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## Conflict of Interest

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# CONFLICT OF INTEREST

Robert H. Aronson\*

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No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and mammon.

*Matthew 6:24* (King James)

Ethical principles concerning the identification and avoidance of conflicts of interest have existed since biblical times, and have been broadly applied to all professionals, representatives, and fiduciaries.<sup>1</sup> "Conflict of interest" is a concept that traverses all areas of the law and affects every lawyer regardless of the nature of his or her practice. Nonetheless, the legal profession has found precise delineation of the proscribed conduct to be a difficult task. Canon 6 of the American Bar Association's old Canons of Professional Ethics<sup>2</sup> provided in part:

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 ABA's current Code of Professional Responsibility defines conflict of interest in terms of the inherent dilution of a lawyer's loyalty toward his client.<sup>3</sup>

Operating under obviously imprecise standards, courts and bar grievance committees have struggled to define and enforce a conflict of interest "common law." This task has been complicated because all substantive areas of law, the myriad attorney working arrangements (for example, solo practice, law partnership, government entity), and all stages of legal counseling and litigation create conflict of interest problems. Within each area of the law and form of legal practice the

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1. *See generally* RESTATEMENT (SECOND) OF TRUSTS § 170 (1959); W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY §§ 147-151 (1964).

2. The ABA CANONS OF PROFESSIONAL ETHICS were superseded in 1969 by the ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited without cross reference as ABA CODE].

3. Ethical Consideration 5-1 states:

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.

ABA CODE, EC 5-1.

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conflict of interest problems are unique, calling for individualized and imaginative treatment. There are, however, certain basic ethical principles which have guided courts and bar association ethics committees in determining which situations cause or are likely to cause a dilution of the loyalty or impairment of the independent judgment of an attorney.

The purpose of this article is to indicate situations in which conflict of interest problems most commonly arise and to suggest principles for avoiding such situations or resolving unavoidable conflicts. Part One presents an overview of the subject, with a discussion of general principles underlying conflict of interest problems. Part Two applies these general principles to a number of frequently encountered problem areas. Throughout the discussion, the author approaches problem situations with a cautious eye. Not every court or grievance committee would impose discipline or invalidate a transaction for all the conflicts scrutinized herein; nevertheless, the possibility of such measures necessitates extreme care.

### I. GENERAL PRINCIPLES

A conflict of interest exists whenever the attorney, or any person represented by the attorney, has interests adverse in any way to the advice or course of action which should be available to the present client. A conflict exists whenever this tension exists—even if the attorney eventually takes the course of action most beneficial to the present client.

When a conflict or potential conflict of interest arises, a conscientious attorney usually faces three possible courses of action: (1) inform all interested parties of the present or potential conflict, inform them of all possible and probable consequences of the conflict should the attorney continue to represent both parties, and continue dual representation with their express, informed consent; (2) after informing the interested parties of the conflict, withdraw from the representation of one of the parties; (3) withdraw from the representation of both parties.

If, despite a potential conflict of interest, the attorney continues to represent the interested parties, the burden will be upon that attorney to demonstrate that (1) no conflict existed, (2) the voluntary, informed consent of all affected parties was obtained, or (3) any action in which

the attorney had a personal interest was fair. Sanctions available for improper representation of conflicting interests include disqualification from<sup>4</sup> or injunction against<sup>5</sup> appearing in the matter, disciplinary proceedings against the attorney,<sup>6</sup> loss of fee,<sup>7</sup> or potential personal liability for injury to either client.<sup>8</sup>

Of course, the nature of a particular case or class of cases may circumscribe both the possible courses of action and the available sanctions for perceived conflicts. For example, if representation of a prospective client would be adverse to the interests of a former client, the primary if not sole consideration must be the interests of the former client. The attorney may neither choose which client to represent nor withdraw from representation of both.<sup>9</sup> Likewise, the possible sanctions may be determined by whether the conflict arises in a civil or criminal case,<sup>10</sup> or whether the conflict results from the conduct of a single attorney or from representation of conflicting interests by two members of the same law office.<sup>11</sup>

#### A. *The Appearance of Impropriety*

The admonition that “[a] lawyer should avoid even the appearance of impropriety”<sup>12</sup> is particularly applicable to potential conflicts of interest. Fostering public confidence in the impartiality of the legal system and the integrity of the legal profession requires more of a lawyer than not being overtly influenced by interests other than those of his client. Because the appearance of impropriety can be just as damaging as actual impropriety to public respect for the law and clients’ belief in their attorney’s loyalty, attorneys must ensure that their conduct does not reasonably appear to have been influenced by conflicting interests.<sup>13</sup>

4. *E.g.*, *Prichec v. Tecon Corp.*, 139 So. 2d 712 (Fla. Dist. Ct. App. 1962).

5. *E.g.*, *Watson v. Watson*, 171 Misc. 175, 11 N.Y.S.2d 537, 539 (Sup. Ct. 1939).

6. *E.g.*, *In re Cowdery*, 69 Cal. 32, 10 P. 47 (1886).

7. *E.g.*, *Hill v. Douglass*, 271 So. 2d 1 (Fla. 1972) (attorney allowed to recover fee for services rendered prior to the time conflict arose, but not afterward).

8. *E.g.*, *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

9. *See* Part II *infra*.

10. *See* Part II-B-4 *infra*.

11. *See* Part II-F *infra*.

12. ABA CODE, Canon 9.

13. *See* EC 9-1, EC 9-2. EC 9-2 states: “When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.”

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The boundary between ethical and unethical behavior is often not clearly delineated; avoidance of the appearance of professional impropriety is, therefore, at the heart of many ethics decisions involving conflicts of interest.<sup>14</sup> Thus, “[i]t has been suggested that a good rule of thumb is ‘When in doubt, don’t.’”<sup>15</sup>

### B. Dilution of Loyalty to Client

The potential variety of interests which might dilute a lawyer’s loyalty to his clients is limitless. They include the attorney’s personal interests (financial security, prestige, and self-esteem) and the interests of third persons (family, friends, business associates, employer, the legal profession, and society as a whole).

The representation of more than one party to a transaction often results in the dilution of loyalty to one or both: buyer and seller, borrower and lender, insurer and insured, consenting mother and adopting parents, seller and issuer of securities, husband and wife, multiple personal injury plaintiffs, or multiple criminal defendants. An attorney’s loyalty to a client may also be adversely influenced by loyalty to a former client, whether the present representation is related or unrelated to the former representation. Because the number of often subtle influences which might dilute or appear to dilute the lawyer’s loyalty to a client is so great, it is essential for an attorney to be aware of the most common conflict situations, and to be on the lookout for diluting influences unique to his particular clientele or form of practice.

### C. Confidentiality

The third part of former Canon 6 provided: “The obligation to represent the client with undivided fidelity and not 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.”<sup>16</sup>

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14. See, e.g., ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 77 (1932), No. 220 (1941), No. 278 (1948); NEW YORK STATE BAR ASS’N COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 413 (1975), No. 415 (1975), reprinted in 47 N.Y. ST. B.J. at 712, 713–14 (1975).

15. WASHINGTON STATE BAR ASS’N LEGAL ETHICS COMM., OPINIONS, No. 161, reprinted in 29 WASH. ST. B. NEWS at 47 (Oct. 1975).

16. ABA CANONS OF PROFESSIONAL ETHICS No. 6.

The duty not to disclose confidential communications was more fully enunciated in 1937 with the addition of Canon 37.<sup>17</sup> The principles of former Canons 6 and 37 are now part of Canon 4 of the Code of Professional Responsibility and its accompanying disciplinary rules and ethical considerations. Canon 4 states simply: "A lawyer should preserve the confidences and secrets of a client."

The Canon acknowledges that preserving a client's secrets and confidences<sup>18</sup> is as important to him as winning his lawsuit or avoiding embarrassment or undue expense. Therefore, an attorney representing a party in a proceeding against a former client will be deemed to have a conflict of interest if he makes use of confidential information obtained from the former client.<sup>19</sup> In fact, it is sufficient that there is a substantial relationship between the attorney's former and his present representation, so that he may or could have obtained confidential information from his former client useful to his present client.<sup>20</sup> It need not be shown that he did in fact receive such information.

This emphasis on preserving a client's confidences also extends beyond the particular attorney involved. The possibility of even an unintended leak of such confidences is in large part responsible for the "vicarious disqualification" of law partners, spouse-attorneys, and even attorneys sharing office space but not otherwise associated.<sup>21</sup>

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17. Canon 37 provided in part:

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

See generally ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 250 (1943).

18. Disciplinary Rule 4-101(A) states:

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

ABA CODE, DR 4-101(A).

19. See notes 135-41 and accompanying text *infra*.

20. See, e.g., *Fleischer v. A.A.P., Inc.*, 163 F. Supp. 548, 552 (S.D.N.Y. 1958), appeal dismissed, 264 F.2d 515 (2d Cir.), cert. denied, 359 U.S. 102 (1959).

21. See Part II-F *infra*.

*D. Anticipating Potential Conflicts*

Persons involved in disciplining lawyers come to realize that grievances frequently result from simple pitfalls that could have been avoided.<sup>22</sup> The key to preventing unintentional or unwitting violations lies in anticipating the probability or possibility that a conflict situation will develop.<sup>23</sup> Obtaining agreement of all parties to appearance by one lawyer on both sides of a question may not be sufficient protection.<sup>24</sup> As stated by Henry Drinker:

The temptation to get into an interesting, important, or profitable case is always alluring, and the lawyer is very prone to rationalize himself into the belief that he will be able to steer safely between Scylla and Charybdis, when sober reflection or a discussion with his partners would bid him pause.<sup>25</sup>

The current Disciplinary Rule mandates that a lawyer decline employment when his independent professional judgment on behalf of another client will be, or is likely to be, adversely affected.<sup>26</sup> Thus, if the intensity of a lawyer's personal feeling<sup>27</sup> or a perceived duty to the public or profession<sup>28</sup> might impair the effective representation of a prospective client, he must decline employment at the outset.

Several specific potential conflict situations are best avoided altogether. If a lawyer or a member of his firm ought to be called as a witness in contemplated or pending litigation, he should not accept employment "unless circumstances arise which could not be anticipated and it is necessary to prevent a miscarriage of justice."<sup>29</sup> Likewise, when an attorney and a client have separate claims against a defendant, the

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22. ABA STANDING COMM. ON PROFESSIONAL DISCIPLINE AND CENTER FOR PROFESSIONAL DISCIPLINE, PROFESSIONAL RESPONSIBILITY AND THE LAWYER: AVOIDING UNINTENTIONAL GRIEVANCES 5 (1975).

23. H. DRINKER, LEGAL ETHICS 104-05 (1953).

24. *Id.*

25. *Id.* Henry Drinker was chairman of the ABA Standing Committee on Ethics and Grievances from 1944-58.

26. DR 5-105(A) states: "A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests."

27. See EC 2-30.

28. *Cf. Johns v. Smyth*, 176 F. Supp. 949 (E.D. Va. 1959) (court found that attorney's failure to press client's case for reasons of conscience denied client due process).

29. *Schwartz v. Wenger*, 267 Minn. 40, 43-44, 124 N.W.2d 489, 492 (1963). See DR 5-101(B); EC 5-9; EC 5-10; *Code of Trial Conduct: Promulgated by the Amer-*



attorney should not represent the client's interest in an action against the defendant; the possibility that the defendant might be financially able to satisfy only one judgment could dilute the attorney's loyalty toward the client.<sup>30</sup> The client's consent to the dual representation will not alter an attorney's duty,<sup>31</sup> nor, apparently, will the possibility that both suits may not be successful or, if successful, that the defendant may be able to satisfy both judgments.<sup>32</sup> The foreseeable possibility that a conflict might arise also prohibits a prosecuting attorney who investigated an automobile accident but decided against criminal prosecution from representing one of the parties in a subsequent civil suit.<sup>33</sup> This is so even though state law does not specifically prohibit him from engaging in private practice.<sup>34</sup>

Dual representation is virtually always improper in transactions such as the sale of property because of the very high probability that future conflicts of interest will develop:

Even within the limited area of marketable title, a situation may exist which casts doubt on the advisability of accepting the title. The buyer's attorney would be under a duty to request the seller to correct the situation, whereas the seller might properly contend that the title was marketable, notwithstanding the buyer's assertion.<sup>35</sup>

Often, the parties themselves will initiate and readily consent to joint representation to reduce costs. However, each party may believe that the attorney represents him exclusively and, once a conflict arises, may adamantly blame the lawyer. Because the lawyer will probably

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*ican College of Trial Lawyers*, 43 A.B.A.J. 223, 224-25 (1957). As stated by the Connecticut Supreme Court of Errors:

The great weight of authority in this country holds that the attorney who acts as counsel and witness, in behalf of his client, in the same cause on a material matter, not of a merely formal character, and not in an emergency, but having knowledge that he would be required to be a witness in ample time to have secured other counsel and given up his service in the case, violates a highly important provision of the Code of Ethics and a rule of professional conduct.

Erwin M. Jennings Co. v. Di Genova, 107 Conn. 491, 499, 141 A. 866, 869 (1928).

30. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 132 (1935).

31. *Id.*

32. If an attorney and client agree to share the recovery pro rata, however, the attorney's suit would be appropriate. *Id.*

33. The ABA Committee on Professional Ethics stated: "Canon 6 prohibits representation of conflicting interests. Without doing its meaning violence, we can extend its prohibition beyond cases of actual present conflict to those in which the interests may with some reasonable degree of probability become conflicting." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 135 (1935).

34. *Id.*

35. *In re Kamp*, 40 N.J. 588, 194 A.2d 236, 239-40 (1963).

