

ETHICAL PROBLEMS FOR THE LAW FIRM OF A FORMER GOVERNMENT ATTORNEY: FIRM OR INDIVIDUAL DISQUALIFICATION?

Canon 9 of the American Bar Association's Code of Professional Responsibility states that "[a] lawyer should avoid even the appearance of professional impropriety."¹ Over the past year, substantial disagreement has developed over whether an appearance of impropriety exists when a law firm accepts a case for which one of its members had substantial responsibility while in government employment. This situation may arise frequently in either of two basic situations. In the first, a young lawyer accepts employment with a federal agency such as the Justice Department or the Securities and Exchange Commission, works there for a few years, and then enters private practice with a firm where the expertise gained in government service will be of value.² In the second, an attorney attains prominence in private practice and is then chosen for a leadership position as a cabinet officer, sub-cabinet official or with an administrative agency. After serving in this capacity for a time, the lawyer then returns to private practice.³ In both situations, a problem arises if a matter handled by the lawyer while in government service comes to the firm which he has joined.

One approach to such a case, advocated by some members of the Ethics Committee of the District of Columbia Bar Association and recently rejected by the whole Committee, would require the law firm as a whole to refuse to handle the matter.⁴ A second approach, formulated in the American Bar

THE FOLLOWING CITATIONS WILL BE USED IN THIS NOTE:

ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 342 (1975), reported in 62 A.B.A. J. 517-21 (1976) [hereinafter cited as Opinion 342];

DISTRICT OF COLUMBIA COMM. ON PROFESSIONAL ETHICS, INQUIRY No. 19 [hereinafter cited as Inquiry 19].

Letter from Harvey L. Pitt, General Counsel of the Securities and Exchange Commission, to the Legal Ethics Committee of the District of Columbia Bar (Oct. 15, 1976) [hereinafter cited as Pitt Letter].

Letter from Antonin Scalia, Assistant Attorney General for the Office of Legal Counsel of the United States Department of Justice, to the Legal Ethics Committee of the District of Columbia Bar (March 23, 1976) [hereinafter cited as Scalia Letter].

The letters cited in this Note are on file in the offices of the *Duke Law Journal*.

1. ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1975).
2. See notes 44-46 *infra* and accompanying text.
3. See notes 47-51 *infra* and accompanying text.
4. This view is best expressed by Inquiry 19, an earlier version of which is reported in DISTRICT LAWYER 39-42 (Fall 1976).

Inquiry 19 was drafted by members of the District of Columbia Ethics Committee, chaired by then Dean Monroe H. Freedman of Hofstra University School of Law. When the Inquiry came up for a final vote it received a majority of the votes cast, but failed to receive final approval due to three abstentions which prevented obtaining the votes of a majority of all Committee members as required by Committee rules for decisions of such importance. Letter

Association's Opinion 342, would allow the firm to take the case only so long as the former government attorney were excluded from participation in the matter and would receive no part of the fee charged by the firm.⁵ The procedure in this second approach is commonly known as "screening."

The government lawyer's entry or reentry into private practice presents a significant question of legal ethics and an issue of great practical importance to many attorneys, law firms and government agencies.⁶ This Note will examine and analyze the differing approaches to this issue and will suggest one solution to the problem. It should be stated at the outset that this Note, like the various ethics opinions it discusses, assumes that the former government attorney himself is disqualified from a case in which he has participated by Disciplinary Rule 9-101(B) of the Code of Professional Responsibility;⁷ the only question that requires analysis is whether the partners and

from Monroe H. Freedman to All Interested People (Dec. 8, 1976). An approach somewhat similar to that of Inquiry 19 was adopted by the Ethics Committees of the Bar Association of Montgomery County, Maryland, and of the Maryland State Bar Association. MONTGOMERY COUNTY BAR ASS'N COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 19 (June 21, 1976); MD. STATE BAR ASS'N COMM. ON PROFESSIONAL ETHICS, Docket 77-10 (July 26, 1976).

After the defeat of Inquiry 19 the D.C. Ethics Committee formulated amendments to Canon 9. These amendments would apply to all lawyers practicing in the District of Columbia and might have persuasive effect elsewhere. Professor Freedman feels there are sufficient votes to adopt these amendments in Committee. Letter from Monroe H. Freedman to All Interested People, *supra*. If so, its action must be approved by the Governing Board of the District of Columbia Bar Association, which must then recommend the amendments to the Court of Appeals for the District of Columbia. *Id.*

The somewhat convoluted history of Inquiry 19 is summarized in *Lawscope, Conflict of Interest: The Debate Heats Up*, 63 A.B.A. J. 16 (1977). Messrs. Freedman and Cutler present their views on Inquiry 19 in *Legal Ethics Forum, Conflict of Interests and the Government Lawyer*, 63 A.B.A. J. 724 (1977).

5. A similar approach was taken in N.Y. CITY BAR ASS'N COMM. ON PROFESSIONAL AND JUDICIAL ETHICS, OPINIONS, No. 889 (Dec. 5, 1976), reported in 45 U.S.L.W. 2292 (Dec. 14, 1976).

6. A substantial number of attorneys enter government service each year, either directly from law school or after some years of private practice, with the intention of entering or reentering private practice after a few years with the government. See notes 44-45 *infra* and accompanying text.

7. The disqualification of the former government attorney himself is often a complicated issue. See, e.g., Opinion 342; D.C. COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 16 (1975), reported in DISTRICT LAWYER 43-44 (Fall 1976); Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to That of Former Client*, 55 B.U. L. REV. 61 (1975); Note, *Disqualification of Counsel for the Appearance of Professional Impropriety*, 25 CATH. U.L. REV. 343 (1976); Note, *Ethical Considerations When an Attorney Opposes a Former Client: The Need for a Realistic Application of Canon Nine*, 52 CHI.-KENT L. REV. 525 (1975). Prior to the 1969 adoption of the Code of Professional Responsibility, the relevant rule in this area was Canon 36 of the Canons of Professional Ethics, which stated in part that: "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ." ABA CANONS OF PROFESSIONAL ETHICS No. 36 (1967). See Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957); Note, *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest*, 73 YALE L.J. 1058 (1964).

associates in his law firm should be disqualified as well.⁸

OPINION 342 AND INQUIRY 19

Both approaches to the problem of firm disqualification—total disqualification and screening—are based on the concerns which underlie disqualification of the former government lawyer himself. These are described by the ABA as:

the prevention of the apparent treachery of switching sides; the safeguarding of confidential governmental information from future use against the government; the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service; and the professional benefit derived from avoiding the appearance of evil.⁹

Balanced against these policies are the government's interest in recruitment of well-qualified attorneys and the danger that such recruitment will be impaired if potential government attorneys fear restrictions on their future practice, the perceived unfairness involved in imposing stringent restraints on the careers of government employees, and the notion that great "sacrifices" should not be asked of lawyers entering public service.¹⁰ In addition, disqualification serves no valid purpose if its sole effect is to interfere with choice of counsel or to deprive a litigant of competent counsel in particularly complex areas of the law where special technical training and experience are invaluable.¹¹

Today, the problem is governed by Canon 9, Ethical Consideration (E.C.) 9-2, and Disciplinary Rule (D.R.) 9-101(B). ABA CODE OF PROFESSIONAL RESPONSIBILITY, E.C. 9-3 (1975) states that: "After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists." D.R. 9-101(B) says that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." The Preliminary Statement to the Code points out that only the Disciplinary Rules are mandatory in character, describing "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.*, Preliminary Statement. The Canons and Ethical Considerations provide norms and objectives for which the profession should aim. *Id.*

For an SEC rule even stricter than D.R. 9-101(B), see 17 C.F.R. § 200.735-8 (1976), discussed at note 47 *infra*.

