

Ethical Problems in Federal Agency Hiring of Private Attorneys

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I. INTRODUCTION

While the federal government employs a very large in-house staff of over 17,000 attorneys to handle its legal problems,¹ it nevertheless spends over twenty-five million dollars a year to hire outside counsel to represent its interests.² A small part of this yearly amount represents the cost of hiring private attorneys to defend federal employees who have been sued for constitutional torts, when a conflict of interest prevents the Justice Department from representing the employees directly.³ In these cases the private lawyers do not really “work for” the government any more than defense counsel representing indigent criminal defendants “work for” the government.⁴ The government retained private lawyers work for the private client—federal employee or indigent defendant—and the federal government merely pays the fees; the government may not direct or regulate the lawyer’s professional judgment.⁵ The lawyer’s duty is to the client, not to the government.⁶

Various agencies of the federal government hire private attorneys to repre-

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1. Nat’l L.J., Feb. 4, 1985, at 1; Wash. Post, July 18, 1985, at A22, col. 1.

2. Nat’l L.J., Feb. 4, 1985, at 1; Legal Times, June 9, 1986, at 2, col. 1.

3. Legal Times, June 9, 1986, at 6, col. 4.

4. See, e.g., *Polk County v. Dodson*, 454 U.S. 312 (1981). See generally 2 R. ROTUNDA, J. NOWAK, & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 16.4, at 186-190 (1986) (involvement of private actor with government must be more than mere receipt of funds to show state action).

Similarly, while an insurance company may pay for the lawyer, the real client is the insured. *Reynolds v. Maramorosch*, 208 Misc. 626, 629, 144 N.Y.S.2d 900, 904 (Sup. Ct. 1955); *Allstate Ins. Co. v. Keller*; *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc.*, 205 Misc. 1066, 1075, 131 N.Y.S.2d 393, 401 (Sup. Ct. 1954); cf. *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 81 Ill. 2d 201, 205, 407 N.E.2d 47, 49 (1980) (counsel employed by insurer in malpractice action had both insurer and physician as its clients).

5. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1980) (“A lawyer shall not permit a person who . . . employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.”); accord MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(C) (1983) (same); *id.* Rule 1.8(f) (“A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation, (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship”); see also *The Florida Bar v. Consolidated Business & Legal Forms, Inc.*, 386 So. 2d 797 (Fla. 1980) (supervision and control of employee lawyers by nonlawyer officers and stockholders of Florida corporation for sole purpose of personal financial gain was inconsistent with MODEL CODE and constituted unauthorized practice of law); *Wood v.*

sent, that is, "work for," the government on a variety of matters. These matters range from the Comptroller of the Currency's fight with a private landlord over rent charged to government agencies to the Federal Deposit Insurance Corporation's purchase of seventeen million dollars of private lawyers' time to handle temporary surges of complicated work throughout the country when banks have failed.⁷

Federal agency hiring of private attorneys raises many legal and economic issues involving the statutory authority for such hiring, the economic justifications, and the possible need for controls to prevent abuse of government resources. These issues may be considered elsewhere.⁸ In this article, I focus instead on the special problems of legal ethics that such agency hiring creates. The article analyzes the implications of the rules of legal ethics as they apply to private attorneys and the private law firms within which they work, when the particular client happens to be a federal agency or the United States government. I then conclude with suggestions concerning the way in which the private attorneys and government agencies involved should address the issues of professional responsibility.

Georgia, 450 U.S. 261, 269 (1981) (payment of legal fees by employer created potential for conflict of interest in establishing legal precedent requiring sacrificing interests of defendants).

A note on citation form: The American Bar Association (ABA) *Model Code of Professional Responsibility* is divided into three types of statements. The nine "Canons" are "axiomatic norms" that "embody the general concepts from which the Ethical Considerations (EC) and the Disciplinary Rules are derived." The "Disciplinary Rules" (DR) are "mandatory in character"; that is, violations may subject the attorney to discipline up to and including disbarment. The Ethical Considerations, on the other hand, tend to be "aspirational in character" and represent an unenforceable but basic consensus of the profession as to proper lawyer behavior. See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statements (1980).

In 1983, the ABA adopted a new model ethical code, called the *Model Rules of Professional Conduct*. The disciplinary rules (or black letter) of the *Model Rules* are cited as MODEL RULES Rule 1.1, etc., while the disciplinary rules of the *Model Code* are cited as MODEL CODE DR 1-101, etc. The commentary to each of the *Model Rules* explains and illustrates the meaning and purpose of the rule. See MODEL RULES Scope, comment 9. The ABA did not officially number the comments, but the numbering system that has become frequently used may be found in T. MORGAN & R. ROTUNDA, 1987 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (1987).

Virtually every state and federal jurisdiction has adopted some form of either the *Model Code* or *Model Rules* as law. I therefore focus on both the *Model Code* and the more recent *Model Rules*.

6. In fact, a public defender's actions in representing his or her client are not even "state action." *Polk County v. Dodson*, 454 U.S. 312, 324-25 (1981). See generally 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 4, at § 19.17, at 770-71 (1986) (government employment alone does not establish color of state law).

7. Nat'l L.J., Feb. 4, 1985, at 53. See also Freiwald, *Private Lawyers See Riches in Federal Debt Collection*, 9 Legal Times, Feb. 16, 1987, at 1, col. 1 (discussing pilot program privatizing collection of debts to federal government.)

8. See generally Dickinson, *Senate Studies Agencies' Use of Outside Counsel*, Legal Times, June 9, 1986, at 2; *Federal Agency Hiring of Private Attorneys, Public Hearing Before the Administrative Conference of the United States*, May 29, 1986 (unpublished) (on file at *Georgetown Journal of Legal Ethics*) [hereinafter *Public Hearing*].

Because ethical conflicts of interest raise particular concern,⁹ it is to those questions that I turn first.

II. CONFLICTS OF INTEREST

A. INTRODUCTION

The importance of the basic federal statutes governing conflicts of interest is reflected by their inclusion in title 18 of the *United States Code*—the criminal title.¹⁰ Federal law, however, does not preempt the field; ethics codes of relevant state jurisdictions also govern.¹¹ Nor do the federal conflict of interest statutes raise any unique or unusual ethical problems as applied to specially retained private attorneys; the statutes simply apply equally to full-time government attorneys or those private attorneys hired by the government.¹² The federal government cannot avoid the applicability of the federal law simply by contracting out its legal needs. Thus, in this section I will focus primarily on the American Bar Association's *Model Code* and *Model Rules* as they govern the problem of private lawyers retained by the government to work on specific problems, because these provisions—which nearly every jurisdiction has adopted as positive law—raise some special concerns.

It is the obligation of the lawyer to “exercise independent judgment on behalf of a client.”¹³ The term “conflicts of interests” is a popular one and

9. *Public Hearing*, *supra* note 8, at 58 (testimony of Prof. S. Cohn); *id.* at 68 (testimony of Prof. T. Morgan).

10. Chapter 11, Bribery, Graft, and Conflicts of Interests, 18 U.S.C. §§ 201-24 (1982). *See generally* Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency*, 1980 DUKE L.J. 1.

11. Special regulations promulgated by an agency would govern its personnel and the people appearing before it. Thus, the Securities and Exchange Commission has taken action to govern the ethics of the lawyers appearing before it. *E.g.*, SEC v. National Student SEC Mktg. Corp., [1977-78 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,027 (D.D.C. May 2, 1977). *See also* Exec. Order No. 11,222, Prescribing Standards of Ethical Conduct for Government Officers and Employees, 30 Fed. Reg. 6469 (1965), as amended, 3 C.F.R. 306 (1964-65) (reprinted in *Codification of Presidential Proclamations and Executive Orders*, 61-67 (1981)) (applying certain ethics rules to all government employees without regard to whether they are lawyers); Agency Regulations Governing Ethical and other Conduct and Responsibilities of Employees, 5 C.F.R. §§ 735.201-735.210 (1986) (same).

12. *See infra* note 47.

13. MODEL CODE Canon 5. *See also* MODEL CODE EC 5-1 (“The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of [the] client and free of compromising influences and loyalties.”); MODEL CODE DR 5-101(A) (“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 or reasonably may be affected by his own financial, business, property, or personal interests.”); DR 5-104(A) (“A lawyer shall not enter into a business transaction with a client if they have differing interests therein . . . unless the client has consented after full disclosure.”); DR 5-105 (“Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer”). *Cf.* MODEL RULES Rules 1.7, 1.8, 1.9. MODEL RULES Rule 1.7 provides in part:

used in the *Model Rules*.¹⁴ The *Model Code* speaks more of “differing interests,” which are said to “include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest.”¹⁵

The ethics codes focus on many types of conflicts of interest, most of which do not raise any unique problems of application when the government retains a private attorney. A conflict might exist between a client’s and the lawyer’s financial, business, property, and personal interests.¹⁶ For example, if the government hired a private attorney to collect a debt, and the debtor was the son or daughter of the private attorney, a possible conflict of interest

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

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

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

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. . . .

MODEL RULES Rule 1.8 provides in part:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire . . . pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in a manner which can be reasonably understood by the client;

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

MODEL RULES Rule 1.9 provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another person in the same or related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
- (b) use information relating to the representation to the disadvantage of the former client except as rule 1.6 would permit with respect to a client or when the information has become generally known.

As MODEL RULES Rule 1.7 comment 1 provides: “Loyalty is an essential element in the lawyer’s relationship to a client.”

14. *E.g.*, MODEL RULES Rule 1.7; MODEL RULES Rule 1.7 comment 1 (“An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.”).

15. MODEL CODE Definitions (1). *See also* MODEL CODE EC 5-14 (“Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant.”).

16. *See generally* MODEL CODE EC 5-1 to 5-13 (interests of lawyer that may affect judgment). *See also* MODEL CODE DR 5-101 to 5-104; MODEL RULES Rule 1.7(b), 1.8, set out *supra* note 13.

would exist and the attorney must either refuse to accept the case or must disclose the conflict and secure knowing consent if the conflict is to be waived. The lawyer, in short, would follow normal procedures; the fact that the client is the federal government rather than a local business would raise no special problems and would affect neither the result nor the method of handling the conflict.

The bulk of conflicts issues that raise special problems involve possible differences between the interests of two or more of the lawyer's present clients (simultaneous representation) or between a present client and the lawyer's former clients (subsequent representation).¹⁷ Because such conflicts of interests between present and former clients are enforced not only in disciplinary rules but also by courts during litigation, it is a particularly significant area with much case law development.¹⁸ These types of conflicts—problems of simultaneous representation and subsequent representation—can have somewhat differing applications when the government is the client.

B. SUBSEQUENT REPRESENTATION

There is no general prohibition against a lawyer suing or taking an adverse position to a former client. Because the former client is no longer a client, there is, by definition, no problem of breach of loyalty.¹⁹ If a blanket prohibitory rule were in force, a vast number of lawyers who had ever done any work for any giant corporation or the government would be disqualified systematically in all future, unrelated cases.

While the lawyer's duty of loyalty exists only for a present client, there is a requirement that the lawyer preserve the confidences and secrets of his or her clients,²⁰ a requirement that continues after the termination of employ-

17. MODEL CODE DR 5-105 (titled "Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer"); MODEL CODE DR 5-106 (titled "Settling Similar Claims of Clients"); MODEL CODE EC 5-14, set out *supra* note 15.

18. *See, e.g., Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268, 270-71 (2d Cir. 1975) (courts have duty and responsibility to disqualify counsel for unethical conduct prejudicial to adversaries).

