Department of Justice
Washington, D.C. 20530

March 23, 1976

Ladies and Gentlemen: Subject: Inquiry #19

I am writing to urge that you expand your Draft Decision on the above matter to make it clear that the disqualification of a law firm because of the former government employment of one of its partners will not apply if, in appropriate circumstances and on the basis of adequate safeguards, the government agency consents to the firm's representation.

While imputed disqualification of an entire firm is often necessary to protect the government's interests or to avoid an appearance of impropriety, that is not always the case. In past practice the Department of Justice has, when the occasion warranted, consented to a law firm's continuing its representation of a client in a matter where the firm would otherwise be disqualified by reason of its having hired a former Department employee, subject to appropriate safeguards. Such safeguards have included (1) an undertaking by the firm and by the disqualified attorney that such attorney would have no personal involvement with the matter and would not discuss it within the firm; (2) a reasonable basis for concluding that such an undertaking could be observed, considering such factors as the competence of the remaining members of the firm to handle the matter and the size of the firm; (3) a requirement that in general the representation predate the hiring of the disqualified lawyer, so as to eliminate any possible suggestion that the firm was retained because of his presence; (4) an undertaking that the disqualified attorney will not share in any fees generated by the representation; and (5) disclosure to the court or agency before which the matter is pending. Similar arrangements have been approved by other Federal agencies including the Securities and Exchange Commission, the Federal Trade Commission (16 CFR 4.1(b)(4)), and the Federal Maritime Commission (46 CFR 502.32(c)). No instances of abuse, real or apparent, are known to us.

We are concerned about two harmful effects which would flow from an absolute and inflexible rule of imputed disqualification. The first is to render a government attorney in many cases unemployable by any law firm with substantial practice in the field of his expertise. Those government lawyers practicing at a supervisory level in a specialized field will not infrequently be charged with "substantial responsibility" (if that term is interpreted as strictly as we would desire) for all or most of the litigation in that field. The Assistant Attorney General for the Antitrust Division, for example, would probably be disabled, under your Disciplinary Rule 9-101(B), from private employment with respect to all major government antitrust cases and investigations pending during his tenure. If, upon his departure from government, this disqualification were automatically extended to all the partners of any firm which he joined, the practical effect would be to prevent his joining any existing firm with a substantial antitrust practice. (In most cases, this result ensues because it would not be financially feasible for the firm to give up all the "infected" business; but in many cases the result is dictated by ethics rather than economics, since it would be improper for the firm to withdraw its services in midstream.) The effect of this disability upon the recruiting of experienced, supervisory-level

attorneys would in our view be significantly harmful. Public service by experienced practitioners already represents a substantial financial sacrifice during the years of government employment; when there is added to this the narrowing or impairment of the attorney's later career, the sacrifice becomes too much for most lawyers to accept.

Our second concern with an absolute and invariable rule of imputed disqualification is its predictable tendency to produce a parsimonious interpretation of the disciplinary rules governing individual disqualification. It is a truism that where a sanction or restriction is unnecessarily severe, the rule invoking it will be narrowly construed. Any disciplinary rule in this field must contain a fairly vague standard to describe the degree of involvement which will trigger the disqualification -- in the case of DR 9-101(B), the standard of "substantial responsibility." In giving content to this term an ethics advisor, counseling an attorney as to those matters from which he should consider himself disqualified after government employment, or an Ethics Committee addressing the same issue, will inevitably be inclined to provide less of a margin of safety for the government where the result of the disqualification is not merely to withhold the lawyer from the case but to disqualify his entire firm, or to prevent his employment. Thus, in the last analysis, I believe the effect of an absolute rule of imputation would be to weaken rather than strengthen the protections for the government against harm arising from subsequent private employment.

The position I have set forth above reflects the longstanding views of the Department of Justice. When the bill which became the current Federal conflict of interest provision now contained in 18 U.S.C. § 207 was being considered, the Department argued against extending to partners of former employees the categorical prohibition of 18 U.S.C. § 207(a) (which is similar to, but somewhat narrower than DR 9-101(B)), because of the adverse effect which such extension would have upon the government's ability to attract outstanding attorneys. See Statement of the Department of Justice on H.R. 8140 before the Senate Judiciary Committee, 87th Cong., 2d Sess. (1962). Moreover, as I have discussed earlier, it has been Departmental practice to give consent to representation in some cases where imputed disqualification might otherwise exist, if appropriate assurances and safeguards were provided.

The protections which have been thought necessary by the Congress and the Executive branch do not of course foreclose your Committee's imposition of additional safeguards through the vehicle of ethical rules. And there is no doubt that ethical obligations should and do exceed the strict requirements of the law. Nonetheless, when Congressional and Executive branch declination to provide a particular prophylactic rule has evidently been based not merely upon an estimation that it is not strictly necessary, but also upon a judgment that it would be harmful to the government service, we hope your Committee will accord that determination substantial weight. We urge that you expand your proposed opinion in Inquiry #19 to confirm that the imputed disqualification will not apply when the government agency consents to representation on the basis of its assurance that adequate measures have been taken to prevent the former employee's participation in or profit from the particular matter, and that no appearance of impropriety exists. As you know, this was the approach adopted by the American Bar Association Ethics Committee in its Formal Opinion 342.

I am grateful for your consideration of these views.

Sincerely,

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Legal Ethics Committee
The District of Columbia Bar
Woodward Building, Suite 840
1426 H Street, N.W.
Washington, D.C. 20005