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have received confidential information from both parties, a subsequent conflict will dictate that she withdraw from representation of both parties.<sup>36</sup> Further, an agreement reached between two parties represented by the same attorney may be voided if a court subsequently decides that the attorney's allegiance was greater towards either of the two parties, or that one of the parties was not adequately informed of the consequences of the agreement. On this basis, courts have voided pre-nuptial<sup>37</sup> and separation<sup>38</sup> agreements. The fact that the parties are on good terms or appear to be in complete agreement at the time of the transaction does not negate the possibility that future disenchantment will develop.<sup>39</sup> A professionally responsible attorney avoids such conflicts by refusing to represent even potentially adverse interests. In addition to avoiding the appearance of impropriety, he prevents himself from being tempted to act or convince the parties to act in a way which avoids the potential conflict but is not in the best interests of one or both of the parties.<sup>40</sup>

## II. APPLICATION OF GENERAL PRINCIPLES TO RECURRING PROBLEMS

### A. *Conflicts Resulting from Lawyer's Personal Interest*

Disciplinary Rule 5-101(A) provides: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be

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36. See DR 2-110(B)(2); DR 5-105(B).

37. *E.g.*, *Friedlander v. Friedlander*, 80 Wn. 2d 293, 494 P.2d 208 (1972).

38. *E.g.*, *Schaller v. Schaller*, 44 U.S.L.W. 2353 (N.Y. Sup. Ct. Jan. 20, 1976).

39. This may be particularly true with respect to the elderly. Freeman and Wiehofen state:

With age often comes sterner moral feelings against criminal and other improper behavior and against non-conformity in general. This heightened moral rigidity may produce a break in relation with members of one's family who do not live by the same standard. It may also lead to cantankerous reactions when the lawyer undertakes to give unwelcome advice or crosses the client in any way.

H. FREEMAN & H. WIEHOFEN, *CLINICAL LAW TRAINING* 465 (1972).

40. See, *e.g.*, *Yablonski v. United Mine Workers*, 448 F.2d 1175, 1179-80 (D.C. Cir. 1971) (*per curiam*):

Whether facts are discovered and legal positions taken which would create such a conflict of interest . . . may well be determined by the approach which counsel . . . takes in this case. We think that the objectives of the . . . Act would be much better served by having an unquestionably independent new counsel in this particular case.

or reasonably may be affected by his own financial, business, property, or personal interests."<sup>41</sup>

Not only is there great temptation for the lawyer to temper his loyalty to his client where his own financial interest is involved, but the appearance of impropriety is also great in such cases. For this reason, all personal financial interests, particularly business dealings between attorney and client from which the attorney benefits, are very closely scrutinized for any unfairness on the attorney's part.<sup>42</sup> In fact, it has been said that "[t]here are no transactions respecting which courts . . . are more jealous and particular, than dealings between attorneys and their clients, especially where there is great intellectual inequality, and comparative inexperience on the part of the latter."<sup>43</sup> Therefore, when an attorney is called into question for entering into a transaction with his client, the attorney must by affirmative evidence defeat the presumption of overreaching, undue influence, or fraud arising out of the fiduciary relationship, or the transaction will be set aside.<sup>44</sup>

Under these principles, it has been held improper for an attorney to enter into an agreement with an elderly client to purchase real estate in return for his promise to support her for the rest of her life.<sup>45</sup> Although the rationale behind the rule would seem to apply equally to business dealings between attorney and client whether related or unrelated to the attorney's employment (a disagreement on an unrelated financial matter could as easily create a conflict), an attorney's purchase of property which was fair and unrelated to the attorney-client relationship has been upheld.<sup>46</sup> The lawyer must still obtain the client's consent after full disclosure, and should any disagreement or conflict arise concerning the property, he would be required to with-

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41. The prior Canon provided: "The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client." ABA CANONS OF PROFESSIONAL ETHICS No. 11. See also EC 5-1; EC 5-2; ABA CANONS OF PROFESSIONAL ETHICS No. 6.

42. See, e.g., *Magee v. State Bar*, 58 Cal. 2d 423, 374 P.2d 807, 811, 24 Cal. Rptr. 839, 843 (1962); *Gerach v. Donnelly*, 98 So. 2d 493, 498 (Fla. 1957); *Creller v. Baer*, 354 Mich. 408, 93 N.W.2d 259, 261 (1958).

43. *Mills v. Mills*, 26 Conn. 213, 219 (1857).

44. *Magee v. State Bar*, 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962); *McFail v. Braden*, 19 Ill. 2d 108, 166 N.E.2d 46 (1960); *Attorney Gen. v. Lane*, 259 Mich. 283, 243 N.W. 6 (1932); *In re Herr*, 22 N.J. 276, 125 A.2d 706, 711 (1956).

45. *Eschwig v. State Bar*, 1 Cal. 3d 8, 459 P.2d 904, 81 Cal. Rptr. 352 (1969).

46. *Palmer v. Arnett*, 352 Mich. 22, 88 N.W.2d 445 (1958). See *Smoot v. Lund*, 13 Utah 2d 168, 369 P.2d 933 (1962).

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draw from all representation of that client's affairs.<sup>47</sup> Therefore, it is advisable for a lawyer to avoid such business dealings whenever possible.

It is clearly improper for an attorney to borrow money from a client, at least where the client is not represented by independent legal counsel,<sup>48</sup> and it is inadvisable, if not improper, to loan money to the client to further a business venture about which the attorney was consulted.<sup>49</sup> Even if the client has not been injured, the appearance of impropriety inherent in attorney-client business dealings renders it improper for an attorney representing the trustee of the holders of first mortgage certificates issued on property in liquidation to purchase some of the certificates at market value. When some certificates so purchased later rose in value, the attorney was held to be a constructive trustee of the profits.<sup>50</sup> Because an attorney's ownership of property in which his client also has an interest might interfere with the attorney's exercise of unbiased judgment on behalf of that client,<sup>51</sup> some lawyers and firms have established a policy of proscribing the ownership of equity securities of their corporate clients.<sup>52</sup>

A presumption of undue influence arises with respect to a will in which the attorney who drafted the will receives a substantial bequest.<sup>53</sup> The presumption may also be raised by provisions appointing the lawyer executor or trustee, giving substantial bequests to the lawyer's relatives,<sup>54</sup> or even by an agreement to draw free wills making a bequest to the lawyer's church.<sup>55</sup> In those jurisdictions which do not recognize the rule of partial invalidity in undue influence cases, the attorney imperils not only his bequest but all bequests.<sup>56</sup> Ordinary pru-

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47. DR 2-110(B)(2); DR 5-104(A).

48. *In re Darrow*, 39 App. Div. 2d 62, 331 N.Y.S.2d 533 (1972); *In re Brown*, 262 Or. 171, 493 P.2d 1376, 1379-80 (1972).

49. *See* Grievance Comm. of Fairfield County Bar v. Nevas, 139 Conn. 660, 96 A.2d 802, 805-06 (1953) (upheld trial court's refusal to order disbarment or suspension, but stated "the trial court might well have decided that a public reprimand should be administered to the defendant").

50. *In re Bond & Mortgage Guar. Co.*, 303 N.Y. 423, 103 N.E.2d 721 (1952).

51. *See* EC 5-3.

52. *See, e.g.*, II R. SWAINE, THE CRAVATH FIRM 9-10 (1948).

53. *See, e.g.*, *In re Jones*, 254 Or. 617, 462 P.2d 680 (1969); *State v. Horan*, 21 Wis. 2d 66, 123 N.W.2d 488, 491 (1963). This presumption may be difficult to rebut. *E.g.*, *State v. Collentine*, 39 Wis. 2d 325, 159 N.W.2d 50 (1968).

54. *E.g.*, *State v. Gulbankian*, 54 Wis. 2d 599, 196 N.W.2d 730 (1972) (\$10,000 and powers of distribution in attorney's sister).

55. OPINIONS OF THE ETHICS COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK No. 608, cited in H. DRINKER, *supra* note 23, at 110 n.24.

56. *See, e.g.*, *State v. Horan*, 21 Wis. 2d 66, 123 N.W.2d 488, 492 (1963).

dence dictates that some other lawyer of the testator's own choosing draft the will to avoid any *suspicion* of undue influence.<sup>57</sup> The necessity of such a course depends on the circumstances: if the lawyer might reasonably be accused of using undue influence, the provision should be drawn by another lawyer.<sup>58</sup> On the other hand, when the testator originates the suggestion, is entirely competent, and has had a long-standing relationship with the lawyer, a reasonable legacy can be given to the drafting lawyer with no necessity of having another lawyer in the case.<sup>59</sup> At least one court has held, however, that the drafting of the will by one who functioned merely as a "scrivener" for the offending lawyer rather than "as an independent attorney" was improper.<sup>60</sup>

In the event that business dealings with a client are unavoidable, the lawyer should take all possible precautions to avoid impropriety. They include obtaining the client's consent after advising him to obtain independent legal advice; informing him of all possible consequences and conflicts that might later develop; ensuring that the roles of the parties and terms of the agreement are clearly defined and re-

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57. "[T]he lawyer should *consider* having the testator submit the will to another lawyer prior to its execution." DECISIONS BY THE ABA ETHICS COMMITTEE No. 266, reprinted in H. DRINKER, LEGAL ETHICS 279 app. (1953) (emphasis added). See Magee v. State Bar, 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962); *In re Blake*, 21 N.J. 50, 120 A.2d 745 (1956).

The Wisconsin Supreme Court has drawn a distinction:

We do not mean to state that a lawyer may never draw a will for a personal friend or members of his family or close relatives in which he or a member of his family is a beneficiary. A lawyer may draft a will for his wife, his children, or his parents, or other close relatives, in which he is a beneficiary and stands in the relationship to the testator as one being the natural object of the testator's bounty. In such a case if the proposed legacy to himself or a member of his family is reasonable and natural under the circumstances or no more than would be received by law and no reasonable grounds in fact exist for the attorney to anticipate a contest or for the public to have reasonable cause to lose confidence in the integrity of the bar, such will may be drawn. . . . However, if the attorney acted as draftsman of the will and there are any circumstances either because of preferential treatment in relationship to others or if the bequest is more than a token or modest bequest from a personal friend or the attorney suggested the bequest to himself or to a member of his family, or any other somewhat persuasive circumstances, the inference arises and would reasonably lead the public to question the integrity of the lawyer.

*State v. Horan*, 21 Wis. 2d 66, 123 N.W.2d 488, 492 (1963).

58. H. DRINKER, *supra* note 23, at 94.

59. *Id.* Drinker adds that in certain circumstances "it is wise" to have the testator state to a disinterested witness that the suggestion for the provisions in question originated with the testator. *Id.* at 94 n.43.

60. *State v. Beaudry*, 53 Wis. 2d 148, 191 N.W.2d 842 (1971).

## Conflict of Interest

duced to writing; and submitting the agreement to another, independent lawyer for review.<sup>61</sup>

Generally, improper financial involvement with clients also occurs when, in connection with contemplated or pending litigation, a lawyer acquires a financial interest in the outcome of that litigation. Despite this prohibition, a reasonable contingent fee is permissible in civil litigation, because it may be the only means by which the indigent or near-indigent can obtain legal counsel.<sup>62</sup> Furthermore, a lawyer may properly secure collection of fees for services rendered by use of statutory liens against the client's present and future income, which may include a pending judgment.<sup>63</sup> Both the contingent fee and the lien, then, give the attorney a permissible financial interest in the outcome of litigation in which he is involved.

There are other, narrowly circumscribed exceptions to the general proscription against acquiring a financial interest in the outcome of litigation. Disciplinary Rule 5-103(B) provides:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.<sup>64</sup>

Although a lawyer may have advanced or guaranteed financial help to her client with the purest of motives—a desire to assist a client in serious financial need—such well-intentioned actions create serious ethical problems. A lawyer's financial interest or obligation in her client's cause limits the exercise of her independent and professional judgment<sup>65</sup>—for example, when a settlement is offered which might

61. See generally *McFail v. Braden*, 19 Ill. 2d 108, 117-18, 166 N.E.2d 46, 52 (1960) (adding the requirement that consideration must be adequate).

62. DR 5-103(A)(2). See EC 5-7; EC 2-20; Comment, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty and a Solution*, 26 U. PITT. L. REV. 811, 829 (1965). See generally F. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* (1964). See also DR 2-106(C).

63. EC 5-7. See DR 5-103(A)(1).

64. See also EC 5-8.

65. ABA STANDING COMM. ON PROFESSIONAL DISCIPLINE AND CENTER FOR PROFESSIONAL DISCIPLINE, *PROFESSIONAL RESPONSIBILITY AND THE LAWYER: AVOIDING UNINTENTIONAL GRIEVANCES* 13 (1975).

take care of her own interest in the verdict but does not advance the interest of her client to the maximum degree.<sup>66</sup>

Although an attorney's personal financial interest in the outcome of the litigation may be removed when a third party finances the suit, that arrangement often creates a conflict of interest regarding loyalty to the client and the third party. "Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client."<sup>67</sup> The responsibility the lawyer naturally feels towards the person financing the litigation mandates, as a minimum, full disclosure of the conflict to the client.<sup>68</sup> In some instances, the potential for or appearance of dilution of loyalty to the client is so great that a third-party arrangement is proscribed altogether. For example, an attorney may not obtain trust business for his trust company employer by drafting documents free of charge naming the trust company as executor or trustee.<sup>69</sup> The appearance of impropriety exists even where the attorney is not retained but only recommended by the trust company, and the subsequent appointment of the company as trustee is on the merits.<sup>70</sup> If problems develop and the trust company's client is deemed not to have had the benefit of independent legal advice, the trust agreement may have to be reformed.<sup>71</sup> Therefore, the trust company should be advised that when asked to recommend an attorney, it should submit the names of several lawyers and let the client make the choice.<sup>72</sup>

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66. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 288 (1954) (advancement of living costs to an injured client or the members of his family found improper because there is no expectation of reimbursement except out of the verdict).

67. EC 5-22.

68. DR 5-107(A)(1)-(2); EC 2-21. See ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 320 (1968).

69. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 122 (1934).

70. See H. DRINKER, *supra* note 23, at 110 ("He will be too disposed to favor the trust company by naming it as trustee."). See also Hicks & Katz, *The Practice of Law by Laymen and Lay Agencies*, 41 YALE L.J. 69, 83 (1931).

