mining concern, in disputed insurance coverage claims against Florida Insurance Guarantee Association, involving some 80,000 asbestos injury claims where the law firm also concurrently represented FIQA on unrelated matters and had failed to consult the insurer, provide full disclosure or obtain the insurer's consent); Smiley v. Director, Office of Workers Comp. Programs, 984 F.2d 278 (9th Cir. 1993) (reversing and remanding on appeal the denial of disability benefits for a Navy claimant to determine whether a conflict of interest in fact existed and whether the plaintiff-claimant had given informed consent where the plaintiff's attorney also represented the navy's insurance carrier in unrelated matters and the navy, not the insurer, was handling all negotiations and hearing in the case).


102. California has its own formulation of the Model Rule 1.7(a) principle:

A member shall not, without the informed written consent of each client . . . [r]epresent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

CAL. RULES OF PROFESSIONAL CONDUCT RULE 3-310(C)(3).

103. Another recent California decision, Flatt v. Superior Court, examined what a lawyer may do when he or she is barred from acting on behalf of a client against another. 885 P.2d 950 (Cal. 1994). Daniel consulted
British Airways, PLC v. Port Authority of New York\textsuperscript{104} was an effort to disqualify the plaintiff airline's lawyer in a suit for damage to an aircraft at JFK Airport. The plaintiff's law firm also represented the Port Authority in personal injury actions for accidents at JFK under lease terms that obliged the airlines to provide representation to and indemnify the airport for awards in such actions. Largely ignoring the policies underlying Cinema 5, the court equated its prima facie rule with a per se rule, stating that "courts in this circuit apply the 'per se' or 'prima facie' rule to disqualification motions when the attorney whose disqualification is sought is actively suing his client in other related, or non-related actions."\textsuperscript{105} The Port Authority was the firm's nominal client in the personal injury cases.\textsuperscript{106} Thus, the court said, a duty of undivided loyalty was owed and all attorney Flatt who told him he had a good claim for legal malpractice arising out of his marital dissolution proceeding. Flatt then learned that her firm represented the prospective defendant firm in an unrelated matter, so she withdrew from the representation. The court approved:

\textit{[In all but a few instances, the rule of disqualification in simultaneous representation cases is a per se or "automatic" one . . . The reason for such a rule is evident, even (or perhaps especially) to the non-attorney. A client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter wholly unrelated to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship.}

\textit{id. at 955. Flatt did not inform Daniel of the statute of limitations on his claim and he waited 18 months to file it. By then, it was too late, so he sued Flatt. The court held that a lawyer who withdraws from representing a client because of a need to avoid breaching a duty to another has no duty to tell the former the statute of limitations on the claim. That would be disloyal to the latter client.}

\textit{104. 862 F. Supp. 889 (E.D.N.Y. 1994).}

\textit{105. id. at 893; see also Molina v. Mallah Org., Inc., 804 F. Supp. 504 (S.D.N.Y. 1992) (disqualifying plaintiff's counsel from suing on behalf of parking garage employees against parking garage owners where the attorneys also represented the Garage Employees Local Union 272 who was not joined in the action but whom the court noted might properly be a defendant in the action later making the possibility of a conflict of interest all too likely creating an immediate appearance of impropriety); In re Am. Printers & Lithographers, 148 B.R. 862 (Bankr. N.D. Ill. 1992) (denying debtor's application in bankruptcy to employ a law firm that concurrently represented a priority creditor, LaSalle National Bank, on unrelated matters, despite the fact that the situation had not yet resulted in actual conflict, where the court refused to rely on any per se rule, but rather exercised its discretion and observed that there was a high possibility that the situation would develop into an actual conflict).}

\textit{106. It was important to the court that the Port Authority had retained the right to direct or fire the law firm tendered by the airline to handle the cases. Thus, the court observed, "these facts convincingly establish that the Port Authority is a traditional non-vicarious client of the law firm." British Almeys, 862 F. Supp. at 897. The court's mistake was in transmuting that right into a right to disqualify the airline's regular law firms in all other cases against the Port Authority. See also Harrison v. Fisons Corp., 819 F. Supp. 1039 (M.D. Fla. 1993) (disqualifying law firm from representing a corporate defendant in a personal injury case where the law firm also represented First Union Bank in unrelated matters, the bank was the guardian for the minor plaintiff in the case and the bank was a named plaintiff in the personal injury action; the court noted that the pertinent rule regulating the Florida bar "provides no possible exception when clients do not consent"); ILL. CODE OF PROFESSIONAL RESPONSIBILITY, Op. 93-2, in NAT'L REP. LEGAL ETHICS & PROP. RESP. (Univ. Pub. Am.) ILL.RULES:1 (1993) (recommending that attorney, who represented a collection agency that collected claims on behalf of both a bank and a creditor, provide full disclosure, obtain the consent of both parties and ascertain whether the bank's interests would be adversely affected by a proposed garnishment action for the collection agency client against the collection agency's client).}
doubts were to be resolved in favor of disqualification.\footnote{107}

However, given the rigidity of cases such as those just discussed, it has been fascinating to observe that many courts have largely ignored the rule, or at least have wisely disregarded the categorical approach.

\textit{Bodily v. Intermountain Health Care Corp.}\footnote{108} represents one such example in which the court refused to disqualify plaintiff's counsel in a series of medical malpractice cases. The firm had been requested by a Los Angeles firm to act as local counsel for Intermountain in a wrongful discharge case filed by an employee while pursuing seven of the medical malpractice cases against Intermountain. The firm said it had a conflict, but the Los Angeles firm said there was no problem and sent the file. The firm did only ministerial work and learned no confidential information. When the local Intermountain people heard who was local counsel, however, they fired the firm and tried to get it disqualified from handling the malpractice cases. Judge Greene agreed there was a conflict and that reliance on the Los Angeles firm's consent was inadequate. However, the court found no prejudice to Intermountain and refused to disqualify the firm.\footnote{109}

\footnote{107. \textit{British Airways}, 862 F. Supp. at 899-900. Cases involving governmental or quasi-governmental entities have asserted particular concern about appearances of impropriety, but by no means have they reached the same result. See \textit{Guthrie Aircraft, Inc. v. Genesee County}, 597 F. Supp. 1097 (W.D.N.Y. 1984) (disqualifying a law firm defending the county against a tort claim for the negligent design and maintenance of a road where the firm was also suing the county in an unrelated case where the key issue involved construction of a snow fence near an airport; the key witness in the snow fence case was likely to be the same highway superintendent being defended in the former case); see also \textit{County Attorneys Ass'n v. Kentucky Bar Ass'n}, 710 S.W.2d 852 (Ky. 1986) (upholding an opinion prohibiting assistant county attorneys and their associates and partners who are recruited from local law firms from representing clients in unrelated civil matters when such clients are also being prosecuted on criminal charges by the same assistant county attorney; the court cited \textit{Guthrie} and held that although the matters are not substantially related, the appearance of impropriety to the general public should be avoided); \textit{In re Vdolyak}, 560 N.E.2d 840 (Ill. 1990) (holding that a Chicago alderman could not represent city employees in workers' compensation cases against a city where lawyer-legislator was subject to legal ethics codes even though there was no lawyer-client relationship with the city). But see \textit{In re Executive Comm'n on Ethical Standard}, 561 A.2d 542 (N.J. 1989) (denying disqualification of Rutgers law professor employed in a clinical teaching program from an action to sue a state clinical teaching program from an action to sue a state agency on behalf of a clinic client, holding that any contrary ruling would disadvantage the educational purposes of the clinic and observing that it would be difficult for a well informed member of the public to conclude any appearance of impropriety); \textit{In re Advisory Comm. on Professional Ethics Op.} 621, 608 A.2d 880 (N.J. 1992) (holding that lawyer who is a part-time legislative aide may not represent private parties before legislature, before any state agency as to a matter for which he or she had substantial responsibility as an aide or in any other matter that would raise an appearance of impropriety, but may be involved in commercial land-use and zoning cases if legislative duties do not involve such matters); \textit{Grieske v. State Dep't of Transp.}, 436 N.W.2d 79 (Wis. 1988) (denying disqualification of an attorney who acted as a part-time county corporation counsel and permitting the attorney to defend a farm owner against a condemnation action filed by the state).}

\footnote{108. 649 F. Supp. 468 (D. Utah 1986).}

\footnote{109. Id. at 478. See also \textit{Kaminski Bros. v. Detroit Diesel Allison}, 638 F. Supp. 414 (M.D. Pa. 1985) (denying motion to disqualify a law firm where the firm had represented GM as local counsel in 15 cases in which it was determined that no confidential information would be used, GM had ceased retaining the lawyer for new cases and only an old case remained open, and lawyer's offer to withdraw as GM's local counsel before motion to disqualify was filed sufficiently denied motion); \textit{Tippon v. Canadian Imperial Bank of Commerce}, 872 431
In re Infotechnology, Inc.\(^{110}\) involved a challenge by Avacus to the merger of Infotech with WNW. Avacus was represented by Skadden, Arps, Slate, Meagher & Flom, who had not represented either Infotech or WNW, but had represented the author of the fairness opinion, Prudential-Bache, in other matters. Infotech sought disqualification of Skadden, and the lower court said it had jurisdiction to protect the honor of the bar against a breach of Skadden's duty to Prudential-Bache. The Delaware Supreme Court, however, held that a non-client has no standing to enforce a lawyer's duty of loyalty to a stranger; otherwise, there might be no end to such claims.\(^{111}\)

Gould, Inc. v. Mitsui Mining & Smelting Co.\(^{112}\) was filed on behalf of Gould by

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F.2d 1491 (11th Cir. 1989) (upholding on appeal a district court's denial of a motion to disqualify the defense attorneys in a sex discrimination suit where the law firm represented the plaintiff in an unrelated property dispute in which the law firm had immediately offered to withdraw from the property dispute action after learning of the conflict and the defense attorneys had not obtained any confidential information from their law firm's representation in the property dispute action); Aerajet Properties, Inc. v. State, 530 N.Y.S.2d 634 (App. Div. 1988) (applying the prima facie test but finding it rebutted where the lawyer had represented the client for four years in the Court of Claims trying to get unpaid rent from the state on offices it leased and where the lawyer was also hired by the state's insurer to defend a suit for personal injuries suffered on state property; court held that "there is absolutely no substantive nexus between the two lawsuits. Nor is there any real potential for the disclosure of confidential information . . . . In essence, [the firm] has not compromised its duty of undivided loyalty to either claimant here or the State in the Bauer action. Given the multitudinous nature of the State's activities, even the appearance of impropriety seems de minimis here"); AmSouth Bank, N.A. v. Drummond Co., 589 So. 2d 715 (Ala. 1991) (refusing to order disqualification of law firm that represented AmSouth in interest rate swaps and also Drummond in a minority shareholder's objection where AmSouth intervened in the latter case on behalf of certain trusts, and the firm, upon AmSouth's refusal to consent, withdrew from AmSouth matters; court concluded that the firm had not created the conflict and that harm from disqualification would be high); Sirotz v. Nelson, 606 N.Y.S.2d 728 (App. Div. 1994) (denying a motion to disqualify plaintiff's counsel from bringing claim against a bank that was also a client of the law firm in an unrelated action where the law firm "met its burden of demonstrating the absence of any conflict in loyalties or impediments to a vigorous representation of each client"); Parkinson v. Phonex Corp., 857 F. Supp. 1474 (D. Utah 1994) (denying disqualification of an attorney from a litigating case in which the attorney had participated for over a three-year period where another member of the law firm had, without knowledge of the existing conflict, been engaged for a period of one month by a defendant in the litigation matter to provide estate planning by a defendant and had since ceased performing estate planning services, not obtained any confidential information and not caused any prejudice by the brief overlap in representation); Chemical Bank v. Affiliated FM Ins. Co., 1994 WL 141951 (S.D.N.Y. 1994) (denying an effort to disqualify Affiliated's counsel in suit to obtain insurance proceeds where the law firm also represented Chemical's interest among others in a pool of insurers trying to rehabilitate yet another company; court carefully traced through the three lines of cases — *Cinema 5, Glueck* and *T.C. Theater Corp.* — and held this situation was attenuated representation, thus, the substantial relationship test of *Glueck* was applicable and because the cases were not related the firm was not disqualified); Bankers Trust v. Bruce, 323 S.E.2d 523 (S.C. 1984) (concluding that the client consented to the lawyer's representation after the lawyer disclosed a retainer relationship with another client that presented a potential conflict of interest); Fisons Corp. v. Atochem North Am., Inc., 1990 WL 180551 (S.D.N.Y. 1990) (finding that a client consented to representation knowing there was potential for conflict of interest because the client was aware of communications between the lawyer and a second client).

110. 582 A.2d 215 (Del. 1990).

111. This result is criticized in HAZARD & HODDES, supra note 92. The authors see Infotechnology as a case where the client who had drafted the opinion was clearly a potential defendant and, thus, a case that should have required consent.

