DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1980-3

A law firm requests our opinion as to whether or not it would be disqualified from continuing to represent a client if it were to hire a former government attorney who had substantial responsibility in a matter for which the firm had been retained on behalf of the client while in the employ of the government.

When the client became involved in the matter before the government, the client asked the then government lawyer for a recommendation of counsel. The requesting firm was one of the references and subsequently the client retained the requesting firm for representation before the government. The government lawyer had a substantial responsibility in the matter as those terms are defined in Disciplinary Rule 9-101(B) of the Code of Professional Responsibility.

The direct contact between the requesting firm and the government attorney ended approximately five months after the recommendation to the requesting firm had been made. At that time a consent judgment was entered into by the parties and the matter proceeded on an administrative basis. However, during the prior direct contact period, the government attorney dealt with the requesting firm on a fairly regular

basis exercising some control over the litigation, conferring with agency counsel in Washington, and to some extent "calling the shots".

The matter remains at the administrative level and at no time in the last five or six months has there been any contact between the government attorney and the requesting firm concerning the case. Nevertheless, because of certain problems in the administrative process, it may be that additional litigation will be required.

In the meantime, the government attorney is now a former government employee who wishes to come into the requesting firm as an associate. The proposed associate would have no connection with the litigation on behalf of the government, nor would he participate in any manner in the proceeding on behalf of the client. The firm would set up a screening procedure in order to continue to represent the client but asks whether or not the screening arrangement would be sufficient under the Code of Professional Responsibility to avoid the inference of impropriety and therefore require disqualification.

OPINION

In the absence of a consent from the government and other parties specifically agreeing to representation of the client by the firm and of the screening procedures to be

utilized by the firm, it would be unethical for the firm to continue in its representation of the client where a proposed associate was a former government employee who had substantial responsibility in the matter while he was in the public employ.

DISCUSSION

The primary disciplinary rules in issue are DR 9-101(B) and DR 5-105(D).

DR 9-101(B) states:

> "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

DR 5-105(D) states:

> "If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment."

and is the basis upon which the prohibition contained in DR 9-101(B) creates a disqualification of the other members and associates of the firm in which the lawyer is employed.

In the opinion of the Committee, it is not significant that the former government employee will not be working on behalf of the client. The client had previously retained the firm and the continued retention of the firm may be jeopardized by the former government employee coming into the firm as an associate after having had substantial responsibility in a matter involving the client.

ABA Formal Opinion 342 (November 24, 1975) dealt at length with the issue of whether a former government attorney in private practice would create a situation whereby his partners or associates would be disqualified in representing clients before the government agency in which he was formerly employed. The opinion discussed the countervailing considerations of the safeguarding of confidential information vis-a-vis the restrictions on an attorney's ability to obtain future employment and the ability of the government to recruit professional competent lawyers without imposing harsh restraints on their future practice. The opinion also observed that the disqualification of the attorney on a very strict basis would serve no worthwhile public purpose if it could become a tool in the hands of a litigant to deprive his opponent of competent counsel.

It is interesting to note that Cannon 9 states that "a lawyer should avoid even the appearance of professional impropriety" but that the test in reviewing DR 9-101(B) is not whether there is an appearance of professional impropriety, but whether the lawyer has accepted private employment in a matter in which he had substantial responsibility while he was a public employee, and whether the balance of his firm is disqualified as a result of his public employment.

Substantial responsibility was defined in ABA Formal Opinion 342 as envisaging:

> "a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question. It contemplates a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question. . . . Yet it is not necessary that the public employee or official shall have personally and in a substantial manner investigated or passed upon the particular matter, for it is sufficient that he had such a heavy responsibility for the matter in question that it is unlikely that he did not become personally and substantially involved in the investigative or deliberative processes regarding that matter."

The definition of the word "matter" is not precise but "seems to contemplate a discreet and isolatable transaction or set of transactions between identifiable parties".

In the question presented for opinion, there is no doubt that the former government employee (the proposed associate) had a substantial responsibility in the matter currently before the government.