8. Both Inquiry 19 and Opinion 342 agree that such an exclusion should not extend to a government agency when one of its attorneys has gone from private practice to the agency. As Opinion 342 states, an entire government agency cannot be forbidden from handling a matter just because one member of the agency staff dealt with the same case while in private practice. Such a result would unduly hamper the ability of the government to function. Opinion 342 at 521.

9. Opinion 342 at 518. See also note 24 *infra*.

10. Opinion 342 at 518.

11. *Id.* at 518-19. The validity of these points is underscored by the Fifth Circuit's recent opinion in *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976), dealing with the disqualification of a former government attorney under D.R. 9-101(B). The Fifth Circuit found that "Canon 9 does not require the disqualification of every attorney who has been privately

While agreeing that the former government attorney himself must be disqualified notwithstanding the factors weighing against his disqualification,¹² the American Bar Association's Opinion 342 and the District of Columbia's Inquiry 19 diverge in the application of these policies to an entire firm. Their starting point is of necessity the language of Disciplinary Rule 5-105(D): "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."¹³ On its face, this rule appears to be absolute,¹⁴ extending to the entire firm of the former government attorney.¹⁵ The ABA, however, tempers this language by adopting a balancing approach. In

retained in a matter for which he had substantial responsibility while associated with the Government." *Id.* at 812. It pointed to "important social interests" similar to those recognized in Opinion 342, "including the client's right to counsel of his choice, the lawyer's right to freely practice his profession, and the government's need to attract skilled lawyers." *Id.* The court further noted that:

Inasmuch as attorneys now commonly use disqualification motions for purely strategic purposes, such an extreme approach would often unfairly deny a litigant the counsel of his choosing. Indeed, the more frequently a litigant is delayed or otherwise disadvantaged by the unnecessary disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion of both the law and the judiciary. An overly broad application of Canon 9, then, would be ultimately self-defeating.

Id. at 813.

12. Opinion 342 at 521; Inquiry 19 at 15-16.

13. ABA CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 5-105(D) (1975).

14. The remaining sections of the rule, D.R. 5-105(A)-(C), which govern other conflict of interest situations, first state an absolute rule and then permit its avoidance when the informed consent of the client is obtained. One of the arguments advanced in Opinion 342 is that since the Code drafters permitted waiver of D.R. 5-105(A) through (C), they must also have intended to permit waiver of the protections of D.R. 5-105(D) as extended to D.R. 9-101(B) disqualifications. Opinion 342 at 521. Contrast note 26 *infra*.

15. Both Opinion 342 and Inquiry 19 point out that disqualification of the entire firm is the general rule when one member of the firm is disqualified. Opinion 342 at 517 n.2; Inquiry 19 at 4. The issue under discussion is whether the rule should extend to the firm of the former *government* attorney; the general rule as applied to movement entirely within the private sector is unquestioned. Inquiry 19 argues that Congress relied on this rule in enacting the Federal Conflict of Interest Law, 18 U.S.C. § 207 (1970), which controls the private employment of former government employees but fails to provide for partners and associates. The Inquiry explains this omission by referring to the Senate Judiciary Committee Report, S. REP. NO. 2213, 87th Cong., 2d Sess. 12 (1962), which stated that this was a question of legal ethics in which the criminal law should not intervene. The Senate thus omitted a House provision which made it a federal crime for a partner or associate to act when the former government attorney was himself disqualified. The Inquiry then refers to an "apparent oversight" when the Code of Professional Responsibility failed to state whether a D.R. 9-101(B) disqualification would bar partners and associates as well, pointing to D.R. 5-105(D) as a rectification of this oversight. Inquiry 19 at 4-6.

In a letter to the D.C. Ethics Committee, Antonin Scalia, the Assistant Attorney General for the Justice Department's Office of Legal Counsel, argued that Congress' failure to extend the law to partners and associates stemmed from a fear of adverse effect on the "government's ability to attract outstanding attorneys." Scalia Letter at 3.

An excellent analysis of the Senate Hearings on the Conflict of Interest Law may be found in Note, *Unchanging Rules in Changing Times*, *supra* note 7, at 1064-66.

order that the needs of the government and its employees will not be sacrificed unnecessarily,¹⁶ the potential benefits to the profession and the public of a strict rule of disqualification are balanced against the restrictive effects flowing from an absolute approach.¹⁷ The result is a screening procedure whereby:

D.R. 5-105(D) applies to the firm and partners and associates of a disqualified lawyer who 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.¹⁸

THE ABA Ethics Committee feels that this limited application of D.R. 5-105(D), allowing the government agency to waive its protection, will accomplish the goal of destroying the incentive for the government lawyer to handle his work so as to affect his future employment opportunities. According to the Committee, "[o]nly allegiance to form over substance would justify blanket application of D.R. 5-105(D) in a manner that thwarts and distorts the policy considerations behind [the] D.R. 9-101(B)" requirement of individual disqualification.¹⁹ The ABA does not indicate how this

16. Opinion 342 at 520-21.

17. This approach is similar to that taken in *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976), discussed note 11 *supra*, in which the court stated that it must be "conscious of its responsibility to preserve a reasonable balance between the need to ensure ethical conduct on the part of lawyers appearing before it and other social interests, which include the litigant's right to freely chosen counsel." *Id.* at 810.

18. Opinion 342 at 521.

19. *Id.*

Screening procedures are already followed by several government agencies including the Department of Justice, the Internal Revenue Service, the Securities and Exchange Commission, the Federal Trade Commission and the Federal Maritime Commission. In a letter to the D.C. Ethics Committee, Assistant Attorney General Antonin Scalia described the screening safeguards required by the Department of Justice. These safeguards include: (1) an understanding with the disqualified lawyer and his firm that he will have no personal involvement with the case and will not discuss it within the firm; (2) reasonable certainty that such an understanding could be upheld after the size of the firm and the competence of other firm members to handle the matter are considered; (3) a general requirement that the representation predate the hiring of the disqualified attorney in order to eliminate any suggestion that the firm was hired for the case because of the attorney's presence therein; (4) an undertaking that the disqualified lawyer will not share in the fees generated by the case; and (5) full disclosure of the situation to the tribunal or agency before which the matter is pending. Scalia Letter at 1.

See also 16 C.F.R. §4.1(b)(4) (1976) (Federal Trade Commission); 46 C.F.R. § 502.32(c) (1975) (Maritime Commission); Pitt Letter (SEC considers such factors as the size of the law firm which requests screening and whether it practiced securities law before the disqualified lawyer joined it, *id.* at 7; see note 74 *infra* and accompanying text). See note 60 *infra* for a discussion of the Internal Revenue Service approach. These examples indicate that screening has been an accepted way to avoid the strict application of D.R. 5-105(D) when it is triggered by the application of D.R. 9-101(B). But see note 37 *infra* for a critique of the screening approach. A modified version of screening has been adopted by the New York City Bar Association Committee on Professional and Judicial Ethics. N.Y. CITY BAR ASS'N COMM. ON PROFESSIONAL AND JUDICIAL ETHICS, OPINIONS, No. 889, *supra* note 6. The New York view differs from that

screening will reduce the public perception of impropriety, an important problem which both D.R. 9-101(B) and Canon 9 seek to remedy.²⁰

The focus of Inquiry 19 is altogether different. Great emphasis is placed on the policy of avoiding the appearance of impropriety.²¹ Inquiry 19's approach is designed to prevent conduct which may lead to an inference—whether justified or not—that a public official was influenced by the hope that he would obtain future legal employment in the private sector²² or that private parties are deriving an unfair benefit from the expertise and relationships developed by a lawyer while in public service.²³ The end product of this focus is the conclusion that the policies behind attorney disqualification can only be protected by absolute disqualification of the firm as well²⁴—that is, by a literal reading of Rule 5-105(D). Screening is

proposed by Opinion 342 in that the government agency is not the sole party which decides whether screening is adequate. The New York Opinion states that:

in a litigated matter or similar proceeding, to vest in the governmental agency absolute discretion to compel disqualification by refusing to give a requisite waiver or consent in many cases would effectively compel the refusal of such conduct out of an understandable fear on the part of Government counsel that should the case be lost, he would be subject to criticism and even possible discipline for failure to take advantage of that veto power.