19. Of course, there is always the factual question whether the client is a "former" or ongoing client. *See infra* notes 76-93 and accompanying text (discussing this problem in *IBM Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978)).

20. MODEL CODE DR 4-101(A) provides:

"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 be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

MODEL CODE DR 4-101(B) provides:

[A] lawyer shall not knowingly: (1) Reveal a confidence or secret of his client. (2) Use a confidence or secret of his client to the disadvantage of the client. (3) Use a confidence or

ment.²¹ The requirement to preserve confidences and secrets applies to government lawyers as well as private attorneys.²²

The rule requiring disqualification of counsel in certain types of subsequent representation cases is usually based on the need to safeguard against the danger of inadvertent use of confidential information.²³ Judge Weinfeld developed the basic test in the leading case of *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.*:²⁴

I hold that the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are *substantially related* to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation

secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

MODEL RULES Rule 1.6 provides:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

21. MODEL CODE EC 4-5 provides:

A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

See also MODEL CODE EC 4-6 ("The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment . . ."); MODEL RULES Rule 1.6 comment 15 ("After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences . . ."). *See generally* *Waterbury Garment Corp. v. Strata Productions*, 554 F. Supp. 63 (S.D.N.Y. 1982). ABA Comm. on Professional Responsibility, Formal Op. 154 (1936) (addresses acceptability of disclosure of nonconfidential information).

22. MODEL RULES Rule 1.6 comment 6 ("The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.").

23. *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975). *See also* *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 709 (7th Cir. 1976) (when attorney represents party where adverse party is attorney's former client, attorney will be disqualified if subject matter of two representations substantially related).

24. 113 F. Supp. 265 (S.D.N.Y. 1953).

confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.²⁵

Judge Weinfeld's "substantial relationship" test for subsequent representation cases has been quoted, relied on, cited, and followed by a host of other court decisions,²⁶ with the debate in the courts focusing primarily on the definition of "substantial relationship."²⁷

The *Model Rules* have sought to codify the case law. They provide that a lawyer who formerly represented a client shall not thereafter represent another "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."²⁸ In addition, a lawyer may not use the confidential or secret information "to the disadvantage of the former client" unless the information "has become generally known" or unless it is no longer privileged as secret or confidential information.²⁹

In all subsequent representation cases, there is the initial blanket requirement in the *Model Code* of vicarious disqualification of all members of the firm if any one member is subject to disqualification.³⁰ The former client, however, may always waive the disqualification.³¹ One lawyer's conflict is imputed to all others in the same firm.

Regarding the former *government* lawyer entering into private practice or a private attorney entering government service—what is often called the revolving door problem—the policy interests regarding subsequent representation and imputed disqualification are somewhat different. Thus the *Model Code*, in DR 9-101(B), provides a special rule regarding subsequent representation in the government setting: "A lawyer shall not accept private employ-

25. *Id.* at 268 (emphasis added).

26. *E.g.*, *State v. Phillips*, 232 Kan. 625, 656 P.2d 771 (1983); *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715 (7th Cir. 1982).

27. *Compare* *Chugach Elec. Ass'n v. U.S. District Court*, 370 F.2d 441, 443 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967) (substantial relationship between issues in present and former cases not dispositive concerning issue of disqualification) *with* *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1130 (5th Cir. 1971) (disqualification not warranted where substantial relationship not shown).

28. MODEL RULES Rule 1.9(a).

29. MODEL RULES Rule 1.9(b). *See generally* Morgan, *Conflicts of Interests and the Former Client in the Model Rules of Professional Conduct*, 1980 A.B. FOUND. RES. J. 993.

30. MODEL CODE DR 5-105(D) ("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.").

31. MODEL CODE DR 5-105(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."); *see also* MODEL CODE DR 5-105(D).

ment in a matter in which he had substantial responsibility while he was a public employee.”³² The purpose of this rule is to protect the public by recognizing interests beyond merely confidences or secrets. Thus, DR 9-101(B) is not limited to cases where confidential information is involved, though safeguarding confidences is one of the rationales behind the rule. In addition, while DR 9-101(B) applies only to lawyers, it does not require that the lawyer act as a lawyer while employed by the government. Recognizing that many lawyers have administrative positions which do not involve the practice of law, the rule requires only that the lawyer, while in government service, was “a public employee.”³³

The rule was drafted in an effort to meet the special problems of the revolving door between the private sector and government, and thus it is broader than the judicially created subsequent representation rule for private attorneys in the private sector. The policy considerations behind DR 9-101(B) are:

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.³⁴

There are nevertheless costs involved with an overly broad interpretation of DR 9-101(B). The rule does not on its face provide for any mechanism for government waiver of its disqualification, and the blanket disqualification is automatically imputed to all other members of the entire law firm.³⁵ Policy considerations that caution against a broad, nonwaivable, imputable, disqualification rule include:

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; 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 rights of litigants to

32. MODEL CODE DR 9-101(B).

33. *Id.*

34. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342, at 1, 3-4 (1975) (citations omitted). The opinion also states that “[p]erhaps the least helpful of the seven policy considerations mentioned above is that of avoiding the appearance of impropriety.” *Id.* at 5 n.17. See also *Woods v. Covington County Bank*, 537 F.2d 804, 814 (5th Cir. 1976) (limitation on former government attorneys avoids charge that position taken by public official in anticipation of private gain).

35. See MODEL CODE DR 5-105(D), set out *supra* note 30.

obtain competent counsel of their own choosing, particularly in specialized areas requiring special technical training and experience.³⁶

The American Bar Association resolved the problem with the language of DR 9-101(B) by allowing the law firms to screen out, by creating a Chinese Wall around, the lawyer disqualified by DR 9-101(B).³⁷ The fiction used to justify these Chinese Wall mechanisms is to say that the government "consents" provided that there is adequate screening. This consent, however, is itself a fiction because unlike the consent of a private litigant,³⁸ the government's consent cannot be withheld arbitrarily to secure tactical advantage.³⁹ That is, if the screening is in place and the Chinese Wall does not leak, then the consent must be granted.

Just as the *Model Rules* incorporated the judicially created subsequent representation rule, they also contained a custom tailored rule for the special conflicts problems of successive private and government employment.⁴⁰

36. ABA Formal Op. 342, *supra* note 34, at 4-5 (citations omitted). See generally Morgan, *supra* note 10, (urging that former employee's disqualification should not extend to law firm or organization); Lacovara, *Restricting the Private Law Practice of Former Government Lawyers*, 20 ARIZ. L. REV. 369 (1978) ("Excessively stringent ethical rules should not defeat their own purposes by severely hampering the government's ability to obtain competent legal counsel.").

37. *Supra* note 32 and accompanying text; *infra* note 38 and accompanying text.

38. MODEL CODE DR 5-105(C).

39. *Kesselhaut v. United States*, 555 F.2d 791, 794 (Ct. Cl. 1977). See also *Kadish v. Commodity Futures Trading Commission*, 548 F. Supp. 1030, 1035 (N.D. Ill. 1982) (court will look beyond government waiver of disqualification and examine effectiveness of "screen").

40. MODEL RULES Rule 1.11 provides:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultations. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

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

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

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or

Under rule 1.11, if a lawyer worked for a government agency on a particular "matter," that is, a contract, claim, judicial proceeding or other matter involving specific parties,⁴¹ and his or her involvement in the matter was "personal," that is, not vicarious,⁴² and was "substantial,"⁴³ that is, his or her involvement was material, clear, and weighty,⁴⁴ then the lawyer may not subsequently represent a private client in connection with that matter, even if that representation is not adverse to the government.⁴⁵ The law firm may represent the client, however, if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee.⁴⁶ The law firm must notify the appropriate government agency promptly so that it can approve of the screening and consent.⁴⁷ Similarly, the private lawyer must not use confidential government information; if he or she has such information, the lawyer must be screened from firm matters where it is relevant.⁴⁸ In addition, the government attorney may not participate in a matter for the government in which he or she had participated personally and substantially while in earlier nongovernmental service.⁴⁹

as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d) As used in this rule, the term "matter" includes:

- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and
- (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which at the time this rule is applied the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

41. MODEL RULES Rule 1.11(d)(1), set out *supra* note 40.

42. MODEL RULES Rule 1.11(a), set out *supra* note 40.

43. MODEL RULES Rule 1.11(a), set out *supra* note 40.

44. MODEL RULES Terminology [10] ("Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.')

45. *Kessenich v. Commodity Futures Trading Comm'n* 684 F.2d 88, 98 (D.D.C. 1982).

46. MODEL RULES Rule 1.11(a)(1), set out *supra* note 40.

47. MODEL RULES Rule 1.11(a)(2), set out *supra* note 40.

48. MODEL RULES Rule 1.11(b), set out *supra* note 40. *See also* *Handelman v. Weiss*, 368 F. Supp. 258 (S.D.N.Y. 1973) (disqualification of attorney based on prior employment pursuant to Securities Investor Protection Act included all members of firm—disqualified attorney's knowledge imputed to his partners).

49. [Model Rules] Rule 1.11(c)(1), set out *supra* note 40. The status of the private lawyer retained by the government—whether the lawyer is a special government employee or an independent contractor is irrelevant for purposes of rule 1.11. *See Public Hearing, supra* note 8, at 57 (testimony of Prof. S. Cohn); *id.* at 63, 69 (testimony of Prof. T. Morgan). Similarly, it is unimportant for purposes of 18 U.S.C. §§ 201-24 (1982). The government cannot avoid the requirements of § 207 or other sections by retaining private attorneys. The distinctions of special employee or independent contractor are not relevant for purposes of legal ethics. As Prof. Morgan has concluded:

The special government employee issue does kick in some of the other conflict of interest

Rule 1.11 and section 207 of title 18 do not prevent a federal employee from handling a case for the federal government after he or she has left the government, if the particular agency wants to hire him or her.⁵⁰ It has been suggested, however, that there should be a rule prohibiting a former employee from being hired to represent the agency or that at least the former employee should be screened from participation and remuneration if the former employee's law firm takes the case.⁵¹ One has no idea how often this situation occurs, if ever. In any event, this per se prohibition is not necessary. Certainly, a government agency may engage in favoritism in hiring a particular attorney. Whenever an agency has the power to engage in sole source bidding, there is always that problem, and the way such dangers are reduced is by strict controls, accounting, and oversight. The blanket prohibition of one class of individuals—those who have developed special expertise in a complex area—may lull one into believing that the problem of favoritism has been solved when it leaves open all the other types of corrupt favoritism, e.g., hiring an individual because he or she is a well-connected politician or rainmaker, or even a relative.

The former government attorney who works, while in private practice, for the agency in which he or she had worked while a government attorney violates none of the policy reasons which led to the screening device of rule 1.11.⁵² There is no treachery of switching sides, for the lawyer stays on the same side. There is no need to safeguard the use of confidential information

statutes, but I think that you'll find that the distinction between special government employee and independent contractor, as a practical matter for what it limits a person's doing and what it doesn't limit their doing, is relatively minor. That is to say, if you're a special government employee, you can't take the same case again as a private lawyer, for example. But you couldn't do that anyway even if you were an independent contractor under the legal ethics rules.

Public Hearing, supra note 8, at 63 (testimony of Professor T. Morgan).

Thus I will not focus on the nuances of 18 U.S.C. § 207 and related federal statutes in chapter 11 of title 18. The discussion does not relate to my main issue of exploration: to what extent are legal ethics rules applicable in a special way to private attorneys retained by the government.