Jones, Day, Reaves & Pogue alleging unfair competition, unjust enrichment and RICO violations against Pechiney, a company long represented in patent matters by the McDougall firm. While the suit was pending, Jones Day merged with the McDougall firm and got consent from Pechiney to continue to act as counsel for Gould. Pechiney then bought IG Technologies whom Jones Day also represented in unrelated matters. The court found there had never been consent by IG to the suit against its parent Pechiney, but there was no showing Jones Day had misused any IG secrets or that Pechiney had been prejudiced, so Jones Day was allowed to choose whether to continue to represent IG or Gould.\(^{113}\)

Artromick International, Inc. v. Drustar, Inc.\(^{114}\) examined when a lawyer-client relationship is at an end. The Schottenstein firm represented Drustar in this action and they had represented Artromick in unrelated matters. The question was whether they still represented Artromick. There was limited contact after 1988; the firm did a little work but the client didn't pay the bill. It sent Artromick a regular firm newsletter. The court found that Artromick sent work it used to send to this firm to other firms instead and said receiving a firm newsletter did not a a client make, so disqualification was not ordered.\(^{115}\) The court noted:

> [T]he manner in which clients use attorneys is both varied and evolving. The concepts of having a 'personal attorney' or a 'general corporate counsel' are much less meaningful today, especially among sophisticated users of legal services, than in the past. Clients may have numerous attorneys, all of whom have some implicit continuing loyalty obligations. Attorney specialization and marketing have contributed to this fractionalizing of a single client's business. Such matters make it more difficult to define the nature and duration of any particular attorney-client relationship that cannot accurately be characterized as a 'one-time-only' deal or a general counsel arrangement.\(^{116}\)

\(^{113}\) See Supreme Court of Tex. Professional Ethics Comm. Op. 423 (1984) (considering the case of a law firm that did legal work for one bank and filed suit on behalf of another client against a second bank, which subsequently acquired the first bank, and finding that the holding company of both banks was the real party in interest in both representations, thus the law firm had to withdraw from one of the clients, but could select which withdrawal it preferred). But see Picker Int'l v. Varian Assoc., 869 F.2d 578 (Fed. Cir. 1989) (concluding that a law firm cannot pick and choose which clients survive a merger of the firm, because this violates the firm's duty of undivided loyalty to each of its clients under DR 5-105; and holding that although disqualification does not automatically follow from a violation of DR 5-105, it is presumed when a lawyer litigates against a present client); United States v. Nabisco, Inc., 117 F.R.D. 40 (E.D.N.Y. 1987) (holding that "the direct, adverse positions of Sag Harbor and Nabisco in the instant case creates a risk of diminution in the vigor of [the firm's] representation of Nabisco;" and disqualifying a law firm from representing Sag Harbor Industries in a contribution action for recovery of costs from Nabisco resulting from an EPA action for environmental cleanup costs where the law firm also represented Standard Brands, a subsidiary of Nabisco, on unrelated matters and another Nabisco subsidiary had potential liability under the EPA claim).


\(^{115}\) See also Heathcote v. Santa Fe Int'l Corp., 532 F. Supp. 961, 964 (E.D. Ark. 1982) (stating that a 15-year period since the last activity for a client was sufficient to find that the relationship terminated).

\(^{116}\) Drustar, 134 F.R.D. at 232.
Finally, *SWS Financial Fund A v. Salomon Brothers, Inc.* was a suit by limited partnerships of securities traders charging fraud in transactions in Treasury Notes. Salomon moved to disqualify Schiff Hardin as counsel for plaintiffs because Schiff was concurrently giving advice to Salomon’s commodities futures operation. Judge Duff found that Salomon was indeed a current client and that Model Rule 1.7(a) forbade the concurrent representation. However, he then looked to the purpose underlying Model Rule 1.7(a) to determine whether disqualification was required rather than some other sanction such as professional discipline, legal malpractice or fee forfeiture. He concluded disqualification was not appropriate.

This case is at the polar extreme from the case in which an individual has a personal relationship with a particular attorney who provides for all or substantially all of that client’s legal needs. In such a case, were the attorney to ‘turn on’ his client and sue him, disqualification would be appropriate . . . A court deciding a motion to disqualify in a case involving mega-firms (like Schiff) and mega-parties (like Salomon Brothers) should not be oblivious to ‘the way that attorneys and clients actually behave in the latter part of the twentieth century . . . Clients of enormous size and wealth, and with a large demand for legal services, should not be encouraged to parcel their business among dozens of the best law firms as a means for purposefully creating the potential for conflicts."

In my view, Judge Duff’s analysis is right but should go to the question of whether there is a conflict at all, not just what the remedy should be. Many cases present neither a realistic threat to the lawyer’s sense of mission or the client’s perception of loyalty. The prima facie approach should be — and it turns out sometimes is being — returned to its rightful meaning and central place in the analysis."

118. Id. at 1402.
119. So many cases present particular issues that it is hard to know where to footnote them. E.g., Conduct of Thorp, 679 P.2d 857 (Or. 1984) (dismissing charges against a lawyer who represented a businessman in various matters and who objected to a suit filed by his law firm against the businessman because the businessman owed a personal debt to a partner in the firm); Curtis v. Radio Representatives, Inc., 696 F. Supp. 729 (D.D.C. 1988) (recognizing that conflicts could arise during a suit to collect fees where the client alleged that the firm had been disloyal in concurrently representing business competitors in a specialized field in unrelated matters, but finding no showing of any conflict and declining to absolutely bar the representation); Santa Clara County Counsel Attorneys Ass’n v. Woodside, 869 P.2d 1142 (Cal. Ct. App. 1994) (acknowledging a county’s fiduciary duty to bargain with union lawyers, but finding that suit brought by the lawyer’s union in county counsel’s office against the county to assure compliance with duty to bargain constituted using a present client).

In addition, there is a body of developing ethics opinions dealing with lawyers who defend other law firms in professional liability matters and who then file or defend a suit involving a client of one of their law firm clients. In short, the opposing law firm — not its client — is the client. Opinions have said that every client of both firms in matters where the firms oppose each other must consent before the liability representation of the other law firm may be undertaken. Also, every client in every new such case that comes to the firms must consent before the firms may accept the new cases. N.Y. State Bar Ass’n Comm. on Professional Ethics, Op. 579, in [1987
THE ABA CORPORATE CLIENT OPINION

It is in this context that Formal Opinion 95-390 recently took up the issue whether a lawyer who represents a corporate client may undertake unrelated representation adverse to an affiliate of the client without obtaining consent. The Committee noted the obvious — good client relations will dictate discussing the issue with the client and getting the necessary consent — but it concluded there was no absolute bar to proceeding without consent.\textsuperscript{120} The majority of the ABA Committee saw that sometimes a corporate affiliate should be treated as a client but sometimes that makes no sense. Whether a corporate affiliate is also a client of the corporate lawyer "depends not upon any clearcut per se rule but rather upon the particular circumstances."\textsuperscript{121}

In analyzing these circumstances, the committee gave several examples of when a corporation should be treated as a client. First, the committee said that a corporate affiliate should be treated as a client if the lawyer has agreed to treat it as a client or if the affiliate reasonably believes it is a client. The Committee cited its Opinions 91-361\textsuperscript{122} and 92-365\textsuperscript{123} for some of the factors to be considered in making that determination.

\textsuperscript{120} See, e.g., Margulies v. Upchurch, 596 P.2d 1195 (Utah 1979) (holding that work for partnership was really work on behalf of the individual partners and that attorney-client relationship could be implied where firm represented plaintiffs in a medical malpractice action against group of doctors; firm also represented limited partnership engaged in drilling for energy; three of the 19 limited partners were the defendant doctors; each defendant had submitted detailed financial records and co-signed personal letters of credit for their partnership contributions; and the firm's work for the partnership included defending against forced collection on those guarantees); In re Liberty Music \& Video, Inc., 54 B.R. 799 (Bankr. S.D.N.Y. 1985) (disqualifying the lawyers of a tenant seeking a declaration that it was not in default on its lease where the defendant was a limited partnership in which Bernstein was general partner; members of tenant's law firm were limited partners in another entity where Bernstein was general partner; the firm had also represented another group of limited partners that included Bernstein's wife); North Star Hotels Corp. v. Mid-City Hotel Associates, 118 F.R.D. 109 (D. Minn. 1987) (disqualifying a law firm in a suit brought by a hotel management firm against a partnership that owned a hotel where the firm that was counsel for management company also represented two other partnerships both formed and largely owned by owner of defendant; court saw question as whether firm could seek to impair financial condition of one of its clients, the owner of the partnerships, for the benefit of another client, and recognized that firm represented the partnerships, not the general partner, but stated that the individual was the real party in interest); Responsible Citizens v. Superior Court, 20 Cal. Rptr. 2d 756 (Cal. App. 1993) (stating that representation of a partnership might, but does not necessarily, constitute representation of each partner where a firm represented a non-profit group in a suit to oppose gravel mining by Askins; the firm was also asked to represent general partnership in which Askins was a member; and Askins declined to give firm waiver because she found the businesses to be separate and saw no conflict); cf. Arpadi v. First MSP Corp., 628 N.W.2d 1335 (Ohio 1994) (holding that the
Second, the affiliate may be a client because it has imparted confidential information to the lawyer.124

Third, the affiliate is a client if it is an alter ego of the client, although sole ownership is not necessarily enough to mandate such a finding.125


124. Several cases support disqualification where the real concern seems to be protection of confidential information and Model Rule 1.6 alone would seem to justify disqualification. See, e.g., Duca v. Raymark Indus., 663 F. Supp. 184 (E.D. Pa. 1986) (holding that unless clients in asbestos litigation consented to disclosure, a law firm should be disqualified from suing clients who have received settlement on behalf of other plaintiffs in a suit when they represented the clients who received settlement on another action, because attorneys might be able to use the confidences of one client for the benefit of the other); Phoenix Elec. Contracting Corp. v. New York Tel. Co., 587 N.Y.S.2d 485 (Sup. Ct. 1992) (holding that the law firm representing the plaintiff in an action against a construction company to recover for electrical work performed by the plaintiff is disqualified from further representation because the firm is trustee in bankruptcy of the defendant and could use confidential information against the defendant); Stanley v. Richmond, 41 Cal. Rptr. 2d 768 (Cal. App. 1995) (finding that when two attorneys in the process of merging their law firms represent clients in litigation against one another they breach their duties of loyalty to their clients, including protecting confidentiality); Metro-Goldwyn-Mayer v. Tracinda Corp., 43 Cal. Rptr. 2d 327 (App. 1995), modified, rehe'g denied, 1995 Cal. App. Lexis 774 (App. 1995) (disqualifying a law firm from representing a party in an action adverse to a former client because it may jeopardize the client's confidentiality).

125. An opinion by the California bar had earlier asked whether a lawyer could represent a client against the wholly owned subsidiary of another client of the lawyer. State Bar of Cal. Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1989-113 (1989). Citing Rule 3-600, the California version of Model Rule 1.13, the court stated that the corporate boundaries must be respected, i.e., the lawyer represented the parent not the subsidiary. Clearly, the suit could have an important effect on the parent, but not every indirect effect on another client (including a decline in the value of its stock or assets) amounted to a violation of the duty of loyalty. An exception to this rule would arise, however, where the subsidiary was an alter ego of the parent (percentage of stock ownership being not the only test). The lawyer also could not use against the subsidiary confidential information of the subsidiary that it had obtained in the course of representing the parent. Further, the lawyer was under the obligation to inform the parent about the planned suit, if it was not secret, so the parent can decide whether to fire the lawyer. See also Sackley v. Southeast Energy Group, Ltd., 1987 WL 12950 (N.D. Ill. 1987) (declining to disqualify firm where purchasers of limited partnership interests alleged they had been defrauded; firm proposed to represent the defendants; plaintiffs objected because the firm represented corporation in which one of the plaintiffs owned one sixth of the shares and had personally guaranteed over $3
But finally, the Committee had to come to grips with the question whether a suit against a corporate affiliate is "directly adverse" to the client the lawyer represents. The Committee's answer was "no," the adverseness is only "indirect" and thus Rule 1.7(a) governs, not 1.7(a).126

Applying the language of Model Rule 1.7(a) as a matter of plain English, that answer is not satisfying. As we have seen, however, the problem lies in the language of the rule, not the Committee's ultimate result. The principal effect of the majority's holding was that proof of a violation of the rule would require that the effect on the representation of either or both clients would have to be found to be "material." That is certainly a move in the right direction, a move that should now be extended beyond the corporate context.

As the Committee correctly observes, the corporate affiliate may be offended, and "the lawyer's concern for remaining in the good graces of client A was likely to impair the independence of judgment or the zeal that the lawyer could bring to bear on behalf of client B."127 But "[i]t is only when there is a threat of material limitation on the lawyer's ability properly to represent a client because of his responsibilities to another client that the Rule requires the lawyer to seek consent."128

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127. Id.

128. Id. (emphasis added). The dissenters were indignant at the result reached by the committee. Richard Anstett wrote:

It may very well be that in the rarified Fortune 500 world, a suit against a subsidiary might be considered as having only a derivative impact upon the parent, but outside those elevated precincts most parent companies would view such a suit as outrageous and a clear conflict of interest.

Id. Lawrence Fox added: "corporate families are financially totally inter-dependent ... [F]or members of a corporate family the location of a corporate family's losses are totally irrelevant to the bottom line." Id. What
CONCLUSION

There is no question that in the vast majority of cases in which a lawyer may be asked to file suit against a current client, the lawyer should send the client to a different firm to handle the matter or should discuss the request in advance with each affected client and determine whether each is willing to consent.129

What this Article has asked is: (1) what must the lawyer do if one or more clients refuses to consent, typically to make life difficult for the other clients, and (2) when is a sanction warranted where the lawyer forgets or otherwise fails to seek consent.