45 U.S.L.W. at 2292. Thus, New York City favors a more liberal type of screening with the government agency lacking the veto power apparently given it by Opinion 342.

20. While Opinion 342 lists the appearance of impropriety as one policy consideration behind D.R. 9-101(B), the ABA does not give it paramount importance. In fact, the Opinion states that "the appearance of evil is only one of the underlying considerations . . . and is probably not the most important reason for the creation and existence of the rule itself." *Id.* at 518. It later observes that "perhaps the least helpful of the . . . policy considerations . . . is that of avoiding the appearance of impropriety." *Id.* at 519 n.17. The ABA feels that "avoiding even the appearance of professional impropriety" is too vague a standard to be helpful. Inquiry 19 criticizes Opinion 342 on this point, Inquiry 19 at 8, as the D.C. Ethics Committee regards avoidance of the appearance of impropriety as the main purpose for D.R. 9-101(B). See note 22 *infra* and accompanying text.

21. See Inquiry 19 at 9:

[I]n analyzing whether conflicts of interest might exist as a lawyer transfers his or her allegiance from a government agency to a private party, it is essential that we bear in mind not only the fact of impropriety in a particular case, but also the appearance that a course of conduct might have in the eyes of a public that is not wholly trusting of lawyers and that may not appreciate sophisticated justifications of practices that seem questionable.

An earlier version of Inquiry 19, reprinted in *DISTRICT LAWYER*, *supra* note 4, discussed several reasons for giving particular attention to the appearance of impropriety. "First, when a matter involving the administration of justice is at issue, the need to maintain public confidence in the system is so great that the necessity to avoid even the appearance of impropriety becomes a goal sought to be achieved, rather than simply avoiding the impropriety." *Id.* at 40. In addition, the earlier version stated that through its focus on appearances "we hope to avoid the necessity of asserting, and the extraordinary difficulty of proving in individual cases, that a particular lawyer has in fact committed an impropriety." *Id.* Though omitted from the final version of Inquiry 19 voted on by the D.C. Ethics Committee, these considerations remain relevant and important.

22. Inquiry 19 at 7.

23. Inquiry 19 at 11-12.

24. Inquiry 19 at 17. Inquiry 19 lists several situations in which it might appear improper for a former government attorney to handle a matter and questions whether these situations can be

dismissed as inadequate and unworkable,²⁵ and the ABA is criticized for creating through the screening procedure "an exception that appears nowhere in the text of the Code of Professional Responsibility."²⁶

resolved merely by disqualifying one attorney and not an entire firm. The areas include: preservation of confidentiality, which Inquiry 19 dismisses as a relatively unimportant concern for a government attorney, *id.* at 10-11; the improper appearance which may arise if it seems that a former government attorney is using the information he gained while in public service for the benefit of one client and not for the public at large, *id.* at 11-12; the suspicion that agency lawyers may show some favoritism to former colleagues, *id.* at 12; the problem of switching sides, *id.* at 1-13; the appearance that a private firm is hurting a government agency by hiring away its key personnel, *id.* at 13; the appearance that government lawyers are "currying favor for themselves" with private firms in order to win future employment, with the result that government interests may be sacrificed for the potential advancement of the government lawyer, *id.* at 14; the problem that a government lawyer might abuse governmental power by commencing government action to obtain discovery or some other advantage over someone who is a potential defendant in a private action that will be brought after the attorney leaves government service, *id.*; and the fear that an attorney might instigate government action in order to create a private employment opportunity for himself, either by defeating or preserving the action he had initiated, *id.*

The Securities and Exchange Commission has issued a statement which questions whether some of these problems are of sufficient substance to merit the absolute approach of Inquiry 19. It questions "whether many members of the public at large actually believe that government attorneys institute government action to obtain discovery or some other advantage against a defendant in subsequent private litigation, or to create subsequent employment opportunities in upholding or upsetting that action." Pitt Letter at 3. The Commission's view is that "[e]ven if some members of the public do in fact harbor such suspicions, [it doubts] that even the restrictions suggested in the Tentative Draft Opinion [of Inquiry 19] would assuage their concerns." *Id.* It goes on to state that "the concern for maintaining confidentiality and avoiding unfair advantage of one party over others exists in the private sector as well, and is addressed by Canon 4 and the Disciplinary Rules promulgated thereunder." *Id.* at 4. The Commission does acknowledge that "buying the government's best people" and "switching sides" are matters that concern it. *Id.* at 3. The SEC's statement that "we are aware of only rare instances involving private law firms engaging in this tactic," *id.*, is an explicit acknowledgment that the situation does occur and is a matter of some concern.

The D.C. Ethics Committee has indicated its feeling that to prevent some of the above problems "[n]othing would suffice short of absolutely forbidding lawyers to move from government service into private employment." Inquiry 19 at 15. It acknowledges that "[s]uch a rule would, of course, impose a severe burden on lawyers in government service," *id.*, and recognizes that D.R. 9-101(B) failed to invoke this strict approach. *Id.* at 15-16. See note 7 *supra*. Inquiry 19 is, however, closely related to D.C. COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 16, *supra* note 7, which interprets D.R. 9-101(B). While Opinion 16 uses logic similar to that of Opinion 342, it seems to expand the definition of what is "substantial responsibility" for a "matter" an attorney considered while a public employee within the terms of the rule. *Id.* at 44. A stricter standard than that suggested by Opinion 342 clearly emerges. When the expansion of D.R. 9-101(B) by Opinion 16 is viewed in the context of the absolute reading of D.R. 5-105(D) favored by Inquiry 19, the Committee may effectively have established a prohibition on movement from government service into private employment.

25. Inquiry 19 at 21.

26. *Id.* at 17. Inquiry 19 makes passing reference to D.R. 5-105(A)-(C), see note 14 *supra*, stating that, in the opinion of the Ethics Committee, there is a conflict of interest for the government lawyer who authorizes a waiver of D.R. 5-105(D) while there is no such conflict when a private client gives a D.R. 5-105(C) consent. Inquiry 19 at 18 n.15. See notes 35-37 *infra* and accompanying text for a discussion of this possible conflict.

