May 11, 1976

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: The Toledo Edison Company and The Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station, Units 1, 2 & 3) and The Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2) NRC Docket Nos. 50-346A, 50-500A, 50-501A, 50-440A and 50-441A

Gentlemen:

At the oral argument on May 10, 1976 concerning the suspension of Squire, Sanders and Dempsey from further participation in this proceeding Mr. Gallagher made reference to Formal Opinion 342.

I am enclosing for your information a copy of Formal Opinion 342 which appeared in the American Bar Association Journal dated April 1976.

Sincerely,

Joseph Rutberg
Chief Antitrust Counsel
for NRC Staff

cc: James Davis
Michael R. Gallagher

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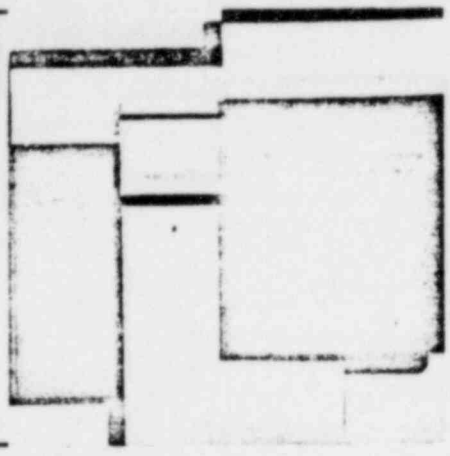
Professional Ethics Opinions



Formal Opinion 342
(November 24, 1975)

Following the 1974 amendment of D.R. 5-105(D), which extended every disqualification of an individual lawyer in a firm to all affiliated lawyers,[1] the interpretation and application of D.R. 9-101(B) have been increasingly of concern to many government agencies as well as to many former government lawyers now in private practice.[2] D.R. 9-101(B) is based upon former A.B.A. Canon 36, but its standard or test is different. Our task is to interpret D.R. 9-101(B) in light of its history and in consideration of its underlying purposes and policies.

D.R. 9-101(B) reads as follows: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."[3]

At the outset, the relationship between D.R. 9-101(B) and the provisions of Canons 4 (confidences and secrets) and 5 (independent professional judgment) should be explored briefly. To some extent, the disciplinary rules of those two canons reinforce the same ethical concepts underlying D.R. 9-101(B).

The disciplinary rules of Canon 4 generally forbid a lawyer to reveal or use a confidence or secret of a client; see D.R. 4-101(B). That rule applies to a government lawyer as well as to private practitioners, for "the disciplinary rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities."[4] A lawyer violates D.R. 4-101(B) only by knowingly revealing a confidence or secret of a client or using a confidence or secret improperly as specified in the rule. Nevertheless, many authorities have held that as a procedural matter a lawyer is disqualified to represent a party in litigation if he formerly represented an adverse party in a matter substantially related to the pending litigation.[5] Even though D.R. 4-101(B) is not breached by the mere act of accepting present employment against a former client involving a matter substantially related to the former employment, the procedural disqualification protects the former client in advance of and against a possible future violation of D.R. 4-101(B).[6]

The disciplinary rules of Canon 5 bring into professional regulation, and with some specificity, the ancient maxim that one cannot serve two masters.[7] The dis-

1. As amended at the midyear meeting of the A.B.A. in February, 1974, D.R. 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." Prior to amendment, the rule undertook to disqualify all such affiliated lawyers only when the lawyer in question was "required to decline employment or to withdraw from employment under DR 5-105. . . ." But see fn. 2, *infra*.