I have suggested that the rule against suing a current client has been a “stealth” rule. It snuck up on the bar — appearing clear and simple — but ultimately causing courts and rule drafters alike to lose sight of the conflict of interest issues they were trying to address.

The present rule addresses two quite different problems as if they were one.130 First, it deals with a perceived threat to the relationship between the lawyer and the client who is being sued by its own lawyer. Second, it deals with the possible risk to the client on whose behalf suit is brought, a risk that the lawyer will be less vigorous in pursuit of the matter so as to avoid offending the client being sued.

Each of these concerns could have been reached by the existing language of Model Rule 1.7(b): “A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client . . . or by the lawyer’s own interests.” The adoption of Model Rule 1.7(a) was not a positive development. What it did was remove the requirement that the effect of the lawyer’s conduct be “material” and transform a reasonably balanced rule into a tactical weapon for litigators.

The prima facie tests used in Cinema 5 reflected a sense that materiality of the conflict was indeed important. It properly placed on the lawyer the burden of showing both a lack of material adverse effect and a lack of the appearance of such adverse effect to a reasonable person, but it allowed that case to be made. Indeed, it was the kind of rule toward which a surprising number of courts have been pushing — whether by finding consent, by not finding standing, by asking

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129. Even consent is not enough, of course, if the lawyer does not “reasonably believe . . . the representation will not adversely affect her representation of the other client [in the unrelated matter].” MODEL RULES Rule 1.7(b) (1).

130. By definition, the rule is inappropriate for dealing with one problem it superficially might seem to address, namely, a failure to look out for the interests of the client being sued. This Article assumes that client has counsel, or access to counsel, in the current matter whose job will be to look out for its interests. Further, if the non-adverse lawyer were to use Client A’s confidential information on Client B’s behalf, the matters would not be “unrelated” within the meaning of this Article, and Client A’s remedy would be for a violation of Model Rule 1.8(b), not Model Rule 1.7.
whose fault it was that the situation arose, by concluding that the matters did not overlap in time, or even by engaging in relatively uncivil disobedience of the rule.

The kinds of issues the lawyer would have to address under a properly functioning prima facie rule would likely be quite similar regardless of which of the two concerns of the rule is involved. For example:

1. How high are the stakes in the lawsuit? Is this "bet the company" litigation? Our initial illustration posited a product liability case — something far from trivial — but only one of dozens of what are for the most part simply a cost of doing business. We also posited a contingent fee that would tend to make "soft pedalling" unlikely, and modest enough work on behalf of General Manufacturing that if Able & Baker were fired altogether, its loss of fees would not be substantial.

The stakes were also relatively modest in the other illustration where Marlene Wilson was one of General Manufacturing's suppliers.\textsuperscript{131} It surely would not reasonably be seen as "disloyal" to GM to answer Ms. Wilson's question about a form of purchase order that Able & Baker did not draft. Nor would Able & Baker likely fail to ask for the terms Ms. Wilson prefers out of a fear General Manufacturing will take offense.\textsuperscript{132}

2. How personal is the attack on the client being sued? The court was probably right in \textit{Rottnert}; it could indeed be personally hurtful to the already disturbed Mr. Twible to have his lawyer allege intentional conduct, seek punitive damages, and attach his home. There is typically no comparable sense of personal loyalty, however, that describes the pragmatic relationship between a large corporation and its local counsel in a remote city.

To be sure, General Manufacturing in our illustration will not want to be sued in the product liability case and some such cases might well involve direct personal attacks on the corporation or its managers. More likely, however, the word "disloyal" would be hurled as a weapon to distract attention from the reality as reasonably understood. General Manufacturing has plenty of lawyers to defend its interest in dealing with Ms. Wilson, and the use of ethics rules to harass Ms. Wilson's lawyer arbitrarily should not be available as part of their arsenal.

3. Is the client being sued one with which the lawyer has worked closely, over

\textsuperscript{131} I will not take on here whether \textit{Model Rule} 1.7(a) applies to representation other than \textit{litigation} directly adverse to a current client. Suffice it to say here that in the dozens of cases on the subject, virtually all involved litigation. The few that have addressed the possibility that the rule is broader have tended to reject the idea, and I believe cases like \textit{Financial General Bankshares, Inc. v. Metzger}, where the court found that a lawyer breached his fiduciary duties by helping a second client while secretly buying interest in a former corporate client, were extreme cases that could have been resolved the same way on other grounds. See supra text accompanying notes 50-53. For an articulate statement of the opposing position, see \textit{Hazard & Hodes, supra} note 91, §.

\textsuperscript{132} The stakes faced by the lawyer are also relevant. If the fees earned from a client are so substantial that the firm could not afford to offend the client, however unreasonable the client's reaction, there could indeed be a danger of soft pedalling to avoid giving offense.
long period, or both? If so, the likelihood of reasonably seeing the suit as disloyal may be greater, as may be the threat that the client bringing suit may get a reduced level of service. In this context, the test should involve more than a temporal dimension. Filing assessment protests for 20 years, for example, would likely involve less interaction with the client than two years of handling labor relations with a contentious union. Even in the case of the labor representative, however, the proposed call about language in the purchase order would be unlikely to be sufficiently material to either client's interests to justify saying that the failure to obtain consent requires sanction.

4. Is the remedy being sought professional discipline, disqualification, or civil liability? A suit against a present client will rarely create unfairness in the litigation process, for example, except insofar as the lawyer for the client bringing the suit has an incentive not to pursue it vigorously. Disqualification should largely be limited to that class of cases. If the client thinks it can show genuine harm of either kind to itself, however, it should be entitled to try to do so in a malpractice action, request for fee forfeiture or other remedy where harm is an element of the proof.133

The point in such cases, including those seeking professional discipline, should be to focus the inquiry again on the questions that properly underlie the now-unitary rule. If those questions once again become central, I believe the rule will not be categorical and materiality will once again become an element. Further, when the courts once again openly start to ask the right questions, I believe we will start to see more consistent decisions and ultimately fewer challenges being filed.

133. In such cases, the burden of persuasion should continue to be on the lawyer to show that the conduct was proper, i.e., that there was no reasonable risk of adverse effect on the client that rendered the lawyer's conduct intentional or negligent. The client should only bear the burden of showing that the adverse consequences occurred.
SCREENING THE DISQUALIFIED LAWYER: THE WRONG SOLUTION TO THE WRONG PROBLEM*

*This article was the Spring 1987 Altheimer Lecture at the University of Arkansas at Little Rock School of Law.

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1. The rule was firmly established in T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268 (S.D.N.Y. 1953): "[W]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited." This rule has been consistently followed ever since. *E.g.*, Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1979); Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975); Chugach Elec. Ass'n v. United States Dist. Court, 370 F.2d 441 (9th Cir. 1966).


Thomas D. Morgan**

INTRODUCTION

Ann Andrews, an associate at Smith & West, has represented the plaintiff in a personal injury suit. The defendant has been represented by the firm of Davis & Baker. Now, Ann Andrews has left Smith & West and been hired by Davis & Baker. Smith & West will continue to represent the plaintiff in the law suit. May Davis & Baker continue to represent the defendant?

The traditional answer is "no." Ann could not herself "switch sides," *i.e.*, represent the defendant after having represented the plaintiff in the case.1 Even if Ann is assigned to other work at Davis & Baker, whatever Ann may not do, the argument goes, her partners and associates may not do either.2 Therefore, because Ann would be "disqualified" from handling the defendant's case, her entire firm must cease the representation of the defendant.

The principle that requires this result is known as the doctrine of "imputed disqualification." The rule is harsh in a world in which lawyers change firms—sometimes frequently—over the course of their careers. It is a rule which some have proposed be modified to reduce its impact on lawyers and clients alike. Until recently, however, the courts have refused to abandon the rule in cases such as the one here described.

Increasingly, however, suggestions are heard that an entire law
firm should not be disqualified solely because it would be improper for one partner or associate of the firm to handle a matter. In a case described more fully later in this article, a federal district court has held a firm not disqualified where the "tainted" associate was formally "screened" from participation in the case.

What are we to make of such a case and of the effort generally to modify the heretofore strict rule of imputed disqualification? In this article, I will take what may be an unpopular position. I will suggest that the "screening" or "Chinese Wall" approach is inappropriate in cases where the representation of a former private client is involved.

I will argue that screening misconceives the purposes of imputed disqualification and is not responsive to those purposes. I will go on to suggest that, instead of examining the viability of screening, the courts should examine more carefully whether circumstances justify barring the arguably disqualified lawyer in the first place.

BACKGROUND

We sometimes naively speak as though lawyer ethics have come down to us from the unknowable past, with broad concensus and extensive precedent. Usually, of course, that is not the case at all.

The rule that an individual lawyer may not switch sides in the same case is of relatively long standing. One hundred fifty years ago, Baltimore lawyer David Hoffman wrote Fifty Resolutions in Regard to Professional Deportment as part of a course of study which he offered for young practitioners. Resolution VIII began: "If I have ever had


5. A one volume version of this course of study that has come down to us is D. Hoffman, A Course of Legal Study 752-75 (2d ed. 1968). Far more convenient for review of these resolutions are H. Drinker, Legal Ethics 338-51 (1953), and Alabama Lawyers Handbook 9-23 (1944).
any connection with a cause, I will never permit myself (when that connection is from any reason severed) to be engaged on the side of my former antagonist."\textsuperscript{6}

That principle, in turn, became embodied in the third paragraph of Canon VI of the 1908 ABA Canons of Professional Ethics: "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."\textsuperscript{7}

In its Formal Opinion 33,\textsuperscript{8} the ABA Committee on Professional Ethics considered the situation of attorney X who had been a member of the firm of X & Y in 1903 when client A retained that firm to annul her marriage. The ground for the annulment was that A was an imbecile. Y had been trial counsel in the case, but X had done work on the decree. Later, the firm of X & Y was dissolved and X formed a partnership with C. Twenty-five years after the original annulment suit, A sought to have a deed cancelled on the ground of her imbecility. A was represented in that suit by a new attorney, and the firm of X & C was hired by the defense.

Should X & C be barred from defense of the deed recission because of X & Y's representation of A twenty-five years earlier? The ABA Ethics Committee said "yes," the firm was disqualified. X's firm maintained that A was an imbecile in the first suit, so X could not maintain otherwise today. In sweeping language that has been quoted and has controlled thinking about this area ever since, the Committee held that X's law firm was barred as well: "The relations of partners in a law firm are so close," the Committee wrote, "that the firm, and all members thereof, are barred from accepting any employment, that any one member of the firm is prohibited from taking."\textsuperscript{9}

\textbf{TWO RELATED SITUATIONS}

Imputed disqualification is not limited to situations in which a law firm wants to take the same case or a case substantially related to

\begin{itemize}
  \item\textsuperscript{6} D. Hoffmann, \textit{supra} note 5, at 753; H. Drinker, \textit{supra} note 5, at 339.
  \item\textsuperscript{7} The Canons of Ethics are reproduced in, e.g., Morgan & Rotunda, 1987 Selected Standards on Professional Responsibility 410-22 (1987); H. Drinker, \textit{supra} note 5, at 309-25. An annotated version is contained in American Bar Association, Opinions on Professional Ethics 11-197 (1967) [hereinafter cited as ABA Opinions].
  \item\textsuperscript{8} ABA Comm. on Professional Ethics and Grievances, Formal Op. 33 (1931), reprinted in ABA Opinions, \textit{supra} note 7, at 277.
  \item\textsuperscript{9} Id.
\end{itemize}
another in which one of its lawyers had been involved on behalf of a private client. Two other situations present the same kind of issues. The law has sometimes treated them differently—differently from each other and from the former private client situation.

First, imputed disqualification has the effect of disqualifying a law firm from handling a case against someone whom the firm is presently representing in another matter. This rule was not part of the Canons of Ethics and was apparently first adopted by the ABA Committee on Professional Ethics in its Formal Opinion 16. The question raised was whether a law firm could handle criminal defense cases which were being prosecuted by a partner in the same firm. The Committee said no, citing the second paragraph of Canon 6: “[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 prosecutor himself cannot represent both the public and the defendant,” the Committee reasoned, “and neither can a law firm serve two masters.”

That kind of case is intuitively easy for most people, but imputed disqualification is now routinely imposed even where the two cases in the firm are wholly unrelated. In *Cinema 5, Ltd. v. Cinerama, Inc.*, for example, an attorney was a partner in two law firms—one in New York City and one in Buffalo. The Buffalo firm represented Cinerama, a distributor of motion pictures and owner of theater chains, as defendant in antitrust suits brought by other theater owners in upstate New York alleging denial of access to popular films. At the same time, the New York firm was representing a client which was suing Cinerama for allegedly trying to acquire control of the client through secret stock acquisitions. Even though the two cases were factually unrelated, and even though the partner common to the two firms was apparently not personally involved in either case, the New York firm was disqualified from handling the suit against Cinerama. “One firm in which attorney Fleischmann is a partner is suing an actively represented client of another firm in which attorney Fleischmann is a partner,” the court reasoned. Thus, attorney Fleischman should be

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12. *Id.* (quoting CANONS OF PROFESSIONAL ETHICS Canon 6 (1942), reprinted in H. DRINKER, supra note 5, at 311).
13. 528 F.2d 1384 (2d Cir. 1976).
14. *Id.* at 1386.
deemed to be on both sides of the same case. The attorney had not sufficiently shown "that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation," so disqualification was required.