Opinion 342

It is clear that Opinion 342 is subject to criticism. The ABA has attempted to mitigate the effects of a literal application of D.R. 5-105(D) when on the face of the Code of Professional Responsibility no screening procedure is authorized. The ABA argument that a rigid interpretation of D.R. 5-105(D) will greatly harm government recruitment may be undercut by the argument that the government is poorly served by the lawyer who intends to work for the government for only a few years.²⁷ Regardless of ethical principles, the argument continues, there is always the danger that such a lawyer will "shape his work for advantage in private practice [T]he chief ethical standards of Government legal work are disinterestedness and objectivity so far as one's own interests are concerned. . . ."²⁸ Mobility in government employment, choice of competent counsel, and similar considerations are important,²⁹ but as at least one court has stated,

the right of the public to counsel of its choice or the possibility of a reduction of "both the economic mobility of employees and their personal freedom to follow their own interests . . . ," must be secondary considerations to the paramount importance of "maintaining the highest standards of professional conduct and the scrupulous administration of justice."³⁰

To some extent the standard of Canon 9 is an ethical absolute which cannot be compromised; screening is such a compromise. In *General Motors Corp. v. City of New York*,³¹ the Second Circuit dealt with a D.R. 9-101(B) disqualification, stating that the court "must act with scrupulous care to avoid any *appearance* of impropriety lest it taint both the public and private segments of the legal profession."³² The court concentrated on the

27. The SEC feels, however, that mobility in its ranks is a positive factor. Such mobility constantly exposes the Commission to new ideas about the complicated problems it faces. Additionally, "the departure of personnel helps enable the Commission to continue to offer one of the important benefits that attracts and motivates persons contemplating serving in federal agencies—the ability to exercise significant responsibility over matters of substance at an early stage in one's professional career." Pitt Letter at 10. Further, the SEC states that the movement of lawyers from private to public sectors and back both "serves the public interest by insuring that individuals and entities subject to federal regulation have an available source of counsel that are knowledgeable in the complicated technical issues that can arise," *id.* at 10-11, and "serves to enhance the private bar's appreciation of the nature and importance of the concerns embodied in the federal securities laws." *Id.* at 11.

28. Fahy, *Special Ethical Problems of Counsel for the Government*, 33 FED. B.J. 331, 334 (1974).

29. See notes 10-11 *supra* and accompanying text.

30. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir. 1975) (citations omitted).

31. 501 F.2d 639 (2d Cir. 1974).

32. *Id.* at 649 (emphasis in original). In an earlier case the Second Circuit had stated its views as follows:

negative impression the public might gain even if in fact no wrongdoing had taken place. This concentration on the appearance of impropriety is the hallmark of Inquiry 19. If one believes in a literal enforcement of Canon 9, Inquiry 19's interpretation is almost unavoidable.

Aside from the consequences of a literal reading of D.R. 5-105(D), at least two valid practical criticisms of the ABA's approach can be made. While some of Inquiry 19's objections³³ may not be sufficiently strong to warrant rejection of screening as a means to prevent disqualification of an entire law firm,³⁴ those regarding potential conflicts of interest for present agency personnel are serious.³⁵ A real conflict is created when personnel of the former agency of the disqualified attorney are called on to approve screening systems, as they must be conscious that they are setting a prece-

[O]ur duty . . . is owed not only to the parties . . . but to the public as well. These interests require this court to exercise its leadership to ensure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process. The stature of the profession and the courts, and the esteem in which they are held, are dependent upon the complete absence of even a semblance of improper conduct.

Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 575 (2d Cir. 1973).

33. The D.C. Ethics Committee lists five objections to the ABA's screening procedure: (1) screening will not dissipate the suspicion that favoritism is being shown the law firm of the former government attorney; (2) screening cannot effectively prevent the disqualified lawyer from passing along agency secrets for the benefit of clients of his firm, and especially cannot prevent the appearance that this sort of impropriety may be taking place; (3) screening will affect neither the problem of the hiring away of key personnel nor the more compelling danger that a lawyer will act during government service to ingratiate himself with a potential private employer; (4) the government lawyers who are to pass judgment on a screening procedure are themselves in a conflict of interest by doing so, as they may later seek private employment and will prefer to tell prospective employers that even if D.R. 9-101(B) disqualifies them from a case the law firm can still handle it; and (5) the screening procedure may itself lead to an inference of impropriety due to the apparent conflict of interest mentioned in consideration (4). Inquiry 19 at 18-20.

A recent decision in the Trial Division of the United States Court of Claims similarly rejected the Opinion 342 screening system. *United States v. Kesselhaut*, No. 166-74, (Ct. Cl. Mar. 29, 1976). In this case a motion to disqualify the law firm of the plaintiffs because one of the firm members was formerly a government lawyer responsible for the issue involved in the suit was filed, based on D.R. 9-101(B) and 5-101(D). *Id.*, slip op. at 1-2. Judge Schwartz granted the motion, and after first summarizing the arguments of Opinion 342 he turned to the views expressed in Inquiry 19. He noted that there was no need for him to choose between the two approaches since the government had refused to waive D.R. 5-105(D), but in extended dicta he stated that he would not have accepted a waiver even had the government given one. He felt that there would be a significant appearance of impropriety if waiver were allowed, as it would appear that the former government lawyer had switched sides and "was taking advantage of information gained in the government's service . . ." *Id.*, slip op. at 35. Judge Schwartz concluded that no screening procedure could remove the appearance that an impropriety existed, and thus that waiver was impermissible.

34. The reference is to objections (1)-(3) in note 33 *supra*. While they may present problems, they do not appear so significant as to preclude the use of screening procedures altogether, unless one accepts the basic view of Inquiry 19 that screening is impermissible *per se*.

35. See objections (4) and (5) in note 33 *supra*.

dent which will govern their own entrance into private practice.³⁶ Screening procedures may not only give rise to the inference that agency attorneys are acting to protect their own futures, but they may also create an appearance that agency personnel have given the required approval in order to help an old friend. Even if in a particular case the agency lawyer acts without considering his future, the public may perceive that a potential conflict exists. The system will seem improper, and thus Canon 9 will be violated. It will be extremely difficult to execute the screening procedures authorized by Opinion 342 without leaving at least an appearance of impropriety in this regard.³⁷

36. An example is provided by the refusal of the Federal Communications Commission to disqualify the law firm of its former Chairman when he was disqualified from a case by D.R. 9-101(B). Green, *Justice Agency, Law Firms Team Up to Oppose Lawyers' Ethics Plan on Regulatory Conflicts*, Wall St. J., Aug. 11, 1976, at 32, col. 1. As Inquiry 19 points out, "each of the Commissioners who rendered that decision has thereby decided, favorably to himself, the rule that will govern his own cases when he returns to private practice." Inquiry 19 at 20. The same situation will arise when young lawyers at an agency such as the Justice Department approve a screening arrangement for a former colleague with knowledge that they themselves will be in a similar position in a few years.

37. An additional criticism of the Opinion 342 screening procedure comes from the two Maryland ethics opinions, note 4 *supra*. Both point out that the real party in interest is the public, not the government (the Maryland case involved a rezoning proceeding). They conclude that a government agency lacks the capacity to waive D.R. 5-105(D) and that there is no practical way to gain "public" consent to such a waiver. MONTGOMERY COUNTY BAR ASS'N COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 19 *supra* note 4, at 6; MD. STATE BAR ASS'N COMM. ON PROFESSIONAL ETHICS, Docket 77-10, *supra* note 4, at 13. The State Bar decision reveals general disapproval of screening provisions and states its general agreement with the views of Inquiry 19. *Id.* at 13-14.

One other potential problem with the screening procedure proposed by Opinion 342 is that agency personnel may sometimes hesitate to approve a screening arrangement when in fact it is proper. They may feel that if they approve the screening procedure and then lose the case they will be criticized or even disciplined for dereliction of duty in granting a waiver. N.Y. CITY BAR ASS'N COMM. ON PROFESSIONAL AND JUDICIAL ETHICS, OPINIONS, No. 889, *supra* note 5. Disapproval or approval of screening clearly should not turn on such considerations.