2. It has long been recognized that the disqualification of one lawyer in an organization generally constituted disqualification of all affiliated lawyers; see, *e.g.*, *American Can Company* v. *Citrus Feed Company*, 436 F. 2d 1125 (5th Cir. 1971); *Laskey Bros. of West Virginia* v. *Warner Bros. Pictures*, 224 F. 2d 824 (2d Cir. 1955); *Silver Chrysler Plymouth* v. *Chrysler Motors Corporation*, 370 F.Supp. 581 (E.D. N.Y. 1973), aff'd 518 F.2d 751 (2d Cir. 1975); *W.E. Basset Company* v. *H.C. Cook Company*, 201 F.Supp. 321 (D. Conn. 1962); Formal Opinions 169 (1937), 49 (1931), 33 (1931), and 16 (1929); Informal Opinions 1336 (1975) and 906 (1966); Texas Ethics Commission Opinion 100 (1954); Perkins, *The Federal Conflict-of-Interest Law*, 76 HARV. L. REV. 1113, 1162 (1963); Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657, 660 (1957); Kaplan, *Forbidden Retainers*, 31 N.Y.U.L. REV. 914, 926 (1956); Casenote, 69 HARV. L. REV. 1339 (1956). The rule is based upon the close, informal relationship among law partners and associates and upon the incentives, financial and otherwise, for partners to exchange information freely among themselves when the information relates to existing employment. As to the application of D.R. 5-105(D) in situations involving D.R. 9-101(B), see the discussion *infra*.

3. The companion provision in the former A.B.A. Canons of Professional Ethics was found in Canon 36 and read as follows: "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

4. Preliminary Statement, C.P.R.

5. See *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F. 2d 562 (2d Cir. 1973); *American Can Company* v. *Citrus Feed Company*, 436 F. 2d 1125 (5th Cir. 1971); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation*, 370 F.Supp. 581 (E.D. N.Y. 1973), aff'd, 518 F.2d 751 (2d Cir. 1975); *Humble Oil and Refining Company* v. *American Oil Company*, 224 F.Supp. 909 (E.D. Mo. 1963); *Schmidt* v. *Pine Lawn Memorial Park*, 198 N.W. 2d 496 (S.D. 1972); Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957); Note, 64 YALE L.J. 917 (1955).

6. If this device of a procedural disqualification based upon the substantial relationship of the subject matter of the two employments were not used, the remedy would be either, first, an after-the-fact disciplinary action in which the issue is whether a particular confidence or secret was actually revealed or used improperly, or second, a procedural disqualification based upon the fact issue of whether confidences or secrets were actually revealed in the first employment that are so relevant that they are likely to be revealed or used during the second employment. The "substantially related" test is less burdensome to the client first represented and is less destructive of the confidential nature of the attorney-client relationship. See *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F. 2d 562, 571 (2d Cir. 1973), in which it is pointed out that an inquiry, on a procedural motion to disqualify, into actual confidences "would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the code" and that if the procedural disqualification were not used as a prophylactic measure, a lawyer might unconsciously or intentionally use a confidence or "out of an excess of good faith, might bend too far in the opposite direction, refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety." *Cf.* E.C. 5-14, C.P.R.

7. "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. See also Formal Opinions 33 (1931), 71 (1932), and 83 (1932). The latter quoted Hoffman's Eighth Resolution: "If I have ever had any connection with a cause, I will never permit myself (when that connection is for any reason severed) to be engaged on the side of my former antagonist."

ciplinary rules of Canon 5 are concerned largely with the effect of dual representation upon the quality of the professional service rendered to a client. Therefore the rules generally require a lawyer to refuse employment or to withdraw from employment when his exercise of professional judgment on behalf of a client may be affected; see D.R. 5-105; E.C. 5-14; and E.C. 5-15. The rules also forbid a lawyer to switch sides even in situations where the exercise of the lawyer's professional judgment on behalf of a present client will not be affected.[8] To this extent, the disciplinary rules of Canon 5 regulate the employment a lawyer may undertake after concluding or terminating past employment, whether the past employment was as a private or as a public lawyer.

D.R. 9-101(B) appears under the maxim of Canon 9, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." It is obvious, however, that the "appearance of professional impropriety" is not a standard, test, or element embodied in D.R. 9-101(B).[9] 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.

The policy considerations underlying D.R. 9-101(B) have been thought to be the following: the treachery of switching sides;[10] the safeguarding of confidential governmental information from future use against the government;[11] 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;[12] and the professional benefit derived from avoiding the appearance of evil.[13]

There are, however, weighty policy considerations in support of the view that a special disciplinary rule relating only to former government lawyers should not broadly limit the lawyer's employment after he leaves government service. Some of the underlying considerations favoring a construction of the rule in a manner not to restrict unduly the lawyer's future employment are the following: the ability of 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;[14] 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;[15] 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

8. The prohibition against switching sides where the exercise of the lawyer's professional judgment on behalf of a client will not be affected is somewhat obscure. The prohibition is found in D.R. 5-105(A) and (B), forbidding the acceptance or retention of employment involving the representation of "differing interests," which is defined as every interest "that will adversely affect either the judgment or the loyalty of a lawyer to a client. . . ." Definitions (1). Generally, see *E.F. Hutton & Company* v. *Brown*, 305 F.Supp. 371 (S.D. Tex. 1969).