Under 18 U.S.C. § 209(a), if a private attorney hired by a federal agency is treated as a "regular Government employee," then that person could not receive any other compensation from his law firm or any other source. A private lawyer hired by an agency should be treated as an independent contractor or a "special Government employee." 18 U.S.C. § 202(c) (1982).

50. MODEL RULES Rule 1.11 governs the former government lawyer who represents a "private client" after leaving the government. *See supra* note 40. 18 U.S.C. § 207 explicitly exempts from its coverage representation of the United States.

51. *Public Hearing, supra* note 8, at 70 (testimony of Prof. T. Morgan).

52. MODEL RULES Rule 1.11 comment 1 (This rule prevents a lawyer from "exploiting public office for the disadvantage of a private client."). For text of rule 1.11, *see supra* note 40. *Cf. Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980), *vacated*, 449 U.S. 1106 (1981) (law firm not disqualified from representing receiver for corporation in suit against SEC because attorney at firm had been SEC assistant director; court found taint and possible appearance of impropriety insufficient reason for disqualification).

because the very same agency that generated the confidential information is the one using it.⁵³ There is no great problem of the government lawyer handling a particular matter to enhance his or her own future employment in the private sector because the agency will have no desire to hire the former government attorney unless he or she handled the case very well, and that kind of encouragement does not hurt the government. To be sure, there is always the danger that the government lawyer will seek to become indispensable, to keep others from having knowledge of the case, so that when he or she leaves government service the agency will have no where else to turn. That problem, however, should be met head on: The agency should have procedures to guard against too much dependence on any one individual who can always leave, become ill, or die.

C. SIMULTANEOUS REPRESENTATION

The primary rationale behind the simultaneous representation rule is the need to protect client loyalty. If a lawyer is representing *A* in a matter adverse to *B* (e.g., divorce), and is simultaneously representing *B* in another matter (e.g., house closing), client *B* will rightly feel that her attorney is not completely loyal to her. Moreover, the other parties should be equally concerned.⁵⁴ In the above hypothetical, for example, there may be a diminution in the vigor of the lawyer's representation of client *A* in the divorce, if the lawyer really is loyal to client *B* because of the other representation (the house closing), and wishes to curry favor with client *B* and earn her future business.

Because of the concern in the diminution in loyalty, the applicability of the disqualification created by simultaneous representation of adverse interests applies even if there is no danger that the lawyer might breach a client's confidences; nor is it necessary that the two cases even be substantially related in order for a disqualification to exist. In *Grievance Committee v.*

53. *Contrast* General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974) (former lawyer for Antitrust Division of Department of Justice now in private practice may not now represent City of New York in antitrust matter against General Motors; attorney had substantial responsibility for antitrust case similar to one City hired him for in contingent fee arrangement; City treated as private client of lawyer in private practice).

54. *E.g.*, Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976) (adverse representation of existing client prima facie improper), *infra* notes 57-97 and accompanying text; *In re Kelly v. Greason*, 23 N.Y.2d 368, 296 N.Y.S.2d 937, 244 N.E.2d 456 (1968) ("[W]here divided loyalties exist, a lawyer may inadvertently and despite the best of motives, be influenced and act detrimentally to the client, or the appearance of misconduct is unavoidable."); *Jeffrey v. Pounds*, 67 Cal. App. 3d 6, 136 Cal. Rptr. 373 (Cal. Ct. App. 1977) (condemning acceptance of employment adverse to client even though employment unrelated to existing representation); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 232-33 (2d Cir. 1977) (avoiding prejudice in action involving adverse representation of existing client "was a goal impossible to achieve.").

Rottner,⁵⁵ for example, a law firm accepted an assault and battery case for O'Brien and against Twible. At the same time it was representing Twible in a collection matter against Houghton. The cases were not at all related but the court concluded:

When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion. If, as in this case, he is sued and his home attached by his own attorney, who is representing him in another matter, all feeling of loyalty is necessarily destroyed, and the profession is exposed to the charge that it is interested only in money.⁵⁶

While some courts appear to be more flexible than others in subsequent representation cases, many courts—at least on a general level—seem to apply a fairly inflexible, mechanical disqualification in simultaneous representation cases. Simultaneous representation of different clients in different and adverse matters—e.g., litigation, arbitration, or a rulemaking proceeding—even though one representation is not at all related to the other, is virtually prohibited; even consent of the clients may not cure the defect.

Consider the approach of the Court of Appeals for the Second Circuit. While it has shown some flexibility in the subsequent representation cases,⁵⁷ it has been most strict and inflexible in the simultaneous representation cases. This point is illustrated by *Cinema 5, Ltd. v Cinerama, Inc.*⁵⁸ One attorney, Manly Fleischmann, was a partner in the Buffalo law firm of Jaeckle, Fleischmann & Mugel.⁵⁹ He was also a partner in the New York City law firm of Webster, Sheffield, Fleischmann, Hitchcock & Brookfield.⁶⁰ In January, 1972, the Buffalo law firm began representing Cinerama and other defendants in an antitrust suit alleging monopolistic licensing of motion pictures in the Rochester area.⁶¹ This suit was brought in the Western District of New York.⁶² The Buffalo law firm also represented Cinerama in a

55. 152 Conn. 59, 203 A.2d 82 (1964).

56. *Id.* at 65, 203 A.2d at 84. See also *In re A.H. Robins, Co.*, No. 85-010307-R, slip. op. (Bankr. E.D. Va., Oct. 29, 1986), discussed in 7 BUS. LAW. UPDATE, Jan./Feb. 1987, at 1, col. 3, (ABA Sec. of Corp., Banking & Bus. Law) (law firm disqualified from continued service as bankruptcy counsel to A.H. Robins Co. because that law firm had provided, and intended to continue to provide, advice on narrow range of unrelated corporate matters to Aetna Life & Cas. Co. second largest creditor of Robins).

57. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 756-757 (2d Cir. 1975) (peripheral representation exception for subsequent representation cases).

58. 528 F.2d 1384 (2d Cir. 1976).

59. *Id.* at 1385.

60. *Id.*

61. *Id.*

62. *Id.*

similar suit involving the Buffalo area.⁶³ That suit began in March, 1974, and was also brought in the Western District of New York.⁶⁴

While those two suits were still pending—that is, while Cinerama was still a client of the Buffalo firm—the New York firm, representing Cinema 5, Ltd., sued Cinerama in the Southern District of New York alleging a conspiracy among the defendants to take over Cinema 5, Ltd.⁶⁵ The Buffalo firm was not involved in the Southern District action and the New York firm was not involved in the Western District action. Cinerama was not a client of the New York City firm; it was a client only of the Buffalo firm. The only connection between the two separate firms was Mr. Fleischmann, and Mr. Fleischmann was apparently personally involved only in the Buffalo litigation. His personal participation in the Buffalo litigation “was minimal, and we [the court] are confident that he would make every effort to disassociate himself from both lawsuits and would not divulge any information that came to him concerning either.”⁶⁶

Notwithstanding all of these mitigating circumstances, the Southern District court disqualified the New York City firm. On appeal the New York City firm argued that “there is nothing substantial in the relationship between an upstate New York conspiracy to deprive local theatre operators of access to films and an attempted corporate takeover in New York City.”⁶⁷ The Second Circuit did not dispute this argument but found it irrelevant.⁶⁸

The court began its analysis by agreeing that the “substantial relationship” test is the one used to determine whether a lawyer may accept employment against a former client. The court distinguished the present case, stating “[h]owever, in this case, the suit is not against a former client, but an existing one.”⁶⁹ Though noting that it intended no criticism of the character and personal integrity of the lawyers involved,⁷⁰ the *Cinema 5* court concluded:

[T]he substantial relationship test does not set a sufficiently high standard by which the necessity for disqualification should be determined. That test may properly be applied only where the representation of a former client has been terminated and the parameters of such relationship have been fixed. Where the relationship is a continuing one, adverse representation is prima facie improper, and the attorney must be prepared to show, at the

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 1387 n.1.

67. *Id.* at 1385.

68. *Id.* at 1386. The court stated that “the propriety of [simultaneous representation] must be measured not so much against the similarities in litigation as against the duty of individual loyalty which an attorney owes to each of his clients.” *Id.*

69. *Id.* at 1386.

70. *Id.* at 1387.

very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation. We think that appellants have failed to meet this heavy burden. . . .

“Because an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests,” this requires his disqualification. Moreover, because of the peculiarly close relationship existing among legal partners, if Mr. Fleischmann is disqualified, his partners at the Webster firm are disqualified as well.⁷¹

The strictness of the *Cinema 5* rule is illustrated by the fact that after learning of the conflict, the Buffalo firm offered to withdraw its representation of Cinerama in the Western District actions.⁷² Cinerama did not accept that offer of withdrawal, and the district court and the Second Circuit still disqualified the New York City firm.⁷³ Moreover, even if Cinerama had accepted the withdrawal of the Buffalo firm’s representation in the Western District actions, Cinerama probably still could have forced the withdrawal of the New York City firm. Although *Cinema 5, Ltd.*, could argue that Cinerama’s acceptance of the Buffalo firm’s withdrawal would amount to consent, the rationale of the simultaneous representation rule is that adverse representation is a violation of the duty of loyalty to the client; even with consent in such circumstances, the attorney should not profit from breach of the duty of loyalty.⁷⁴ The *Cinema 5* rule has broad support in the case law.⁷⁵

In *Cinema 5* both matters involved litigation, but that fact is not a necessary element for the simultaneous representation rule to apply. *IBM Corp. v. Levin*⁷⁶ made that point clear. The Third Circuit upheld the district court’s disqualification of a law firm from further representation of plaintiffs Levin et al.⁷⁷ In *Levin*, the law firm of Carpenter, Bennett & Morrissey (CBM) repre-

71. *Id.* at 1387 (citations omitted) (emphasis in original).

72. *Id.*

73. *Id.*

74. Fordham, *There Are Substantial Limitations on Representation of Clients in Litigation which Are Not Obvious in the Code of Professional Responsibility*, 33 BUS. LAW. 1193, 1204 (1978). See also *Kelly v. Greason*, 23 N.Y.2d 368, 374-379, 244 N.E.2d 456, 459-62, 296 N.Y.S.2d 937, 942-46 (1968) (lawyers may not represent claimants of insurance carrier while simultaneously one of lawyers also carrier’s employee; discipline appropriate unless and perhaps even if consent obtained from both clients after full disclosure); *In re Boone*, 83 F. 944, 952 (N.D. Cal. 1897) (“[C]lient may waive a privilege which the relation of attorney and client confers upon him, but he cannot enter into an agreement whereby he consents that the attorney may be released from all the duties, obligations, and privileges pertaining to the relation of attorney and client.”).

75. *E.g.*, *Grievance Comm. v. Rottner*, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964), *supra* note 53 and accompanying text; *Jeffry v. Pounds*, 67 Cal. App. 3d 6, 136 Cal. Rptr. 373 (Cal. Ct. App. 1977) (Cal. Rule 5-102(B) violated when, without knowledge and consent of current client, lawyer undertakes to represent third person suing client on unrelated matter).

76. 579 F.2d 271 (3d Cir. 1978).