In recognition of the problems inherent in screening by government agencies, the Food and Drug Administration has refused either to approve or disapprove requested waivers of D.R. 5-105(D), stating that "it believes there is a substantial question as to whether the Department should participate in the administration of Disciplinary Rule 5-105(D) by acting on requests for such waivers." Letter from William H. Taft IV, General Counsel of the Department of Health, Education, and Welfare to C. Russell Twist, Staff Liaison on the Committee on Ethics and Professional Responsibility of the American Bar Association (Dec. 23, 1976), at 3. The letter also expresses

serious reservations as to whether the Department could effectively administer the waiver procedure contemplated by Opinion 342. In particular, it is probably beyond our capacity to make a case-by-case determination of the effectiveness of the screening measures adopted by a particular firm to isolate an individual lawyer from participating in a matter and sharing in the fees attributable to it.

Id.

In contrast to the FDA's position, the SEC has questioned whether allowing present agency personnel to pass on screening arrangements creates any real problem. It has stated that "the likelihood that an attorney would perceive that his personal interest in a future determination of his own case would be served by any particular ruling is most remote, and certainly pales by comparison to his interest in assuring that former government attorneys do not impair his agency's efforts." Pitt Letter at 8. It further pointed out that this argument against the Opinion 342 screening method raises questions about "the competence and integrity of attorneys

Inquiry 19

While the ABA's screening procedure is not without its shortcomings, the approach of Inquiry 19 seems unnecessarily harsh and to some extent unrealistic. Opinion 342 recognizes in a practical way that a rigid application of D.R. 5-105(D) will handicap government recruitment for legal positions in government agencies, prevent many litigants from obtaining the counsel of their choice,³⁸ and work grave hardships on many present or former government lawyers.³⁹ Through an "excess of caution," Inquiry 19 may well hinder "the attainment of other important social interests,"⁴⁰ including the need for a competent and mobile group of government attorneys. As Chief Judge Kaufman of the Second Circuit has observed, "[t]he situation of the former government attorney or the attorney contemplating government service is conducive to the overcautious approach. The restrictions placed upon his future career are so unclear and may be so sterilizing that unless he is completely unwary he will hesitate before accepting government employment."⁴¹ The absolute approach of Inquiry 19 may therefore cause more harm than good in pursuit of the prevention of all conceivable violations of Canon 9.

Effect of Inquiry 19 on government employment. Perhaps the most common objection to Inquiry 19, as indicated above, is that it will unduly hamper the recruitment of lawyers to work in government.⁴² This objection must be approached from two directions, as the recruitment of two different types of attorneys will be affected.⁴³ One group is composed of young

serving in government." *Id.* at 9. The SEC indicated a belief that government attorneys would disqualify themselves from a particular decision if their personal interests prevented them from acting objectively, much as private attorneys decide when to disqualify themselves from particular cases. The Commission concluded that it "fail[ed] to understand how the operation of the screening device differs . . . from other examples of persons who decide issues that may, in the future, have an impact on their own personal careers—persons such as those practicing lawyers who sit on Ethics Committees and interpret canons of ethics." *Id.*

Perhaps the Commission has missed two important points. First, lawyers who serve on ethics committees are generally not former associates of those who come before the committee, and if they are they usually disqualify themselves from the matter at issue. Second, a damaging appearance of impropriety may arise even if the agency lawyer has in fact acted in a thoroughly disinterested fashion.

38. [In addition, a]n inflexible extension of disqualification throughout the firm often would result in real hardship to a client if complete withdrawal of [already undertaken] representation was mandated, because substantial work may have been completed regarding specific litigation prior to the time the government employee joined the partnership, or the client may have relied in the past on representation by the firm.

Opinion 342 at 521.

39. See notes 10-11 *supra* and accompanying text.

40. Kaufman, *supra* note 7, at 657.

41. *Id.*

42. This criticism has been voiced by a number of federal agencies, the Federal Bar Association, several law firms, and many individual attorneys. See notes 44-45 *infra* and accompanying text.

43. See text accompanying notes 2-3 *supra*. A very interesting description which sets forth numerous examples of both types of attorneys and their moves from private to public to private

attorneys who graduate from law school and then enter government service. Another group consists of older, more experienced lawyers who have spent some years in private practice and then are asked to assume supervisory positions in government with the knowledge that they will eventually return to their former law firms.

The first group is the body whose recruitment is most likely to suffer from any rigid application of D.R. 5-105(D). Many young lawyers take government jobs with the expectation that they will leave the government after a few years, using the expertise they gained while in government service to obtain positions with private law firms.⁴⁴ An Inquiry 19 approach will cause many law firms to lose interest in hiring such attorneys—if a firm will have to drop or refuse a case that would generate substantial fees before it can hire a young lawyer from a government agency, it will certainly hesitate.⁴⁵ When this becomes evident, “[y]oung, talented lawyers with new ideas would be discouraged from working for the government and those already there would find they had ‘no place to go in the private sector. . . .’”⁴⁶

sectors may be found in Jenkins, *Working Both Sides of the Court, The Cozy Game Between Federal Agencies and Washington Law Firms*, STUDENT LAWYER 34 (Feb. 1977).

44. The practice has been described as follows for those coming directly from law school: Many of them view government service as a valuable springboard to lucrative jobs in private practice. They'll go to work for, say, the Securities and Exchange Commission, develop some expertise in securities law, take a job with a law firm that deals in SEC matters, and then appear before the agency on behalf of a corporate client they once helped regulate.

Green, *supra* note 36, at col. 1. It is difficult to determine exactly how many lawyers use this “springboard” into private practice, but it seems especially common among firms in the Washington, D.C. area which have substantial practices before federal agencies. Inquiry 19 states:

There is “a good deal of movement of both younger and older lawyers in Washington between private practice and Government service.” Some firms “freely permit and encourage” members to accept offers of employment in Government service “with the expectation (without any commitment) that they may some day return to the firm”

Inquiry 19 at 3.

One former government contracting lawyer who now practices with a Washington firm stated that in his case “after practicing for some years in the field in the Navy, he was of interest only to private firms with such contract business on their books. When he left the service, ‘no other law firm would hire me I was 33 at the time. Who was going to hire you if they have to take time to train you in an all-new specialty?’” Moskowitz, *Can D.C. Lawyers Cut the Ties that Bind?*, JURIS DOCTOR 34, 35-36 (Sept. 1976).

45. At least one Washington law firm has ceased hiring attorneys from government agencies pending the final disposition of the Inquiry 19 approach. Moskowitz, *supra* note 44, at 36-37.

46. Roderick M. Hills, Chairman of the S.E.C., in debate with Dean Monroe H. Freedman, reported in *The Washington Post*, Oct. 7, 1976, § A, at 17, col. 3.