71. *Jothann v. Irving Trust Co.*, 151 Misc. 107, 270 N.Y.S. 721 (1934), *aff'd*, 243 App. Div. 692, 277 N.Y.S. 955 (1935).

72. See Statement, National Conference Group (1951), reprinted in 93 A.B.A. REP. app. at 25 (1966), cited in L. PATTERSON & E. CHEATHAM, *THE PROFESSION OF LAW* 231 & n.1 (1971). The particularly troublesome problems of third-party payment and conflicts of interest for retained insurance company attorneys representing the insured under the terms of the client's liability insurance are treated in text accompanying notes 77-95 *infra*.

## Conflict of Interest

### B. *Conflicts Resulting from Representation of Adverse Interests in Same Proceeding*

Disciplinary Rule 5–105 provides in part:

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5–105(C).

....

(C) . . . [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.<sup>73</sup>

“Differing interests” may be “conflicting, inconsistent, diverse, or otherwise discordant,”<sup>74</sup> but further definition is left by the Code to case-by-case development.

In an adversary system it is essential that the adversaries have, to as great a degree as possible, an equal opportunity to promote their interests.<sup>75</sup> If the interests of two or more parties diverge, it is impossible (or at least would appear to be impossible) to represent both with equal zeal.<sup>76</sup> Any possibility that the attorney will act or refrain from acting in a way detrimental to the best interests of one or both clients requires full disclosure to and consent by all concerned. If a court or ethics committee subsequently determines that the attorney was not able adequately to represent both parties, his conduct will be deemed unethical. In all cases, a lawyer should look for guidance to the principles enunciated above, but an awareness of commonly recurring problem areas is also helpful in avoiding many subtle conflicts of interest.

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73. DR 5–105(B) requires a lawyer to discontinue multiple employment under the same conditions as DR 5–105(A).

74. EC 5–14.

75. See Aronson, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273, 303–04 (1976).

76. See generally ABA CODE CANON 7.



### 1. *Insurer-insured*

Liability insurance policies usually contain the following provisions: (1) that the insurer will hold the insured harmless within the monetary limits of the policy; (2) that the insurer will provide a lawyer to represent the insured with respect to any claim or action covered under the policy; and (3) that the insured will cooperate with the insurer in the defense against such claims or actions. By signing the insurance contract and subsequently complying with his duty under the contract to forward any court process to the insurer, the insured is deemed to have consented to and approved the representation by the insurer's attorney.<sup>77</sup> Interests of the insurer and the insured arising out of the insurance contract will be virtually identical when an action is brought by a third party against the insured for damages within the policy limits.<sup>78</sup>

Despite this initial unity of interest, however, events occurring at various stages of the litigation often cause the interests of the insurer and the insured to differ, if not actually conflict. It is then that the attorney selected and paid by the insurer but expected to maintain "an undeviating and single allegiance" to his client (the insured)<sup>79</sup> is most likely to act unethically. This divided allegiance is the primary reason for careful scrutiny of situations involving lay intermediaries.<sup>80</sup> Although the social utility of liability insurance justifies some modification of the usual professional standards, "[i]t is incumbent on lawyers to take account of the difficulties inherent in their dual representation and to consider the resulting duties."<sup>81</sup>

#### a. *Settlement offer within policy limits*

A common conflict arises when a claimant offers to settle for a sum

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77. "If the insured does not desire to avail himself of the company's obligation to defend the suit including counsel, together with payment of any judgment and costs, he is at complete liberty to renounce his rights under the insurance contract and employ independent counsel at his own expense." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 282 (1950).

78. *Id.*

79. *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc.*, 205 Misc. 1066, 1075, 131 N.Y.S.2d 393, 401 (Sup. Ct. 1954). See DR 5-107(B); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 320 (1968) ("[A] third party may pay the cost of legal services so long as control remains in the client and the responsibility of the lawyer is solely to the client.").

80. See DR 5-107.

81. L. PATTERSON & E. CHEATHAM, *supra* note 72, at 238.

within the limits of a liability policy. Fearing a possible verdict for a sum above these limits, the insured urges the acceptance of the offer regardless of the cost to the insurer. The insurer, on the other hand, prefers to litigate the claim or hold out for a lower settlement offer. For example, in one case the insurer rejected the plaintiff's offer to settle for \$5,000—well within the \$10,000 policy limit. The attorney appointed by the insurer to defend the action did not include the insured in the settlement negotiations and did not fully advise him of settlement offers. The trial resulted in a \$45,000 verdict for the plaintiff. The insurer was later held liable to the insured for the amount of the judgment.<sup>82</sup> In another case, the attorney, following the insurer's instructions, rejected plaintiff's offer to settle for \$10,000, the amount of the policy limit. Following a \$225,000 verdict for the plaintiff, the insured sued both the insurer and the attorney. The insurer settled, and a verdict for the attorney was reversed following appeal, the court stating that the attorney had committed malpractice as a matter of law: "By continuing to act as counsel for the estate, while entertaining the belief that his primary obligation in the matter of settlement was to the insurer, defendant violated the legal and ethical concepts which delineated his duties to the estate."<sup>83</sup>

In such cases, the insurer quite naturally is not particularly concerned about protecting the insured's interest in avoiding the possibility of a judgment exceeding the policy limits. It is the lawyer's responsibility to inform the insurer of its duty to the insured and the likelihood of legal liability should it fail to fulfill that duty. If the desires of the insurer and insured cannot be reconciled, the lawyer should withdraw with proper notice.<sup>84</sup>

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82. *Hamilton v. State Farm Mut. Auto. Ins. Co.*, 9 Wn. App. 180, 511 P.2d 1020 (1973), *aff'd*, 83 Wn. 2d 787, 523 P.2d 193 (1974).

83. *Lysick v. Walcom*, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406, 416 (1968). *See National Farmers Union Property & Cas. Co. v. O'Daniel*, 329 F.2d 60 (9th Cir. 1964); *Farmers Ins. Exch. v. Henderson*, 82 Ariz. 335, 313 P.2d 404 (1957); *Olitkowski v. St. Casimir's Sav. & Loan Ass'n*, 302 Mich. 303, 4 N.W.2d 664, 668 (1942). *See also Brodsky, Duty of Attorney Appointed by Liability Insurance Company*, 14 CLEV.-MAR. L. REV. 375, 385 (1965); Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954).

84. *See Lysick v. Walcom*, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406, 413 (1968); DR 2-110(B)(2); DR 2-110(C)(1)(c), (e); H. DRINKER, *supra* note 23, at 115 n.16. It has been suggested that the parties may avoid this problem by creating a relationship under which the attorney has a duty to the insured only with respect to trial defense and not during settlement. Keeton, *supra* note 83, at 1167-71. "It is essential in such a case, however, that the parties clearly understand that the client-attorney relation-

*b. Failure to cooperate*

When the liability insurance policy provides an attorney to the insured, it also places a duty upon the insured to cooperate in the defense of any suit covered by the policy. In some instances, particularly suits by a guest against a family-member driver, the insured fails to cooperate fully in the defense because he desires that his relative obtain a judgment against him to be paid by the insurer. It is most desirable to encourage an equitable settlement among all concerned. A suit by the guest against the family-member owner "should be brought only after all other methods of direct settlement, or trial of the issue, [have] been denied by the company."<sup>85</sup> The insured should be reminded that he has a duty to cooperate and that his failure to do so may absolve the insurer of its duty both to defend and to indemnify him. The insurer should be informed of the possibility that in a subsequent action the court may find that there was no legal failure to cooperate and that the insurer must therefore fully indemnify the insured. Should the conflict be irreconcilable, withdrawal from representation of one or both parties is mandated.<sup>86</sup>

Similarly, a lawyer may not defend the insured and at the same time investigate the failure of the insured to give timely notice of an accident as required by the insurance policy.<sup>87</sup> Nor may counsel reveal to the insurer the insured's confidential disclosure indicating that

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ship does not extend to the matter of settlement, and . . . that [the attorney] represents only the company with respect to settlement." *Lysick v. Walcom*, 65 Cal. Rptr. at 415.

85. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 99 (1933).

86. Permission of the court and notice sufficient for the insured to retain new counsel are necessary prior to withdrawal from representation of the insured. DR 2-110(A)(1)-(2). See L. PATTERSON & E. CHEATHAM, *supra* note 72, at 240. See also *Thomas v. Douglas*, 2 App. Div. 885, 157 N.Y.S.2d 45 (1956) (attorney may not, at the direction of the insurer, withdraw from representation of insured).

Henry Drinker observed:

[A]fter defending the insured pursuant to the clause in the policy, the same lawyer may not sue the insured for failing to cooperate as required by the policy. Irrespective of actual conflict of interest, maintenance of public confidence requires a lawyer not to appear both for and against the same party in the same controversy.

H. DRINKER, *supra* note 23, at 115.

87. *Employers Cas. Co. v. Tolley*, 496 S.W.2d 552 (Tex. 1973).

his earlier version of the accident is untrue,<sup>88</sup> or that the case is not covered by the insurance policy.<sup>89</sup>

Conflict of interest also exists when the policy covers negligently inflicted harm but not intentionally inflicted harm, and the insured is sued on a claim alleging both;<sup>90</sup> when the policy covers those driving the insured's car with his consent and the attorney defends a claimant's suit against the insured on the ground that the driver did not have the insured's consent;<sup>91</sup> or when counsel impeaches the insured on the witness stand for the benefit of the insurer who is not a party to the suit.<sup>92</sup> Professor Pirsig points out that courts, "[w]hile critical of the attorney's conduct in these several situations . . . have not acted with the vigor and conviction displayed in other conflicting interests situations evidencing conflicts no more clearcut," adding that "[t]his may be due to the unrealism of the assumption that the attorney defending an insured is primarily the attorney for the insured."<sup>93</sup>

There is no conflict of interest, on the other hand, when a lawyer employed by the insurer and prosecuting the company's subrogation claim against a third party<sup>94</sup> simultaneously prosecutes the claim recoverable by the insured under a deductible policy, providing the lawyer does so on a fee basis paid by the insured directly to the lawyer and not to the insurance company.<sup>95</sup>

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88. *State Farm Mut. Ins. Co. v. Walker*, 382 F.2d 548, 552 (7th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968) ("counsel should have refused to participate further in view of the conflict of interest").

89. See Guiding Principle VI of the ABA National Conference of Lawyers and Liability Insurers, reproduced in 20 FED'N INS. COUNSEL Q. 95 (1970), cited in M. PIRSIG & K. KIRWIN, *CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* 433 (3d ed. 1976). See also *Schumm v. Long Island Lighting Co.*, 56 Misc. 2d 913, 290 N.Y.S.2d 423 (Sup. Ct. 1968) (insurance company attorney permitted to withdraw from representation of insured upon insurer's asserting disclaimer of coverage).

90. *Brasseaux v. Girouard*, 214 So. 2d 401 (Ct. of App. 1968).

91. *Hammett v. McIntyre*, 114 Cal. App. 2d 148, 249 P.2d 885 (1952). See also *Roos, The Obligation to Defend and Some Related Problems*, 13 HASTINGS L.J. 206, 211 (1961).

92. *Gass v. Carducci*, 37 Ill. App. 2d 181, 185 N.E.2d 285, 290-91 (1962).

93. M. PIRSIG & K. KIRWIN, *supra* note 89, at 183. *But see* *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc.*, 205 Misc. 1066, 1075, 131 N.Y.S.2d 393, 401 (Sup. Ct. 1954) ("The Canons of Professional Ethics make it pellucid that there are not two standards, one applying to counsel privately retained by a client, and the other to counsel paid by an insurance carrier.").

94. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 282 (1950).

95. *Id.*

2. *Buyer-seller; borrower-lender; husband-wife; etc.*

An obvious conflict exists when an attorney attempts to represent both buyer and seller, particularly if he has had a long-standing relationship with one of them.<sup>96</sup> In such cases, the attorney must not represent both.<sup>97</sup> However, if the parties have already agreed on the basic terms of the agreement and the attorney acts primarily as a "scrivener," he may normally represent both parties after obtaining their consent.<sup>98</sup> The lawyer should disclose in advance the full significance of the representation of conflicting interests, including the pitfalls that may arise in the course of the transaction which might mandate or make it desirable that one or both parties obtain independent counsel.<sup>99</sup> Both parties must consent to the attorney's possible withdrawal from representation of one but not both parties. The decision as to whom the attorney will represent in such an event should be made at the outset.

The same principles apply to representation of both borrower and lender. Failure to give adequate advice to either of the parties could render the lawyer liable in damages<sup>100</sup> or lead to the lawyer's suspension.<sup>101</sup>

It is of the utmost importance that the attorney representing both parties to a transaction reflect upon the rationales behind conflict of interest proscriptions. It is not sufficient that the attorney believes himself able adequately to represent potentially differing interests, or even that all parties have consented. The possibility of subconsciously favoring the interests of either party, the appearance of impropriety that may arise from even the slightest dissatisfaction, the likelihood of receiving confidential information from one party that is damaging or

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96. See, e.g., *In re Kamp*, 40 N.J. 588, 194 A.2d 236 (1963).

97. See *Florida Bar v. Teitelman*, 261 So. 2d 140 (Fla. 1972).

98. See *Blevin v. Mayfield*, 189 Cal. App. 2d 649, 11 Cal. Rptr. 882 (1961); *Richards v. Wright*, 45 N.M. 538, 119 P.2d 102 (1941).

99. See *Craft Builders, Inc. v. Ellis D. Taylor, Inc.*, 254 A.2d 233 (Del. 1969) ("He represented both buyer and seller so long as their interests coincided, but withdrew completely when they reached the parting of the ways."). Cf. *In re Lanza*, 65 N.J. 347, 322 A.2d 445 (1974) (lawyer failed to adequately inform of potential conflicts and to withdraw when a dispute arose).