9. But *cf. Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation*, 518 F. 2d 751 (2d Cir. 1975); *General Motors Corporation* v. *City of New York*, 501 F. 2d 639 (2d Cir. 1974); *Motor Mart, Inc.* v. *Saab Motors, Inc.*, 359 F.Supp. 156 (S.D. N.Y. 1973); *Hilo Metals Company, Ltd.* v. *Learner Company*, 258 F.Supp. 23 (D. Hawaii 1966); *United States* v. *Standard Oil Company*, 136 F.Supp 345 (S.D. N.Y. 1955); Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957). Judge Weinstein made an appropriate comment regarding "appearances of impropriety" in *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation*, 370 F.Supp. 581, 589: "Defendants seem to suggest that the complexities of the factual determination to be made by this court should be avoided by a decision couched in notions of possible appearance of impropriety. On the contrary, the importance of the underlying policy considerations call for careful analysis of the matters embraced by previous and present litigations. Vague or indefinite allegations do not suffice. . . . The danger of damage to public confidence in the legal profession would be great if we were to allow unfounded charges of impropriety to form the sole basis for an unjust disqualification."

10. See formal Opinion 71 (1932); Kaplan, *Forbidden Retainers*, 31 N.Y.U.L. REV. 914, 917 (1956); Association of the Bar of the City of New York, CONFLICT OF INTEREST AND FEDERAL SERVICE 45 (1960). Thus Canon 5 and D.R. 9-101(B) are based at least in part on the same considerations of ethics.

11. See *Allied Realty of Saint Paul* v. *Exchange National Bank of Chicago*, 283 F.Supp. 464 (D. Minn. 1968), aff'd 408 F. 2d 1099 (8th Cir. 1969); Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957). *Cf.* McKay *An Administrative Code of Ethics: Principles and Implementation*, 47 A.B.A.J. 890 (1961). Thus Canon 4 and D.R. 9-101(B) are based at least in part on the same considerations of ethics. Speaking of former Canon 36, the forerunner of D.R. 9-101(B), Judge Kaufman said: "Canon 36 was designed to supplement the other two [canons regarding conflicts and confidences], not to replace them." *Id.* at 660.

12. "Interviews revealed a substantial body of opinion that government employees who anticipate leaving their agency some day are put under an inevitable pressure to impress favorably private concerns with which they officially deal." Ass'n of the Bar of the City of New York, CONFLICT OF INTEREST AND FEDERAL SERVICE 233 (1960). See also *Allied Realty of Saint Paul* v. *Exchange National Bank of Chicago*, 283 F.Supp. 464 (D. Minn. 1968), aff'd 408 F. 2d 1099 (8th Cir. 1969); *Hilo Metals Company* v. *Learner Company*, 248 F.Supp. 23 (D. Hawaii 1966); Formal Opinion 37 (1931).

13. See *General Motors Corporation* v. *City of New York*, 501 F. 2d 639 (2d Cir. 1974); *Motor Mart* v. *Saab Motors, Inc.*, 359 F.Supp. 156 (S.D. N.Y. 1973); *Hilo Metals Company, Ltd.* v. *Learner Company*, 258 F.Supp. 23 (D. Hawaii 1966); *United States* v. *Standard Oil Company*, 136 F.Supp. 345 (S.D. N.Y. 1955); Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957).

14. "It is not sufficiently recognized that postemployment restrictions can be overly stringent, hurting the government more than they help it. This is most easily seen in the deterrent effect of such regulation upon the government's recruitment of manpower; no man will accept government appointment—especially temporary government appointment—if he must abandon the use of his professional skills for several years after leaving government service. The adverse effect of such restrictions on the government's efficient use of skills and information is probably even greater. The knowledge of an experienced former official may be made to operate against the government, but it may also contribute to the ends of the government." Ass'n of the Bar of the City of New York, CONFLICT OF INTEREST AND FEDERAL SERVICE 224 (1960). It was also said that the "most damaging result of the present system is its deterrent effect on the recruitment and retention of executive and some kinds of consultative talent." *Id.* at 181.