ABA Formal Opinion 342 attempted to balance the policy considerations and concluded that:

> "Although vicarious disqualification of a government department is not necessary or wise, the individual lawyer should be screened from any direct or indirect participation in the matter, and discussion with his colleagues concerning the relevant transaction or set of transactions is prohibited by those rules.
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> . . . .

> So long as the individaul lawyer is held to be disqualified and is screened from any direct or indirect participation in the matter, the problem of his switching sides is not present; by contrast, an inflexible extension of disqualification through the firm often would result in real hardship to a client . . . because substantial work may have been completed regarding specific litigation prior to the time the government employee joined the partnership, or the client may have relied in the past on representation by the firm." (emphasis added)

By establishing a screening process it was thought that requirements of the disciplinary rules could be met by discouraging government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters. The opinion further noted that the screening process must be to the satisfaction of the government agency concerned. However, the opinion did not go so far as to state that the consent of other parties was necessary.

The obligation on the private firm is not only to determine whether or not there is a conflict and a need for screening, but to assure that the screening procedure is approved by the agency involved. The opinion makes no statement or gives no guidelines with respect to the manner in which the screening is to be conducted or how the approval is to be obtained from the agency. In ABA Informal Opinion 1374 (September 7, 1976), a former attorney for the Securities and Exchange Commission requested a ruling as to whether or not he could represent a former defendant in an SEC action

which the attorney had prosecuted for the SEC and for which one of the witnesses was now a defendant in an action brought by the former defendant in the SEC action. The matter of screening was not discussed by the Committee and the ruling was that since the requesting attorney had prosecuted the case, and the private litigation arose out of the matter which was prosecuted for the SEC, the attorney was precluded from private employment in that matter.*

The case of Armstrong v. McAlpin, 606 F. 2d 28 (2nd Cir. 1979) noted that even though the agency had no objection to representation by the former government attorney, it concluded that disqualification extended to the law firm in spite of a screening procedure which had received no objection from the government agency and the lower court. The court left open the question of whether court approval of the representation and the screening process was necessary or appropriate. Armstrong was a securities case where the firm employed a prior SEC assistant director who had been involved in a case against the client. However, disclosure was made, a screening procedure was established, and a suit subsequently filed which arose out of the issues in which the former government attorney had a substantial responsibility. Two years after the commencement of the action, other defendants

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*Prior to Formal Opinion 342, ABA Informal Opinion 1129 (November 26, 1969) concluded that a former government attorney could represent a client before the government agency in which he was previously employed because his duties did not normally include the problems which would be presented by his client should he accept employment before the agency.

moved to disqualify the firm because of the attorney's prior SEC activity. The Court believed that the conduct of the governmental investigation and enforcement litigation was precisely the sort of activity in which the risk of being influenced by the prospect of future employment was very real. The Court also ruled that with respect to the question of substantial responsibility, the government attorney with a direct, personal involvement in a matter involving enforcement of laws that are the basis for private causes of action had to understand, and it had to appear to the public, that there would be no possibility of financial reward if he later succumbed to the temptation to shape the government action in the hope of enhancing private employment. Id. at 34.

While Armstrong is persuasive, the decision to disqualify an entire firm must be judged on a case by case basis which must include, but not be limited to, such factors as the nature of the responsibility of the former government employee, the participation he had in matters between the client and the agency, the nature of the representation sought by the client, the ability of his partners and associates to effectively screen him from participation or knowledge in the proposed representation, the time period over which the representation will take place, the likelihood of additional persons being made a party to the action at a

later date, and, most importantly, the disclosure to and consent of the government agency involved. Because of Armstrong, disclosure to and consent of all parties is, in the Committee's opinion, necessary. To the extent such approval is obtained from the government agency and other parties, a memorandum of agreement among the parties setting forth the factual basis for the agreement and the express consent of the parties to the representation of the client by the firm would probably create a sufficient record so that a subsequent challenge would cause the least amount of difficulty and delay for the parties.

Dated: February 27, 1980