100. *Lawall v. Groman*, 180 Pa. 532, 37 A. 98 (1897) (overlooking prior lien).

101. *In re Greenberg*, 21 N.J. 213, 121 A.2d 520 (1956) (inadequate disclosure to unrepresented borrower).

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helpful to the other,<sup>102</sup> and the possibility that a court will subsequently disagree with the attorney's decision that he was able adequately to represent both interests—all dictate extreme caution in these situations.

The temptation to represent potentially conflicting interests is particularly difficult to resist in family disputes. Often the attorney is the "family lawyer" and has represented husband, wife, and even the children on previous occasions. Conflicts may arise, however, if the husband and wife seek a separation or divorce, including property settlement or custody agreements, or if one of the parents desires defense in a battered child action.<sup>103</sup> The lawyer may see his role as counselor or negotiator for all concerned.<sup>104</sup> At a minimum, the attorney must ensure that each understands the potential conflicts and their consequences, particularly the potential necessity for him to withdraw from representation of one or both and his inability to use confidences received from any of the parties in a subsequent suit between them. Even a seemingly amicable separation or divorce could later result in bitter litigation over property settlement or custody. If the parties have not clearly understood the lawyer's ethical responsibilities *ab initio*, the ensuing rancor may be directed toward him.<sup>105</sup>

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102. See, e.g., *State v. Rogers*, 226 Wis. 29, 275 N.W. 910 (1937) (attorney representing both the issuer and seller of securities had ethical duty to inform seller that issuer was converting the funds received from the sale). For analysis of the conflict of interest problems in the most complex borrower-lender situations, liquidation and reorganization, see L. PATTERSON & E. CHEATHAM, *supra* note 72, at 240-42.

103. Occasionally, the interests of all concerned may be identical, e.g., where battering parent can be convinced to seek psychiatric help. But if the interests of mother, father, and children differ in any way, they must be counseled to obtain independent legal advice; in the case of children, a guardian or separate representation should be suggested to the court.

104. See generally Harper & Harper, *Lawyers and Marriage Counselling*, 1 J. FAM. L. 73, 79-81 (1961).

105. This is particularly true when one or both parties perceive that the lawyer has a greater loyalty to the other party. See, e.g., *Staedler v. Staedler*, 6 N.J. 380, 78 A.2d 896 (1951) (possible disciplinary action against husband's regular attorney who managed entire proceedings); *Schaller v. Schaller*, 44 U.S.L.W. 2353 (N.Y. Sup. Ct. Jan. 20, 1976) (separation agreement prepared by wife's attorney voided where consequences not adequately explained to husband who was unrepresented by independent counsel); *Friedlander v. Friedlander*, 80 Wn. 2d 293, 303, 494 P.2d 208, 214 (1972) (antenuptial agreement prepared by husband's attorneys voided because wife did not "sign the agreement freely and voluntarily on independent advice with full knowledge of her rights") (emphasis in original).

Partly for this reason, a lawyer for one spouse should not recommend a lawyer for the other (ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 245 (1942)) or act for or give legal advice to the other (ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 58 (1931)). See DR 7-104(A):

### 3. *Representing multiple plaintiffs*

Conflicts of interest occasionally arise during the representation of multiple plaintiffs. Because of this potential,<sup>106</sup> each client must have the opportunity at the outset of the representation "to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires."<sup>107</sup> Even where there is consent, if the clients' interests come into actual conflict during the course of representation, the attorney must withdraw from representing at least one of them.

These principles, along with the importance of avoiding both the appearance of impropriety and the possible subconscious effects on an attorney's loyalty to his client, are evident in *Jedwabny v. Philadelphia Transportation Co.*<sup>108</sup> In that case, the court upheld the granting of a new trial because of the trial judge's failure to ascertain whether a plaintiff had full knowledge of his attorney's conflict of interest. Plaintiff driver was one of three plaintiffs represented by the same attorney in a personal injury action. The defendant transportation company joined the plaintiff driver as a defendant; the jury found the driver and the transportation company jointly liable. Because the result was a verdict against the driver in favor of plaintiffs represented by the same attorney, the court held that it was essential that the judge ensure that the driver "had been fully informed and had an intelligent and complete understanding of his then legal status."<sup>109</sup> In dictum, the majority indicated that because the conflict was inherently adversarial, joint representation might never be justified in this type of situation.<sup>110</sup>

A dissenter argued that the interests of the driver and the two other plaintiffs did not conflict because all contended that only the transpor-

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During the course of his representation of a client a lawyer shall not: . . . (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

106. This is one of the "typically recurring situations involving potentially differing interests" identified in EC 5-17.

107. EC 5-16.

108. 390 Pa. 231, 135 A.2d 252 (1957).

109. 135 A.2d at 254.

110. The court stated:

[M]anifestly, there are instances where the conflicts of interest are so critically adverse as not to admit of one attorney's representing both sides. Such is the situation which this record presents. No one could conscionably contend that the

tation company was at fault.<sup>111</sup> The dissent reflects several common misunderstandings in analyzing conflict of interest problems. Because of the need to maintain public confidence in the legal profession, the proscription extends beyond merely forbidding clearly conflicting interests; it forbids as well representation which would *appear* to be in some way affected by the differing interests. In addition, if there had been independent representation, the two passengers might have sued the driver as well as the transportation company. Even assuming full disclosure and consent to be represented by a single attorney, when the transportation company joined the driver as co-defendant, it was no longer feasible for a single lawyer to represent the differing interests adequately. In *Jedwabny*, failure to appeal the \$10,500 verdict against the driver unquestionably demonstrated the conflict.<sup>112</sup>

#### 4. *Representation of multiple criminal defendants*

The sixth amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”<sup>113</sup> In *Glasser v. United States*,<sup>114</sup> violation of conflict of interest principles when representing multiple criminal defendants reached constitutional dimensions. In that case, Glasser and a co-defendant were convicted of conspiracy to defraud the United States. When the co-defendant dis-

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same attorney may represent both the plaintiff and defendant in an adversary action. Yet that is what is being done in this case.

*Id.* Similarly, joint representation of plaintiffs, driver and passenger, has also been proscribed when a counter-claim is interposed against the driver. *Weinberg v. Underwood*, 101 N.J. Super. 448, 244 A.2d 538 (1968). *See also Dupont v. Southern Pac. Co.*, 366 F.2d 193 (5th Cir. 1966), *cert. denied*, 386 U.S. 958 (1967) (court may not compel designation of lead trial counsel to represent consolidated cases of plaintiffs driver and passenger, because the necessary contention on behalf of the passenger that if the driver was contributorily negligent the passenger could still recover conflicts with the lawyer's obligation to the driver to contest allegations of contributory negligence).

111. 135 A.2d at 256.

112. *Id.*; *see* THE ASS'N OF THE BAR OF THE CITY OF NEW YORK COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 109 (1928-29), *reprinted in* OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYER'S ASSOCIATION at 52 (Colum. U. Press 1956) [hereinafter cited as NEW YORK OPINIONS].

113. U.S. CONST. amend. VI. The importance of the right to counsel has led to the requirement of appointed counsel for indigent criminal defendants in both federal (*Johnson v. Zerbst*, 304 U.S. 458 (1938)) and state prosecutions (*Gideon v. Wainwright*, 372 U.S. 335 (1963)).

114. 315 U.S. 60 (1942).



charged his attorney during the trial, the judge asked Glasser's attorney to act as counsel for both defendants. Although the co-defendant was amenable, both Glasser and his lawyer expressed reservations before acceding to the appointment. The Supreme Court held that Glasser had been denied his sixth amendment right to effective assistance of counsel.<sup>115</sup> The Court stated that the sixth amendment right "contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired."<sup>116</sup>

The *Glasser* holding, that conflicts of interest in the representation of multiple criminal defendants could violate the sixth amendment, requires criminal defense attorneys to be particularly aware of potential conflicts. Several recurring problems in this area warrant separate treatment.

a. *Defendant inculcates co-defendant*

In *Bruton v. United States*,<sup>117</sup> the introduction into evidence of a co-defendant's confession implicating the defendant was held to abridge the non-confessing defendant's right of cross-examination secured by the confrontation clause of the sixth amendment. This was so even though the jury was instructed to disregard the confession as inadmissible hearsay with respect to the non-confessing defendant. Conversely, in a joint trial where the confessing defendant was subject to cross-examination, the Court of Appeals for the Fifth Circuit held that the conviction of the non-confessing defendant did not violate *Bruton* principles.<sup>118</sup>

These general principles have implications in the conflict of interest area when defendants have joint representation. In *Baker v. Wainwright*,<sup>119</sup> the prosecution introduced the oral confession of Baker's co-defendant inculcating himself and Baker in the robbery charged. It

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115. *Id.* at 76.

116. *Id.* at 70.

117. 391 U.S. 123 (1968).

118. *James v. United States*, 416 F.2d 467 (5th Cir. 1969). See *United States v. Bujese*, 434 F.2d 46 (2d Cir. 1970); *Santoro v. United States*, 402 F.2d 920 (9th Cir. 1968), *cert. denied*, 400 U.S. 849 (1970).

119. 422 F.2d 145 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970).

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was to the co-defendant's benefit to take the stand and deny having made the oral confession. If he had not taken the stand, the trial would have been void as to Baker because of *Bruton*. The Court of Appeals for the Fifth Circuit held that although Baker's right to confront the witnesses against him was not abridged, the conflict of interest denied him effective assistance of counsel. The court stated: "When a defense counsel has it within his power to void a proceeding against his client and, because of his representation of another is not completely free to exercise this power, he most assuredly has a directly conflicting interest."<sup>120</sup> Because the attorney resolved the conflict by having the co-defendant testify, Baker was prejudiced.<sup>121</sup>

A defendant was also held to be entitled to a new trial when his co-defendant pleaded guilty and implicated the defendant on the stand, because counsel's duty to cross-examine and impeach the co-defendant interfered with his duty to secure the most lenient sentence possible for the co-defendant.<sup>122</sup> There was no conflict of interest, however, when a co-defendant's confession implicating both himself and the defendant was admitted into evidence, because both pleaded not guilty and therefore both had an interest in having the confession excluded or attacked. Hence, joint representation did not deny effective assistance of counsel.<sup>123</sup>

### b. Defendant and co-defendant jointly represented at sentencing

In many cases in which the co-defendants' interests and defenses at trial are identical, the individual treatment accorded them at sentencing might create a desire on the part of defense counsel to argue that one is less culpable, more contrite, a better rehabilitative risk, or has a more compelling family situation. In such cases, the attorney has a conflict of interest, because any such argument necessarily suggests that the other defendant deserves a harsher sentence; both defendants cannot be *less* culpable.<sup>124</sup>

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120. *Id.* at 148 (footnotes omitted).

121. *Id. Cf.* State v. Martineau, 257 Minn. 334, 101 N.W.2d 410 (1960) (defendant entitled to new trial where co-defendant who could have exculpated him did not). See also Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968).

122. People v. Ware, 39 Ill. 2d 66, 233 N.E.2d 421 (1968). See White v. United States, 396 F.2d 822 (5th Cir. 1968).

123. Miller v. Cox, 457 F.2d 700 (4th Cir.), *cert. denied*, 409 U.S. 1007 (1972).

124. See People v. Chacon, 69 Cal. 2d 765, 447 P.2d 106, 73 Cal. Rptr. 10 (1968) (*dicta*) (counsel jointly representing co-defendants on the issue of punishment is

Where co-defendants both pleaded guilty and received death penalty sentences, one contended on appeal that the joint counsel might have argued in mitigation of his sentence that his character was somewhat better than that of his co-defendant. Although the court upheld joint representation, it apparently did so only after noting that the evidence indicated that the degree of guilt and general character of the defendants were substantially equal.<sup>125</sup>

*c. Defendant and co-defendant have inconsistent defenses*

Defense counsel is faced with an obvious conflict when her clients have inconsistent defenses. For example, the defendant was denied effective assistance of counsel when her attorney did not assert a lack of responsibility defense warranted by the evidence because of possible harm to the co-defendant's case.<sup>126</sup> Joint representation was not found to be improper, however, when one defendant had a "clean" record but his co-defendant had a criminal record, because the co-defendant's record would have come into the case in any event.<sup>127</sup> Nor could a defendant show prejudice due to joint representation in an action for conspiracy, even though the defenses differed, because each was involved in a different aspect of the conspiracy; consequently, the defense of one would not implicate the other.<sup>128</sup> The possibility (particularly the *appearance*) of diluted loyalty is heightened if counsel is paid by only one co-defendant,<sup>129</sup> or if the co-defendants are husband and wife.<sup>130</sup>

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necessarily precluded from arguing that one co-defendant is less culpable than the others, or from showing mitigating circumstances as to one defendant not applicable to others).

125. *State v. Kruchten*, 101 Ariz. 186, 417 P.2d 510 (1966), *cert. denied*, 385 U.S. 1043 (1967).

126. *Austin v. Erickson*, 477 F.2d 620 (8th Cir. 1973). *Cf. Sanchez v. Nelson*, 446 F.2d 849, 850 (9th Cir. 1971) (lack of inconsistent defenses is not proper test for determining effective assistance, but whether joint representation deprived either or both defendants of counsel's undivided loyalty).

127. *United States v. Rispo*, 470 F.2d 1099 (3d Cir. 1973).

128. *United States v. Lovano*, 420 F.2d 769 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970).

129. *See People v. Hilton*, 26 Mich. App. 274, 182 N.W.2d 29 (1970) (counsel failed to cross-examine thoroughly a witness who inculpated indigent defendant and exculpated retained co-defendant, and to object to admission of retained co-defendant's denial of guilt implicating defendant). *But see Mesch v. United States*, 407 F.2d 1290 (10th Cir.), *cert. denied*, 396 U.S. 826 (1969) (*per curiam*).