The second imputed disqualification situation analogous to the case of the former private client is the situation of the government lawyer who has passed through the revolving door into private practice. Imagine that Ann Andrews, the lawyer whose career change began this article, had worked for the SEC prosecuting insider trading cases. She has left the agency to enter private practice and counsel corporate executives on when they may and may not buy and sell their companies' stock. First, may she give this kind of advice in private practice? Second, if not, is any firm which she may join barred from all insider trading work before or against the SEC?

It turns out that the ABA and reviewing courts have been quite liberal in what they have permitted former government lawyers to do in private practice. In the example just posed, even Ann herself would not be barred from giving advice about insider trading the day after she left government service. She would only be barred from representing a private client in a "matter" in which she had had "substantial responsibility" while at the SEC. In this context, "matter" refers to a particular case and not to a general substantive area of the law. Ann would not be barred from giving advice, nor would her firm be disqualified.

Even assuming that the private firm Ann joined had been defending a case actually being prosecuted by Ann, the firm would not now have to withdraw. The ABA Standing Committee on Ethics and Professional Responsibility considered that express issue in its Formal Opinion 342. The government would have a hard time hiring attorneys, the Committee reasoned, if those that it hired could not readily make the transition to private practice. "So long as the individual lawyer is held to be disqualified and is screened from any direct or indirect participation in the matter" (including being excluded from

15. Id. at 1387.


sharing in the fee for the case), the Committee reasoned, "the problem of switching sides is not present." That major qualification of the imputed disqualification principle was later confirmed by the Second Circuit in the case of Armstrong v. McAlpin, and seems to represent settled law today.

THE MODEL RULES' TREATMENT OF THESE ISSUES

The ABA Model Code of Professional Responsibility had been extraordinarily terse in its treatment of imputed disqualification. Disciplinary Rule No. 5-105(D) said only: "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."

That language clearly covered simultaneous representation of opposing sides, but as discussed above, the ABA read a screening possibility into the language in the case of the former government lawyer. The case of the former private client was more ambiguous, because the Model Code nowhere explicitly prohibited switching sides in such a case. The prohibition was developed by the courts from a generous reading of Canons 4 and 9 of the Model Code, and imputed disqualification was applied by analogy.

The ABA Model Rules of Professional Conduct represent an important effort to improve upon the Model Code's formulation and to summarize the case law relative to imputed disqualification. The problem with the Model Rules is that they tend to deal with the various situations in which imputed disqualification is applied as if they were properly seen as different. In so doing, I believe the Model Rules may have missed a chance to fit the disparate rules into a coherent whole.

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19. Id. at 521. A similar result was reached by Opinion 889 of the Association of the Bar of the City of New York. 31 THE RECORD 552 (1976). See also, Morgan, Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency, 1980 DUKE L.J. 1.


21. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1980). Before 1974, the provision imputed disqualification to the attorney's law firm in cases of conflict of interest, but no others. The language "or any other lawyer affiliated with him or his firm" was also added at that time. At the time, these were seen as "housekeeping changes." See C. WOLFRAM, supra note 3, at 393-94; ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 246 (O. Maru ed. 1979).

22. See, e.g., Bd. of Ed. of New York City v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979); Arkansas v. Dean Food Products Co., 605 F.2d 380, 384-86 (8th Cir. 1979); Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706 (7th Cir. 1976).
Model Rule 1.923 deals with the problem with which we began—the problem of a lawyer's personally taking cases contrary to the interest of a former private client. Such representation, without the former client's consent, is not proper (1) if the current case is the same or substantially related to the matter in which the lawyer represented the former client, or (2) if the present representation would involve the lawyer's use of confidential information learned in the prior representation.

Rule 1.10(a) then states the imputed disqualification rule absolutely and in a way apparently applicable to all situations: "Where lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so . . . ."24

Rule 1.10(b) then goes on to make the point with which we began this article—that a lawyer disqualified by actual knowledge of client confidences gained at a prior firm disqualifies everyone in the new firm which she joins.25 Conversely, however, a lawyer who would have been only disqualified by imputation while in the prior firm, and who in fact knows no disqualifying client confidences, is not disqualified from taking a case contrary to that client of the prior firm.

Rule 1.10(c) further qualifies imputed disqualification where a personally disqualified person has left a firm. If no lawyer remaining in the firm had in fact received any disqualifying information about the client, i.e., all were disqualified solely by imputation from the person who has now left, the firm's disqualification is thereby lifted.26

24. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) (1983).
25. Model Rules of Professional Conduct Rule 1.10(b) (1983). The language of the rule is:
   When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 1.6 and 1.9(b) [i.e. confidential information] that is material to the matter.
26. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(c) (1983). The rule specifically provides:
   When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless: (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and (2) any lawyer remaining in the firm has information protected by rules 1.6 and 1.9(b) that is material to the matter.
Finally, Rule 1.11(a) provides that while a former government lawyer may not "represent a private client in connection with a matter in which the lawyer participated personally and substantially" while in government service, the firm in which that lawyer is practicing is not disqualified if "the disqualified lawyer is screened from any participation in the matter and apportioned no part of the fee therefrom." 27

THE EFFORT TO GET JUDICIAL MODERATION OF THESE RULES

Once again, it is easy but misleading to suppose that today's relatively clear rules are the product of many years of development. In fact, however, the first major "former client" imputed disqualification case seems to have been decided in 1954. 28

The limits of the doctrine have been tested for some time during the over thirty intervening years, but the most straightforward attempt to qualify the rule was the 1986 decision of Nemours Foundation v. Gilbane. 29 That case involved a complex dispute surrounding the building of an addition to a hospital. Basically, the prime contractor and a major subcontractor were suing each other, and also the architect and mechanical engineer on the project.

On the lawyer disqualification issue, the facts were not in dispute. Attorney Bradley had been an associate in the law firm which represented the mechanical engineer. That firm had been aligned with the architect in the litigation. In April, 1984, Bradley had been asked by his firm's principal litigating partner on the matter to prepare a set of notebooks to be used by the participants in a "mini-trial" which the parties hoped to use as a settlement device. The case did not settle, and Bradley did nothing more on the case. He testified that he did not even remember what documents he saw or whether any were protected by the attorney-client privilege and not disclosed during the settlement effort.

Sometime within the next year, Bradley left his former firm and was hired by the firm which was local counsel for the subcontractor, i.e., a party on the other side of the case. Bradley himself had nothing to do with the litigation at the new firm, and indeed seems not to have known that his new firm had any part in it until May, 1985.

27. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a) (1983).
At that time, he met an attorney from the principal counsel for the subcontractor who was visiting his new firm's office and whom he had apparently met in connection with the mini-trial. Senior counsel at Bradley's new firm figured out what happened, and it was agreed that no one at the firm would talk with him about the case. All files were previously and thereafter kept adjacent to the main litigator's office, and not in the firm's file room. Thus, Bradley had no access to them. Nevertheless, in November, 1985, counsel for the architect moved to have Bradley's firm disqualified from further participation in the litigation.

The court held that it had the authority to supervise the conduct of attorneys appearing before it, including the authority to order their disqualification. It also held that the architect had to be deemed to have been a "client" of Bradley, even though Bradley's firm actually represented the mechanical engineer. The two parties were aligned together in the case, they held joint strategy sessions, and some of the architect's documents were part of the "book" which Bradley prepared. Thus, Bradley himself clearly had to be disqualified from taking part in the current phase of the litigation.

Of course, no one was seriously contesting Bradley's disqualification. The question was disqualification of his law firm. As to that point, the court discerned a seeming liberalization of imputed disqualification under the Model Rules of Professional Conduct as compared to the Model Code of Professional Responsibility.

The court cited Rule 1.10(b), which we have seen provides in substance that where an attorney leaves a firm representing one side in a case, but in fact has done nothing on the case and knows nothing about it, the lawyer does not disqualify the firm to which he moves. Second, the court cited Rule 1.11(b) which provides that a former government lawyer's firm is not disqualified if the lawyer is "screened from any participation in the matter and apportioned no part of the fee therefrom." Neither of the above rules was specifically applicable to the facts before the court, of course, but the spirit of the rules seemed to the court to modify the traditional no-exemption application of imputed disqualification.

The court was concerned that the case had already consumed several years and that the cost of now switching counsel would be

30. Id. at 421-22 (citing Richardson v. Hamilton Int'l Corp., 469 F.2d 1382 (3d Cir. 1972)).
31. Id. at 423-24 (citing Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978)).
great both to the client and the progress of the case.\textsuperscript{32} The court concluded that with proper screening the actual prejudice to the former client would be minimal.\textsuperscript{33} Thus, the court held that Bradley’s firm should not be per se disqualified, provided that Bradley was continuously kept under a “cone of silence” by his firm with respect to all information concerning the case.\textsuperscript{34}

**THE POOR CASE OFTEN MADE FOR IMPUTED DISQUALIFICATION**

I am sure that the result in the *Nemours* case seems inherently reasonable to many. It is consistent with what we know of the reality of modern law firms. One advocate for change in the rule has written: “Indiscriminate application of the firm-disqualification rule—a rule fashioned in a day when law firms were small and intrafirm relations informal—is no longer viable in the complex world of large firms.”\textsuperscript{35} As we all know, large firms today are simply not family-like places in which everybody knows what everyone else is doing, much less what client information each other knows.

The sense of unreality underlying firm disqualification is reinforced by some of the arguments used to justify the rule. It may be argued, for example, that imputed disqualification is the inevitable result of applying agency law to the lawyer-client relation. Partnerships, including law partnerships, are made up of reciprocal principal/agency relations.”\textsuperscript{36} As Comment 6 to Model Rule 1.10

\textsuperscript{32} *Id.* at 430. The court also pointed out that the moving party had known of the possible conflict for five months before filing its motion. The court gently suggested that “mere delay and harassment” might have motivated the motion at this point in the litigation. *Id.* at 431.

\textsuperscript{33} *Id.* at 429. At least two other cases involving former private clients have reached this same result. *See* INA Underwriters Ins. Co. v. Rubin, 635 F. Supp. 1 (E.D. Pa. 1983); Lemaire v. Texaco, Inc., 496 F. Supp. 1308 (E.D. Tex. 1980).

\textsuperscript{34} *Id.* at 428. The term “cone of silence” was a conscious invention of the court in this case.

The conical image, a metaphor adopted from popular television, more appropriately describes the responsibility of the *individual* attorney to guard the secrets of his former client. He is commanded by the ethical rules to seal, or encase, these particular confidences within his own conscience. The term ‘Chinese Wall’ is suggestive of attempts in the context of a large law firm to physically cordon off attorneys possessing information from the other members of the firm who represent clients whose interests are adverse to interests of these former clients. Such an approach tends to cast a shadow of disrepute on attorneys separated in this manner from their professional colleagues.

*Id.* at 428 (citation omitted).


\textsuperscript{36} **UNIFORM PARTNERSHIP ACT** § 6 U.L.A. 132 (1914): “Every partner is an agent of
puts it: "[A] firm of lawyers is essentially one lawyer for purposes of
the rules governing loyalty to the client." 37

Traditionally, what one agent of a firm knows, all members of
the firm are presumed to know. From this presumption of vicarious
knowledge, 38 then, the case for imputed disqualification may be made.
Even a moment's reflection, however, suggests the weakness of this
analysis. The Second Circuit has written:

[I]t would be absurd to conclude that immediately upon their entry
on duty [lawyers] become the recipients of knowledge as to the
names of all the firm's clients, the contents of all files relating to
such clients, and all confidential disclosures by client officers or
employees to any lawyer in the firm. Obviously, such legal osmosis
does not occur. 39

Indeed, except in the case of simultaneous representation, the ar-
gument is not even good partnership law. Partners are not literally
assumed to know everything each other knows. Instead, they are
charged with knowledge acquired in pursuit of the partnership's af-
fairs. 40 Put another way, in a business firm in which communication
of information should occur, the legal rule assumes it has occurred so
as to require the firm to organize itself so that it will occur.

This kind of presumption about knowledge certainly does not ex-
plain imputed disqualification in a law firm setting, at least not in all
settings in which the rule applies. In the former client case, for ex-
ample, where Ann Andrews moved from Firm A to Firm B, she could
not, by definition, have acquired any disqualifying knowledge while
in pursuit of Firm B's affairs. The subsequent imputed disqualification
of Firm B, then, must depend on something other than the mechan-
ical invocation of agency or partnership law. 41

the partnership for the purpose of its business . . . . "; Cf. RESTATEMENT (SECOND) OF
AGENCY § 14A (1958).

37. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 Comment 6 (1983).

38. This analysis evolved into what several cases have called a "conclusive presumption"
that all lawyers in a firm have shared the confidences and secrets of each other's clients. E.g.,
Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc., 607 F.2d 186,
197-98 (7th Cir. 1979) (en banc) (Swygert, J., dissenting); Celanese Corp. v. Lessona Corp. (In
re Yarn Processing Patent Validity Litigation), 530 F.2d 83, 89 (5th Cir. 1976); Laskey Bros.
of W. Va., Inc. v. Warner Bros. Pictures, Inc. 224 F.2d 824, 827 (2d Cir. 1955).

39. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 753-54 (2d
Cir. 1975).

40. UNIFORM PARTNERSHIP ACT § 12, 6 U.L.A. 160 (1914): "[T]he knowledge of the
partner . . . acquired while a partner . . . [or which the partner] could and should have com-
municated . . . to the acting partner, operate as knowledge of the partnership . . . ."; Cf. RESTATE-

41. Yet another incomplete justification for the rule is the American Bar Foundation's
THE BETTER RATIONALE FOR IMPUTED DISQUALIFICATION

If imputed disqualification of a law firm were, in fact, derived thoughtlessly from agency law, perhaps an equally technical response such as screening could be justified. When disqualification is seen as the measured response to a real problem, however, one must evaluate the response in terms of the reality. I believe that the disqualification of Firm B is required by three realities of life in the modern law firm.

First is the relative informality of information exchange within most law firms. This is not an argument that within a modern firm everyone knows everyone else's business. It is a recognition of the fact that people tend to specialize their work within firms and tend to consult others in the firm who can give them necessary help on areas outside their expertise.

Second is the powerful economic incentive to use information that will help the firm win a case on behalf of a current client. Competition for clients can be fierce today. Clients want to hire winners and a record of being second best is not good enough for most firms to succeed.42 Indeed, a highly-regarded American Bar Foundation study of Chicago lawyers suggests that the fear of losing clients creates the single most important pressure to engage in less-than-clearly ethical behavior today.43

Third and perhaps most important is the fact that no one outside a firm—indeed often leadership inside a firm—can ever be sure what has transpired behind the law firm's closed doors. One need not be an unreformed cynic to see that the success of screening depends almost entirely on the other side's confidence in the good faith and ability to control conduct within the firm purporting to build the "Chinese Wall," honor the "screen," or create the "cone of silence." Professor Wolfram puts the matter well: "In the end there is little but the self-serving assurance of the screening-lawyer foxes that they will care-

42. The pressures within a law firm today are discussed in A.B.A. COMMISSION ON PROFESSIONALISM, "IN THE SPIRIT OF PUBLIC SERVICES:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 8-9 (1986).
fully guard the screened-lawyer chickens.\footnote{44} I respectfully submit that these three observations are realities of today’s law firms. They are not necessarily unique to today, of course, but they are concerns that all lawyers can understand. I believe that these are both the concerns that led the courts to the rule of imputed disqualification and that now should dictate the courts’ attitudes toward screening.\footnote{45}

\textbf{SOME “COMPETING VALUES” CONSIDERED}

If the arguments in favor of imputed disqualification are not made persuasively, “competing values” which suggest the propriety of screening can seem more important than they should.

First, imputed disqualification is sometimes criticized because it tends to limit attorney mobility.\footnote{46} If Ann Andrews, longtime counsel to Litigant, wants to change firms, she will effectively be limited from joining any firm now representing someone in a suit against Litigant. That is clearly a practical limitation on Andrews’ mobility, but is it a consideration that should be of ethical significance?

At best, the concern for attorney mobility is a concern for the welfare of attorneys, not clients. To be sure, of course, we often reflect concerns for attorneys’ own interests in our ethical standards. Indeed, our own interests sometimes seem to be put ahead of those of our clients, the courts and the public.\footnote{47}

But when we are drafting ethics rules that way, at the very least we ought to understand clearly what we are doing. All other things being equal, there is probably no harm in designing ethical rules that

\footnote{44. C. Wolfram, supra note 3, at 402.}
\footnote{45. The attorney-client privilege does not have to be sold to lawyers, but it may be useful to recall that a concern about protecting valuable information is not unique to the legal profession. When trade secrets are disclosed to persons for specific, limited purposes, the law protects the disclosing person’s rights in such information. The law recognizes that it is often important for persons to be able to make disclosures with the assurance that the recipient of the information will not then use it for his own benefit or to the detriment of the disclosing party. In addition, the law of agency has treated as an implied term of the principal-agent relationship that the agent would similarly respect the principal’s right to information. I believe that this respect for property rights in information is a useful way to think about the lawyer’s duty to protect the confidences and secrets of a client. We often like to think the rules that apply to lawyers are “different” from the rules governing other mortals, but I believe that it is properly humbling for us to see that lawyer ethical rules are neither unique to us nor matters over which we have complete control.}
\footnote{46. E.g., Developments in the Law: Conflicts of Interest, 94 Harv. L. Rev. 1244, 1365-67 (1981).}
\footnote{47. This thesis is developed in Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702 (1977).}
permit maximum attorney job mobility. It is simply not an objective to be pursued if, in the process, significant client or public concerns—such as client confidences—are potentially compromised.

Second, it is sometimes argued that an imputed disqualification rule works a particular hardship in a city with only a few large firms. The court in Nemours, for example, noted that there are only ten large firms in Wilmington. They employ 40% of the county’s lawyers, and all but two of the firms were already involved in the case. If one firm had to be disqualified, the court implied, the business of being local counsel might have to go to other than a “top-ten” firm.48

Surely, this argument falls of its own weight as well. Encouraging firm growth and protection of local firms should not be independent objectives to be valued in developing rules of ethical conduct. The size and number of firms should evolve from the otherwise-justified rules faced by those firms; the rules should not be driven by a desire to keep firms large or the business local.

Third, and potentially most client centered, is the argument that imputed disqualification tends to reduce clients’ free choice of counsel. If Litigant wants to hire Ann Andrews, for example, but Andrews is disqualified because of her prior representation of Opponent, Litigant will have to retain someone other than its first choice of counsel.

Whether or not Litigant’s frustration about taking second-best should be something that justifies ethical concern depends in part on why Litigant wants to hire Andrews. Litigant and Andrews or Andrews’ firm may have had a longstanding attorney-client relationship, for example, which would be expensive and time-consuming to recreate with another firm. If so, I believe that is a matter for legitimate concern. It goes to the issue of effective and efficient service to the client, and such concerns properly should be considered in design of the ethical rule.

On the other hand, Litigant may have wanted to retain Andrews precisely because Litigant thought Andrews, because of her prior representation of Opponent, would be especially sophisticated about handling a case against Opponent. It seems to me clear that the information on which that sophistication is based should not be Andrews’ to sell. What will sometimes be a limitation of Litigant’s free choice, may in other cases simply be a restriction of Litigant’s criteria for the selection of counsel. The problem, of course, lies in designing

an approach which will protect the legitimate concerns of Litigant without infringing on those of her former client.

A PREFERABLE APPROACH TO DISQUALIFICATION

What, then, should be the proper approach to imputed disqualification? Should the courts adopt a balancing test, for example? Should all relevant factors be placed before the court and the decision on disqualification simply be left to the judge?

I believe that that would be the wrong approach. While there will always be close cases that will require judicial resolution, the best ethics rules are those which are relatively uncomplicated and possible for an attorney to apply in his or her own office. Courts which have been uncomfortable with imputed disqualification are certainly correct that motions to disqualify have been used as tools for delay and harassment.\textsuperscript{49} The Supreme Court has reduced the problem somewhat by holding that rulings on such motions may not be the subject of interlocutory appeals.\textsuperscript{50} Federal Rule 11 may also provide a remedy for baseless disqualification motions.\textsuperscript{51} However, it is essential that the rule of imputed disqualification be no broader and no more ambiguous or flexible than reasonably necessary to achieve its purposes.

Must every firm be disqualified, then, no matter how slight one of its members’ connection with a case might have been, and no matter when that contact was? Again, I believe the answer should be no. I believe that the right answer to what is the best disqualification rule can only be found if we ask—not whether one can screen the disqualified lawyer from contact with others in the firm—but whether the lawyer realistically should be said to have received enough of the former client’s information that the court’s protection is required.

This approach is consistent with that taken in ABA Model Rules 1.10(b) & (c).\textsuperscript{52} We saw earlier that those rules deal with the situation of a lawyer who would have been disqualified by imputation had she

\textsuperscript{49} See, e.g., Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982); In re Airport Car Rental Antitrust Litig., 470 F. Supp. 495 (N.D. Cal. 1979).


\textsuperscript{51} Fed. R. Civ. P. 11 was amended in 1983 to provide for the award of attorneys’ fees to a litigant burdened by the harassing tactics of an opponent. The rule has spawned a vast number of Rule 11 awards. See, e.g., SHAFFER, SANCTIONS: RULE 11 AND OTHER POWERS (1986); Batista, Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans?, 54 FORDHAM L. REV. 1 (1985).

\textsuperscript{52} See supra text accompanying notes 25-26.
remained at her prior firm. However, where she in fact had not received confidential information from a disqualified partner or associate at that prior firm, she would not be disqualified after she left the firm. Nor would she be the cause of disqualification of her new firm.

The approach I am suggesting has the additional virtue of making consistent the rule of imputed disqualification as it applies in the simultaneous representation, former private client, and former government client situations. We have seen that the cases of simultaneous representation require disqualification and should. That is because there is no de minimus case of conflicts in simultaneous representation. Information from the client is still being received and could be shared in ways that would be extremely prejudicial.

In the former government lawyer situation, on the other hand, I believe screening is tolerated principally because the kind of information developed by most government lawyers is not “secret” in the sense that private information is. As I have argued elsewhere, statutes such as the Freedom of Information Act give much government information a different character than private information.\(^{53}\) Screening is imposed and tolerated only where we do not believe the information is likely significant anyway, much as someone washes his hands before eating even when his hands are not really dirty. Indeed, under Model Rule 1.11(a)(2), if the government is concerned that important secrets might be compromised by the way screening is handled in the firm, it has a basis to object and protect those secrets.\(^{54}\)

Insofar as one can tell from an appellate opinion, the kind of inquiry I am suggesting was properly made in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.\(^{55}\) Attorney Schreiber was an associate in a large New York law firm. He had worked there for about thirty months before leaving to form his own small firm. While an associate, he worked on bits and pieces of matters involving Chrysler Corporation. After leaving the large firm, Schreiber filed suit against Chrysler on behalf of a dealer whose rent had been raised, arguably in violation of a written lease. His former employer sought to have him disqualified. The district court refused to do so, and the court of appeals affirmed.

Schreiber’s involvement was, at most, limited to brief, informal dis-

\(^{53}\) This analysis of the cases is suggested in Morgan, supra note 19 at 38.

\(^{54}\) Rule 1.11(a)(2) reads: “[W]ritten notice [must be] promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.”

\(^{55}\) 518 F.2d 751 (2d Cir. 1975).
cussions on a procedural matter or research on a specific point of law... We do not believe that there is any basis for distinguishing between partners and associates on the basis of title alone—both are members of the bar and are bound by the same Code of Professional Responsibility. But there is reason to differentiate for disqualification purposes between lawyers who become heavily involved in the facts of a particular matter and those who enter briefly on the periphery for a limited and specific purpose relating solely to legal questions.\

The point of Silver Chrysler Plymouth is that, if there had been bona fide confidences and secrets at stake, the court would have required disqualification. Minimum contacts with the case at the prior firm, however, were not enough.

Interestingly, under my analysis, the Nemours case may well have been rightly decided after all, even if its use of screening as a solution to conflicts problems was wrong. Bradley, the young attorney, had worked on but one part of the lawsuit in question. It was in the settlement phase, and it was not at all clear that confidences of the clients—not disclosed in the "mini-trial"—were involved. Even if they were, his involvement had been so slight and so far removed that he asserted that he remembered nothing. Certainly the burden of proof should be on Bradley to show the client would not be compromised, but the availability of a doctrine of imputed disqualification does not itself require Bradley's disqualification in the first instance.

My proposed rule would not be without its close cases. Some would require judicial resolution. But I believe the majority of cases would be clear to the reasonable lawyer. The issue would be how much connection the lawyer had with the case at the former firm. Doubts about the degree and importance of prior involvement should be resolved against the lawyer. "Screening" might be appropriate for appearance sake where there would be no real harm if the "Chinese Wall" were breached, but it should not be used where legitimate interests of the client are at stake.\

56. Id. at 756 (citations omitted). Another good illustration of this approach is Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc., 607 F.2d 186 (7th Cir. 1979)(en banc).
58. This approach seems implicit in INA Underwriters Ins. Co. v. Rubin, 635 F. Supp. 1 (E.D. Pa. 1983). The court noted that the "client" had consulted a lawyer in the firm which represented his opponent before that lawyer had time to run a conflicts check. The court did not expressly accuse the client of "setting up" the firm, but it said that on the "peculiar facts" of the case, including even a five month delay in filing the motion to disqualify, that "screening," not disqualification, was the appropriate remedy. Id. at 5-6.
An alternative approach, of course, would be not to disqualify lawyers and their firms at all in these cases, but rather to trust the integrity possessed by the majority of lawyers and rely on the attorney discipline process to deal with those lawyers who abuse their clients' confidences. The problem with such a solution, however, is simply that a client can often never know for sure when or whether his confidence has been abused. That the trustworthy must suffer for the sins of the rest is unfortunate, but client confidence must be the key. The rules requiring imputed disqualification have been established in order to prevent abuse before it happens. The discipline process is a necessary but not a sufficient remedy for lawyer violation of professional standards. A remedy which can only be invoked after the fact is often no remedy at all.

In short, I submit that the proposed screening of disqualified lawyers in order to permit their firms to continue representation in a case—whether under the name of "screening," the "Chinese Wall" or the "cone of silence"—represents the wrong answer to the wrong question. It seeks to serve the interest of today's client, and today's interest of law firms. It does so, however, at the expense of former clients whose confidences the lawyer is every bit as obligated to protect.