The SEC has indicated particular concern that the Inquiry 19 approach will seriously handicap its functioning. As it points out, unlike some federal agencies which deal with matters concerning only the government, “the Commission has a substantial private sector counterpart which deals with securities questions [T]he Commission’s ability to attract quality people depends to a large extent on the ability of those people to find subsequent employment in the private sector.” Pitt Letter at 9. It notes that the SEC seeks a three-year commitment from the lawyers it hires, and that while some lawyers stay at the Commission much longer than

A rigid application of D.R. 5-105(D) will give older attorneys pause for thought as well. While the prestige and challenges accompanying the positions they assume will lead some to accept government jobs, many may hesitate when they consider the ramifications of an Inquiry 19 approach. Since few supervisory positions are permanent, any appointee must realize that he may eventually return to private practice. Lawyers with supervisory authority over specialized fields of the law in government agencies may frequently be charged with "substantial responsibility" over most if not all the litigation in that field.⁴⁷ The number of cases from which such an

the three years, "the financial and geographic constraints of service with the Commission, combined with the natural desire of many talented individuals to vary their professional experiences and accept new challenges, prompts the majority of attorneys serving at the Commission to leave the Commission eventually to accept employment with private law firms, the private sector, or the academic community." *Id.* at 10. The Commission concludes that it is "realistic enough to know that, with respect to most new lawyers, if they cannot be assured that they will not be burdened by unnecessarily [*sic*] harsh limitations on their eventual subsequent employment, they may not choose to forego the superior financial benefits they could command at some of the nation's law firms in favor of service with the Commission." *Id.*

It can be argued that the problem of firm reluctance to hire government attorneys under Inquiry 19's approach has been exaggerated. Firms will lose individual cases, and not entire clients, as a result of Inquiry 19's application. This is a situation with which a large law firm is continually confronted in more typical conflict of interest cases (as where two of a firm's clients become parties to the same legal dispute). If a firm is seriously interested in hiring a former government attorney, it will do so despite the lost case, since the lower echelon government lawyer may not have had substantial responsibility for enough cases seriously to jeopardize the firm's practice. Additionally, many firms will be faced with the same problem, so that business will merely be shifted from one firm to another and clients will not lack competent legal advice in the competitive legal communities where such problems will ordinarily arise. However, one must recognize that, unlike many conflict of interest situations, if a firm is disqualified by Inquiry 19 it may have to drop a case it has handled for some time, suddenly leaving a client without the counsel he had depended on for years. This is the result when a lawyer moves from one firm to another, and it is tolerated in that situation. If it is extended to former government attorneys as well it may have a devastating impact due to its range and frequency. Finally, many firms may fail to be so rational in their attitudes and may simply refuse to hire former government attorneys. Indeed, as pointed out in note 45 *supra*, one firm has already taken such a view.

At least potentially, the Inquiry 19 approach may also extend beyond agency attorneys and affect judicial clerks as well, thereby penalizing those who agree to serve a judge for a brief period without expecting the experience to hamper future prospects for employment. *See* Letter from John B. Jones, Jr. to the Legal Ethics Committee of the District of Columbia Bar (Oct. 14, 1976) at 2; Letter from Wilmer, Cutler & Pickering to the Legal Ethics Committee of the District of Columbia Bar (Oct. 15, 1976) at 4-5. It may reasonably be argued that Inquiry 19 should not and does not apply to judicial clerks, since they are not involved in the strategic decisions of the case. Still, the ban might be extended to them, and if it were it would discourage many law graduates from clerkship positions and thus deprive judges of valuable assistance.

47. Scalia Letter at 2. D.R. 9-101(B) can have long-lasting effects on former agency chiefs. One former agency chairman has said it was six years after he left the government before he could represent clients before his former agency. Moskowitz, *supra* note 44, at 35. The SEC position is that a former SEC Commissioner is considered responsible for every matter pending at the Commission while he was there, including those resolved at the staff level. In addition, "the Commission has taken the position that a former member has a lifetime ban precluding his

attorney would be disqualified could be substantial, and if an agency chief returned to a firm which specialized in the same area of law as the agency where he worked, he might cripple the firm by making it unable to handle any cases in its field of specialization.⁴⁸ For example, the Assistant Attorney General for the Antitrust Division of the Justice Department would be disqualified by D.R. 9-101(B) from private employment on all major government antitrust cases and investigations which were pending during his years of service. "If, upon his departure from government, this disqualification were automatically extended to all the partners of any firm which he joined, the practical effect would be to prevent his joining any existing firm with a substantial antitrust practice."⁴⁹ Such a result would certainly discourage many distinguished lawyers from accepting appointments as cabinet officials or agency chiefs. While the power and prestige of certain positions may make some restrictions on a later career reasonable,⁵⁰ it must be remembered that "[p]ublic service by experienced practitioners already represents a substantial financial sacrifice during the years of government employment; when there is added to this the narrowing or impairment of the attorney's later career, the sacrifice becomes too much for most lawyers to accept."⁵¹

The final group which will be significantly affected by Inquiry 19 includes those lawyers who either presently work for the government or have done so in the past. Many of these lawyers expect eventually to enter private practice,⁵² but an Inquiry 19 approach may leave them permanently trapped in government jobs.⁵³

involvement in any matter that came up for a Commission vote and as to which the minutes do not reflect the absence of the Commissioner, irrespective of whether the former Commissioner may recall the matter." Pitt Letter at 6. The SEC Conduct Regulation is generally much stricter than even D.R. 9-101(B). See 17 C.F.R. § 200.735-8 (1976). A disqualification thus can be a lifetime matter, and if applied to an entire firm could devastate its securities practice.

48. A former General Counsel for the National Labor Relations Board has estimated that the Inquiry 19 approach would jeopardize between three and four hundred matters currently being handled by the New York firm he joined. Moskowitz, *supra* note 44, at 35.

49. Scalia Letter at 2. John B. Jones, Jr., of Covington & Burling has described the situation when his firm wished to take the head of the Antitrust Division into the partnership: "As did virtually every other law firm in the country practicing antitrust law, we had at least one case in our office in which this former Assistant Attorney General would be personally barred from participating." Since it would have been unfair to the client to suddenly withdraw from the case, "[a] blanket rule of imputation would have precluded this lawyer from coming with us or with any other firm he would normally have contemplated joining." Letter from John B. Jones, Jr. to the Legal Ethics Committee of the District of Columbia Bar, *supra* note 46, at 1-2; Letter from John B. Jones, Jr. to Dean Monroe H. Freedman (May 24, 1976).

50. See note 54 *infra*.

51. Scalia Letter at 2.

52. See note 44 *supra* and accompanying text.

53. These lawyers have expressed their concern over the possible result of an absolute application of D.R. 5-105(D). The Federal Bar Association, a group of 15,000 present and former government attorneys, held its annual meeting on September 18, 1976. After hearing

Thus, the Inquiry 19 approach may greatly hamper government recruitment at both staff and supervisory levels and may impose substantial hardships on present and past government attorneys. Arguably, some sacrifice may properly be demanded of public servants, at least those with positions of power and prestige.⁵⁴ Still, though the appearance of profes-

Calvin J. Collier, Chairman of the Federal Trade Commission, speak out against Inquiry 19, the F.B.A. passed a resolution favoring screening and opposing Inquiry 19. *News from the Federal Bar Association*, No. 332 (Sept. 20, 1976).

It might be argued that the best way to solve the problem of present and former government attorneys is to exempt them from the absolute application of D.R. 5-105(D) by use of some form of a "grandfather clause." This would quiet their fears regarding their own careers and apply the Inquiry 19 approach only to those who enter government service with knowledge of the absolute application of D.R. 5-105(D) and the potential that once they enter the government they may have difficulty leaving. This same "grandfather clause" could apply to judicial clerks if the Inquiry 19 approach were extended to them. See note 46 *supra*. Such a clause would prevent the injustice which otherwise would occur and would answer some of the criticisms raised against Inquiry 19. However, it would also involve a compromise of the Inquiry 19 approach and thereby violate the basic spirit of a position that views any compromise of an ethical principle as wrong. If the rule of absolute firm disqualification is correct it should apply to all government attorneys—past, present or future. In addition, adoption of a grandfather clause would only answer part of the criticism brought against Inquiry 19; the harm to government recruitment and other injurious results would remain. The clause would, however, avert the most unjust result of Inquiry 19, and seems to be the only fair way to treat present and former government lawyers if the Inquiry's approach were adopted.