See also *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation*, 370 F.Supp. 581 (E.D. N.Y. 1973) ("A concern both for the future of young professionals and for the freedom of choice of the litigants in specialized areas of law requires care not to disqualify needlessly"), aff'd 518 F.2d 751 (2d Cir. 1975); *United States* v. *Standard Oil Company*, 136 F.Supp. 345 (S.D. N.Y. 1955) ("If service with the government will tend to sterilize an attorney in too large an area of law for too long a time, or will prevent him from engaging in practice of the very specialty for which the government sought his service—and if that sterilization will spread to the firm with which he becomes associated—the sacrifices of entering government service will be too great for most men to make. As for those men willing to make these sacrifices, not only will they and their firms suffer a restricted practice thereafter, but clients will find it difficult to obtain counsel, particularly in those specialties and suits dealing with the government"); Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957) ("The restrictions placed upon [the government attorney's] future career are so unclear and may be so sterilizing that unless he is completely unwary he will hesitate before accepting government employment"); Casenote, 68 HARV. L. REV. 1084 (1955) (suggesting that a lawyer should not be disqualified in a case involving his specialty unless a hearing, such as an in camera hearing, results in a finding that the information obtained from the client is not available elsewhere by reasonable research); Kaplan, *Forbidden Retainers*, 31 N.Y.U. L. REV. 914 (1956); Casenote, 64 YALE L. J. 917 (1955) ("Furthermore, the attorney's right to develop a special skill free from unwarranted limitations as to employment must be recognized").

15. *Cf. Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F. 2d 562, 574 (2d Cir. 1973).

technical training and experience.[16]

D.R. 9-101(B) itself, while presumably drafted in the light of the above policy considerations, does not embody any of them as a test. The issue of fact to be determined in a disciplinary action is whether the lawyer has accepted "private employment" in a "matter" in which he had "substantial responsibility" while he was a "public employee." Interpretation apparently is needed in regard to each of the quoted words or phrases, and each should be interpreted so as to be consistent, insofar as possible, with the underlying policy considerations discussed above.[17]

As used in D.R. 9-101(B), "private employment" refers to employment as a private practitioner. If one underlying consideration is to avoid the situation where government lawyers may be tempted to handle assignments so as to encourage their own future employment in regard to those matters, the danger is that a lawyer may attempt to derive undue financial benefit from fees in connection with subsequent employment, and not that he may change from one salaried government position to another. The balancing consideration supporting our construction is that government agencies should not be unduly hampered in recruiting lawyers presently employed by other government bodies.[18]

Although a precise definition of "matter" as used in the disciplinary rule is difficult to formulate, the term seems to contemplate a discrete and isolatable transaction or set of transactions between indentifiable parties.[19] Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter.[20] By contrast, work as a government employee in drafting, enforcing, or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under D.R. 9-101 (B) from subsequent private employment involving the same regulations, procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties.[21]

The element of D.R. 9-101(B) most difficult to interpret in light of the underlying considerations, pro and con, is that of "substantial responsibility." We turn first to the language of the predecessor Canon 36—language found wanting.

Canon 36, former A.B.A. Canons of Professional Ethics, stated that the former government lawyer should not accept employment in connection with a matter "he has investigated or passed upon" while in government employ. But "passed upon" proved to be too broadly encompassing; for example, it was held under Canon 36 that a lawyer could not accept employment in connection with a land title which he had passed upon in a perfunctory manner, the title having been before him for consideration only because title reports were made in his name as assistant chief title examiner or in the name of the chief title examiner.[22] And if disqualifying a lawyer because of a mere "rubber stamp" approval of the work of another was not bad enough, this committee was confronted with the necessity of either disregarding that language of Canon 36 or holding that a lawyer who was a former governor was disqualified from litigation involving any legislation he had passed upon—perhaps by vetoing, signing, or permitting it to become law without signature—as governor.[23] Perhaps an extreme in the interpretation of the language was reached when the

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16. *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F. 2d 562, 565 (2d Cir. 1973); *Laskey Bros. of West Virginia, Inc.* v. *Warner Bros. Pictures*, 224 F. 2d 824 (2d Cir. 1955); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation*, 370 F.Supp. 581 (E.D. N.Y. 1973), aff'd 518 F.2d 751 (2d Cir. 1975); Note, 64 YALE L.J. 917 (1955).