77. The court also affirmed the district court’s order ameliorating the hardship of the disqualification by permitting the disqualified counsel to turn over its work product to new counsel and to consult with new counsel for 60 days. *Id.* at 283.

sented Levin and filed suit against IBM in June, 1972, alleging antitrust violations.⁷⁸ CBM had represented Levin, and corporations with which he was associated, for a number of years.⁷⁹ In April, 1970, CBM wrote an opinion letter for IBM on a labor law problem. CBM accepted two other labor law assignments from IBM in July, 1970 and May, 1971.⁸⁰ In April, 1972, CBM accepted another labor law assignment from IBM and (according to CBM), brought to IBM's attention the possible conflict in that CBM was contemplating an antitrust suit against IBM.⁸¹ CBM said it then secured consent from IBM (which IBM later denied) and from Levin.⁸² During CBM's prosecution of the antitrust suit against IBM, CBM accepted four additional non-litigative labor relations assignments from IBM, one in February, 1974, one from June, 1974 to August, 1976, and two in June and July 1976.⁸³

In June, 1977, five years after the antitrust suit was filed, IBM moved to disqualify CBM from representing Levin et al. in the antitrust suit.⁸⁴ The district court disqualified CBM and the Third Circuit affirmed.⁸⁵

The court rejected the argument that IBM had constructive notice of CBM's representation of Levin.⁸⁶ Although IBM's labor lawyers knew of CBM's representation of IBM, and IBM's antitrust lawyers in the same department knew of CBM's representation of Levin, this constructive notice was found not to meet the requirements of DR5-105(C): "Clearly, full and effective disclosure of all the relevant facts must be made and brought home to the prospective client."⁸⁷

CBM also argued that actual consent had been obtained from IBM. Even accepting CBM's version of the facts, the district court determined that they did not constitute "full and adequate disclosure as required by DR 5-105"⁸⁸ The Third Circuit affirmed this ruling, though IBM was hardly a callow youth or befuddled widow.

While it was clear that CBM had an ongoing relationship with Levin, there still was the question whether CBM had such an ongoing relationship with IBM.⁸⁹ Both the district court and the circuit court found that IBM was in fact a client of CBM because of the pattern of legal assignments:

78. *Id.* at 274.

79. *Id.* at 275.

80. *Id.* at 276.

81. *Id.*

82. *Id.* at 277.

83. *Id.*

84. *Id.*

85. *Id.* at 283.

86. *Id.*

87. *IBM Corp. v. Levin*, 579 F.2d at 282 (footnote omitted). MODEL CODE DR 5-105(C), set out *supra* note 31.

88. *Id.*

89. *Id.*

Although CBM had no specific assignment from IBM on hand on the day the antitrust complaint was filed and even though CBM performed services for IBM on a fee for service basis rather than pursuant to a retainer arrangement, the pattern of repeated retainers, both before and after filing of the complaint, supports the finding of a continuous relationship.⁹⁰

Having concluded that CBM represented both IBM (in rendering legal advice in some labor matters) and Levin (in an antitrust suit), the Third Circuit found it irrelevant that the two cases were not at all related.⁹¹ The court cited and quoted with approval from *Cinema 5*,⁹² and held that CBM must be disqualified because of its simultaneous representation of Levin and IBM;⁹³ the court required disqualification even though the two cases were completely unrelated and CBM never acquired any confidential information from IBM useful to the Levin antitrust suit.

As *Levin* illustrates, a lawyer might find that an occasional client is a continual one for disqualification purposes and that informal consent is not sufficient to cure the ethical defect. At the least, consent should be obtained in writing to bring home to the client the seriousness of the matter. The rule of *Levin* should apply equally to the private lawyer retained by the government. If consent will cure the defect, then the need for, and fact of, consent should be brought home to the client. If consent is not presumed for even a large, sophisticated corporation like IBM, then it is unlikely a court will presume governmental consent. If consent is needed, it must be clearly obtained.

As *Cinema 5* and other cases in this area illustrate, a lawyer may find his or her firm disqualified because one part of the firm is representing a client who is being sued by another part of the firm in a completely unrelated matter. Because the two matters are completely unrelated, there may be no danger of a leak of confidential information—a danger that furnishes the common rationale for the subsequent representation cases discussed above.⁹⁴ Nevertheless, this fact does not reduce the need for disqualification: In simultaneous representation cases there is always the danger of divided loyalties that might cause a lawyer to temper zealous representation of one of the two clients. The lawyer's possible desire to retain the patronage of one client might serve to diminish the vigor of his representation of the other client.

Will the broad, mechanical application of *Levin* mean that if lawyer *A* is retained or appointed to represent a criminal defendant in a federal case, that lawyer *A* (or another lawyer in lawyer *A*'s firm) may not simultaneously represent the Federal Deposit Insurance Corporation (FDIC), which is part of

90. *Id.* at 281.

91. *Id.*

92. *Id.* at 280.

93. *Id.* at 283.

94. *See supra* notes 19-30 and accompanying text.

the federal government, in an unrelated case?⁹⁵ Alternatively, may lawyer *A* represent the FDIC in collecting assets in a bank foreclosure, while lawyer *A* (or another lawyer in *A*'s firm) represents a private client in a rulemaking before the FDIC (or a completely different agency, e.g., Federal Communication Commission)?

In such cases, the primary question is, who is the client? Is it the FDIC or the federal government? The simultaneous representation rule does not even begin to apply unless one first determines who the client is. "Client identity is ambiguous, continuously problematic, and requires resolution by conscious choice."⁹⁶

1. Appearance of Impropriety

Some commentators have argued for a broad and strict application of the conflicts rules as applied to attorneys who work for the government and in private practice.⁹⁷ Some courts and commentators often focus on the problem of the "appearance of impropriety," which is found in the title to DR 9-101 but not in any disciplinary rule.⁹⁸ Lawyers are sometimes disqualified from representing a client because "the conduct under scrutiny must therefore be evaluated in an 'eye of the beholder' context, and the lawyer must be disqualified when an actual appearance of evil exists, though there be no proof of actual evil."⁹⁹

Reliance on the term "appearance of impropriety" should not substitute for careful analysis and interpretation of the *Model Code*. As the court carefully noted in *Fund of Funds, Ltd. v. Arthur Andersen & Co.*:¹⁰⁰ "When dealing with ethical principles . . . we cannot paint with broad strokes. The lines are fine and must be so marked [T]he conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent."¹⁰¹

95. See *Public Hearing*, *supra* note 8, at 58-59 (testimony of Professor S. Cohn).

96. G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 43-44 (1976).

97. Cf. Freedman, *For a New Rule*, 63 A.B.A. J. 724 (1977) (discussing difficulty in articulating adequate standards for screening disqualified attorney from others in firm).

98. See MODEL CODE DR 9-101 ("Avoiding Even the Appearance of Impropriety."). The title to canon 9 is: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." Titles are not disciplinary rules, but "statements of axiomatic norms." MODEL CODE Preliminary Statement.

99. *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 609 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978). See also *Emle Indus., Inc. v. Pantentex, Inc.* 478 F.2d 562, 571 (2d Cir. 1973) (attorney must be disqualified where he "might have acquired information" during previous employment related to the subject matter of his subsequent representation) (emphasis in original); *Marketti v. Fitzsimmons*, 373 F. Supp. 637, 639 (W.D. Wis. 1974) ("Proof that no confidential information had been obtained would not remove the taint of disloyalty.").

100. 567 F.2d 225 (2d Cir. 1977).

101. *Id.* at 227 (footnote omitted) (quoting *United States v. Standard Oil Co.*, 136 F. Supp. 345, 367 (S.D.N.Y. 1955)). As Professor Wolfram has remarked, the charms of the appearance of im-

While the undefined maxim regarding the "appearance of impropriety" may be found in the ethical aspirations,¹⁰² it is significant that no disciplinary rule requires that a lawyer avoid the "appearance of impropriety." In Formal Opinion 342, the American Bar Association has warned that if the "appearance of impropriety" guidelines had been made a disciplinary rule, "it is likely that the determination of whether particular conduct violated the rule would have degenerated . . . into a determination on an instinctive, or even *ad hominem* basis . . ." ¹⁰³ Courts have acknowledged, for example, that the "appearance" test "should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules."¹⁰⁴ The "appearance" maxim is not a rule in itself; it is a reason why the *Model Code* sometimes draws mechanical and absolute rules, e.g., those dealing with the commingling of trust funds. Lawyer conduct that does not violate a disciplinary rule, however, should not be vulnerable to discipline because of someone's *ad hoc* belief that it looks bad to the layperson. A lawyer's defense of a guilty man may appear improper to the layperson, yet it is an ethical duty.¹⁰⁵

It is interesting to note that the *Model Rules* reject the use of "appearance of impropriety." The drafters thought the term too loose and vague; it gave no fair warning; and it encouraged instinctive, *ad hominem* judgments. Nowhere do the *Model Rules* use that term. A definition of "appearance of impropriety" depends on a prior definition of "impropriety," and the *Model Code* defines neither term.¹⁰⁶

Moreover, excessively strict conflicts rules are not cost free. They bring with them many disadvantages. There are severe costs to the public interest in making it unreasonably difficult for attorneys in private practice to representing the government. For example, an overly restrictive rule makes it very difficult for the government to recruit and retain private attorneys even when that route is the most economically efficient one for the government to

propriety rationale "are only surface." C. WOLFRAM, *MODERN LEGAL ETHICS* § 7.1.4, at 319 (1986).

102. MODEL CODE EC 9-3 ("After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility before his leaving, since to accept employment would give the appearance of impropriety even if none exists."); MODEL CODE EC 9-6 ("Every lawyer owes a solemn duty to uphold the integrity and honor of his profession . . . and to strive to avoid not only professional impropriety but also the appearance of impropriety.").

103. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975), at 5 n.17 (reprinted in T. MORGAN & R. ROTUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* 109 n.17 (3d ed. 1984)).

104. *International Electronics Corp. v. Flanzer*, 527 F.2d 1288, 1295 (2d Cir. 1975).

105. MODEL CODE EC 2-29 (compelling reasons justifying exclusion from undertaking representation do not include "the belief of the lawyer that the defendant in a criminal proceeding is guilty.").

106. R. ROTUNDA, *PROFESSIONAL RESPONSIBILITY* 17 (1984).

take. It places severe burdens and opportunity costs on any law firm which accepts a government retainer, because it precludes the firm from accepting other clients. Because lawyer disqualification is typically imputed¹⁰⁷ to all other lawyers in the firm, an overly broad conflicts rule also restricts the lateral mobility of lawyers among firms.¹⁰⁸ It deprives the government of views from the outside. It deprives private sector lawyers of the benefits of government service, including the opportunity to acquire public service perspectives.¹⁰⁹

2. Agency-Specific Disqualification

The demarcation of proper boundaries must be done carefully on the basis of sound policy reasons rather than mere *ad hominem*, or instinctive reactions. Two cases illustrate the relevant distinctions, *Zuck v. Alabama*¹¹⁰ and *People v. Crawford Distributing Co.*¹¹¹

In *Zuck*, a law firm represented a defendant in a criminal case and also represented the prosecutor being sued in his *personal* capacity in a completely unrelated civil matter. The court held that there was an actual conflict of interest rendering the criminal trial unfair in the absence of the criminal defendant's knowing and intelligent waiver.¹¹²

The rule in *Zuck* is sound because the simultaneous representation involved a realistic and direct problem of lessened zeal. If a law firm represents the prosecutor in a personal matter and represents the defendant in a criminal matter brought by the prosecutor, there is a real danger of divided loyalty. Though no breach of confidences is involved, there is the reasonable possibility that the law firm will be less zealous in the criminal case—and less likely to attack the prosecutor's motives or tactics—because the prosecutor is also its client. Because the law firm is less likely to launch a personal attack on its own client (the prosecutor), the conflict of interest of the particular lawyer representing the prosecutor is automatically imputed to the entire

107. See MODEL CODE DR 5-105(D); Rule 1.7, Rule 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7, 1.8(c), 1.9 or 2.2."), set out *supra* note 13.