The right question is whether legitimate interests are at stake in a case which require protection. The approach to imputed disqualification proposed here will tend to focus the lawyer in the first instance, and if necessary later a court, on that right question. If the burden of proof is properly placed on the lawyer and the firm who are the subjects of the disqualification motion, we ought to come as close as possible to sound decisions in these cases.

59. Such an approach is vigorously advocated in Lindgren, supra note 3.
In the Common Defense

National Security Law for Perilous Times

James E. Baker
To my teachers.
learned from the long and somewhat eventful history of intelligence oversight may be fruitful. What has worked well? What has proved redundant or unduly subject to politicization?

The intelligence experience offers a fourth additional lesson. Homeland security is arguably the most legally intensive of the national security law fields. There are complex questions of constitutional law involving federalism, the military, privacy, and federal regulation of the private sector. It is no surprise that Northern Command has the largest staff judge advocate's office. What's more, many of these issues are new issues, for which there is no practice or precedent on which to call. That means that lawyers should not just advise on the substance and process of law. They should actively and aggressively appraise the implementation of law for unintended consequences and efficacy. As the DNI is required to report to the president and the Congress each year on the state of intelligence law, homeland security lawyers should identify any statute, regulation, or practice that impedes the ability of their agency to fully and effectively secure the nation. Likewise, policymakers and lawyers should take note from the intelligence experience—law can facilitate response, but legislation marks a beginning of the process, not its conclusion. Homeland security like intelligence ultimately depends on the human factor—leadership and the moral courage to face hard risks and make hard choices.

10 The National Security Lawyer

This book has considered national security law and process in the context of four security threats. First is the threat of attack by nonstate and state-sponsored or supported actors using terrorist means. Overseas, this threat is realized on a daily basis. Within the United States the threat is continuous, but intermittent. The threat of high-explosive attack, like car and truck bombs, targeted suicide bombings, or the sabotage of aircraft, is most likely to materialize. The threat of catastrophic attack with nuclear weapons has the greatest potential impact on our way of life and in terms of human cost. It is in relation to this threat in particular that we need to evaluate and test national security law and process, both because of the potential consequence and because of the focus the enemy has placed on this means of attack.

Second, U.S. constitutional values may ebb and wane in an endless conflict against state and nonstate actors engaged in acts of terrorism or posing the threat of terrorism. In light of the interminable nature of this threat, assertions of presidential authority made in extremis may become embedded in U.S. practice and law without a corresponding application of checks and balances. Left outside the reach of effective and independent mechanisms of appraisal, broad assertions of executive authority may in time diminish both the principles of law that define American life as well as the physical security at which they are directed.

Third, sincere policy differences, as well as those that are politically inspired, regarding the nature of the terrorist threat and the corresponding measure of response may result in a zero-sum compromise; that is, a diminution of security or a diminution of law, rather than contextual formulas that advance both at once. If the executive needs broad and rapid authority to engage in intelligence collection—as it does—the better course is not to limit the authority, for fear of misuse, but to increase the opportunities for meaningful internal and external appraisal. Such appraisal will deter misuse, but as importantly, encourage effective use. In this enduring conflict we may exhaust our resources or our principles in a manner that leaves us unwilling
or unable to effectively address this century's other certain crises, including the proliferation of weapons of mass destruction to unreliable state actors, the advent of pandemic disease, and environmental degradation and change.

This book has focused on the threat of terrorist attack because this is the threat that today drives the legal debate about the president's constitutional authority. More generally, it drives the purpose and meaning of national security law. It will continue to do so. It is also the threat with the greatest potential to transform U.S. national security, in both a physical and a values sense. The importance of addressing other issues, such as conflict in the Middle East, totalitarian regimes, or pandemic disease, must not be overlooked. Each bears the potential to spiral beyond control resulting in catastrophe at home and overseas. Each of these issues warrants full consideration of the national security instruments and processes described in this book.

In each context, law and national security lawyers may contribute to national security in multiple ways. First, the law provides an array of positive or substantive instruments the president may wield to provide for security. Second, the law provides procedural mechanisms offering opportunities to consider, validate, appraise, and improve policy, as well as ensure its lawful execution. These mechanisms include the horizontal separation of constitutional powers at the federal level, and the vertical separation of powers between the federal government and state government. They are found as well in statute and in internal executive directive.

The most effective means of appraisal are often found through informal practice. Informal contact allows participants to speak with a freedom not permitted or not often found when hearing the institutional mantle of an office or branch of government. Consider the difference in reaction between the counsel that sits down with the policymaker for a discussion and the counsel who requests the policymaker to put down in a memorandum everything that occurred. With informal practice the role of personality and friendship can serve to facilitate information exchange and the frank exchange of views.

Third, in the international context, law provides mechanisms to achieve U.S. national security objectives. This is evident in the context of maritime security, where U.S. law is pegged to an international framework, and effective security requires international as well as domestic participation. In the area of intelligence integration, bilateral and multilateral agreements, like the PSI and bilateral aviation agreements, provide essential mechanisms for identifying intelligence, sharing intelligence, and acting on intelligence.

Fourth, the law reflects and projects American values of democracy and liberty. Values are silent force multipliers as well as positive national security tools. As Lawrence Wright, the author of The Looming Tower, and others argue, jihadists like Osama Bin Laden offer no programs or policies for governance, no alternative to Western democracy. They offer only the opportunity for revenge. Rule of law is the West's alternative to jihadist terrorism. Law, and respect for law, offers the structure of democracy, the opportunity for individual fulfillment regardless of sex, race, or creed, and a process for the impartial administration of justice. Sustained commitment to the rule of law in practice and perception will serve as a positive national security tool in curtailing recruitment of the next wave and generation of jihadists.

But law, like homeland security, is an incremental endeavor. It is dependent on sustained action, not rhetoric, and perceptions can be swept aside in a few ill-chosen moments. Law, like this conflict, requires sustained sacrifice and sustained support. Thus, divisive legal arguments should be eschewed, unless they are essential to security and there are no alternative means to accomplish the same necessary security end.

The law may contribute to national security in other ways as well. The law is a source of predictability. Through prediction, it becomes a source of deterrence. If the law is understood to permit the use of force, or the collection of intelligence, then allies and opponents alike may modulate their behavior accordingly.

Law can also be a source of calm and stability at times of crisis, guiding but not compelling decisionmakers to processes of decision that rapidly identify risks and benefits and fix accountability. Rapid decision can be obtained through secrecy and by truncating process; it can also be found through the expectation and practice that process provides. This is evident in the case of the military chain of command. This can be true with the president's national security processes as well.

The law is also a source of continuity. An enduring conflict requires enduring commitment, in values, funding, and sacrifice, and thus unity across party or factional transitions. Where essential policy is embedded in framework statutes, it is less subject to, but not immune from the vicissitudes of momentary political advantage or the policy pressures of immediacy. In a conflict marked by intermittent attacks over years, at least in the United States, law can insulate policy from the loss of public or even official attention. For example, where a tool is dependent on sustained funding and policy commitment, legal mandates can hold bureaucratic focus. And, where policy is embedded in law, intelligence and law enforcement operatives may take greater risks knowing the authority for their actions is documented in law and not dependent on classified authorities or recollections of approval.

At the same time, there is much the law cannot do. Law and process provide an opportunity for success, but do not guarantee result. Leadership, culture, personality, and sometimes good luck are as important as law. A well-crafted emergency response directive does not compel first responders to climb the stairs of a burning building—courage, leadership, and commitment do.

Law is a human endeavor that is dependent on the human factor. We are a nation of laws, but we are also a nation of men and women, or if you like a
nation of law and lawyers. It is men and women who write the law, interpret the law, and decide whether to uphold the law. Where national security is at stake, the human influence is manifest. "National security" necessarily involves the application of subjective values and not just security criteria. Further, as considered in Chapter 4, the law is as dependent on theory as it is on black-letter principle, and thus is dependent on human values and choice. Even where the law is clear, the facts rarely are, for the reasons articulated in Chapter 7. The application of fact to law, of intelligence to security, involves human judgment rather than the mechanical review of facts.

Law also involves moral courage. Field Marshal Slim, who served on the Western Front during the First World War and is considered one of the best commanders during World War II, compared physical and moral courage. He described moral courage as "a more reasoning attitude, which enables [a man] coolly to stake career, happiness, his whole future, on his judgment of what he thinks either right or worthwhile." Slim said,

I have known many men who had marked physical courage, but lacked moral courage. On the other hand I have seen men who undoubtedly possessed moral courage very cautious about taking physical risks. But I have never met a man with moral courage who would not, when it was really necessary, face bodily danger. Moral courage is a higher and rarer virtue than physical courage.¹

Most lawyers will not have Field Marshal Slim's opportunity to test the comparative proposition. But they will have their moral courage tested. They will be tested sitting at a Principals Meeting when they have to decide whether, and how to speak up. They will be tested when they must step outside their personalities, loud, quiet, or in between, and step into a different role in order to apply the law more meaningfully. The quiet personality will be asked to make public presentations on behalf and in defense of the law. Sometimes the strong personality must sit down for the law, for example, at an interagency meeting where bureaucratic diplomacy may be the order of the day. But minutes later, in the face of the deputy secretary or national security advisor, the lawyer must have the courage to insist on attendance at a necessary meeting. In short, national security law is as contingent on the national security lawyer as it is on the law.

A. NATIONAL SECURITY LEGAL PRACTICE

In a constitutional democracy decisions are intended to be made according to law. That means that sound national security process must incorporate timely and competent legal advice. What form should that advice take?

In some cases, legal review is dictated by statute, as in the case of the Foreign Intelligence Surveillance Act, which requires designated officials, including lawyers, to certify requests for electronic surveillance or physical search before they are submitted to the FISA court. In other cases, the president has directed a specific process of legal review, for example, in areas historically prone to peril, such as covert action. However, the majority of legal advice within the national security process is not required by law or directive, but is the product of practice, custom, and the rapport, if any, between officials and their lawyers.

At the national level the daily participants are generally the same from administration to administration: the attorney general and deputy attorney general; the Office of Legal Counsel within the Department of Justice; and other agencies' general counsels, especially those at Defense, State, CIA, and DHS, as well as the chairman's legal advisor. Of course, in context, senior deputies and alter egos play an equivalent role.

Traditionally, lawyers for the president engaged in national security law have included the counsel to the president and the National Security Council's legal advisor. Practice varies as to the relative role and weight of each and the extent to which other White House lawyers, such as the deputy White House counsel, are involved in national security decision-making, if at all.² Depending on administrations, and personalities, the role of the counsel to the vice president has ranged from a defining one to no role at all with respect to national security law.³

Other lawyers play central roles as well. The judge advocates general of the military services, for example, are central players in the development of military law and legal policy as well as the application of the law of armed conflict. Within the Department of Justice, the assistant attorney general for national security, the head of the Office of Intelligence Policy and Review, the Office of Legal Counsel, and the assistant attorney general for the criminal division are all central players on issues of intelligence and counterterrorism. Counsel at each of the intelligence community components and those engaged in issues of terrorism asset control and money laundering at Treasury also engage in daily national security practice. Each of these officials is supported by line attorneys who in many cases are the experts in their discipline and serve as the initial (and often) final point of contact for legal advice.

Each president, agency head, and commander will adopt his or her own approach to legal advice, ranging from active engagement with their lawyers and an understanding of the law to avoidance. Some officials do seek legal advice unless the word "law" is mentioned and then only if it is mentioned four times in the subject line of a memo. Other officials view their lawyers as wide-ranging advisors, officials outside the policy process - stakeholders, and thus troubleshooters who may serve in capacity of counselor and not just legal advisors.

Officials and lawyers sometimes refer to lawyers "staying in their lane." But with national security there is rarely a street map. It is not always clear
where the lane begins or ends, and whether the intended road is a goat path or an informational superhighway. Some lawyers will operate on a defined track — litigators litigate, Office of Intelligence Policy and Review (OIPR) attorneys process FISA requests (among other things), the AECA lawyer reviews munitions list licenses. However, for more senior lawyers there are rarely set templates outside those dictated by law or directive for how to practice national security law. That means the individual lawyer will define the role as much as he or she will assume it. Moreover, policy officials will ultimately find those lawyers whose style and advice they trust regardless of individual assignments.

Application of national security law involves the rapid review and identification of legal issues embedded in policy options, policy decisions, and policy statements. At the NSC, for example, counsel traditionally coordinate the provision of advice to meetings of the Principals and Deputies Committees, among other tasks, and, where appropriate, attend such meetings to field questions and identify issues. However, this role appears to have varied in texture depending on whether the NSC staff are viewed as facilitators of interagency process or sources of rival legal advice to department general counsel. It also depends on the national security role assumed by the counsel to the president. In addition, NSC counsel provide internal legal advice to the president, national security advisor, and NSC staff as well as review and write memoranda to the president, issue spotting and discussing the legal issues raised. However, these roles are not defined in statute and are, outside the confines of certain narrow spheres, not defined in directive. Rather, these roles are defined by practice and the adoption or modification of past practice by successor officials.