17. Perhaps the least helpful of the seven policy considerations mentioned above is that of avoiding the appearance of impropriety. This consideration appears in the heading of Canon 9 and is developed more fully in E.C. 9-2 and 9-3, thereby giving guidance to lawyers when making decisions of conscience in regard to their professional responsibility. Thus, "avoiding the appearance of evil" is relevant to our task of interpreting D.R. 9-101(B), even though it is not relevant when a grievance committee or court is determining whether a violation of the standard of D.R. 9-101(B) has in fact occurred. It is fortunate that "avoiding even the appearance of professional impropriety" was not made an element of the disciplinary rule, for it is too vague a phrase to be useful (see McKay, *An Administrative Code of Ethics: Principles and Implementation*, 47 A.B.A.J. 890, 894 (1961)), and lawyers will differ as to what constitutes the appearance of evil (see *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation*, 370 F.Supp. 581 (E.D. N.Y. 1973), aff'd 518 F.2d 751 (2d Cir. 1975)). For the same reasons, the concept is of limited assistance as an underlying policy consideration. If "appearance of professional impropriety" had been included as an element in the disciplinary rule, it is likely that the determination of whether particular conduct violated the rule would have degenerated from the determination of the fact issues specified by the rule into a determination on an instinctive, *ad hoc* or even *ad hominem* basis; *cf.* McKay, *supra* at 893.

18. This position is not in conflict with *General Motors Corporation* v. *City of New York*, 501 F. 2d 639 (2d Cir. 1974). In that case it appears that the lawyer for the municipality was privately retained, and the appellate court held that this employment constituted "private employment" within the meaning of D.R. 9-101(B).

19. See Manning, FEDERAL CONFLICT OF INTEREST LAW 204 (1964).

20. See *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F. 2d 562 (2d Cir. 1973), where an issue of fact regarding Burlington's control of Patentex was an issue of fact in the earlier litigation as well as in the instant litigation. Similarly, in *General Motors Corporation* v. *City of New York*, 501 F. 2d 639 (2d Cir. 1974), it appeared that many, if not all, of the issues of fact in the two cases involved the same conduct of General Motors that allegedly resulted in monopolizing trade in the manufacture and sale of city buses, and it was held that the same "matter" was involved within the meaning of D.R. 9-101(B). In that opinion it was said, at 651: "The district court set forth the proper test (60 F.R.D. at 402): In determining whether this case involves the same matter as the 1956 *Bus* case, the most important consideration is not whether the two actions rely for their foundation upon the same section of law, but whether the facts necessary to support the two claims are sufficiently similar."

21. "Many a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department in which he was employed, has learned the procedures, the governing substantive and statutory law and is to a greater or lesser degree an expert in the field in which he was engaged. Certainly this is perfectly proper and ethical. Were it not so, it would be a distinct deterrent to lawyers ever to accept employment with the government. This is distinguishable, however, from a situation where, in addition, a former government lawyer is employed and is expected to bring with him and into the proceedings a personal knowledge of a particular matter," the latter being thought to be within the proscription of former Canon 36; *Allied Realty of Saint Paul* v. *Exchange National Bank of Chicago*, 283 F.Supp. 464 (D. Minn. 1968), aff'd 408 F. 2d 1099 (8th Cir. 1969). See also B. Manning, FEDERAL CONFLICT OF INTEREST LAW 204 (1964).

A contrary interpretation would unduly interfere with the opportunity of a former lawyer to use his expert technical legal skills and the prospect of such unnecessary limitations on future practice probably would unreasonably hinder the recruiting efforts of various local, state, and federal governmental agencies and bodies.