108. See MODEL CODE DR 5-105(D); *id.* DR 9-101(B), MODEL RULES Rule 1.11. While attorneys can create "Chinese Walls," the erection of walls is a burden, and if the erection is unnecessary and not justified by sound policy reasons, the burden created is equally unnecessary. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975). Moreover, the Chinese Wall involving the revolving door between Government service and private practice is only applicable in subsequent representation cases, not simultaneous representation cases. See generally C. WOLFRAM, *supra* note 76, § 7.6.4, at 401-401 (1986).

109. Cf. Morgan, *supra* note 10, at 50-56.

110. 588 F.2d 436 (5th Cir. 1979).

111. 65 Ill. App. 3d 790, 382 N.E.2d 1223 (1978).

112. *Zuck*, 588 F.2d at 440.

firm, which should be disqualified.¹¹³ The creation of a Chinese Wall, which is sometimes allowed in the subsequent representation cases,¹¹⁴ does not apply. Although the entire law firm is disqualified, a realistic concern about diminution in loyalty and zeal justifies imputation of the conflict.

Moreover, there is also no significant countervailing interest in favor of permitting the dual representation. If the law firm were already representing the prosecutor, the criminal defendant could simply retain other counsel. In addition, if the law firm were already representing the criminal defendant, it should not accept the prosecutor's offer of employment. The conflict rule in *Zuck* did not place any severe burden on plaintiff or defendant, and it did not disqualify the lawyers from a whole class of representation.

In *Crawford Distributing*, beer distributors were convicted of fixing prices. On appeal, they claimed that their convictions were tainted because the defendants were represented by lawyers in a firm in which at least one member was a special assistant attorney general for nonantitrust civil proceedings. The majority found no conflict:

If [the Special Assistant Attorney General], whose authority does not include criminal cases, takes on the representation of a person charged in a criminal proceeding in which the Attorney General is involved, that attorney is not placed in a position . . . where he might have to cross-examine and impeach his own clients. Neither is he placed in a position . . . where his civil clients stand to gain by the conviction of the individual he represents in the criminal case. The Special Assistant Attorney General for limited civil types of cases owes no duty to the Attorney General in criminal matters.¹¹⁵

The court's conclusion is sound. It is unrealistic to believe that the State Attorney General would choose a private law firm to represent it in various civil matters because the firm would thereby be more likely to represent incompetently their criminal clients and "take a fall" in criminal cases. The danger of diminution in zeal in the facts of *Crawford Distributing* is not real. However, if the law firm could not represent any criminal defendants or could not represent any civil clients in other unrelated civil matters—e.g., a lawsuit to determine the amount of just compensation due a store owner in a condemnation case, while the Special Assistant Attorney General handled only civil tax fraud cases against farmers—then there will be fewer lawyers available to be retained by the state. These lawyers will charge more because the supply of lawyers has been artificially constricted while the demand is constant. Civil clients, too, will suffer. When they hire a lawyer in a civil matter (e.g., a civil service suit against the government), they preclude the

113. MODEL CODE DR 5-105(D); MODEL RULES Rule 1.7, Rule 1.10(a).

114. See MODEL RULES Rule 1.11.

115. 65 Ill. App. 3d at 795, 382 N.E.2d at 1228.

lawyer from accepting any other work from the government (e.g., representation of the FDIC). If so, that lawyer may be unwilling to take future civil cases. Such burdens are acceptable if they are the price of sound benefits. The *Crawford Distributing* court did not find any sound benefits from an overly strict conflict of interest rule.

The *Model Rules* appear to recognize the ambiguity existing in the *Model Code*, because the *Model Rules* now provide that “simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.”¹¹⁶ This rule for large economic enterprises in the private sector should apply equally to the government. In other words, in determining who the “client” is for purposes of the simultaneous representation rule, the usual presumption should be that the *particular agency* rather than the federal government is the client unless, for some other reason, a sound basis exists for concluding that there is a reasonable expectation of diminution in the lawyer’s zeal on behalf of a client. For example, if two or more agencies have a close community of interests in a particular matter—the Department of Justice and the Federal Trade Commission on a certain trade issue, for example, the “client” for purposes of the simultaneous representation rule should be the agencies with that close community of interests.

3. Simultaneous Representation of Non-Adverse Clients

In the above cases, where one of the matters involves representation adverse to a present client, the law firm representing, for example, the FDIC in a litigative matter, should not be able simultaneously to represent a private client suing that particular agency, or a private client seeking some benefit before that *same* agency—e.g., a rulemaking proceeding before the FDIC. Such is the learning of cases like *IBM Corp. v. Levin*.¹¹⁷ Courts often opine that even consent of both clients cannot waive the conflict because of the interest of the judicial system in vigorous representation of each client.¹¹⁸ If

116. MODEL RULES Rule 1.7 comment 2.

117. 579 F.2d 271 (3d Cir. 1978). See *supra* note 64 and accompanying text (discussing *IBM Corp. v. Levin*).

118. E.g., *Kelly v. Greason*, 23 N.Y.2d at 374-79, 244 N.E.2d at 459-62, 296 N.Y.S.2d at 942-46 (“Where the circumstances establish such delicate conflicting relationships and inescapable divided loyalties that the likelihood alone of improper conduct or motivation, without any showing of harm and regardless of disclosure and consent, may give rise to professional misconduct.”); *In re Boone*, 83 F. at 956 (“I am firmly of the opinion that a contract, or waiver, or release, or consent, or by whatever name it may be styled, by which it is sought to release an attorney from all the duties, burdens, obligations, and privileges incident to the relation, is totally inoperative and void, and contrary to public policy.”) (*Morrow, J.*). Cf. *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 228-29 (7th Cir. 1978) (simple consent by client to representation of adverse party not a defense to former client’s motion for disqualification based on possibility that confidential information will be used against former client).

neither representation involves any adverse setting—e.g., the law firm provides an opinion letter to the FDIC on a labor law issue while simultaneously providing a banking opinion to a banking client—the analysis is somewhat different.

The law firm must determine initially if there is any realistic likelihood that the interests of one client would really be adverse to another concurrent client. If there are no adverse interests in existence or likely to develop, there is no simultaneous representation problem.¹¹⁹ The law firm simply represents multiple clients. If there are adverse interests, there is a simultaneous representation problem but the law firm may be able to represent both clients (the private client and the government agency) *if* both clients consent after full disclosure *and* the lawyer reasonably believes that his or her independent judgment will not be compromised.¹²⁰ Because neither matter involves litigation, the conflict is subject to waiver and the courts normally will allow each party to consent to the multiple representation. Because neither matter involves litigation, there is not the same danger of a breach of loyalty existing when the lawyer is suing a present client. If the interests later unexpectedly become so adverse that the lawyer must later withdraw, withdrawal does not cause serious prejudice of the clients' interests because neither matter involves litigation, and, by hypothesis, there is no tribunal to disrupt.¹²¹

119. MODEL CODE DR 5-105(B); MODEL RULES Rule 1.7(a), 1.7(b).

120. MODEL CODE DR 5-105(C); MODEL RULES Rule 1.7(a)(1), 1.7(b)(1).

121. MODEL CODE EC 5-15 provides:

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing; withdrawal is less likely to have a disruptive effect upon the causes of his clients.

MODEL RULES Rule 1.7 comments 10-12 provide:

[10] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

[11] For example, a lawyer may not represent multiple parties to a negotiation whose

III. BARGAINING FOR LEGAL FEES

Some have argued that it is unseemly for the government to bargain with law firms and to seek fee concessions when hiring private attorneys.¹²² Indeed, it has been suggested that fee concessions would invite potential malpractice because law firms, in a search for profits, would use the least experienced and least expensive junior associates to handle complex legal problems.¹²³

The argument is amusing. Lawyers already have the ethical duty to render competent legal services,¹²⁴ a duty that the client cannot waive,¹²⁵ and a duty which is enforced by private malpractice actions.¹²⁶ What the no fee concession argument says is that lawyers must be paid to be ethical. If they are not paid what they believe they "should" be paid, then they will cut corners to raise profit margins to earn what they "should earn." But if a lawyer is already undeterred by a malpractice action and fear of discipline, and fear that a knowledgeable client will detect poor quality, that lawyer probably is already offering shoddy service to increase his or her profit

interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

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

122. Various attorneys have privately told me that they believe it "unethical" for the government to seek fee concessions. *See also Public Hearing, supra* note 8, at 62 (testimony of Prof. T. Morgan referring to this argument).

123. ABA Comm. on Professional Ethics and Grievances, Formal Op. 302 (1961) ("When members of the Bar are induced to render legal services for inadequate compensation, as a consequence the quality of the services rendered may be lowered, the welfare of the profession injured and the administration of justice made less efficient.").

124. MODEL CODE EC 6-1 ("[A] lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle."); MODEL CODE EC 6-6 ("A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice . . ."); MODEL CODE DR 6-101(A)(1) ("A lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle . . .").

125. MODEL CODE EC 6-6; *id.* DR 6-101 (A)(1); MODEL CODE DR 6-102(A) ("A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.").

126. *E.g.*, *Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979) (in attorney malpractice action, attorney could be found to have had duty to refer client to specialist or recommend assistance of specialist).

margin.¹²⁷

There is no provision in the present *Model Code* or *Model Rules* setting any minimum fee, and if there were one, it would violate the antitrust laws.¹²⁸ There is also no rule prohibiting lawyers from charging discriminatory fees; that is, a lawyer may charge client *A* more than client *B*, because client *B* is a relative of another lawyer¹²⁹ or cannot afford as much.¹³⁰ If a lawyer can charge client *B* less because that client can afford less, then the lawyer must be charging client *A* more because that client can afford more. Charging someone less because of poverty is simply the other side of the coin of charging someone more because of affluence. If the ethics rules allow such price discrimination when instituted by lawyers, there can hardly be an ethical proscription when a client bargains for lower fees because the client supplies a steady stream of business.

It is common practice for lawyers representing insurance companies in defense work to charge less per hour than they charge other clients. Insurance companies are sophisticated consumers of legal service who extract fee concessions and who can go elsewhere if no concessions are forthcoming; they are good clients who pay their bills, provide steady work, and have somewhat standardized problems.¹³¹ Indeed, the ethics rules explicitly provide that law firms, in setting the fee, may take into account the "nature and length of the professional relationship with the client" in setting the fee.¹³²

Thus, the government should act like other sophisticated users of legal fees and bargain for lower rates when appropriate. Normally, market mecha-

127. As Prof. Milton Friedman has commented on an analogous argument of the medical profession:

[When] people explicitly comment on the desirability of limiting numbers to raise incomes they will always justify the policy on the grounds that if "too" many people are let in, this will lower their incomes so that they will be driven to resort to unethical practices in order to earn a "proper" income. The only way, they argue, in which ethical practices can be maintained is by keeping people at a standard of income which is adequate to the merits and needs of the medical profession. I must confess that this has always seemed to me objectionable on both ethical and factual grounds. It is extraordinary that leaders of medicine should proclaim publicly that they and their colleagues must be paid to be ethical. And if it were so, I doubt that the price would have any limit. There seems little correlation between poverty and honesty. One would rather expect the opposite; dishonesty may not always pay but surely it sometimes does.

M. FRIEDMAN, *CAPITALISM AND FREEDOM* 152 (1962).

128. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

129. See MODEL CODE EC 2-18 ("It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.").

130. See MODEL CODE EC 2-16 ("[R]easonable fees should be charged in appropriate cases to clients able to pay them [P]ersons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services") (emphasis added).