130. In such cases, there is a greater temptation for one spouse to exculpate the other at his or her own expense. *See, e.g., United States v. Pinc*, 452 F.2d 507 (5th Cir. 1971). *Cf. United States v. Jones*, 436 F.2d 971 (6th Cir. 1971) (although the

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The multiple criminal defendant cases above indicate that the need for counsel to disclose fully all potentially conflicting interests to his clients is greatest in this area.<sup>131</sup> Once disclosure has been made, the co-defendants may waive the right to conflict-free representation.<sup>132</sup> A number of jurisdictions have also placed this duty of disclosure upon the trial court.<sup>133</sup>

### *C. Conflicts Resulting from Representation of Interests Adverse to a Former Client*

In addition to conflicts arising from representation of multiple clients in the same proceeding, conflicts between the interests of present and former clients must also be avoided. Several general principles offer guidance in determining when such conflicts exist. An attorney may not represent the second client if it would (1) require undoing what he had been retained to do for a former client; (2) involve use or possible use of information confidentially received from a former client; or (3) create the appearance of impropriety with respect to his representation of a former client.

The third paragraph of former Canon 6 of the Canons of Professional Ethics 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

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husband alleged that his defense was hampered for this reason, the court found no conflict and no denial of effective assistance of counsel).

131. See, e.g., *United States v. Mandell*, 525 F.2d 671, 677 (7th Cir. 1975), cert. denied, 423 U.S. 1049 (1976) (duty of informing criminal co-defendants of potential dangers of joint representation is initially upon the attorney) (excellent summary of decisions). See also *Larry Buffalo Chief v. South Dakota*, 425 F.2d 271 (8th Cir. 1970) (burden of informing court of reasonable possibility of conflict of interest is upon retained counsel, but apparently not upon appointed counsel).

132. See *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975); *United States v. Swanson*, 509 F.2d 1205 (8th Cir. 1975) (dictum) (co-defendants who were accountants and were warned by both counsel and the court of potential conflict of interest due to joint representation, but who insisted upon joint counsel, had "requisite education and training" to make knowing intelligent waiver, despite assertion by one co-defendant of other's negligence as a defense). Cf. *Larry Buffalo Chief v. South Dakota*, 425 F.2d 271 (8th Cir. 1970) (defendant who retained co-defendant's appointed counsel does not necessarily waive right to conflict-free counsel where he is a twenty-five year old, uneducated Indian not expected to understand possibility of unforeseen conflicts of interest).

133. See *United States v. Foster*, 469 F.2d 1 (1st Cir. 1972) (prospective application of rule for district courts because no prejudice in this case); *Campbell v. United States*, 352 F.2d 359 (D.C. Cir. 1965). But see *United States v. Paz-Sierra*, 367 F.2d 930 (2d Cir. 1966), cert. denied, 386 U.S. 935 (1967).

others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." The possible disclosure of confidences is not, however, the only test of whether representation of a present client conflicts with the duty of loyalty to a former client.

Clearly, a lawyer may not seek to overthrow or invalidate his own work performed for a former client, and the death of the former client does not release him from this obligation.<sup>134</sup> Equally clear is the lawyer's duty not to represent both adversaries in any part of litigation, no matter how drawn out. Hence, it was improper for an attorney to file a divorce action for the plaintiff wife and subsequently to defend the husband against a contempt citation for failure to comply with the terms of the order.<sup>135</sup>

An attorney who has prepared a contract on behalf of a corporate client may not subsequently represent the other party against the corporation in litigation on the contract;<sup>136</sup> nor may former corporate counsel defend suits brought by the corporation's receiver against its customers.<sup>137</sup> Because the attorney's duty of loyalty is to the corporation as an entity and not its officers or directors,<sup>138</sup> change of control within the corporation will not necessarily remove the bar against subsequently representing conflicting interests, even if there is no evidence that the attorney received confidential information while acting for the corporation.<sup>139</sup>

The primary test is whether the former and present representation are "substantially related," so that the attorney *could have* obtained confidential information from his former client beneficial to his present client.<sup>140</sup> For example, in *Chugach Electric Association v. United*

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134. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 64 (1932) (will). See H. DRINKER, *supra* note 23, at 113.

135. *In re Blatt*, 42 N.J. 522, 201 A.2d 715 (1964) (court only reprimanded the attorney because there was no violation of Canon 6, the evidence was inconclusive regarding Canon 37, there was no showing of the use of confidential information, and the attorney was a recent admittee). See also *In re Maltby*, 68 Ariz. 153, 202 P.2d 902 (1949) (reprimand); *Florida Bar v. Ethier*, 261 So. 2d 817 (Fla. 1972) (reprimand); *In re Themelis*, 117 Vt. 19, 83 A.2d 507 (1951) (three-month suspension).

136. *Auseon v. Reading Brass Co.*, 22 Mich. App. 505, 177 N.W.2d 662 (1970).

137. "A lawyer may, however, try cases which are being defended by an insurance company which he formerly represented, disclosing to his new client his former relation to the insurance company." H. DRINKER, *supra* note 23, at 111.

138. EC 5-18. See Part II—*E infra*.

139. *Northeastern Okla. Community Dev. Corp. v. Adams*, 510 P.2d 939, 941 (Okla. 1973) (the attorney "carries the burden of avoiding the appearance of evil").

140. See note 20 *supra*.

*States District Court for the District of Alaska*,<sup>141</sup> the trustee in bankruptcy for a coal company charged Chugach with violations of the federal antitrust laws. The trustee's attorney had formerly been the attorney for Chugach, representing the position of a majority of the board members. After numerous disputes, a minority gained enough support to take over control of the corporation, and the attorney resigned. Subsequently, the alleged illegal activities occurred. The trial court refused to disqualify the attorney for the trustee in the suit against Chugach, because there was no showing that he had had access to secrets or confidential information related to issues in the case during his time as counsel for Chugach. The court of appeals reversed, despite the fact that "an actual conflict of interest was not clearly established."<sup>142</sup> The court stated: "A likelihood here exists which cannot be disregarded that [the attorney's] knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events in an anti-trust context and offer a promising source of discovery."<sup>143</sup>

Occasionally, the appearance of an attorney on behalf of a party with interests adverse to a former client on a matter *unrelated* to his former representation has been held to be improper. In these cases, the potential use of confidential information was not a factor. Rather, courts cited the appearance of impropriety and the possibility that the lawyer would not take a fully adversarial approach in pressing a claim against the former client.<sup>144</sup> In fact, his sense of loyalty to both might cause him to choose a course of action which avoids any conflict, but which is not as beneficial to his present client as it could be.

### D. Attorneys Employed by the Government

#### 1. General considerations

The principles relating to representation of interests adverse to a

141. 370 F.2d 441 (9th Cir.), *cert. denied*, 389 U.S. 820 (1967).

142. 370 F.2d at 442.

143. *Id.* at 443. See *Motor Mart, Inc. v. Saab Motors, Inc.*, 359 F. Supp. 156 (S.D.N.Y. 1973) (plaintiff's attorney disqualified due to representation of defendant in a similar matter twelve years earlier). Cf. *Chris-Craft Indus., Inc. v. Independent Stock Co.*, 354 F. Supp. 895, 916 (D. Del. 1973) (no substantial relationship found to exist between two suits in which the attorney had participated).

144. See, e.g., *Yablonski v. United Mine Workers*, 448 F.2d 1175 (D.C. Cir. 1971) (*per curiam*), *cert. denied*, 406 U.S. 906 (1972); *In re Kushinsky*, 53 N.J. 1, 247 A.2d 665 (1968).

former client have created unusual problems for government attorneys:<sup>145</sup>

Unlike the private lawyer, who can identify his duty of loyalty to an individual client, the government lawyer works for an abstraction, the identity of which is so diffused that the duty of loyalty is not only hard to identify, the harm to the government of obtaining a personal benefit is often difficult to perceive.<sup>146</sup>

Although the Code of Professional Responsibility provides only that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee,"<sup>147</sup> the Federal Conflict of Interests Act of 1962<sup>148</sup> is more specific. A lawyer is permanently disqualified with respect to matters in which he personally and substantially participated,<sup>149</sup> and is disqualified for one year with respect to any matter which was "under his official responsibility . . . at any time within a period of one year prior to the termination of such responsibility."<sup>150</sup>

The statute and the Code must be considered together in determining the necessity for disqualification of a former government attorney. In *United States v. Standard Oil Co.*,<sup>151</sup> decided prior to passage of the statute, the court referred to the general principles of the Code to determine what constitutes substantial participation.<sup>152</sup> In denying a government motion to disqualify a former government lawyer and his firm, the court stated:

[W]here an attorney has worked for a vast agency of the United States government, as in the instant case, it is hardly reasonable to hold that an appearance of evil can be found in his undertaking a case against

145. "For the lawyer in government service the representation of conflicting interests has the double condemnation of the principle of law as to public officers as well as the standards of the profession." L. PATTERSON & E. CHEATHAM, *supra* note 72, at 242.

146. *Id.* at 199.

147. DR 9-101(B). See also EC 9-3. One of the policy justifications for the rule is to avoid "the manifest possibility that [the lawyer's] action as a public legal official might be influenced (or be open to the charge that it had been influenced) by the hope of later being employed privately either to uphold or to upset what he had done." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 37 (1931).

148. 18 U.S.C. §§ 201-218 (1970 & Supp. V 1975) (originally enacted as Act of Oct. 23, 1962, Pub. L. 87-849, § 1, 76 Stat. 1119-25).

149. *Id.* § 207(a).

150. *Id.* § 207(b).

151. 136 F. Supp. 345 (S.D.N.Y. 1955).

152. *Id.* at 353-65 (discussing ABA CANONS OF PROFESSIONAL ETHICS NOS. 6, 36, 37).

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the government where there is not some closer factual relationship between his former job and the case at hand than that the same vast agency is involved.<sup>153</sup>

Similarly, in two recent cases involving attorneys who had long since left government service, *Control Data Corp. v. International Business Machines Corp.*<sup>154</sup> and *General Motors Corp. v. City of New York*,<sup>155</sup> courts considered the general principles of disqualification rather than relying upon the federal statute. Even though the statutory time requirement was met, both courts carefully scrutinized the factual allegations and attendant circumstances in question to determine whether there was any possibility of an appearance of impropriety or of using confidentially obtained information.<sup>156</sup>

The rationale used by the Court of Appeals for the Second Circuit in *General Motors* emphasizes actual knowledge acquired while working on a particular suit rather than on the supervision of the office in which it was pursued. The attorney in question had worked in the Justice Department, investigating among other things an antitrust suit against General Motors. This investigation led to the filing of a complaint in 1956 which he signed and in the course of which he "participated substantially."<sup>157</sup> Between 1961 and 1963, he headed the Washington, D.C., office of the antitrust section of the Justice Department, during which time he was technically responsible for the

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153. 136 F. Supp. at 364. The attorney left the Economic Cooperation Administration and returned to private practice in October, 1951. His law firm was hired in the spring of 1952 by the oil company to defend against a suit brought by the United States to recover refunds for overcharges in transactions financed by the ECA during the time the attorney had worked for the agency. The government contended, unsuccessfully, that there was an appearance of impropriety and an inference of access to confidential information even though the transactions had involved only the ECA's Washington office and the attorney had only been involved with its Paris office.

154. 318 F. Supp. 145 (D. Minn. 1970).

155. 501 F.2d 639 (2d Cir. 1974), *rev'g* 60 F.R.D. 393 (S.D.N.Y. 1973).

156. In *Control Data*, a motion was brought to disqualify the plaintiff's attorney because he had represented the government in an earlier suit. In denying the motion, the court relied on the length of time since the attorney left government service (15 years), the different subject matter involved in the cases, change and development in the industry involved which rendered information gained in the earlier suit obsolete and valueless, and the fact that the current allegations were not "investigated or passed upon" in the earlier case. 318 F. Supp. at 147.

The phrase "investigated or passed upon" of Canon 36 of the Canons of Professional Ethics has been replaced in DR 9-101(B) by the phrase "in which the attorney had substantial responsibility." For an argument that the change in wording does not reflect a substantive change, see *In re Biederman*, 63 N.J. 396, 307 A.2d 595 (1973).

157. 501 F.2d at 642.



1956 complaint. The complaint was settled in 1965, and in 1972 the attorney was hired on a contingent fee basis to prosecute a private civil antitrust suit against General Motors. The complaint filed was similar to the 1956 complaint.<sup>158</sup>

Denying the motion to disqualify the attorney, the district court stated: "In determining whether this case involves the same matter as the 1956 [complaint], the most important consideration is not whether the two actions rely for their foundation upon the same section of the law, but whether the facts necessary to support the two claims are sufficiently similar."<sup>159</sup> The court then concluded that they were not.

The court of appeals accepted the district court's test, but found the two claims to be sufficiently similar in that the same statute was involved and "virtually *every* overt act of attempted monopolization alleged in the city's complaint was lifted *in haec verba* from [the 1956 complaint]."<sup>160</sup> Interestingly, the court focused on the sixteen-year period between the complaints, not on the eleven-year period between the end of the attorney's government employment and the filing of the complaint. The court ignored his technical supervision over the case as late as 1962, therefore, and found the impropriety to lie specifically in the fact that the attorney helped initiate and sign the 1956 complaint sixteen years earlier.

## 2. *Alternative approaches*

Recently, three separate groups have addressed the problem of encouraging government lawyers to bring their expertise to the private sector (and vice versa) without running afoul of the conflict of interest rules and without creating the appearance of impropriety. The American Bar Association position was enunciated in Formal Opinion 342 of the Committee on Professional Ethics<sup>161</sup> (hereinafter referred to as Opinion 342). A second approach to the problem was taken in a recently published Internal Revenue Service advisory committee report. Finally, an analysis expressly rejecting Opinion 342 appeared in a re-

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158. *See id.* at 652-54.

159. 60 F.R.D. at 402.

160. 501 F.2d at 650 (emphasis in original). Additionally, the court seemed to give weight to the fact that the attorney was hired, on a contingent fee basis, specifically for the suit against General Motors. *Id.*

161. 62 A.B.A.J. 517 (1976) (adopted Nov. 24, 1975).