Our interpretation leaves protection of governmental confidences or information largely to the disciplinary rules of Canon 4, which apply to governmental lawyers as well as privately employed lawyers; see fn. 4, *supra*. This result is consistent with the trend toward "government in the sunshine" and with such statutes as the Freedom of Information Act; *cf. National Labor Relations Board* v. *Sears, Roebuck & Company*, 421 U.S. 132 (1975), which discusses the application of that act and its exceptions to the work of government lawyers and generally protects information held by government lawyers when the information falls within the classifications of attorney work product or executive privilege.

22. Formal Opinion 37 (1931).

23. The committee concluded that the governor was not disqualified. Formal Opinion 26 (1930). In the opinion it was observed that the literal language of former Canon 36 would prevent governors and legislators from ever again dealing with any subject studied while in office. "They illustrate that the canon was not intended to have the effect that its words too literally construed imply."

government contended in one case that a lawyer was barred under Canon 36 when the lawyer "should have passed," even if he had not passed, upon a particular matter.[24]

Discussions of former Canons 6 (predecessor to Canon 5), 36 (predecessor to the disciplinary rule in question), and 37 (predecessor to Canon 5) sometimes are worded in terms of "rebuttable presumptions," "irrebuttable presumptions," "rebuttable inferences," "horizontally imputed knowledge," "vertically imputed knowledge," "charged with knowledge," and other conceptions not found in the language of those prior canons or in the language of the present disciplinary rules.[25] To an extent, the discussions are confusing and seem to constitute a bit of a tour de force. It is not clear, for example, whether the presumptions in question are intended to have the procedural effect of assuring the sufficiency of evidence on a fact issue, or of shifting a burden of going forward with evidence, or of shifting the burden of persuasion, or, in fact, of constituting a new substantive rule different from that stated in the canon or disciplinary rule in question.[26] Neither is it clear why knowledge should be "imputed" or "charged" to a person, nor, indeed, why knowledge itself, rather than "investigated or passed upon," is even relevant in some instances. But after reading such discussions one senses that there is dissatisfaction with having to make findings of certain facts such as, for example, whether the lawyer in question personally did in fact "investigate or pass upon" the matter in question.[27]

Apparently the new language of D.R. 9-101(B), "substantial responsibility," was designed to alleviate some of the difficulties discussed above. The new language is, however, not without its own difficulties.

As used in D.R. 9-101(B), "substantial responsibility" envisages a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question.[28] 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. Thus, being the chief official in some vast office or organization does not *ipso facto* give that government official or employee the "substantial responsibility" contemplated by the rule in regard to all the minutiae of facts lodged within that office.[29] Yet it is not necessary that the public employee or official shall have personally and in a substantial manner investigated or passed upon the particular matter, for it is sufficient that he had such a heavy responsibility for the matter in question that it is unlikely he did not become personally and substantially involved in the investigative or deliberative processes regarding that matter.[30] 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. To do so would be akin to switching sides, might jeopardize confidential government information, and gives the appearance of professional impropriety in that accepting subsequent employment regarding that same matter creates a suspicion that the lawyer conducted his governmental work in a way to facilitate his own future employment in that matter.

The element of "substantial responsibility," as so construed, should not unduly hinder the government in recruiting lawyers to its ranks or interfere needlessly with the right of litigants to employ technically skilled and trained former government lawyers to represent them.

The last factual element of D.R. 9-101(B) deserving explanation is that of "public employee." It is significant that the word lawyer was not used instead of employee. Accordingly, the intent clearly was for D.R. 9-101(B) to be applicable to the lawyer whose former public or governmental employment was in any capacity and without regard to whether it involved work normally handled by lawyers.

The extension by D.R. 5-105(D) of disqualification to all affiliated lawyers is to prevent circumvention by a lawyer of the disciplinary rules. Past government employment creates an unusual situation in which inflexible application of D.R. 5-105(D) would actually thwart the policy considerations underlying D.R. 9-101(B). The question of the application of D.R. 5-105(D) to the situation in which a former government employee would be in violation of D.R. 9-101(B) should be considered in the light of those policy considerations, viz.: opportunities for government recruitment and the availability of skilled and trained lawyers for litigants should not be unreasonably limited in order to prevent the appearance of switching sides, yet confidential information should be safeguarded, and government lawyers should be discouraged 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. The desire to avoid the appearance of evil, even though less important, must be considered. A realistic construction of D.R. 5-105(D) should recognize and give