54. It is instructive to consider the requirements imposed by President Carter on federal appointees in his Administration. His code of conduct, which derives in part from HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, REPORT OF THE COMMISSION ON EXECUTIVE LEGISLATIVE AND JUDICIAL SALARIES, 94th Cong., 2d Sess. 23-28 (Comm. Print 1976), will require approximately two thousand upper-level appointees to sign letters of financial disclosure in which they agree to file an itemized statement of assets and liabilities; to avoid participation in any matter affecting either individuals or corporations "with which the appointee had financial dealings in the year before assuming office"; to refrain from contacting for financial gain any official of an agency or department in which the appointee has served for the year after he leaves office; to have no financial dealings in any matters for which the appointee had responsibility while in government service for two years after leaving the Administration [apparently a less stringent version of D.R. 9-101(B) that will apply to both attorneys and non-attorneys in government service]; and to file a periodic statement of the sources and amounts of income received by the appointee for two years after leaving the Administration. U.S. NEWS & WORLD REPORT, Jan. 17, 1977, at 50.

In addition to the above requirements, cabinet-level appointees must divest themselves of any assets "where the nature of the holding or liability is such that it will be broadly affected by government monetary and budgetary policies." *Id.* Appointees below the cabinet level must divest themselves of holdings only if conflicts of interest might arise which would "seriously impair the capability of the officer to perform" his responsibilities. *Id.*

President Carter himself has placed his family farm and peanut business in a blind trust with close friend Charles Kirbo as trustee, has announced plans to sell his shares of common stock, and will donate all royalties from his recent book and all income from a future book of his speeches to an independent charitable foundation. *Id.*

Thus, the President has imposed heavy restrictions on his appointees. Some of these may already be required by the Federal Conflict of Interest Law, 18 U.S.C. § 207 (1970), but others are more expansive and reflect a feeling that government officials should conduct themselves in an irreproachable fashion. The adoption of this approach may have been stimulated in part by the recent report of the Commission on Executive, Legislative and Judicial Salaries which

sional impropriety should be avoided whenever possible, there is much to recommend the view that "[n]o opinion should be entered which would unnecessarily restrict the government in recruiting personnel from private practice of law or those in government from finding employment in their profession outside of government."⁵⁵

Effect of Inquiry 19 on individual disqualification. An additional objection to the strict firm disqualification approach of Inquiry 19 is that it may restrict the situations in which D.R. 9-101(B), governing disqualification of individual attorneys, will be applied.⁵⁶ Application of D.R. 9-101(B) is conditioned on a vague standard—the “substantial responsibility” test. Lawyers and ethics groups may tend to restrict their views as to what constitutes “substantial responsibility” for a case if application of the rule would bar an entire firm from a case.⁵⁷ While Inquiry 19 itself states that D.R. 9-101(B) should be “broadly construed and strictly applied,”⁵⁸ “there will be inevitable difficulties in applying such broad standards for individual disqualification when firm disqualification inevitably follows.”⁵⁹ The strict rule called for by Inquiry 19 may actually have the harmful effect of discouraging the application of the individual disqualification rule in all but the most flagrant situations and thus of increasing, rather than decreasing, the instances when the public will suspect professional impropriety.⁶⁰

condemned the “‘revolving-door’ arrangements through which company executives, government regulators, and contract negotiators pass freely, changing hats or uniforms as they go, doing damage to public respect for Government.” HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, *supra* at 26. President Carter is clearly concerned with the problems attacked by Inquiry 19 and wishes to control all high-level government officials, both attorneys and non-attorneys, in order to avoid any appearance of impropriety in the conduct of government affairs. He recently proposed a new Ethics in Government Act which would apply to nearly 13,000 officials, Foreman, *President Proposes Ethics Law to Bar Conflict of Interest*, N.Y. Times, May 4, 1977, § A at 1, col. 6, and apparently feels that strong sacrifices may be demanded of those to whom the nation gives positions of great power and prestige. See also H.R. Res. 287, 95th Cong., 1st Sess. (1977) (“the toughest financial code of ethics ever imposed on a U.S. legislative body . . .,” TIME, Mar. 14, 1977, at 12); S. Res. 110, 95th Cong., 1st Sess. (1977) (a corresponding code of ethics enacted by the Senate).

55. Letter from John B. Jones, Jr. to the Legal Ethics Committee of the District of Columbia Bar, *supra* note 46.

56. See note 7 *supra*. A strict interpretation may have the “predictable tendency to produce a parsimonious interpretation of the disciplinary rules governing individual disqualification. It is a truism that where a sanction or restriction is unnecessarily severe, the rule invoking it will be narrowly construed.” Scalia Letter at 2.

57. See Scalia Letter at 2.

58. Inquiry 19 at 16.

59. Letter from Wilmer, Cutler & Pickering to the Legal Ethics Committee of the District of Columbia Bar, *supra* note 46.

60. Automatic firm disqualification was recently rejected by the Internal Revenue Service in the final report of the Advisory Committee on Rules of Professional Conduct of the Chief Counsel, 41 Fed. Reg. 41106 (1976). In an excellent analysis of the background of and approaches to the issues examined in this Note, the Advisory Committee stated that it did “not believe that the interests of the Government and of the public generally would be adequately

In the final analysis, neither Opinion 342 nor Inquiry 19 is "right" or "wrong." The situation requires a balancing of abstract ethical considerations against practical realities. The prevention of even the slightest appearance of professional impropriety is a worthy ideal, but on a practical level the cost of achieving it is prohibitive. When a question such as this arises, a court or ethics committee must

weigh for itself what those problems are, how real in the practical world they are in fact, and whether a mechanical and didactic application of the Code to all situations automatically might not be productive of more harm than good, by requiring the client and the judicial system to sacrifice more than the value of the presumed benefits.⁶¹

A SUGGESTED RESOLUTION

All this is not to say that the objections raised by Inquiry 19 should be ignored and Opinion 342 accepted as the proper resolution of the problem. Even if one does not accept the ultimate solution embodied in Inquiry 19,⁶² much of its underlying reasoning deserves consideration. Inquiry 19 is highly skeptical of the present screening systems,⁶³ and some changes in these procedures are warranted. The Inquiry quite correctly points out the inherent conflict of interest and resulting appearance of impropriety when the decision on screening is made by agency personnel who may later wish to be screened themselves.⁶⁴ Some different system which can avoid this flaw must be developed; the government agency should not have an absolute right to approve or disapprove a lawyer's participation in any particular case.⁶⁵ At least one government agency has recognized the inherent conflict when it decides whether waiver is proper, and as a result has refused to do so.⁶⁶

Inquiry 19 mentions in passing the possibility of judicial approval of screening procedures, but flatly rejects such a procedure as inconsistent with

served by any rule automatically and rigidly disqualifying all the partners and associates of a former Government employee from a particular representation merely because the former employee himself was disqualified from undertaking it." *Id.* at 41113.

61. *International Electronics Corp. v. Flanzer*, 527 F.2d 1288, 1293 (2d Cir. 1975).

62. One former Nader expert on the civil service, while acknowledging that Inquiry 19 may lead many lawyers to reject government job offers, has said that it may "incline a different type of person to apply for a job with the agency, someone with a kind of basic commitment to the role of the agency." He feels that the FTC, for example, might then attract those who wish to represent consumer interests rather than those who intend after a few years to use the expertise gained at the FTC in fighting its decisions as members of private law firms. Moskowitz, *supra* note 44, at 37.

63. See note 33 *supra*.

64. See notes 35-37 *supra* and accompanying text.

65. An absolute veto has already been rejected by the New York City Bar Association. See note 19 *supra*. If the agency should not have absolute veto power, neither should it alone provide the approval needed for a waiver of D.R. 5-105(D).