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cently drafted opinion of the District of Columbia Bar Association Committee on Legal Ethics. Each of these analyses is discussed separately below.

### a. *Opinion 342*

Opinion 342 was written to interpret Disciplinary Rule 5–105(D), which was amended in 1974 to extend disqualification of an attorney under *any* disciplinary rule to all partners in the firm. Prior to the amendment, the vicarious disqualification rule had not been applied to disqualifications under Disciplinary Rule 9–101(B), which provides: “A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.”

Opinion 342 outlines five policy considerations supporting restrictions on former government employees, including “the 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.”<sup>162</sup>

The rationale for extending disqualification to the firm of a former public employee, according to the ABA, is primarily to prevent circumvention of the disciplinary rules by the disqualified lawyer.<sup>163</sup> Although the “appearance of professional impropriety” is also a factor, Opinion 342 contends that it is not the primary test in applying the revised rule.<sup>164</sup> Instead, the opinion emphasizes the view that a special disciplinary rule relating to former government employees should not broadly limit the lawyer’s employment after he leaves government service.<sup>165</sup>

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162. *Id.* at 518.

163. *Id.* at 520.

164. The Committee observed:

It is obvious . . . that the “appearance of professional impropriety” is not a standard, test, or element embodied in D.R. 9–101(B). D.R. 9–101(B) is located under Canon 9 because the “appearance of professional impropriety” is a policy consideration supporting the existence of the disciplinary rule. The appearance of evil is only one of the underlying considerations, however, and is probably not the most important reason for the creation and existence of the rule itself.

*Id.* at 518.

165. The Committee ascribed weight to several considerations:

To prevent such limitation, the Committee on Professional Ethics stated that, in applying DR 9-101(B), the phrase "matter in which [the lawyer] had substantial responsibility while he was a public employee"<sup>166</sup> would be defined narrowly, to disqualify only where the employee had a responsibility so strong and compelling that he *probably* became involved in the investigative or decisional processes<sup>167</sup> regarding the same discrete and isolatable transaction between identifiable parties.<sup>168</sup> The committee also took the position that strict application of DR 5-105(D)—disqualification of the firm—to former public employees disqualified by DR 9-101(B) would frustrate the policy considerations underlying DR 9-101(B). On balance, the ability of the government to recruit and the right of litigants to have trained counsel were held to outweigh prevention of the "appearance of switching sides" and related policies.

The opinion recognizes two conflict of interest issues to be valid and to require controls—safeguarding confidential information and discouraging government lawyers from handling particular assignments in such a way as to encourage their own future employment after leaving government service. It provides that "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."<sup>169</sup>

In reaching a workable interpretation of the two rules, the ABA

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[T]he ability of the government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraints upon future practice nor should too great a sacrifice be demanded of the lawyers willing to enter government service; the rule serves no worthwhile public interest if it becomes a mere tool enabling a litigant to improve his prospects by depriving his opponent of competent counsel; and the rule should not be permitted to interfere needlessly with the right of litigants to obtain competent counsel of their own choosing, particularly in specialized areas requiring special technical training and experience.

*Id.*

166. DR 9-101(B).

167. According to the opinion:

"[S]ubstantial responsibility" envisages a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question. It contemplates a responsibility requiring the official to become personally involved to an important, material degree in the investigative or deliberative processes regarding the transactions or facts in question. . . . With a responsibility so strong and compelling that he probably became involved in the investigative or decisional processes, a lawyer upon leaving the government service should not represent another in regard to that matter.

62 A.B.A.J. 517, 520 (1976).

168. *Id.* at 519.

169. *Id.* at 521.

seemed to give primary weight not to the rules themselves, for their wording clearly imputes disqualification to the entire firm, but to the policies that form the basis for those rules. The opinion concludes that Rule 5-105(D) can be avoided if precautions outlined in a two-part process are taken. First, the firm must develop screening measures to isolate the disqualified lawyer from the matter in question and from any fees to be received in connection with that matter. Then the government agency must review the proposed screening measures. If the agency is satisfied that the individual will be screened effectively from participation and from fees, and that there is no appearance of significant impropriety, the government may waive disqualification of the firm.<sup>170</sup>

However, the opinion closes on an equivocal note:

Although this opinion has dealt explicitly and at length with the interpretation and application of DR 9-101(B), it is not amiss to point out that, on the ethical rather than the disciplinary level of professional responsibility, each lawyer should advise a potential client of any circumstances that might cause a question to be raised concerning the propriety of his . . . employment and should also resolve all doubts against the acceptance of questionable employment. *See* E.C. 5-105 and E.C. 5-16.<sup>171</sup>

### b. *IRS opinion*

The Internal Revenue Service, whose employees are a primary focus of the concerns raised in Opinion 342, issued an opinion recommending revised regulations for former employees and their private associates practicing before the IRS and the courts. The opinion, the final report to the chief counsel from his Advisory Committee on Rules of Professional Conduct, deals not only with attorney ethics, but also with the conduct of all past employees of the IRS who might subsequently represent taxpayers.<sup>172</sup>

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170. The committee decided:

In the event of such a waiver and provided the firm also makes its own independent judgment as to the absence of particular circumstances creating a significant appearance of impropriety, the result will be that the firm is not in violation of DR 5-105(D) by accepting or continuing the representation in question.

*Id.*

171. *Id.*

172. 41 Fed. Reg. 41,106 (1976) (Chief Counsel's Advisory Committee on Rules of Professional Conduct—Final Report to the Honorable Meade Whittaker, Chief Counsel).

The IRS opinion includes an extensive history of the problem and the attempts of various professions, the Congress, and the IRS to deal with conflicts of interest. Although it generally follows the view expressed in Opinion 342 that rigid application of DR 5-105(D) to former public employees and their associates is too restrictive, its analysis differs in several respects. The IRS opinion places heavy emphasis on the appearance of professional impropriety as the basis for its recommendation to expand the existing IRS rule which prohibits only the official "appearance" of a former IRS employee in a matter in which he had official responsibility while a government employee.<sup>173</sup>

The IRS committee, confronting the issue of disqualification of associates of former employees, accepted the policy considerations expressed in Opinion 342 regarding government recruitment and the right to competent counsel for litigants, but balanced them against the need to minimize any opportunity for violation of confidences and the need to preclude employees from handling their government assignments in such a way as to promote future employment. The IRS committee's solution was to impose three conditions on representation by a previous employee's firm where the employee would otherwise be disqualified.

In the view of the IRS committee, a firm may not represent a party to a transaction in which a firm member *participated* as a public employee unless (1) the firm did not initiate the employment discussions until the employee's government employment was ended or until six months after the termination of her participation in the transaction (whichever is earlier); (2) the former government employee did not initiate employment discussions with the firm while participating in the transaction (or the employment discussions complied with 18 U.S.C. § 208(b));<sup>174</sup> and (3) the former government employee is completely isolated in such a way that she does not assist in the representa-

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173. *Id.* at 41,112-13.

174. According to the IRS committee, § 208

imposes criminal penalties upon a Government employee who continues to act as such with respect to a matter in which a person with whom he is conducting employment negotiations has a financial interest. Under subsection (b) of section 208, however, the statute will not be violated if the Government employee receives a written statement from the appropriate person that the conflict of interest involved is sufficiently minor that the employee's integrity is not likely to be compromised.

41 Fed. Reg. at 41,112 (footnote omitted).

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tion. This requires statements filed with the IRS Director of Practice by both the employee and the firm.<sup>175</sup> The IRS committee specifically recognized that compliance with its administrative procedures would not in any way protect against ethical charges of impropriety within the profession.

### C. *District of Columbia opinion*

The third recent attempt to provide a workable test for disqualification appears in an opinion drafted, but not formally adopted, by the District of Columbia Bar Association Committee on Legal Ethics.<sup>176</sup> The chairman of the committee, Monroe H. Freedman, expects this opinion to be the basis for amendments to the D.C. Code of Professional Responsibility.<sup>177</sup> The opinion (hereinafter referred to as Inquiry No. 19) takes Opinion 342 to task on several issues, sharply criticizing the ABA's analysis and weighting of the policies underlying the disciplinary rules in question. "[A] . . . fundamental . . . error in Opinion 342 is the way in which it denigrates concern with the appearance of professional impropriety. . . . There are . . . only nine Canons, or 'axiomatic norms,' in the Code. One of them, Canon 9, states that 'A Lawyer Should Avoid Even the Appearance of Professional Impropriety.'"<sup>178</sup> Inquiry No. 19 emphasizes the need, in meeting the mandate of Canon 9, to view ethics from the eyes of an unsophisticated public "not wholly trusting of lawyers."<sup>179</sup>

Inquiry No. 19 addresses policy concerns similar to those raised by the other opinions, but analyzes each more carefully as to whether it can adequately be resolved by individual disqualification without disqualifying the entire firm:

1. *Confidentiality of government information*—The D.C. committee concluded that a government attorney does not have an obligation of confidentiality to the degree that a private attorney does, because of the government's duty to deal openly with its citizens. Even

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175. 41 Fed. Reg. at 41,117-18.

176. A tentative version of the opinion was published in 3 D.C. BAR REP. 6 (1975).

177. Letter from Monroe H. Freedman, Chairman, D.C. Bar Ethics Committee, accompanying the Committee's draft opinion in response to Inquiry No. 19 (Dec. 8, 1976). A copy of the draft [hereinafter cited as Draft Copy] is on file with the *Washington Law Review*.

178. Draft Copy, *supra* note 177, at 8-9 (footnote omitted).

179. *Id.* at 9.

in cases where there is at least a temporarily legitimate interest in confidentiality (*e.g.*, contract bidding), the real danger is not one of leaking information to the general public so much as the fear it will be used to give one private party the advantage over another—the second area of policy concern.

2. *Unfair advantage to one private party over others*—Inquiry No. 19 recognizes a valid concern that one private party might obtain access to government secrets to the detriment of another private party, and concludes that even in the absence of actual secrets, the “resulting appearance of undue advantage to the attorney’s private client, is a significant concern.”<sup>180</sup>

3. *Favoritism to former colleagues*—When a former employee’s clients appear to receive preferential treatment from the involved government agency, the appearance of impropriety is “highly undesirable” and difficult to overcome. Even when no favoritism is shown, Inquiry No. 19 concludes that the *appearance* of favoritism is inevitable when attorneys are dealing, on behalf of clients, with their former government employers.

4. *Switching sides*—The opinion views switching sides as the issue of widest disagreement between the public and the bar. Notwithstanding the British tradition of being able to render able legal assistance on either side of a question, the public tends to view lawyers

not only as uncommitted, but as opportunistic, cynical, and even deceitful—prepared to betray yesterday’s client for the sake of today’s fee. . . . The mere fact of switching from government service to a private firm is not likely to aggravate that kind of adverse public attitude, but when such a switch involves a lawyer who has had substantial responsibility on the other side of the very same matter, it can be expected to foster a lessening of regard for lawyers and, thereby, for the administration of justice.”<sup>181</sup>

5. *Buying the opposition’s best people*—The reality or appearance that a private firm can impair the effectiveness of a government agency by hiring away one or more key people creates the appearance that justice can be “significantly affected by money and by the willingness of lawyers to put income above principle.”<sup>182</sup>

6. *Abuse of government power to further the attorney’s career*—

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180. *Id.* at 12.

181. *Id.* at 13.

182. *Id.*

Employees who anticipate leaving an agency someday are put under inevitable pressure to impress favorably the private concerns with which they deal. In addition, there is a temptation to use government action to obtain discovery or other advantage against a potential defendant in subsequent private action or to institute action to create subsequent private employment for the attorney.

With respect to these concerns, the D.C. ethics committee concluded that Opinion 342 construes DR 9-101(B) too narrowly to deal adequately with the real conflicts and appearances that exist. All of the real conflicts and improper appearances could be eliminated only by "forbidding acceptance of private employment from any client or any firm with which the attorney conducted official business while a government employee."<sup>183</sup> Although some balance must be struck, Inquiry No. 19 concludes that the applicable disciplinary rules themselves represent a balancing of the interests, and that in the face of all the policy considerations favoring disqualification, DR 9-101(B) should be broadly construed and strictly applied.<sup>184</sup>

With respect to vicarious disqualification of an entire firm, Inquiry No. 19 concludes that two of the ABA's policy concerns—switching sides and abuse of government power to further the attorney's private career—are normally dealt with adequately by individual disqualification, without disqualifying the entire firm. But other policy concerns are not solved, and may in fact be aggravated by the ABA interpretation and the Opinion 342 procedure. For example, where it appears that favoritism is being shown to the clients of former colleagues of agency lawyers or that agency secrets are being used for the benefit of individual clients, it would be essential to disqualify the firm as well as the individual attorney, because barring the attorney while his firm handled the case would leave the appearance of favoritism or unfair advantage.<sup>185</sup>

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183. *Id.* at 15.

184. The Committee reasoned:

[I]f a firm were to . . . hire . . . key lawyers from an agency in order to cripple the agency's enforcement efforts, disqualification of the attorney in particular matters would not be adequate to discourage such conduct. Nothing would suffice short of absolutely forbidding lawyers to move . . . into private employment. Such a rule would, of course, impose a severe burden on lawyers in government service, and DR 9-101(B) has struck the balance against a complete prohibition. At the same time, however, the policy considerations enumerated above remain relevant, and suggest, at least, that DR 9-101(B) should be broadly construed and strictly applied.

*Id.* at 15-16 (footnote omitted).

185. *Id.* at 16-17.