131. Cf. G. HAZARD, *supra* note 96, at 104, 132 (1978).

132. MODEL CODE DR 2-106(B)(6); MODEL RULES Rule 1.5(a)(6).

nisms determine the best fee to pay: One should not seek to pay too little by hiring mere apprentices when one should be hiring masters.¹³³ The point is not that cut-rate fees will encourage a lawyer to provide shoddy work; instead, the point is that if a lawyer is engaged in routine bill collection, he or she may not be competent to handle a complex bank reorganization, no matter what the client pays. In addition, if a competent lawyer can be found to engage in routine bill collection for seventy-five dollars per hour, it makes no sense for the government to pay one hundred dollars per hour.

The market does not always work well when the government hires private attorneys because "it is very difficult to determine precisely what a government agency is responsible for achieving (it has no counterpart of a profit and loss statement), and therefore what are gains and losses. This in turn makes it difficult to say for a government agency what are efficient means of maximizing gains and minimizing loss."¹³⁴ Most government legal services are handled by its civil service. Thus, Professor Geoffrey Hazard concludes that "except when it employs special counsel, the government is never victimized by excessive fee rates."¹³⁵

One need not be so pessimistic. A typical case where the government hires outside counsel occurs when a bank or savings and loan fails. The FDIC must take care of the problem, act as a receiver, and reorganize the bank. The FDIC uses local counsel for such short-term problems. These counsel are already on the scene and familiar with local law.¹³⁶ This procedure may make more economic sense than training and putting on the payroll a great many lawyers as permanent federal employees. It should not be difficult for the FDIC to determine what banking lawyers in the particular locality charge for that kind of work, and then try to seek some sort of concession from that base rate. In fact, that is what the FDIC does, and it should be emphasized that there is no ethical restriction to such "unseemly" bargaining. "If the subject brings to mind a counting house rather than chambers, it is nevertheless a necessary and therefore legitimate aspect of the practice of law."¹³⁷ The government's efforts at cost minimization are quite similar to corporate efforts to contain cost. The danger is not so much that the government will pay too little for legal services but that it will pay too much, and hire outside counsel who performs no unique service that could not be performed in-house with equal or better quality and at a substantially reduced fee.¹³⁸

133. G. HAZARD, *supra* note 96, at 105 (1978).

134. *Id.*

135. *Id.*

136. *Public Hearing, supra* note 8, at 96-99 (statement of Margaret Maguire, formerly Deputy to Chairman of F.D.I.C.).

137. G. HAZARD, *supra* note 96, at 100-01 (1978).

138. See, e.g., "Califano Fees, Roles Draw Fire," NAT. L.J., June 23, 1986, at 2, col. 1 (over last

Large corporations are not shy about seeking fee concessions; they try to contain their legal costs by using in-house counsel for legal work which is most suitable for them, e.g., constantly recurring problems where the repetitive nature of the work takes advantage of the learning curve of the inside corporate legal staff.¹³⁹ Outside counsel are used only when it is more cost efficient to hire them.¹⁴⁰ If the government would establish economic criteria to emulate private corporations it would violate no ethical restraints and produce a more efficient allocation of resources.

IV. CLIENT CONTROL OVER THE LAWYER'S INDEPENDENT JUDGMENT

The client is not the ward of the lawyer. The client is instead the principal and the lawyer the agent.¹⁴¹ The lawyer, however, has a certain domain of professional independent judgment within which the client has no control. The lawyer nevertheless must abide by the "client's decisions concerning the objectives of representation"¹⁴² *The Model Code and Model Rules*

six years Califano collected \$2.8 million in fees from U.S. Postal Service). See also "Fees for Califano Firm Top \$600,000 in 1986," Fed. Times, Feb. 2, 1987, at 15, col. 1 (during first 11 months of 1986, U.S. Postal Service paid \$600,000 to Califano's law firm); Wolf, Block, Schorr and Solis-Cohen, USE OF PRIVATE COUNSEL BY FEDERAL GOVERNMENT AGENCIES, Report to the Administrative Conference of the United States, 46 (Sept. 1986):

As far as the survey research could determine, Mr. Califano's services apparently involve no areas of special expertise, such as patent work, and do not involve complex litigation. Mr. Califano's services do not appear to have been a kind that could not be provided by the Postal Service's lawyers. The retention of Mr. Califano thus deviated from use of private counsel by other agencies.

139. Ryan, *Costly Counsel: Regulations and Fees Boost Legal Expenses; Firms Try to Cut Them*, Wall St. J., April 13, 1978, at 1, col. 1.

140. The average hourly costs of in-house counsel is about half that of outside counsel. Ryan, *supra* note 139, at 33. At one major bank, inside legal costs were less than \$100 per hour, while the bank's outside legal bills were much higher, up to \$250 per hour. Stewart, *Legal Landmark: Major Banks Loosen Links to Law Firms, Use In-House Counsel*, Wall St. J., April 26, 1984, at 1, col. 6. Some law firms are reluctant to raise rates "because clients would probably respond by taking more legal work in-house." *Bus. Bull.*, Wall St. J., April 5, 1984, at 1, col. 5.

141. *Prate v. Freedman*, 583 F.2d 42, 48 (2d Cir. 1978); *Brinkley v. Farmers Elevator Mutual Ins. Co.*, 485 F.2d 1283 (10th Cir. 1973); *State v. Barley*, 240 N.C. 253, 254, 81 S.E.2d 772, 773 (1954).

142. MODEL RULES Rule 1.2 provides:

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

therefore attempt to lay out basic guidelines to distinguish between those matters where the lawyer must secure client waiver and those where the lawyer is in control and prior consent is unnecessary.

In general, the lawyer is entitled to make his or her own decisions in matters "not affecting the merits of the cause or substantially prejudicing the rights of the clients"; in other cases "the authority to make decisions is exclusively that of the client"¹⁴³ As the *Model Rules* candidly admit, however, sometimes a "clear distinction . . . cannot be drawn."¹⁴⁴ Examples help make the test more concrete. Thus, the client decides whether or not to accept a settlement offer or to plead guilty.¹⁴⁵ In criminal cases, the client has the final say as to whether or not to testify on his or her own behalf.¹⁴⁶ The lawyer has the duty to advise the client of the possible effect of each legal alternative.¹⁴⁷

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

143. MODEL CODE EC 7-7 provides:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

Accord MODEL RULES Rule 1.2(a).

144. MODEL RULES Rule 1.2 comment 1.

145. MODEL CODE EC 7-7; MODEL RULES Rule 1.2(a).

146. MODEL RULES Rule 1.2(a); *ABA Standards Relating to the Administration of Criminal Justice*, ch. 4: The Defense Function, standard 4-5.2(a)(iii) (1979) ("Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are . . . whether to testify on his or her own behalf.").

147. MODEL CODE EC 7-8 provides:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In

At other times lawyers have rights with which the client may not interfere. Lawyers have a right to agree to "reasonable requests of opposing counsel which do not prejudice the rights of his client . . .,"¹⁴⁸ such as reasonable requests regarding continuances and waiver of procedural formalities.¹⁴⁹ A client, to make the adversary's life more uncomfortable, cannot require the lawyer to refuse to agree to a reasonable continuance. Lawyers also cannot require their clients to waive the right to decide whether to accept a settlement.¹⁵⁰

It has been suggested that the lawyer for the government may not have the same independence of judgment as a privately retained lawyer.¹⁵¹ It is certainly true that the government, a sophisticated client, may well decide to

assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego [sic] legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

One court has stated likewise:

An attorney may refuse to call a witness even though his client desires that the witness testify; may abandon a defense he deems to be unmeritorious, may stipulate that the trial judge could view the premises, that a witness, if called, would give substantially the same testimony as a prior witness, and that the testimony of a witness in a prior trial be used in a later action; and he may waive the late filing of a complaint. On the other hand, an attorney may not, by virtue of his general authority over the conduct of the action, stipulate that his client's premises constituted an unsafe place to work where such a stipulation would dispose of the client's sole interest in the premises, nor may he stipulate to a matter which would eliminate an essential defense. He may not agree to the entry of a default judgment against his client, may not compromise his client's claim, or stipulate that only nominal damages may be awarded, and he cannot agree to an increase in the amount of the judgment against his client. Likewise an attorney is without authority to waive findings so that no appeal can be prosecuted, or agree that a judgment may be made payable in gold coin rather than in legal tender. An attorney also is forbidden without authorization to stipulate that the opposing party's failure to comply with a statute would not be pleaded as a defense

Linsk v. Linsk, 70 Cal. 2d 272, 278-79, 449 P.2d 760, 763, 74 Cal. Rptr. 544, 547 (1969) (citations omitted).

148. MODEL CODE DR 7-101(A)(1). See also MODEL CODE EC 7-10 ("The lawyer's duty to zealously represent his client does not "militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.").

149. MODEL CODE EC 7-38 ("A lawyer should . . . accede to reasonable requests regarding court proceedings, settings, continuances, waiver of formalities, and similar matters which do not prejudice the rights of his clients . . .").

150. MODEL CODE EC 7-7; MODEL RULES Rule 1.2(a). See generally *Hayes v. Eagle-Pitcher Indus.*, 513 F.2d 892 (10th Cir. 1975) (arrangement allowing majority of clients in group to govern rights of minority violates attorney-client relationship).

151. *Public Hearing*, *supra* note 8, at 65 (testimony of Prof. T. Morgan).

defer less to the lawyer's judgment, but there is no logical or policy reason why the ethical rules regarding the lawyer's independence should vary depending on whether the lawyer's client is the government or a private party. Larger business corporations are also sophisticated consumers of legal service and they also may grant less *carte blanche* authority to counsel, yet the ethical requirements governing a lawyer's independent professional judgment do not vary when the lawyer is outside counsel for a corporation or is in-house legal counsel.¹⁵² The crucial test is not the status of the client—be it the government or a nongovernmental entity—but rather the sophistication and mental condition of the client. The lawyer should expect less direction from an illiterate, incompetent person than from an experienced, sophisticated client.¹⁵³

A client who is sophisticated and financially able simply has more ability to restrict the lawyer in the area where the client has the ability to exercise ultimate control. In contrast, an appointed counsel has more freedom to

152. See Davis, *Corporate Law Departments—A New Look at the "New Look,"* 18 BUS. LAW. 569, 570 (Jan. 1963) (“[A] lawyer is a lawyer whether he charges fees or receives a salary. A salary corrupts no more than does a fee.”).

153. MODEL CODE EC 7-11 provides:

The responsibilities of a lawyer may vary according to the intelligence experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer and appearances before administrative and legislative bodies.