66. See note 37 *supra*.

its opposition to screening systems in general.⁶⁷ Nonetheless, the idea merits further evaluation. If a judge, or even a special ethics committee, had the final word on all screening arrangements, the apparent conflict of interest would be gone. The agency would contribute to the decision, but only by means of a recommendation for the judge to consider. A judge is an appropriate person to approve screening procedures, as the judicial power normally includes the regulation of attorneys and the preservation of respect for the legal system.⁶⁸ There would be little inconvenience in allowing the judge to make screening decisions in litigated matters, since he would already be familiar with the facts of the cases before him. Matters not yet in litigation and thus not before a judge could be screened by the ethics committee of the local bar association. Since the ethics committee is also called upon to maintain discipline in and respect for the legal profession and the administration of justice, it would be an appropriate body to approve participation in these cases. When a screening procedure comes before the appropriate body for approval, the position of the government agency involved should be ascertained, all other interested parties should present their views,⁶⁹ and the facts should be weighed to determine whether or not disqualification is appropriate in the particular case. While relatively informal procedures might be proper at a hearing on such a matter, at least minimal procedural protections should be provided.⁷⁰ In a close case, the

67. Inquiry 19 at 20 n.18.

68. The role of the judge as guardian of the profession's integrity is well established in our system of justice. For example, the Code of Judicial Conduct provides that "[a] judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." ABA CODE OF JUDICIAL CONDUCT, Canon 3(B)(3) (1972). The judge "should maintain order and decorum in proceedings before him," *id.* Canon 3(A)(2), and should require proper conduct of the lawyers who practice before him. *Id.* Canon 3(A)(3). Supervision of a screening procedure would simply be an extension of the judicial duty to maintain propriety in the legal profession.

69. Such parties would include the disqualified attorney, his law firm, the party who challenged representation in the matter, and anyone else with a valid interest in the proceeding.

70. The hearing on screening might be patterned after a disbarment proceeding, for which all jurisdictions have made some provision and to which constitutional due process protections apply. *See Ex parte Robinson*, 86 U.S. 505 (1873). An example of the procedure called for in such a proceeding is that used in the District of Columbia. When a formal disciplinary proceeding is held in the District, the attorney charged with misconduct is served with a copy of the charges against him, files an answer to these charges, and if the pleadings indicate the existence of any factual issues or if the respondent-attorney requests to be heard, a hearing is held fifteen days after notice of the hearing is served on the attorney. At the hearing he is entitled to be represented by counsel, to cross-examine witnesses, and to present evidence. Under some circumstances the attorney is entitled to reasonable discovery. After the hearing is held, the hearing committee presents its recommendation to the Disciplinary Board of the D.C. Bar, which makes the final decision. The attorney charged with misconduct may waive any or all of these procedures. D.C. CT. APP. BAR R. 11(8). Such a procedure will be particularly appropriate when a bar association ethics committee handles some or all screening matters, as it will already be familiar with its disbarment procedures.

Arguably, a screening hearing need not be so formal as a disbarment proceeding, since

law firm should normally be disqualified; if the arrangement seems questionable to a judge, it will doubtless appear improper to the public at large. When making his decision and balancing Canon 9 against the possible costs of disqualification, the judge might at least ponder the contention that

an attorney need not be disqualified even when there is a reasonable possibility of improper professional conduct . . . [A] court must also find that the likelihood of public suspicion of obloquy outweighs the social interests which will be served by a lawyer's [or a law firm's] continued participation in a particular case.⁷¹

While some might protest that the use of such a standard would permit disqualification only in extreme cases, it must be remembered that the disqualification of an entire law firm is itself an extreme remedy.⁷²

Whenever screening is an issue, an important consideration should be *when* the case was brought to the law firm. A clear distinction should be made between cases which were with the firm before the ex-government attorney was hired and those which come in after the disqualified lawyer has either joined the firm or announced his intention to do so. It is only in the latter situation that it is likely to appear that a case was brought to the firm because of the presence of a disqualified lawyer. In addition, the judge or other body should consider whether the case comes from a long-established client or from a new one,⁷³ since the same consideration applies, although to a lesser degree. The judge should examine the situation very closely before approving participation in the second situation; approval should be routine

disbarment is much more serious than a failure to approve screening; disbarment will completely divest the attorney of his livelihood while disapproval of screening will bar the law firm from only one matter. Some of the requirements for disbarment hearings might be relaxed when screening is involved, with the relevant body for each jurisdiction deciding which safeguards are unnecessary after examining its disbarment procedures. The parties might often agree to waive some or all of the procedural safeguards.

71. *Woods v. Covington County Bank*, 537 F.2d 804, 813 n.12 (5th Cir. 1976).

72. In addition to perfecting the procedures for approval of screening arrangements, more formal safeguards for the segregation of fees must be developed if any are to be utilized at all. Under Opinion 342, a firm is supposed to segregate the fee generated by a case from which a former government attorney is barred so that the disqualified lawyer will be unable to share in it. See text accompanying note 18 *supra*. While theoretically this appears to be a sound solution, in fact it seems that such segregation is a hollow gesture. Though the disqualified attorney may not share in the proceeds of the particular case, the fees from the matter will nevertheless benefit his law firm. As a member of the firm, the lawyer benefits as well, either directly or indirectly.

Perhaps the segregation of fees should be dropped as unworkable, and emphasis should be placed on screening the disqualified attorney from participation on the work of the case. It is possible that this will increase the appearance of impropriety, but it is doubtful. The main public suspicion will be that a disqualified attorney helps his partners prepare the case, not that he receives some fees from it. An ineffective fee segregation may be worse than none at all.

73. This point was forcefully made in the Letter from John B. Jones, Jr. to the Legal Ethics Committee of the District of Columbia Bar, *supra* note 46, at 3. The Justice Department has incorporated it into point (3) of its screening procedure, note 19 *supra*.

only when the client was with the firm long before the disqualified lawyer joined it. The screening body should also consider whether the particular firm had the capacity to handle the type of case involved before the disqualified attorney joined the firm; if it did not have that capacity, the obvious inference is that the client retained the firm because of the presence of the disqualified lawyer.⁷⁴

Realistically, there can be no complete solution to the problem presented by the two ethics opinions. Canon 9 needs to be preserved, yet if strictly applied through D.R. 5-105(D) it may have devastating results. One should not compromise a moral or ethical norm, yet some compromise is imperative in the present situation. The ideals of Inquiry 19 must be balanced against the effect of their absolute application, with the result that some sort of screening procedure seems necessary. Still, screening violates the basic spirit of the Inquiry 19 approach.

The basic problem is so inherently irreconcilable that to some extent this Note "endeavors only to raise the problem, state some of the issues, and offer certain suggested approaches."⁷⁵ By way of tentative conclusion, it seems that the potential ill effects of an absolute application of D.R. 5-105(D) are so great that Inquiry 19 must be rejected. While one might argue that the Inquiry 19 approach is proper for supervisory personnel even if it is too harsh for lower-level government attorneys, the adverse effects of such a rule on government recruitment and other matters are so substantial that it should be held inapplicable even to them. Some form of screening procedure must be permitted. That proposed by Opinion 342 fails to do enough, but, coupled with procedures such as those proposed in this Note, it can be made adequate to the task of preserving (or restoring) public confidence in the integrity of the legal profession. Practicality requires that some form of screening be permitted, since an absolute application of D.R. 5-105(D)'s firm disqualification rule leads to results so harsh as to be counterproductive.

74. The SEC considers this factor before approving a screening arrangement. Pitt Letter at 7.

75. Kaufman, *supra* note 7, at 669.