24. See *United States* v. *Standard Oil Company*, 136 F.Supp. 345 (S.D. N.Y. 1955).

As to the applicability or interpretation of the "investigated or passed upon" language of former Canon 35, see also *United States* v. *Trafficante*, 328 F. 2d 117 (5th Cir. 1964); *Traylor* v. *City of Amarillo, Texas*, 335 F.Supp. 423 (N.D. Tex. 1971); *Minnesota* v. *United States Steel Corporation*, 44 F.R.D. 559 (D. Minn. 1968); *Hilo Metals Company* v. *Learner Company*, 258 F. Supp. 23 (D. Hawaii 1966); Kaplan, *Forbidden Retainers*, 31 N.Y.U.L. REV. 914 (1956); 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); Casenote, 69 HARV. L. REV. 1339 (1956); B. Manning, FEDERAL CONFLICT OF INTEREST LAW 196 (1964).

25. See, *e.g. Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation*, 518 F.2d 751 (2d Cir. 1975); *American Can Company* v. *Citrus Feed Company*, 436 F. 2d 1125 (5th Cir. 1971); *Laskey Bros. of West Virginia* v. *Warner Bros. Pictures*, 224 F. 2d 824 (2d Cir. 1955); *United States* v. *Standard Oil Company*, 136 F Supp 345 (S.D. N.Y. 1955); Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957).

Imputation of knowledge from a lawyer to his firm need not be explored where a lawyer is disqualified by reason of prior representation or employment, for D.R. 5-105(D) specifically makes all associated lawyers disqualified and therefore knowledge *vel non* is irrelevant. Imputation of knowledge is likewise irrelevant in considering the fact issue whether the former government lawyer did in fact personally "investigate or pass upon" a matter; knowledge of close associates or subordinates regarding the matter in question may in some instances be logically relevant in determining whether the lawyer did investigate or pass upon the matter, but to work in terms of "imputed knowledge" tends to fictionalize the fact-finding process. Yet, in the application of D.R. 4-101(A), a lawyer's knowledge of a confidence or secret may be a highly relevant fact. Under D.R. 9-101(B) an issue of fact obviously is whether the lawyer had "substantial responsibility" in regard to the matter in question, rather than whether he possessed certain knowledge.

26. Compare with *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation*, 370 F.Supp. 581, 587-8 aff'd 518 F. 2d 751 (2d Cir. 1975). Generally see McCormick, EVIDENCE 802–6 (2d ed. 1972).

27. For example, Judge Kaufman's discussion suggests that the test whether the government lawyer personally investigated or passed upon the matter in question affords inadequate protection. Many responsible supervisory government officials make decisions based on the work of subordinates, and the work and knowledge of the subordinates may or may not be known to or remembered by the official. See Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 666 (1957).

28. See Informal Opinion 1129 (1969), discussing both D.R. 9-101(B) and former Canon 36.

29. If "official responsibility" had been used in lieu of "substantial responsibility," the scope of D.R. 9-101(B) would have been enlarged considerably but perhaps to the detriment of governmental recruiting. Compare Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 BOSTON U.L. REV. 299, 318 (1965).

30. Compare the views expressed in Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657, 667 (1957). See also Perkins, *The New Federal Conflict-of-Interest Law*, 76 HARV. L. REV. 1113, 1127 (1963).

effect to the divergent policy considerations when government employment is involved.

When the disciplinary rules of Canons 4 and 5 mandate the disqualification of a government lawyer who has come from private practice, his governmental department or division cannot practicably be rendered incapable of handling even the specific matter. Clearly, if D.R. 5-105(D) were so construed, the government's ability to function would be unreasonably impaired. Necessity dictates that government action not be hampered by such a construction of D.R. 5-105(D). The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice. This important difference in the adversary posture of the government lawyer is recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates. Accordingly, we construe D.R. 5-105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of D.R. 4-101, D.R. 5-105, D.R. 9-101(B), or similar disciplinary rules. Although vicarious disqualification of a government department is not necessary or wise, the individual lawyer should be screened from any direct or indirect participation in the matter, and discussion with his colleagues concerning the relevant transaction or set of transactions is prohibited by those rules.