In *People v. Deere*, 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (1985), a defendant was convicted of first degree murder. The defendant told his lawyer that he knew “that he does not deserve mercy” and that he did not want to lose “the last vestige of dignity he has” by calling as character witnesses members of his family to testify that defendant should not be given the death penalty. *Id.* at 361, 710 P.2d at 929, 222 Cal. Rptr. at 18. The California Supreme Court held that the defense attorney was mistaken in his belief that he has “no right whatsoever to infringe upon his [client’s] decisions about his own life.” *Id.* at 364, 710 P.2d at 933, 222 Cal. Rptr. at 20. The court held that “[w]hile counsel should of course endeavor to comply with his client’s wishes to the maximum extent consistent with his legal and ethical responsibilities, he is not . . . a mere ‘mouth-piece.’” *Id.*

By contrast, in *People v. Frierson*, 39 Cal. 3d 803, 705 P.2d 396, 218 Cal. Rptr. 73 (1985), another death penalty case dealing with the allocation of decisionmaking authority between the defendant and his attorney, the defendant wanted to testify that he was under the influence of alcohol and drugs when he committed the crime. The attorney insisted that that contention only be presented at the penalty phase of the trial. *Id.* at 809-12, 705 P.2d at 399-401, 218 Cal. Rptr. at 76-78. The court recognized that most matters of tactics are for counsel to decide, but adopting counsel’s strategy here guaranteed that the defendant would face at least a life sentence without possibility of parole. *Id.* at 814-15, 39 705 P.2d at 403, 218 Cal. Rptr. at 79-80. “Given the magnitude of the consequences that flowed from the decision,” the court held the defendant had to have the right to choose. *Id.* Thus it ordered a retrial on the issue of special circumstances and penalty. *Id.* at 818, 705 P.2d at 406, 218 Cal. Rptr. at 82.

The client in *Frierson* was quite capable of making the reasonable decision he did, so the lawyer should defer to it. The client in *Deere* had no right to embrace the death penalty; it is for society to make that decision.

disregard a client's wishes than a retained counsel, simply because the client who has a lawyer appointed has no place else to go. *Jones v. Barnes*¹⁵⁴ illustrates this point. In that case, a defendant objected on constitutional grounds to the fact that his appointed counsel did not raise every nonfrivolous issue on appeal as requested by the defendant. The defendant filed a pro se brief after his appointed counsel refused to raise on appeal all of the nonfrivolous issues requested by the defendant.

Chief Justice Burger, for the majority, rejected defendant's constitutional claim that the appointed counsel must raise every nonfrivolous issue requested by the client.¹⁵⁵ However, the Court—both the majority and the dissent—acknowledged that a client who had the ability to hire his or her own counsel could make clear, at an appropriate time such as the beginning of the relationship, that the lawyer must raise a particular nonfrivolous issue or issues.¹⁵⁶ The paying client could not specify that the attorney raise frivolous issues, because lawyers have a duty not to raise them. The paying client could insist, however, that the lawyer raise nonfrivolous issues, and if the lawyer objected, the paying client could hire another lawyer to take the case and force the first lawyer to withdraw from further representation.¹⁵⁷

There is a basic core level of lawyer independence. As explained above,

154. 463 U.S. 753 (1983).

155. *Id.* at 751-52.

156. *Id.* at 753 n.6 (referring to the AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Chapter 21, *Criminal Appeals*, "which appear to indicate that counsel should accede to a client's insistence on pressing a particular contention on appeal.") (Burger, C.J., for the Court). Burger said, however, "that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution." 463 U.S. at 753 n.6.

See also *id.* at 758 n.2 ("[W]ith regard to issues involving the allocation of authority between lawyer and client, courts may well take account of paying clients' ability to specify at the outset of their relationship with their attorneys what degree of control they wish to exercise, and to avoid attorneys unwilling to accept client directions.") (Brennan, J., joined by Marshall, J., dissenting); *id.* at 754 ("[I]t seems to me that the lawyer, after giving his client his best opinion as to the course most likely to succeed, should acquiesce in the client's choice of which nonfrivolous claims to pursue.") (Blackmun, J., concurring).

157. MODEL CODE DR 2-110(C)(1)(e) provides:

[A] lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because his client . . . insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

See MODEL RULES Rule 1.16(b)(3) ("[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if . . . a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.").

The client—no matter how much he or she pays—cannot force the lawyer to raise a frivolous issue. MODEL CODE DR 2-109 (A)(2) provides:

A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to . . . present a claim or defense in litigation that is not warranted

the client, whether the government or private party, has no right to insist that the lawyer refuse to accede to a reasonable request by opposing counsel regarding a continuance.¹⁵⁸ Beyond that core level, there is a broad zone where the client and the lawyer have freedom to contract to limit the objectives of representation.¹⁵⁹ We should expect that more sophisticated and powerful clients, such as the government and some corporations and individuals, will have more of an interest in limiting, and power to contract to control, the lawyer's discretion concerning the objectives and means of representation. And then there is a core level where the lawyer has no right to limit the client's discretion—no matter how weak the bargaining power of the client—such as the client's decision whether or not to accept a settlement.¹⁶⁰

The government lawyer, then, has no more or less independence of judgment than other attorneys working for private clients who are sophisticated, interested, and powerful consumers of legal services.

V. THE DUTY OF ZEALOUS REPRESENTATION

All attorneys must represent their clients competently.¹⁶¹ The title to canon 7 of the *Model Code* also requires the lawyer to represent the client "zealously."¹⁶² The *Model Rules* do not use that precise term because "zeal"

under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

MODEL CODE DR 7-102(A)(2) provides: [A] lawyer shall not . . . knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law. MODEL RULES Rule 3.1 provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

158. MODEL CODE EC 7-38; MODEL RULES Rule 1.2 comment 1 ("In questions of means, the lawyer should assume responsibility for technical and legal tactical issues . . .").

159. MODEL RULES Rule 1.2(a),(c).

160. MODEL CODE EC 7-7; MODEL RULES Rule 1.2(a). *See, e.g., In re Montrey*, 511 S.W.2d 805 (Mo. 1974) (counsel suspended indefinitely for settling case for unauthorized amount); *In re Stern*, 81 N.J. 297, 406 A.2d 970 (1979) (counsel disbarred for secretly accepting settlement offer against client's wishes).

161. MODEL CODE DR 6-101(A)(1); MODEL RULES Rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

162. MODEL CODE Canon 7 ("A lawyer should represent his client zealously within the bounds of the law."). *See also* MODEL CODE EC 7-1 ("The duty of a lawyer, both to his clients and to the legal system, is to represent his client zealously . . .").

can easily be interpreted to mean “overzeal,”¹⁶³ but the *Model Rules* do require the lawyer to act “with reasonable diligence and promptness in representing a client.”¹⁶⁴

The government lawyer—because he or she is a government lawyer—has the duty to mitigate this zeal in certain circumstances. It is sometimes said that the sovereign wins whenever justice is done. The duty of the government lawyer is not merely to win; it is to do justice. As the Supreme Court explained in *Berger v. United States*:¹⁶⁵

The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.¹⁶⁶

However, the ethics rules place special limits on the zealotry of government attorneys in only one class of cases, criminal cases. Thus, the prosecutor may not institute charges when he or she “knows” that they are not supported by probable cause,¹⁶⁷ and he or she must make “timely disclosure” to defense counsel of evidence that “tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.”¹⁶⁸ The *Model Rules* seek to codify present law by adding several other requirements that

163. Cf. MODEL RULES Rule 1.3 (“A lawyer should act . . . with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.”); *In re Blatt*, 65 N.J. 539, 543, 324 A.2d 15, 17 (1974) (substituting altered evidence and warning witnesses not to cooperate with authorities “transgressed” boundaries of ethical conduct).

164. MODEL RULES Rule 1.3. See *id.* comment 1 (“[A] lawyer should act . . . with zeal in advocacy upon the client’s behalf.”).

165. 295 U.S. 78 (1935).

166. *Id.* at 88.

167. MODEL CODE DR 7-103(A) (“A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.”); MODEL RULES Rule 3.8(a) (“The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”).

168. MODEL CODE DR 7-103(B) provides:

A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

apply only to government prosecutors.¹⁶⁹

The differences between the rock bottom constitutional requirement and the higher ethical standards should not be minimized,¹⁷⁰ because it is important to realize that the ethics rules tend to be broader than the constitutional rules. Thus, the constitutional rule typically requires the defense counsel to make a specific request for disclosure,¹⁷¹ while the ethics rule is not so limited.¹⁷² The point is simply that those ethical restrictions which are unique to government attorneys and which serve to limit zeal are only those which relate to prosecutors. Other ethics rules which limit zeal apply to all counsel, whether government counsel, or private attorneys.¹⁷³

It is the unusual case where the federal government hires private counsel to prosecute a criminal case; however, the situation can exist. The most obvious example in modern times would be the situation where the Attorney

MODEL RULES Rule 3.8(d) provides:

The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

169. See MODEL RULES Rule 3.8(c) (prohibits prosecutor from seeking to obtain nonknowing waivers of important rights from accused). *Accord* Spano v. New York, 360 U.S. 315 (1959) (conviction reversed where assistant prosecutor and law enforcement officers persistently questioned accused leading to involuntary confession).

170. Compare Brady v. Maryland, 373 U.S. 83 (1963) (court found due process violation where prosecutor suppressed material evidence favorable to accused despite request for evidence from opposing counsel) with United States v. Agurs, 427 U.S. 97 (1976) (court held no constitutional error based on prosecutorial misconduct where defense counsel did not request prosecutor to turn over possibly material evidence; prosecutor has no constitutional duty to volunteer exculpatory matter).

171. *Id.* at 97. The constitutional requirement comes into play only when the violation causes the defendant specific harm, i.e., not "harmless error." See, e.g., United States v. Lovasco, 431 U.S. 783 (1977) (investigative delay does not deprive defendant of due process despite some prejudice to his defense). The ethical violation nonetheless exists; cf. United States v. Doss, 563 F.2d 265 (6th Cir. 1977) (grand jury's interrogation of secretly indicted defendant regarding subject of indictment results in prosecutorial abuse).

172. MODEL CODE DR 7-103(B); MODEL RULES Rule 3.3(d) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.").

173. Certainly, there are other requirements that limit prosecutors—such as the duty not to obstruct the other counsel's access to witnesses. United States v. Hyatt, 565 F.2d 229 (2d Cir. 1977) (prosecutor's termination of defendant's discussion with informant was improper but not prejudicial enough to warrant reversal). However, these requirements equally apply to nongovernment lawyers representing private clients. MODEL CODE DR 7-109(B) ("A lawyer shall not advise or cause a person to secret himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein."); MODEL RULES Rule 3.4(a) ("A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.").

General appoints a Special Prosecutor.¹⁷⁴ When this situation occurs, there is no policy reason why the limitations on the zeal of a criminal prosecutor should be any less than when the prosecutor is a private attorney hired for purposes of a particular case or a particular investigation. Whenever the government retains a Special Prosecutor to conduct a criminal investigation, the duty is to seek conviction, *if* justice so requires.¹⁷⁵ The temporary, privately retained prosecutor should be under the same ethical obligations as the permanent prosecutor.

The *Model Rules* contains one special ethical aspiration, EC 7-14, which applies to government lawyers generally and not just to prosecutors:

A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.¹⁷⁶

The *Model Rules* provide no explicit counterpart to EC 7-14 and its admonition to avoid "unfair litigation." Both the *Model Code* and *Model Rules*, however, already have other sections not limited to government attorneys

174. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 694 n.8 (1974) (Attorney General's statutory authority vests independent Special Prosecutor with power to control course of investigation). There may also be the unusual case where the court rules a particular prosecutor is disqualified because of conflicts of interest. *See People v. Superior Court*, 19 Cal. 3d 255, 561 P.2d 1164, 137 Cal. Rptr. 476 (1977) (district attorney disqualified because victim's mother employed in prosecutor's office in charge of prosecution; mother material witness who would gain custody of grandchild if defendant convicted). The prosecutor's zeal should "be born of objective and impartial consideration of each individual case." *Id.* at 267, 561 P.2d at 1172, 137 Cal. Rptr. at 484. *Cf. Vuitton et Fils, S.A. v. Klaymine*, 780 F.2d 179 (2d Cir. 1986) (judge appointed counsel in civil case as special prosecutor to prosecute contempt charge against opposing counsel), *cert. granted*, 107 S. Ct. 266 (1986); *General Motors Corp. v. United States*, 573 F.2d 936 (6th Cir. 1978) (I.R.S. attorney disqualified from criminal case).