Lawyers serving in defined billets are more likely to find continuity in the form and method of practice, but not necessarily in the substance of practice. For example, the assistant attorney general for the Office of Legal Counsel and his or her deputies generally provide constitutional advice to the executive branch and arbitrate interagency legal disputes, usually through promulgation of formal (often classified) legal memoranda. They are consulted, but are usually less active on daily issues of national security implementation and NSC policy development.

Likewise, line attorneys, as well as programmatic attorneys, are more likely to specialize in particular areas of law and find defined and generally accepted roles. This description might apply, for example, to a line attorney at the State Department who reviews export control licenses, or the attorney at the Treasury Department who reviews financial transactions with foreign states, or a Justice Department lawyer who reviews FISA applications. These lawyers play critical national security roles, but are less likely to address the breadth of national security issues identified in this book. Their lanes are relatively clear and defined.

In addition, lawyers serving as agency general counsel, or their equivalent, perform or oversee the performance of myriad tasks generally associated with lawyers, such as drafting legal documents, reviewing legislation, overseeing litigation, and addressing matters of budget, personnel, and contracting. Rule of law and respect for law are often defined by these tasks. Do the lawyers apply the ethics rules with reason, care, and rigor? Are legislative and public documents searched conducted in earnest? These everyday tasks help define constitutional government, involving as they do the interface between branches of government and between the government and the public.

Harder to define is the role lawyers should take involving matters where there is discretion as to the style of practice, where the lawyer might have a choice between a proactive, active, or reactive role. In role-playing, personality can be as important as intellectual capacity and training. Not every attorney is suited to a process of decision-making that can be rapid and is conducted under stress and often involves the application of law to uncertain or emerging facts. In this context, lawyers must know when to render their best advice and let go of an issue or when to hold an issue and request time for further review, or to buck the issue up the legal line. There is rarely time to double back for a second look. This may be difficult for lawyers who prefer the deliberative and careful speed of appellate work. It may also be difficult for lawyers who prefer practice areas oriented toward black-letter law and absolute answers. In short, national security practice requires a capacity to close on issues and make decisions, identifying nuance and caveats, if necessary.

National security practice also requires a capacity to compartmentalize work. This is true in a security sense. Lawyers operate under multiple constraints regarding what they can say and to whom based on the attorney-client, deliberative process, and state secrets privileges. (A sure way for a lawyer not to be in the right place at the right time is to garner a reputation for indiscretion.) However, by compartmentalization, I also mean an emotional and intellectual ability to move from one issue to another in rapid succession without getting stuck on just one issue. Policymakers must master this same skill. In contrast, subordinates assigned to specific issues are expected to devote their attention to a single policy issue and drive that issue up and down the chain of command.

As in other legal fields, national security lawyers should learn to subordinate matters of ego to the task of meaningfully applying the law. In doing so, they will have ample opportunity to learn the maxim that it is often the messenger who pays the price for the message. How common is the disapproving refrain, "Lawyers!" The refrain might be more aptly addressed - "Legislators!" "Democracy!" or "Benjamin Franklin!" — unless, of course, it is the lawyer who has delayed decision or diluted decision out of undue
caution or concern. Lawyers must also appreciate that while steady and faithful application of the law is a hallmark of constitutional government, in most bureaucratic and substantive contexts they are supporting arm to the policy process. Outside the Department of Justice, success is associated with the policy and not the legal work that supports the policy.

Lawyers are also subject to having their advice tested, as they should. That is part of the national security process and an essential part of internal and external appraisal. Does the lawyer understand the facts? Does the lawyer understand the law? Has the lawyer distinguished between law and legal policy? However, style varies. Where the stakes are high the distinction between understanding, testing, and bullying may be lost. Policymakers have a duty to push. Policymakers do not become policy generals by sitting back and waiting for events to unfold or opportunities to come their way. Boot camp, it turns out, is sound training for national security lawyers. National security lawyers will be tested and pushed, as they should be when national security is at stake. The lawyers will know when a bad idea has encountered a better idea and they must have the courage to adjust their views; but they will also know when they have bent under pressure, knowing the difference between a good faith argument and an inability to hold a line.

The practice of national security law, like many areas of law, requires endurance. However, in private practice the client has usually come to the counsel and now expects hard and constant effort. National security law requires comparable effort, but a different kind of endurance. Lawyers are not always invited into the decision-making room. This reluctance reflects concerns about secrecy, delay, and “lawyer creep” (the legal version of “mission creep,” whereby one legal question becomes seventeen, requiring not one lawyer but forty-three to answer). Of course, decisionmakers may also fear that the lawyer may say no to something the policymaker wants to do. Rule of law often depends on the lawyer being in the right place at the right time to render advice. This is achieved by reading agendas, attending staff meetings, and ensuring that they and not the policymaker or the secretariat define what it is the lawyer needs to see.

National security process is never designed to convenience the lawyer. Sometimes it is specifically designed to avoid the lawyer. Endurance means having fresh legs in the middle of the night as well as first thing in the morning. Some officials will wait until the late night or the weekend to move their memos, noting “not available” for a legal clearance. The lawyer avoids such traps by meeting deadlines, negating silent consent, and where necessary by laying out tripwires, alerting the executive secretary of issues they need to see, sending timely e-mail prompting inclusion in discussions, and meeting each policy staff member one-on-one to establish expectations and confidence.

Most important, counsel should gain the support of the principal official engaged. This is done by adding value to the process and articulating for the decisionmaker why lawyers should have a seat at the table (or in the Situation Room, along the wall). Counsel keeps that seat through effective practice that is proactive, entailing the same zeal in overcoming legal and bureaucratic obstacles as they show in identifying them. A lawyer engaged at the advent of policy development is more likely to influence and guide than one that clears the final memorandum to the decisionmaker, where policy advisors have already committed to both the substance of decision and means of execution. Moreover, if the lawyer waits for issues, or is perceived as an obstacle rather than a source of value, the lawyer will find he or she is only contributing to decisions where legal review is mandated and then only as the last stop on the bureaucratic bus route.

Lawyers can advance the application of law in a number of ways. First, by understanding national security process, counsel can better identify where decisions are formed and made and thus where legal input is most useful. Second, by understanding the military and intelligence instruments counsel can better apply the law to fact. For example, military lawyers can hardly apply the principles of proportionality, discrimination, and necessity to targets without having an understanding of the weapons, munitions, and tactics that inform judgments about necessity and proportionality. Likewise, counsel addressing the use of force should understand the qualitative and quantitative limits of intelligence, distinguishing between evidence, inference, and intelligence in the process. Third, counsel must understand bureaucracy, knowing when and how to provide advice in person, via memo, and through e-mail, without losing sight that each written communication is a record no matter how informal, and that tone and demeanor can get lost in e-mail.

Finally, counsel should master and proactively recommend legal methods for overcoming bureaucratic inertia and resistance. Such methods include (a) presidential directives, (b) agency directives, (c) interagency or intra-agency memoranda of understanding, (d) lead agency designations, (e) the conduct of exercises, (f) textual adjustments that defer or eliminate concerns, or (g) just the force of personality or diplomacy. Concerns about the deployment of armed forces in civil context might be addressed through resort to any one of these methodologies or by textually limiting the scope, service, or situation in which the forces might be used. Such limitations might be put in the president’s action memorandum, in the executive order, or in the rules of engagement. Alternative process may work as well, such as resorting to bimonthly meetings of the agency heads, in an effort to take issues up and over bureaucratic obstacles, or holding weekly lunches of the sort that Mr. Carlucci and Mr. Berger found effective.

Where lawyers are being used to dress policy disagreements up in determinative legal clothing – “my lawyer says this is illegal” – good legal process
can allow decisionmakers to focus on the policy issues at hand. Legal issues should be culled from policy agendas and intra- or inter-agency legal meetings held in advance to review options. This allows an opportunity to send issues up the legal chain rather than letting them linger, and possibly side-tracking deliberations. Moreover, just as policymakers forum shop for “can do” lawyers, or perhaps compliant lawyers, lawyers do the same, looking for lawyers who are problem solvers and do not shoot from the hip.

As in other areas of law, preparation is essential. This means reading agendas, consulting with relevant experts on an intra-agency and inter-agency basis, and taking issues up the legal chain of command in advance of meetings so that the lawyer can speak authoritatively when presented with the opportunity to do so. The opportunity may not come again.

Lawyers should also craft, and figuratively or actually, carry walk-about books to address national security issues as they arise. There is no excuse, for example, if the Northern Command staff judge advocate or counsel to the president does not have draft declarations “in the can” to address virtually every homeland security scenario. One purpose of tabletop exercises is to alert policymakers and lawyers to legal obstacles that lie ahead so that lawyers might find the means of circumnavigation before the crisis.

Preparation also entails educating the policymaker. Absent groundwork, the policymaker may respond at the moment of crisis by seeing the law only as something that allows or does not allow the policymaker to do what he wants. Contextual advice built on a foundation already laid is readily absorbed and accepted and will add greater value to the national security mission. A 3 AM conference call is no time to explain for the first time the principles of proportionality, necessity, and discrimination in targeting. Nor is the immediate aftermath of a natural disaster or terrorist attack the optimal time to explore for the first time the delicate legal policy issues raised by the deployment of U.S. military personnel in a civil context. In addition, the policymaker will understand in a live situation that the lawyer is applying “hard law” — specific, well established, and sanctioned — and not kibitzing on policy or operational matters.

Advance education also helps establish lines of communication and a common vocabulary of nuance between lawyer and policymaker before the crisis. A policymaker who hears a good briefing on civil-military deployment will be sure his or her lawyer fully participates in any subsequent decisional process. In a large and layered bureaucracy, where the lawyer may be less proximate to the decisionmaker, and cannot count on immediate access, the teaching process is equally important in defining roles as well as legal expectations; however, it is more likely to occur through submission of written memoranda.

National security law also entails the application of legal policy; however, lawyers must take care to distinguish between what is law and what is legal policy. The identification of a preferred course as between lawful options is legal policy. The identification of a better argument among available arguments is legal policy. Identification of the long-term and short-term impact of legal arguments is legal policy. For example, will other states assert the same right to act as the United States asserts, and if so, what are the long-term costs and benefits of the United States asserting such authority? If a constitutional argument is legally available to the president, will it nonetheless generate a congressional or public response disproportionate to the benefits of using the argument?

The reality is that many national security law questions are not yes or no questions. Just as many national security policy decisions represent 51–49 judgments, legal judgments may be close calls; legal policy helps to identify the pros and cons of taking alternative positions. This is particularly the case where legal policy is national security policy as well; for example, where foreign reaction to U.S. legal choices may help or hinder alliances, or where reciprocal applications of law may harm U.S. national security.

Finally, lawyers, like policymakers, must return to appraise their work. Has the ground truth shifted in a manner that alters the legal basis for an action in either a permissive or restrictive manner? Has the president’s directive been implemented in the manner intended? Do the ROE provide adequate protection and flexibility for U.S. forces? Has process been implemented in a manner that facilitates or that impedes rapid decision or the identification of policy options?

In summary, the national security lawyer must consider not only the substance of the law but also the practice and process of law and the essential decisional skills that bear on the practice of national security law. In the end, however, most senior executive branch lawyers serve at the direction and sometimes discretion of the department counsel, department head, and ultimately the president. Chances are, if the policymaker is not satisfied with the manner, method, or substance of advice he will replace his counsel, seek his reassignment, or work around counsel to work with other lawyers. Whether he is satisfied will not only depend on the performance of the lawyer but also on whether they share common expectations of how to define the duties of the national security lawyer.

B. THE DUTY OF THE NATIONAL SECURITY LAWYER

Academics and practitioners sometimes define the roles and responsibilities of lawyers through identification of the client and the client’s interests. Thus, in private context, the ABA Model Rules of Professional Conduct state:

A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.⁴
It is the client who must decide critical questions of strategy and it is to the client to whom the attorney owes a duty of loyalty and confidentiality.

The client-based private model, however, is less apt in identifying and defining the responsibilities of the national security lawyer. To start, in government context, there are differing views on just who (or perhaps who) is the "client." Scholars and practitioners have identified both animate and conceptual candidates, including the president, the agency, the public interest, and the Constitution. Consider that there are at least five possible and distinct facets to the president as client alone. At any given time the president may function as chief executive, party leader, commander in chief, the embodiment of the institution of the office of the president, or the president in his personal capacity. Each facet potentially represents distinct interests and responsibilities. While the national security lawyer certainly owes the president dedication and commitment as commander in chief, he does not necessarily owe the president as party leader the same zeal. Indeed, he may be legally barred under the Hatch Act from exercising any zeal at all.

In a related manner, there are differing perspectives, or models, on how national security lawyers should practice law, which reflect but are not necessarily determined by the identification of the "client." In the judicial model for example, the lawyer is expected to render neutral detached views on the law, as a judge might, ultimately rendering a decision as to what the law is. The advisory model posits that the attorney will render advice on legally available options. The advocacy model, perhaps, is closest in paralleling the private model, with the attorney serving to guide the client to the client's preferred outcomes and then defending the client's actions. It might be said that with the judicial model the attorney works with both hands, presenting both sides of each issue. In the client-based or advocate model, the attorney works with one hand, finding a legal basis for what it is the client wishes to accomplish.