The D.C. committee pointed out:

ABA Opinion 342 reaches a contrary conclusion by creating an exception that appears nowhere in the text of the Code of Professional Responsibility. That is, the partners and associates . . . need not be disqualified if the former government employee is "insulated" or "screened" from involvement in the case "to the satisfaction of the government agency concerned."<sup>186</sup>

The D.C. opinion registers five specific objections to the screening process adopted by the ABA, "apart from the violence done to the text of the Code:"<sup>187</sup>

First, screening . . . does not preclude favoritism from being shown, or appearing to have been shown, to the firm . . . . Second, if a former government lawyer is inclined to give unfair advantage to a client of his or her firm by passing . . . secrets, there is no way effectively to police such conduct. . . . [I]n terms of appearance, the evil remains. Third, screening is irrelevant to . . . hiring away key personnel, or to the government lawyer's ingratiating himself or herself with a potential private employer. . . . [T]hose concerns will not be resolved by . . . disqualification in individual cases. They do militate . . . against weakening DR 9-101(B) by creating exceptions that do not appear in the text of that section.<sup>188</sup>

The fourth objection is that government lawyers called upon to review the disqualification and screening for the agency are, themselves, "implicated in a serious conflict of interest," since they most likely will also seek private employment and will want favorable precedents establishing that their employment will not disqualify the firm from cases for which they had public responsibility. The final reason follows directly from that point: "[T]he screening device . . . does not avoid the appearance of conflict of interest but, indeed, compounds the conflict and aggravates the appearance of impropriety."<sup>189</sup> The D.C. opinion and future D.C. disciplinary rules,<sup>190</sup> then, are likely to

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186. *Id.* at 17.

187. *Id.* at 18 (footnote omitted).

188. *Id.* at 18-19 (footnotes omitted).

189. *Id.* at 20 (footnote omitted).

190. Monroe H. Freedman has stated:

The final vote on the draft opinion, requiring disqualification of partners and associates, was 9 to 7 (with three abstentions) in favor of adopting the opinion. Under the Committee's rules, however, a majority of the full membership of the Committee is necessary to adopt an opinion "of broad scope." Since the

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reject the use of a screening device and seem likely to leave unaltered the "long-established rule that when an individual partner is disqualified, his or her partners and associates must also be disqualified."<sup>191</sup>

The D.C. committee has written the better reasoned opinion and stated the better rule for accomplishing the explicit purposes of DR 9-101(B).<sup>192</sup> The ABA has construed the rule narrowly in its definitions, resulting in the lawyer being disqualified only as to specific cases in which she had actual (or highly probable) participation. Further, even when a lawyer had that degree of personal involvement on

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Committee's membership is now 19, we were therefore one vote short . . .

However, the Committee has also directed a subcommittee to draft amendments to the Code of Professional Responsibility regarding the issues involved in the opinion. The amendments will (1) preserve the disqualification of the individual lawyer in any matter for which he or she had substantial responsibility while in government service, and (2) impute the disqualification to that attorney's partners and associates; in addition, the subcommittee will (3) attempt to draft appropriate standards and procedures for screening the individual lawyer and thereby waiving the imputed disqualification of partners and associates.

The Committee appears to be unanimously in favor of the first two of those propositions. With regard to the third—that is, the screening exception—the vote on the draft opinion indicates that a majority of the Committee (9-7) opposes such an exception.

Letter from Monroe H. Freedman, Chairman, D.C. Bar ethics committee (Dec. 8, 1976) (on file with the *Washington Law Review*).

Dean Freedman goes on to say that two additional votes will change when the policy is presented in Code rather than Opinion form, leaving probable final vote at "11-5 in support of a Code amendment which would impute disqualification of partners and associates and provide no exception through a screening device." *Id.* (emphasis omitted). This result is particularly important because of the amount of government-related law that is practiced by the firms subject to the D.C. Code of Professional Responsibility.

191. Draft Copy, *supra* note 177, at 21 (footnote omitted).

192. *But see* Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977). In *Kesselhaut*, a law firm represented a client in a matter against a federal agency in which one of their partners had practiced. The firm, in reliance upon Opinion 342, established the following screening procedures to avoid vicarious disqualification: the lawyer in question was allowed to have no connection with the case, none of the other attorneys was to discuss the case with him, the files were kept in a locked cabinet to prevent case documents from reaching him, and the keys to the cabinet were controlled by senior partners. The court stated:

We share the view expressed in . . . Opinion 342 that an inexorable disqualification of an entire firm for the disqualification of a single member or associate, is entirely too harsh and should be mitigated by appropriate screening as we now have here, when truly unethical conduct has not taken place and the matter is merely one of the superficial appearance of evil, which a knowledge of the facts will dissipate. . . . [T]housands of attorneys employed in the Government do not . . . have Civil Service protection, and are subject to removal . . . . Personal disqualifications . . . will be extensive in the case of one holding high supervisory responsibility, like [the attorney in this case]. Should an attorney, having left Government perhaps contrary to his own volition, 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 . . . .

555 F.2d at 793.

the opposite side of a case, his firm may continue representation by way of an undefined, unregulated, and, according to the D.C. opinion, "unpoliceable" screening procedure. Approval of the conflict is allocated to government employees who are themselves forced into a conflict situation. The procedure seems to do little to combat the appearance of impropriety for a suspicious public, and has little prospect of curbing the *actual* existing abuses, which the ABA seemed very hesitant to acknowledge.

As in cases not involving government attorneys, there can be no rigid formula for determining when a former government attorney is ethically required to refrain from representing interests adverse to the government in circumstances not covered by statute.<sup>193</sup> Because such persons bear dual responsibility, both as an attorney and as a former public official, they should pay special heed to the maxim, "When in doubt, don't." As a minimum, an attorney should consider filing a motion in court for an order that his present representation is not improper in light of his prior government service.<sup>194</sup>

*E. Representing Corporations, Labor Unions, Tenant Associations, and Other Entities*

Ethical Consideration 5–18 provides:

A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization.

When various members of a particular entity come into conflict, it is often difficult to determine which of the competing interests should be

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193. For an excellent analysis of the Federal Conflict of Interests Act of 1962 and its predecessors, see B. MANNING, *FEDERAL CONFLICT OF INTEREST LAW* (1964). See also Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957); Perkins, *The New Federal Conflict of Interest Law*, 76 HARV. L. REV. 1113 (1963). Obviously, the ethical principles concerning conflicts of interest of former federal government attorneys apply equally to state-employed attorneys. See, e.g., *In re Biederman*, 63 N.J. 396, 307 A.2d 595 (1973) (interpreting DR 9–101(B)); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 134 (1935).

194. See, e.g., *United States v. Standard Oil Co.*, 136 F. Supp. 345 (S.D.N.Y. 1955).

deemed those of *the* entity for purposes of legal representation. This problem of identifying the institutional interest involved arises most often in derivative suits against corporations and unions wherein the officers are charged with misconduct in the management of the organization. Regular counsel for the corporation or union initially must determine whether there is in fact a conflict between his representation of the officers involved and his duty of loyalty to the organization as an entity. If there is very little possibility that the plaintiffs will succeed, it would appear that there would be no conflict between the interests of the entity and the defense of the officers. The attorney was probably hired to represent the entity by the defendant officers, however, and his loyalty to those officers would make difficult an unbiased evaluation of the likelihood of the plaintiffs' succeeding on the merits. Whether facts are discovered and legal positions taken which would create such a conflict of interest between the organization's position and the position of the individual officers might well be determined by the approach which counsel for the organization decides to take.<sup>195</sup> The interests of the organization in the outcome of the litigation may be adverse to those of the defendant-officers; the attorney's familiarity with the facts involved in the litigation might "unfairly tip the scales against plaintiffs from the outset";<sup>196</sup> familiarity with the organization's affairs might make the attorney "a very likely witness if the proceedings go to trial."<sup>197</sup> For these reasons, it would be inappropriate for an attorney to represent both the organization and its individual officers.<sup>198</sup>

In some instances, the attorney will be disqualified from representing *either* the organization or its individual officers. For instance, in *Yablonski v. United Mine Workers*,<sup>199</sup> union members brought an action under the Labor-Management Reporting and Disclosure Act<sup>200</sup> against the UMWA and three named officers for an accounting of funds dispersed and for restitution of funds misappropriated and mis-

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195. See, e.g., *Yablonski v. United Mine Workers*, 448 F.2d 1175 (D.C. Cir. 1971) (per curiam).

196. *Tucker v. Shaw*, 378 F.2d 304, 306 (6th Cir. 1967).

197. *Id.*

198. See *Murphy v. Washington Am. League Baseball Club, Inc.*, 324 F.2d 394, 398 (D.C. Cir. 1963) (quoting *Milone v. English*, 306 F.2d 814, 817 (D.C. Cir. 1962)); *Marco v. Dulles*, 169 F. Supp. 622 (S.D.N.Y. 1959); *Essential Enterprises Corp. v. Dorsey Corp.*, 182 A.2d 647, 654 (Del. Ch. 1962).

199. 448 F.2d 1175 (D.C. Cir. 1971) (per curiam).

200. 29 U.S.C. § 501b (1970).

spent. Regular UMWA counsel represented the union and the individual defendants at the initial stages. When plaintiffs moved to disqualify UMWA counsel for conflict of interest, the firm withdrew as counsel for the individual defendants in the instant case, although it continued to represent the union officers in other cases. The firm resisted withdrawal as counsel for UMWA, contending that its withdrawal from representation of the officers removed any possible conflict of interest. The union's need for objective counsel, the possibility of future conflicts of interest, and the appearance of conflict of interest were primary concerns of the court in requiring the firm's withdrawal.<sup>201</sup>

Although problems in determining the "institutional interest" of an entity most commonly arise in the context of corporate or union derivative suits, such problems are not limited to any particular type of entity or litigation. Whenever a lawyer represents an entity comprising individuals with conflicting or potentially conflicting interests, she must carefully determine the interests of the entity as a whole and withstand the influence of particular individuals. For example, a legal aid society which has agreed to represent a local tenants' association must represent the association's interests and not those of the officers alone. What if the officers want to withhold rent and refuse to permit a vote of the entire membership on the issue? Should the attorneys help? *Require* a vote before helping? Do the attorneys have the right (or duty) to require democratic governance of the association? Is this so even if the officers appear to have the best understanding of the needs of the group as a whole?

Similar problems confront the lawyer for a large state university. Does the lawyer represent the president, the board of regents, the student body, or the state taxpayers? If conflicts develop among these groups, is there an automatic duty to represent a particular segment, or may the lawyer choose those whom he believes to be acting in the best interests of the university as an entity?

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201. 448 F.2d at 1179-80. The court also noted that independent counsel could better evaluate the union's interest. *Id.* at 1181. Similarly, the identification of the institutional interest and the importance of appearing to represent only the entity were reasons for the ABA to hold it "improper for an attorney who is general counsel for a corporation to solicit proxies from, or to act as proxy for, stockholders in a contested election of directors." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 86 (1932). See generally Note, *Independent Representation for Corporate Defendants in Derivative Suits*, 74 YALE L. J. 524 (1965).

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In most cases, answers to these questions would require careful evaluation of the particular circumstances involved. Nonetheless, the questions reveal how important it is that an attorney for such an entity not identify too closely with any one individual or group, and that he ensure that groups whose interests he chooses not to represent are made aware of his position and the need for independent legal representation.

### F. Vicarious Disqualification

Disciplinary Rule 5-105(D) provides: "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."<sup>202</sup> This rule of vicarious disqualification is a particular example of the need to avoid influences unrelated to the representation of a client which might tend to dilute the lawyer's loyalty to that client. All of the rationales underlying more general conflict of interest problems are relevant in this area also. A member of a firm who represents interests adverse to those of the clients of other firm members could be influenced by a desire not to antagonize the other members or harm the firm financially. Even if such influences are effectively resisted, the appearance of impropriety is great.

Of primary importance in this area is the possible use of confidential information obtained through the firm relationship. "The everyday interchange of ideas and problems between legal associates may inadvertently release information which would have been otherwise kept confidential."<sup>203</sup> Although the potential for abuse is greatest in a law partnership, where all members of the firm are responsible to the client, vicarious disqualification extends beyond partners. Lawyers who share office space<sup>204</sup> and a former law clerk<sup>205</sup> have been dis-

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202. See ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 33 (1931), which states: "The relations of partners in a law firm are so close that the firm, and all the members thereof, are barred from accepting any employment that any one member of the firm is prohibited from taking."

203. *Kurbitz v. Kurbitz*, 77 Wn. 2d 943, 946, 468 P.2d 673, 676 (1970).

204. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 104 (1934). See also NEW YORK OPINIONS, *supra* note 112, No. 105: "When attorneys occupy offices together, they have a mutual relationship of trust and confidence and should aid, rather than rival each other."

205. H. DRINKER, *supra* note 23, at 106 & n.38.

qualified. Similarly, the proscription against serving as both attorney and witness in the same cause is applicable to an attorney whose partner is to testify.<sup>206</sup>

The rule of vicarious disqualification is not limited to situations where firm members would otherwise presently represent clients with adverse interests; an attorney also may not accept litigation against his partner's past client, even though he was not a partner at the time of the prior litigation.<sup>207</sup> "And once a partner is thus vicariously disqualified, the subsequent dissolution of the partnership cannot cure his ineligibility to act as counsel in that case."<sup>208</sup> The disqualification attaches to any firm which the attorney subsequently joins. Thus, in *Consolidated Theatres v. Warner Bros. Circuit Management Corp.*,<sup>209</sup> a partnership was disqualified from appearing against clients of the former law firm of one of its partners, despite the lack of any direct evidence of access to information which could be used against the company in the present suit.

It is important, however, that the rule not be carried to extremes. The basis for disqualification disappears when there is little potential for access to confidential information or when the relationship between the partnerships involved in the present and former representation has become sufficiently attenuated. Any possible appearance of impropriety is then outweighed by the interests in permitting clients to retain attorneys of their own choosing and in not unduly restricting the mobility of attorneys between private firms and government service or from one firm to another. Several recent cases have recognized these countervailing interests.

In *American Can Co. v. Citrus Feed Co.*,<sup>210</sup> for example, the court denied a motion to disqualify a law firm from representing a party against a former client of one of the associate's former partners. The court refused to impute the knowledge obtained by the original attorney to the present firm: "Carriage of this imputation-on-an-imputation to its logical terminus could lead to extreme results in no way required to maintain public confidence in the bar."<sup>211</sup>

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206. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 50 (1931). See *Flynn v. Flynn*, 283 Ill. 206, 119 N.E. 304 (1918). But see ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 220 (1941).