175. *E.g.*, *United States v. Kelly*, 543 F. Supp. 1303 (D. Mass. 1982) ("The United States attorney's duty is not to *win* cases brought by him. Instead, his duty is to prosecute those cases diligently and fairly, with the firm purpose of seeing to it that justice is done in the courtroom.") (emphasis in original). For a contrary view, consider the remarks of a prosecutor quoted in Frankel, *The Adversary Judge*, 53 TEX. L. REV. 465, 471 (1976) ("You must never forget that your [the prosecutor's] goal is total annihilation.") (quoting M. Nadjari, Selection of the Jury (Voir Dire), text of lecture for National College of District Attorneys, University of Houston, (Summer 1971)). *Cf. McDonald v. Musick*, 425 F.2d 373, 375-76 (9th Cir.), *cert. denied*, 400 U.S. 852 (1970) (violation of DR 7-103(A) and DR 7-105(A) when prosecutor added charges after criminal defendant refused to stipulate police had probable cause for his arrest); *Hoines v. Barney's Club, Inc.*, 28 Cal. 3d 603, 42, 620 P.2d 628, 170 Cal. Rptr. 42 (1980) (limiting *Musick* to cases involving "improper motivations" and "coercive tactics").

176. MODEL CODE EC 7-14.

and that require *all* lawyers to refuse to bring an action or assert a position for the purpose of harassing another.¹⁷⁷ While EC 7-14 warns the lawyer, as an ethical aspiration, not to “use his position or the economic power of the government to harass parties, or to bring about unjust results,” the *Model Rules* warn *all* lawyers that they have “a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure.”¹⁷⁸ Similarly, *all* lawyers should point out to their clients those factors

177. MODEL CODE DR 2-109(A) provides:

A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to (1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person. (2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

MODEL CODE DR 7-102(A)(1), (2) provide:

In his representation of a client, a lawyer shall not: (1) file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another; (2) knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

MODEL RULES Rule 3.1 & comment 2 provide:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

... .
The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

MODEL RULES Rule 4.4 (“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden or third person, or use methods of obtaining evidence that violate the legal rights of such a person.”). *Cf.* MODEL CODE DR 7-106(C)(2) (A lawyer shall not “[a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.”).

178. MODEL RULES Rule 3.1 comment 1, *supra* note 149. *Cf.* *Zimmerman v. Schweiker*, 575 F. Supp. 1436, 1440 (E.D.N.Y. 1983) (if attorney for private client should advise client not to defend claim, then government lawyers should do likewise).

Similarly, MODEL CODE EC 7-14 urges the government attorney to advise his superiors when he believes that a government claim lacks merit. All lawyers, however, already have the obligation to avoid prosecuting frivolous claims. MODEL CODE DR 2-109(A); DR 7-102(A)(1); DR 7-102(A)(2). This responsibility cannot be avoided by a lawyer refusing to advise his superiors. At-

“which may lead to a decision that is morally just as well as legally permissible.”¹⁷⁹

Nonetheless, one can find dictum in some cases that suggests government lawyers in a civil context do have a higher duty than a private attorney to avoid legal forum shopping.¹⁸⁰ It is difficult to understand why legitimate forum shopping rises to the level of an ethical issue, but some judges apparently are quite concerned about it. In any event, if a government lawyer should not engage in legitimate forum shopping—and the cases do not so hold—then the same rule should apply to private attorneys retained by the government *if* the policy reasons behind the principle are equally applicable. Because judges when announcing their dictum do not explain the policy reasons behind legitimate forum shopping, it is unclear whether private attorneys retained by the government should be under the same restrictions a few judges would seek to impose. Even if such restrictions would apply, they would apply only under the *Model Code*, because the *Model Rules* do not retain EC 7-14.

VI. IMPLICATIONS OF IMPROPER INFLUENCE

The *Model Code* explicitly provides that a lawyer “may not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.”¹⁸¹ The *Model Rules* have a similar prohibition.¹⁸²

On one level, there is no reason to discuss this requirement. It is an obvi-

torney Grievance Comm’n v. Kahn, 290 Md. 654, 431 A.2d 1336 (Ct. App. 1981). See also MODEL RULES Rule 5.2(a) (“A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person.”).

179. MODEL CODE EC 7-8, set out *supra* note 119. See also MODEL CODE EC 7-9 (“[W]hen an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.”). Accord MODEL RULES Rule 2.1 & comments 2, 3 (“[A] lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”).

180. See *May Dep’t Stores Co. v. Williamson*, 549 F.2d 1147, 1150 (8th Cir. 1977) (accusing government of forum shopping) (“It seems to me the Department of Justice has a greater responsibility to the courts and to the law.”) (Lay, J., concurring); *Caleshu v. United States*, 570 F.2d 711, 715 (8th Cir. 1978) (criticizing government tactic to force taxpayer to litigate claim several thousand miles from home state) (“This type of legal harassment destroys the confidence of individual taxpayers in the fundamental fairness of the system.”) (Ross, J., concurring).

181. MODEL CODE DR 9-101(C) (“A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.”).

182. MODEL RULES Rule 8.4(e) (“It is professional misconduct for a lawyer to state or imply an ability to influence improperly a government agency or official.”). This prohibition has a long history. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 184 (1938) (An announcement that includes “statements of the lawyer’s experience in and acquaintance with the various departments and agencies of the government . . . is not only bad taste but ethically improper.”).

ous one, and applies equally to private lawyers hired by the government. However, reference to it is significant only because many lawyers do not seem to be aware of or care about its existence. Indeed, some attorneys are particularly willing to work for a government agency, even at a reduced fee, because the relationship can be used to foster an appearance of favoritism with their private clients.¹⁸³

The requirement that a lawyer not imply the ability to influence government action on improper grounds applies whether or not the lawyer actually exercises the influence and whether the lawyer could, in fact, exercise the influence. The rationale for this rule is that such implications by lawyers serve no valid purpose and undermine public confidence in the legal system even if the implication is false.¹⁸⁴

Consider, for example, *In re Sears*,¹⁸⁵ where a lawyer wrote an official of a company that was his client. The lawyer implied that he had the ability to influence improperly a federal judge in connection in an investigation by the Securities and Exchange Commission involving the company and corrupt financier Robert Vesco. The court concluded: "In the instant case, the Vesco request was aimed at influencing the SEC suit and was highly improper. By fostering the impression that he had satisfied or could satisfy that request, respondent's conduct fell directly within the ambit of DR 9-101(C)."¹⁸⁶

The prohibition against implying the ability to influence the government improperly may be so widely engaged in that agencies should make a special effort to inform the private lawyers whom they hire that the lawyers must be especially careful to avoid giving their clients an improper impression. For those lawyers who do not care to follow the law, more effective discipline is the only answer. But for the rest, education should help reduce the problem.

183. See *Public Hearing*, supra note 8, at 76 ("It's part of an attorney's marketing device.") (statement of Prof. S. Cohn).

184. MODEL CODE EC 9-4 ("[A]ny statement or suggestion by a lawyer that he can or would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it."); MODEL RULES Rule 8.4 comment 3 ("Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.").

185. 71 N.J. 175, 364 A.2d 777 (1976).

186. 71 N.J. at 191, 364 A.2d at 785. Cf. *In re Brady*, 64 N.J. 100, 312 A.2d 505 (1973) (attorney suspended for implying that attorney was able to influence improperly police officers); *Ohio State Bar Ass'n v. Consoldane*, 50 Ohio St. 2d 337, 364 N.E.2d 279 (1977) (attorney suspended for attempting to obtain funds from client for purpose of bribe to influence public official); *In re Fasig*, 444 N.E.2d 849 (1983) (attorney publicly reprimanded for suggesting criminal defendant's bond would be reduced on basis of attorney's friendship with judge). Cf. ABA Informal Op. 1448 (Dec. 18, 1979) (referring to former judge who appears at trial as counsel by title "judge" could be perceived as attempt to bolster position of litigant and work unfair advantage).

VII. CONCLUSION

Just as large corporations with in-house counsel may decide that the location of, and special expertise involved in, a particular legal problem may suggest the need to hire outside counsel, so also in various circumstances it may make good economic sense for the government to hire private attorneys. Such agency hiring usually does not raise special problems of legal ethics. That is, in most instances, the private attorney will follow the same ethics rules he or she must follow if the client were a private entity. However, in a few instances—e.g., if the private attorney is hired to aid in a criminal prosecution—the private attorney will be under the special ethical restrictions of a government attorney, for there is no policy reason to place the private attorney under any lesser restriction. The private attorney will also be under the restrictions of the various federal conflicts of interest statutes, for the government cannot relieve itself of the requirements of these statutes merely by hiring a private attorney. These statutory conflicts of interest rules do not apply in any unusual way to the private lawyers retained by the government. In addition, some types of ethics rules, for example the rules prohibiting attorneys from implying an ability to influence agency action on improper grounds, apply in the ordinary way, but some private lawyers retained by the government may not fully appreciate their application and significance.

In all these cases, it would be worthwhile for each federal agency, or some central government source, such as the U.S. Department of Justice, to issue ethics guidelines to the attorneys hired by the government. These ethics guidelines could focus attention on the relevant ethical and statutory prescriptions and serve to sensitize private attorneys to the already existing requirements. A special agency effort to inform attorneys of the ethics rules will have no effect on those attorneys who would recklessly disregard them. More effective discipline and disqualification from further federal employment may be the only effective remedies. However, an effort to make lawyers aware of the problem should be adequate preventive medicine for most lawyers.

For the special problem of conflicts of interest, more particularly, problems of simultaneous representation of conflicting interests in unrelated cases, the policy reasons and precedent all point in the direction of an agency-specific disqualification. That is, while an attorney is handling a matter for the Veterans Administration, neither the lawyer nor his or her firm should simultaneously be able to represent private clients who have claims against the Veterans Administration. In addition, if the Veterans Administration, in our hypothetical, hires the private attorney sufficiently often, then the Veterans Administration will probably be regarded as the “client” of that attorney. In this situation, neither that attorney nor his or her firm may take any cases adverse to the Veterans Administration even if, on a particular day,

the attorney has no outstanding matter to perform for the Veterans Administration. This rule serves important policy justifications, as discussed above. It is not unduly onerous (in fact, it is the rule private attorneys have followed for years) *as long as* the disqualification is agency specific. A broader disqualification would burden both the government and private attorneys without compensating benefits to the public.

The private attorney should also be able to represent multiple clients simultaneously if their interests are not adverse. If the interests are only slightly adverse and neither client is directly opposed to another (e.g., neither matter involves litigation, or arbitration, or negotiation on opposite sides of the issue, or rulemaking), then both clients should normally be able to consent to the lawyer's representation of multiple clients.

There is always the danger that some state disciplinary jurisdictions or courts will be unduly mechanical in applying the simultaneous representation rule. To prevent such a possibility the federal government could always preempt¹⁸⁷ conflicting state rules. An individual agency or the U. S. Department of Justice, if authorized by Congress, could promulgate federal regulations making clear that the "client" for purposes of the simultaneous representation rule is the particular federal agency (and related agencies sharing a special community of interests) instead of the entire federal government.

187. *Sperry v. Florida*, 373 U.S. 379 (1963). *Cf.* *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir. 1965), *cert. denied*, 385 U.S. 987 (1966).