Such models bring structure to consideration of the practice of national security law and may serve as a point of departure in describing the duties of the national security lawyer. However, in the daily mix of practice, most national security lawyers do not relate their conduct back to specific theories of ethical responsibility and conflict of interest analysis, as a government or private practitioner might do in criminal practice. This reflects the nature of most national security practice. The provision of advice regarding the Foreign Assistance Act, for example, does not require identification of the client, but rather the competent official who can authorize use of the authority. This may vary depending on the section of law and internal agency process. When the assistant secretary asks whether the United States can provide aid, the question is not, who is the client? - it is whether the Act authorizes such aid and, if so, subject to what substantive and procedural thresholds.

Likewise, judge advocates in the field do not ask, who is the client? - they ask, which commander has the authority to issue the lawful order to attack? Even where issues present what look like traditional private legal ethics questions, for example, in cases involving the waiver of a privilege, the question is not resolved through identification of the client - for example, the agency or agency head - but rather through knowledge of the substance of law and process. In the case of executive privilege the answer is the president. In the case of classified information the answer is found in some combination of the originating agency, the DNI, and the president. And in the litigation context, the answer may vary depending on who can ultimately speak for the government on the specific issue presented.

Moreover, attorneys need not resort to ethics or academic models to define their role, when so much of the role is already defined in law and in particular in the Constitution. First, in Article II the president is charged with taking "Care that the Laws be faithfully executed." Second,

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

Third, Article VI requires that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."

As a matter of statute, government officials, including attorneys, also undertake an oath of office tied to the Constitution.

An individual, except the president, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath:

"I, , do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign or domestic; that I will bear true faith and allegiance to the same; that I will take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

This section does not affect other oaths required by law. As is clear from the statutory text, the oath is not exclusive, but is applied in conjunction with other ethical obligations. Thus, in context, attorneys may well have to consider questions pertaining to the identification of the client. A judge advocate, for example, must adhere to his constitutional oath and to applicable bar codes pertaining to the representation of criminal law clients.
The point is that in the private context where academics and practitioners might reasonably debate to whom the attorney owes loyalty, the government attorney takes one oath and that is to the Constitution and not to a client. Further, that oath and the Constitution require faithful application of the law. That starts with faithful application of the Constitution, its structure and its substance, in the common defense of security and liberty.

Finally, the "client," used here to identify the official with authority to decide an issue, as well as the role of the national security attorney, will vary in context. There are more than 40,000 lawyers in the government. Only a fraction of this number practice national security law. In each context, the "client" may be different. Moreover, within each setting the lawyer will (or should) play each role described above: advisor, counselor, advocate, and judge. The practice is also sufficiently contextual that the answer as to which role is appropriate is found not in identifying the client or a particular model of practice, but in the facts. The skill and art is in knowing when and how to play each role.

Consider the following hypothetical, presenting a preemptive scenario likely to occur in the future. The president's attorney is asked in the middle of the night to review a prospective target for a missile strike. For reasons of operational security, a "black list" is in place. It does not include the attorney general. The target is a suspected WMD weapons facility in a restricted country, but one with which the United States is nominally at peace. The facility is operating under cover as a legitimate commercial enterprise. The target is in play because of intelligence suggesting, but not confirming, that the plant is linked to an Al Qaeda affiliate.

For sound operational reasons, an up or down decision on attacking is needed within two hours, or sooner, to avoid the risk that the enemy will disperse extant WMD weapons. However, no matter that at the staff level there is disagreement on whether the intelligence linking the target to terrorist actors or even clandestine activities is credible and persuasive. There are also differences of view as to whether additional methods of intelligence gathering may improve U.S. knowledge, although there is general agreement that the target is a hard target and that any disclosure of U.S. interest in the facility could lead to the rapid dispersion of existing WMD stockpiles (if any).

What is the role and the duty of the attorney, and is that role defined by identification of the client or application of a judicial, advocacy, or advisory model of practice?

In the advocate model, the attorney might determine that he or she will defend the president's decision regardless of how the factual dispute is resolved, or for that matter whether it is resolved. Thus, the attorney might advise that so long as the president believes he is defending the country he has the legal authority to do so and counsel will support the decision under U.S. and international law.

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In a judicial model, the attorney might ask additional questions. What is the potential for collateral consequences? And, what is the basis for the difference in intelligence opinion? He would then apply the law to the facts as they are known to determine whether a strike is lawful under U.S. and international law. To what extent the attorney believes the target is "illegal" under U.S. law he would indicate so, and if necessary, advise the president that he could not in good faith approve the target.

Under an advisory model, the attorney might advise the president as to the legal standard and defer to the president's judgment on the application of law to fact. Under the public interest model, the attorney might consider what is in the best interest of the United States or the public. Presumably this interest would revolve around getting the facts right, but also taking all measures necessary to defend the country, erring on the side of security.

The attorney should play all of these roles. First, under any rubric the attorney has a duty to resolve the factual ambiguity. Arguably, under an advocacy model, the attorney might sit back and defer to the president's view of the law and facts and then defend both. However, it is not clear how such inaction would represent zealous or diligent representation. The president would still require knowledge of the facts and the law to faithfully execute his security functions. Moreover, under the advocacy model, even if the attorney were poised to validate the president's judgment, he would still need to know the counterarguments to better represent the president's choice. Thus, the question is how best to do so in a manner that respects the role of the president as commander in chief and chief executive.

The hypothetical also illustrates the potential range of duties, functions, and choices the attorney might (and in my view should) address in a given scenario. The national security lawyer has a duty to guide decisionmakers toward legally available options. In performing this function in a timely and meaningful manner, the lawyer provides for our physical security. In doing it faithfully, based on honest belief on the application of law, he provides for the security of our way of life, which is to say, a process of decision founded on respect for the law and subject to law.

The hypothetical presents threshold questions of authority. Therefore, the attorney must consider whether the president has the constitutional authority to authorize the missile strike. As the president is also, in effect, approving a specific military target while authorizing the initial resort to force the attorney should run through a three-pronged substantive template:

(1) Does the president have the constitutional authority to use force, and is it subject to a statutory overlay? If so, must or should the president consult with the Congress, or notify the Congress in advance?
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(2) Is the use of force a lawful exercise in self-defense, anticipatory self-defense, or preemption? Will such an assertion be viewed as controversial? And, what are the legal policy ramifications of U.S. decision?

(3) Is the president's selection of targets and the means and methods of attack consistent with the law of armed conflict as reflected in U.S. and international law?

The attorney should also consider a procedural template:

(1) Who must authorize the use of force?
(2) Must the attorney general be informed? Should the attorney general be informed? If not, or if so, who must/should make that decision?
(3) Is the president aware of the factual dispute? If not, whose duty is it to inform him?
(4) Must the factual dispute be resolved before authorization may be given? If so, how can it be resolved in the timeline presented?

These questions present a mix of fact and law, law and legal policy, as well as substance and process. There are no textbook answers. There are clearly wrong answers. There are as well, as a matter of legal policy, preferred answers. One solution: the lawyer can identify the parameters of the factual dispute and ensure that they are framed and communicated within any decisional documents going to the president. But it is two in the morning! The president has already made his decision, without knowing that the facts are sliding. One solution: the president's lawyer can call the national security advisor and identify the problem and a solution – a conference call with the DNI, national security advisor, and the secretary of defense to determine if the facts are sliding or whether analysts are rehashing judgments already made at the top, without their knowledge. Does the DNI stand by the intelligence and intelligence judgment or not? And if there is any shift in fact or analysis, is the president and the military chain of command aware?

The scenario continues. With the input and concurrence of the attorney general, the DNI, and the secretary of defense, the president decides to authorize the strike. The lawyer now becomes advocate. He clears talking points for use with the Congress, the media, and foreign governments, conscious that the talking points, as opposed to the advice rendered in advance of decision, will shape outside perspectives on the validity of U.S. assertions of authority. As a matter of legal policy, will this be cast in the language of preemption, anticipatory self-defense, self-defense, or under some other rubric? In doing so, he considers what information if any can be disclosed in support of the intelligence link between the target and terrorism. He adds bullets on the legal basis for the strike, not as judge or advisor, reflecting the best arguments on both sides, but as advocate, presenting the arguments in support of action. Bigot list permitting, the lawyer ensures the State Department is generating an Article 51 report to the United Nations identifying the U.S. legal position as one of self-defense.

The strike occurs. The lawyer now shifts to the role of advisor appraising the process. What worked well and what didn't work well? Could the factual dispute have been resolved through alternative process, or was it only identified and forced to the surface through the presentation of decision? Should the president retain case-specific decision authority over comparable strikes, or authorize such strikes in concept in the future and if so subject to what qualifications in policy, law, and legal policy? Is this a question of law, or of command preference that should be dictated by operational need and presidential style?

The hypothetical also illustrates the extent to which the application of national security law and process is dependent on culture, personality, and style. The president can direct legal review of his decisions, but if a national security advisor is not committed to such a review, it will not occur in a meaningful manner, if at all. The process would have failed if the lawyer did not make the call or if the national security advisor would not take the call. In short, it is not the presence of counsel at the NSC, the White House, or the Defense Department that upholds the law. It is the active presence of a president, a national security advisor, and department secretaries who insist on legal input in the decision-making process and lawyers who will place their integrity and careers on the line to provide it.

An indeterminate conflict, of indefinite duration, against unknown enemies and known enemies unseen will put uncommon strain on U.S. national security. It will also put uncommon strain on principles of liberty. If we meet this day's threats without destroying the fabric of our constitutional liberty it will be through the effective and meaningful application of national security law.

The sine qua non for broad national security authority is meaningful oversight. By oversight, I mean the considered application of constitutional structure, executive process, legal substance, and relevant review of decision-making – all of which depend on the integrity and judgment of lawyers. It is lawyers who will help us find the right combination of broad executive authority to defeat terrorism with the considered application of law before action and subsequent appraisal to protect our liberty. So whether one likes law or not, it is central to national security. Lawyers and not just generals will decide the outcome of this conflict.

Lawyers reside at the intersection where physical safety and liberty merge. In this role they are indispensable to good process and should feel a duty to advocate good process. Good process permits the faithful application
of the law and the accomplishment of the security objectives. In any given context, the pressure of the moment may encourage short-term thinking and the adoption of process shortcuts. The lawyer alone may be sufficiently detached from the policy outcome to identify the enduring institutional consequences of a particular course of action. So too, the lawyer alone may be familiar, and may feel an obligation to be familiar, with applicable written procedures. Process is substance if it means critical actors and perspectives are omitted from the discussion table.

Good process is not antithetical to timely decisions, operational timelines, or to secrecy. Process must find the right balance between speed and strength, secrecy and input. But process can always meet deadlines. There is no excuse for shortcuts. Process can be made to work faster and smarter. By example, if legal review is warranted, the attorney general alone can review a matter and, if need be, do so while sitting next to the president in the Oval Office.

Third, process should be contextual. The legal and policy parameters for responding to terrorism are different from those for responding to a Balkan crisis. Clandestine and remote military operations against a hidden enemy will dictate different decision processes than NATO air operations against fixed targets, as will the different political and policy parameters of both situations. One has to maintain situational awareness, to find the measure of process and approval that ensures law is applied in a manner that is faithful to constitutional, statutory, and executive dictates and that meets operational timelines. Therefore, there will always be some tension as to who should see what when.

Finally, lawyers support and defend the Constitution and not just the policies of their government. It is not clear how a president can faithfully apply the law without faithfully applying the constitutional principles identified in Chapters 3 and 4, including the separation of powers, and checks and balances. Constitutional faith recognizes that the Constitution is a national security document, which in the face of a WMD threat is appropriately read broadly and realistically. Constitutional faith also recognizes that liberty and the rule of law are national security values, which the Constitution is designed to preserve and to protect.

A definition of national security that includes constitutional values makes lawyers schooled in history, law, and ethics essential to the national security process. Being a lawyer in such a process is more than saying yes to a client’s goals; it means guiding policymakers not just to lawful outcomes, but to outcomes addressing both aspects of national security by providing for security and preserving our sense of liberty. That is one reason this book places as much emphasis on the role of the lawyer as it does on the content of the law.

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There are hard questions ahead in a time of homeland insecurity from which lawyers should not shy. Hamilton observed,

The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions that have a tendency to destroy their civilian and political rights. To be more safe, they at length become willing to run the risk of being less free.

It is the national security lawyer’s duty to alert policymakers to these tensions. The lawyer’s duty is to show all sides to every issue while guiding policymakers and above all the president to lawful decisions that protect our security and our liberty. This is hardest to do when lives are at stake. But the Constitution was not designed to fail, to safeguard our security at the expense of our freedom, nor celebrate freedom at the expense of security. It is designed to underpin and protect us and our way of life. National security lawyers daily demonstrate how it can and must do both.

As a result, we should not begrudge democracy’s adherence to law, but continue to find the best contextual process for its meaningful application. In war, and no more than in addressing a threat where the terrorists’ choice of weapons and targets may be unlimited, this means a substance, process, and practice of law that is both security effective and faithful to democratic values.

As Justice Brandeis reminded in Whitney,

Those who won independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They believed liberty to be the secret of happiness and courage to be the secret of liberty.15

The law depends on the morality and courage of those who apply it. It depends on the moral courage of lawyers who raise tough questions, who dare to argue both sides of every issue, who insist upon being heard at the highest levels of decision-making, and who ultimately call the legal questions as they believe the Constitution dictates and not necessarily as policymakers may want at a moment in time. We do not live in a moment in time. We and our children live in perilous times.