Likewise, D.R. 9-101(B)'s command of refusal of employment by an individual lawyer does not necessarily activate D.R. 5-105(D)'s extension of that disqualification. The purposes of limiting the mandate to matters in which the former public employee had a substantial responsibility are to inhibit government recruitment as little as possible and enhance the opportunity for all litigants to obtain competent counsel of their own choosing, particularly in specialized areas. An inflexible extension of disqualification throughout an entire firm would thwart those purposes. So long as the individual lawyer is held to be disqualified and is screened from any direct or indirect participation in the matter, the problem of his switching sides is not present; by contrast, an inflexible extension of disqualification throughout the firm often would result in real hardship to a client if complete withdrawal of representation was mandated, because substantial work may have been completed regarding specific litigation prior to the time the government employee joined the partnership, or the client may have relied in the past on representation by the firm.

All of the policies underlying D.R. 9-101(B), including the principles of Canons 4 and 5, can be realized by a less stringent application of D.R. 5-105(D). The purposes, as embodied in D.R. 9-101(B), of discouraging 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 of avoiding the appearance of impropriety, can be accomplished by holding that D.R. 5-105(D) applies to the firm and partners and associates of a disqualified lawyer who has not been screened, to the satisfaction of the government agency concerned, from participation in the work and compensation of the firm on any matter over which as a public employee he had substantial responsibility. Applying D.R. 5-105(D) to this limited extent accomplishes the goal of destroying any incentive of the employee to handle his work so as to affect his future employment. Only allegiance to form over substance would justify blanket application of D.R. 5-105(D) in a manner that thwarts and distorts the policy considerations behind D.R. 9-101(B).

Our conclusion is further supported by the fact that D.R. 5-105(C) allows the multiple representation that is generally forbidden by D.R. 5-105(A) and (B), where all clients consent after full disclosure of the possible effect of such representation. D.R. 5-105(A) and (B) deals, of course, with much more egregious contingencies than those covered by D.R. 9-101(B). It is unthinkable that the drafters of the Code of Professional Responsibility intended to permit the one afforded protection by D.R. 5-105(A) and (B) to waive that protection without also permitting the one protected by D.R. 9-101(B) to waive that less-needed protection. Accordingly, it is our opinion that whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interests of the government, the government may waive the disqualification of the firm under D.R. 5-105(D). In the event of such waiver, and provided the firm also makes its own independent determination 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 D.R. 5-105(D) by accepting or continuing the representation in question.

Although this opinion has dealt explicitly and at length with the interpretation and application of D.R. 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 undertaking the employment and should also resolve all doubts against the acceptance of questionable employment. See E.C. 5-105 and E.C. 5-16. ▲

Five World Court Judges Start Terms

FIVE JUDGES entered on nine-year terms as members of the International Court of Justice on February 5 after election last November by the United Nations General Assembly and Security Council. The court consists of fifteen members, five of whom are elected every three years.

Manfred Lachs of Poland, president of the court, was re-elected, and the four other members, all new to the court, are T.O. Elias of Nigeria, Hermann Mosler of the Federal Republic of Germany, Shigeru Oda of Japan, and Salah El Dine Tarzai of the Syrian Arab Republic. Members whose terms expired in 1976 and were not re-elected are Sture Petren of Sweden, Charles D. Onyeama of Nigeria, César Bengzon of the Philippines, and Fouad Ammoun of Lebanon.

Members of the court whose terms expire in 1979 are Hardy C. Dillard of the United States, Louis Ignacio-Pinto of Dahomey, Federico de Castro of Spain, Platon Morozov of the Soviet Union, and Eduardo Jiménez de Arechaga of Uruguay.

Members whose terms expire in 1982 are Isaac Forster of Senegal, André Gros of France, José Maria Ruda of Argentina, Nagendra Singh of India, and Sir Humphrey Waldock of the United Kingdom.

Last December the U.N. General Assembly increased the salaries of judges of the International Court of Justice to $50,000 a year, effective January 1 of this year. In addition, the president of the court receives a special allowance of $12,200 annually and the vice president an allowance of $76 for each day he acts as president, up to an annual maximum of $7,600.