207. See ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 33 (1931).

208. *Lasky Bros. v. Warner Bros. Pictures*, 224 F.2d 824, 826-27 (2d Cir. 1955).

209. 216 F.2d 920 (2d Cir. 1954).

210. 436 F.2d 1125 (5th Cir. 1971).

211. *Id.* at 1129. See also *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F.

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In a particularly well-reasoned opinion, Judge Weinstein in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*<sup>212</sup> denied a motion to disqualify plaintiff's attorney who had formerly been a young associate in the 80-member law firm which represented the defendant auto manufacturer. The court considered the attorney's possible personal exposure to the defendant's confidential information while in the firm, any reasonable imputation of knowledge, and the appearance of impropriety, and held that the attorney would not be irrebuttably presumed to have knowledge of the confidences of every attorney in the firm.<sup>213</sup>

The *Silver Chrysler Plymouth* decision represents a welcome recognition of the need for flexibility in the application of conflict of interest rules where important public policy interests are involved. It recognizes the right of clients to representation by attorneys of their choice, the necessity of avoiding undue restrictions on the mobility of young attorneys in an increasingly concentrated legal profession,<sup>214</sup> and the trend in large law firms to insulate the various departments from each other (the "Chinese Wall" solution).<sup>215</sup> The court noted: "Changing times have resulted in continual modification of the practitioner's ethical, social and political rules in our society. . . . Rules appropriate in guiding lawyers of several decades ago must be applied in light of current realities."<sup>216</sup>

Countervailing policy considerations, in addition to those enunci-

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Supp. 265, 272 (S.D.N.Y. 1953).

212. 370 F. Supp. 581 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975).

213. 370 F. Supp. at 587. The court stated:

Defendants' proposed rule of an irrebuttable broad presumption would forever bar any participation in any suits against any interest ever represented by a previous firm by all partners and associates of a large firm—even students working for one summer. The size and influence of modern law firms and the number of huge national and international corporate interests they represent militate against such a harsh result.

*Id.* at 588.

214. *Id.* at 589. See AMERICAN BAR FOUNDATION, THE 1971 LAWYER STATISTICAL REPORT 10 (1972).

215. Lipton & Mazur, *The Chinese Wall Solution to the Conflict Problems of Securities Firms*, 50 N.Y.U.L. REV. 459 (1975). "[T]he techniques of departmental isolation of inside information—otherwise known as the 'Chinese Wall' or 'Don't tell your partner' technique—has been widely acclaimed as a practical solution to the multiservice firms' conflict problems." *Id.* at 462 (footnote omitted). The Chinese Wall has also been adopted by "commercial banks that obtain inside information . . . and also maintain trust departments engaged in investment management . . ." *Id.* at 462 n.7.

216. 370 F. Supp. at 589. See L. PATTERSON & E. CHEATHAM, *supra* note 72, at 65-67; Note, *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest*, 73 YALE L.J. 1058, 1068-69 (1964).



ated in *American Can Co.* and *Silver Chrysler Plymouth*, include the unavailability of alternative counsel due to the rural nature of the area or the limited number of attorneys with expertise in the field, and the value to the client of the knowledge and expertise gained from a long-standing relationship of attorney and client. Thus, in a rural community where five of the six attorneys willing to handle criminal cases would normally have been disqualified from criminal defense work, the rules requiring disqualification were interpreted to be inapplicable to four of them, at least with respect to the defense of indigent prisoners.<sup>217</sup>

Similarly, the ABA Committee on Professional Ethics has acknowledged extenuating circumstances where testimony of partners is concerned. Generally, a lawyer should not accept employment if he then knows that his partner will necessarily be a witness as to matters not relating to his professional duties. The lawyer need not necessarily withdraw, however, if his partner's testimony relates to matters occurring in the course of his professional duties, or if the lawyer's "long and intimate familiarity with the matter in litigation" makes withdrawal prejudicial to the client's case.<sup>218</sup>

In *Silver Chrysler Plymouth*, the court cited the accelerated tendency toward specialization in the bar, and the resulting limitation on the number of firms with the necessary expertise in highly complex areas of the law, as creating a need for flexibility in decisions concerning vicarious disqualification for conflicts of interest.<sup>219</sup> The need for "cross fertilization" of outlook and expertise between the public and private sectors of the bar<sup>220</sup> may indicate a need for flexible limits on disqualification rules concerning former government attorneys in private practice.<sup>221</sup>

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217. Although the county prosecutor remained disqualified, the judges of the juvenile and police courts and the city attorney and his partner were allowed to take the cases. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 55 (1931).

218. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 220 (1941). *But see id.* at 441 (dissenting opinion of Mr. Houghton).

219. 370 F. Supp. at 590 (citing M. MAYER, *THE LAWYERS* 388 (1967)); *Proceedings of American Law Institute*, 41 U.S.L.W. 2627, 2628 (1973) (remarks of P. A. Wolkin); Note, *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest*, 73 YALE L.J. 1059, 1068 (1964).

220. See, e.g., Brennan, *The Responsibilities of the Legal Profession*, 54 A.B.A.J. 121 (1968).

221. It has been suggested that this reasoning may have been the basis for the limits set on disqualification in *United States v. Standard Oil Co.*, 136 F. Supp. 345 (S.D.N.Y. 1955), and the Federal Conflict of Interests Act of 1962, 18 U.S.C. § 201-218 (1970 & Supp. V 1975). See L. PATTERSON & E. CHEATHAM, *supra* note 72,

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It should be emphasized, however, that none of the countervailing considerations outweighs clear conflicts of interest (including *actual* access to confidential information). Rather, the objection is to the use of irrebuttable inferences and prophylactic rules. Instead of disqualification founded merely upon some relationship indicating the potential access to confidences, a showing of actual access or virtual identity of the cases should be required. Further, law firms should be permitted to rebut any suggestion of access to confidential information or the appearance of impropriety by demonstrating that attorneys within the firm are "effectively insulated from exposure to the confidences of other clients."<sup>222</sup>

The need for such an insulating procedure is particularly compelling with respect to multi-service securities firms performing functions of broker, dealer, market-maker, underwriter, investment banker, investment manager, and investment adviser, and also with respect to spouses who practice with private firms or with city and state prosecutors in the same city. Commentators have argued persuasively that the performance of "functions vital to our capital markets" with respect to the former,<sup>223</sup> and the substantial hardship to married couples caused by a policy of refusal to hire a lawyer whose spouse works for another firm or potentially adverse government office in the same city with respect to the latter,<sup>224</sup> require, as a minimum, recognition of the "Chinese Wall" solution to potential conflicts of interest.

Conflict between the rule of vicarious disqualification and the need for effective representation of indigent persons by legal aid society and criminal defender organizations has also created a need for accommodation and innovative solutions. Although the economic interest rationale for disqualification of private law firm members is absent in such cases, the potential for disclosure of confidential infor-

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at 236. *But see* text accompanying note 192 *supra*. *See generally* B. MANNING, FEDERAL CONFLICT OF INTEREST LAW (1964).

222. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 370 F. Supp. 581, 588 (E.D.N.Y. 1973). *See* Lipton & Mazur, *supra* note 215; Note, *Representation of Differing Interests by Husband and Wife: Appearances of Impropriety and Unavoidable Conflicts of Interests?*, 52 DEN. L.J. 735, 752 (1975). *But see* W. E. Bassett Co. v. H. C. Cook Co., 201 F. Supp. 821 (D. Conn. 1961) (disqualification ordered even though plaintiff's attorney conducted the case "at arm's length from his present partners," there had been no discussion or consultation among them, and the defendant had failed to make timely objection). Arguably, a more stringent rule should apply to former government attorneys moving into private practice. *See* notes 184-192 and accompanying text *supra*.

223. Lipton & Mazur, *supra* note 215, at 460.

224. *See* Note, *supra* note 222.

mation may be equally acute. For example, in *Borden v. Borden*,<sup>225</sup> the simultaneous representation of two parties to a divorce action by the same neighborhood legal services office was proscribed despite the recognized lack of financial conflict of interest: "Lawyers who practice their profession side-by-side, literally and figuratively, are subject to subtle influences that may well affect their professional judgment and loyalty to their clients, even though they are not faced with the more easily recognized economic conflict of interest."<sup>226</sup> And, in ABA Informal Opinion No. 1233 (1972), the Committee on Professional Ethics read EC 5-14 and DR 5-105(A) and (B) to discourage, if not prohibit, representation by a legal services program of both individual Native American clients and their tribe, even where no conflict of interest was presently apparent. The committee concluded that representation of the tribe would run afoul of the profession's ethical standards, because it was conceivable that at some future time the tribe and the individuals *might* have divergent interests, that the danger of exposure or use of confidences of the one against the other by an office representing both was too great to permit simultaneous representation, and that the dual representation might also appear improper.<sup>227</sup>

*Borden* and Informal Opinion 1233 are technically correct under vicarious disqualification principles designed to protect paying clients from subtle conflicts inherent in law partnership working relationships. However, they do not consider adequately the countervailing interests relevant to indigent parties. To the extent that conflict of interest rules have been designed to protect the client and prevent the public appearance of impropriety, the rule of vicarious disqualification cannot be applied with equal force to legal aid societies.

For wealthy clients, disqualification of an attorney means hiring another. For indigent clients, however, disqualification of an entire legal aid or defender organization has far more serious consequences. If given the choice, most would gladly accept the risk of potentially divided loyalty. In addition, ethical rules which deny representation to the poor through vicarious disqualification, despite the consent of all

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225. 277 A.2d 89 (D.C. 1971).

226. *Id.* at 91.

227. The OEO legal services office had previously represented individual tribe members when approached by the tribe, which sought counsel in a dispute over reservation boundaries. The individuals previously represented endorsed the tribe's position and urged the legal services office to represent the tribe. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1233 (1972).

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parties concerned, create a greater danger of public disillusionment than the appearance of impropriety which results from such dual representation.<sup>228</sup>

Some courts have taken a more flexible approach to vicarious disqualification issues when legal aid representation is involved. In *McGee v. McGee*,<sup>229</sup> the court denied a Neighborhood Legal Services Program lawyer's motion to withdraw from representation of the defendant in litigation because the plaintiff was also represented by a legal aid lawyer. The court cited the duty to represent indigents in need of legal counsel, the lack of any financial conflict, and the fact that Legal Services lawyers were not associated in a legal partnership requiring a duty to all clients. In *People v. Wilkins*,<sup>230</sup> a criminal defendant alleged ineffective assistance of counsel due to conflict of interest after the New York City Legal Aid Society had defended him while representing the complaining witness in an unrelated criminal proceeding. Although conceding that the defendant might have prevailed on the conflict of interest allegation had the *same* lawyer represented both parties without the defendant's knowledge and consent, the court refused to apply vicarious disqualification principles to the Legal Aid Society. In light of the vast number of indigents represented by the Legal Aid Society and the reduced potential for undue influence, financial or otherwise, prejudice would not be presumed but must be demonstrated.<sup>231</sup>

*McGee* and *Wilkins* represent the better rule that when economic influence and potential use of confidential information are reduced and the countervailing need for representation increased, actual prejudice must be demonstrated rather than vicarious disqualification presumed solely from the working relationship. Legal Aid Societies can thereby avoid actual conflicts by insulating one another from attor-

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228. This is true especially when the conflict is as speculative as that involved in Informal Opinion No. 1233; see note 227 and accompanying text *supra*. Even in *Borden*, where the wife did not consent to the legal aid officer's subsequent representation of the husband, the court at least should have *considered* the extent to which it would permit a "race to the legal aid society" by indigents, in which the loser is denied representation.

229. 98 Wash. Law Rep. 929 (D.C. Ct. Gen'l Sess. 1970).

230. 28 N.Y.2d 53, 268 N.E.2d 756, 320 N.Y.S.2d 8 (1971).

231. The court noted: "In view of the nature of the organization and the scope of its activities, we cannot presume that a complete and full flow of 'client' information between staff attorneys exists, in order to impute knowledge to each staff attorney within the office." 268 N.E.2d at 758, 320 N.Y.S.2d at 11.

neys representing clients with competing or potentially competing interests.

### III. CONCLUSION

Attorneys generate numerous complaints resulting in litigation or grievance committee action because they knowingly or unknowingly undertake representation of conflicting interests. Most of these complaints can be avoided if attorneys consider and comprehend the various rationales behind the rules *before* commencing representation of a potential client, and withdraw or at least seek guidance if a conflict arises.

The potential number and manifestations of conflict of interest situations are limitless. This article merely scratches the surface in an effort to give some indication of the array of contexts in which these conflict of interest problems arise. Many other examples could have been chosen.

For example, if an attorney's representation of two clients in unrelated matters requires that he argue for a change in the law that would be beneficial to one but detrimental to the other, what is his ethical duty? There is little if any potential for misuse of confidential information, but would the tension created cause him to give less than undivided loyalty to one or the other? Would the representation *appear* to be improper? Would the voluntary and informed consent of both obviate the need to withdraw?

What about the government attorney who learns about confidential or semi-confidential *procedures* not relevant to any one case, but applicable to all? May the attorney entering private practice make use of such knowledge to the detriment of his former employer?

Clearly, an attorney for two defendants cannot properly agree to trade the guilty plea of one in an exchange for a lesser charge for the other. Is it equally improper for an attorney working in a legal aid or defender organization and constantly dealing with the same prosecutor to plea bargain when steadfast refusal to do so would be beneficial to one client but detrimental to numerous other present and future clients, especially if the present client has himself benefited from his attorney's past willingness to bargain in connection with other clients?

Entirely satisfactory answers to these and many other questions

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may not exist. However, awareness of these subtle (as well as the obvious) influences should at least result in efforts to adopt procedures that minimize the possibility of conflicts, and to determine carefully the most ethical alternative should a conflict unavoidably arise.