Boston College Law Review

Volume 16
Issue 4 *Number 4*

Article 5

4-1-1975

Legal ethics -- The ABA Code of Professional Responsibility -- Disciplinary Rule 9-101 (B) -- Former Government Attorneys and the Appearance of Evil Doctrine -- General Motors Corp. v. City of New York

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CASE NOTES

Legal Ethics—The ABA Code of Professional Responsibility—Disciplinary Rule 9-101(B)—Former Government Attorneys and the Appearance of Evil Doctrine—*General Motors Corp. v. City of New York.* [1]—On October 4, 1972, the City of New York instituted a class action against General Motors, alleging that General Motors had, *inter alia,* [2] violated section 2 of the Sherman Antitrust Act,[3] by attempting to monopolize and monopolizing "trade and commerce in the manufacture and sale of city buses."[4]

Prior to filing suit, the City's Office of Corporation Counsel retained Mr. George Reycraft, a partner in a private New York law firm, primarily to assist in preparing the complaint, on a contingent fee basis. In 1954, Reycraft had been employed by the Antitrust Division of the United States Department of Justice as a trial attorney in the General Litigation Section. He was subsequently assigned to an investigation of the alleged monopolization of the city and intercity bus business by General Motors, which culminated in the issuance of a complaint, in 1956, alleging a violation of section 2 of the Sherman Act.[5] Though never in charge of *1956 Bus,* Reycraft admitted that he had participated substantially in the preparatory proceedings, and had, in fact, signed the complaint.[6] He continued such active involvement in the capacity of staff attorney until 1956 when, via an appointment to the Special Trial Section of the Antitrust Division, he "no longer had any direct or indirect involvement with the 1956 Bus case."[7]

In 1961, Reycraft was promoted to Chief of Section Operations, and assumed technical responsibility for *1956 Bus,* although he could recall no active participation in the matter from the date of his appointment to the Special Trial Section until his departure from the Antitrust Division in December, 1962.[8]

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[1] 501 F.2d 639 (2d Cir. 1974).

[2] Another cause of action alleged that General Motors (G.M.) had violated § 7 of the Clayton Act, 15 U.S.C. § 18 (1970), by acquiring a controlling interest in Yellow Truck & Coach Mfg. Co., which acquisition " 'threatens substantially to lessen competition and [tends] to create a monopoly in the manufacture and sale of buses within the United States . . . .' " 501 F.2d at 641, quoting the complaint filed by the City of New York.

[3] 15 U.S.C. § 2 (1970).

[4] 501 F.2d at 641, quoting the complaint filed by the City of New York.

The Second Circuit also determined that, under the test of Kohn v. Royall, Koegel and Wells, 496 F.2d 1094, 1098 (2d Cir. 1974), G.M. could not appeal the federal district court's interlocutory order granting class action standing to the City at this preliminary stage of the proceeding. 501 F.2d at 664. Judge Mansfield concurred in the result despite his disagreement with certain of the criteria used by the majority in reaching the conclusion of non-appealability. Id. at 656.

[5] United States v. General Motors Corp., Civil No. 15816 (E.D. Mich. 1956) [hereinafter cited as 1956 Bus]. The case eventually ended in a settlement.

[6] 501 F.2d at 642, quoting Affidavit of George D. Reycraft, sworn to on June 18, 1973 at ¶ 3 [hereinafter cited as Affidavit].

[7] 501 F.2d at 642, quoting Affidavit, supra note 6, at ¶ 4.

[8] 501 F.2d at 642. A grand jury inquired into the operations of General Motors'

In the light of Reycraft's participation in *1956 Bus,* General Motors moved for his disqualification from the instant case, on the theory that his involvement therein violated Canon 9[9] of the American Bar Association Code of Professional Responsibility (present Canon 9) and subjoined Disciplinary Rule DR 9-101(B).[10] In refusing to disqualify Reycraft, the United States District Court for the Southern District of New York reasoned first, that his role as counsel for the City in *General Motors* was not "private employment" within the meaning of DR 9-101(B), and second, that *General Motors* was not the same "matter" with which Reycraft was involved during his employment with the Justice Department.[11]

In reaching its decision, the trial court noted that present Canon 9 is intended to prevent the employment of former public employees by private parties in matters directly opposed to the employee's formerly adopted public position, and that, in the instant case, the interests of the City and the federal government coincided.[12] The court concluded that the facts necessary to support the

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Electromotive Division from 1959 to 1961, and Reycraft was substantially involved in that investigation. The ethical issue raised by this fact was aired in the district court, but the court of appeals did not reach it, since Reycraft's participation in *1956 Bus* was declared sufficient to warrant his disqualification. Id. at n.6.

[9] ABA Code of Professional Responsibility [hereinafter cited as ABA Code], Canon 9, provides: "A Lawyer Should Avoid Even the Appearance of Impropriety."

The preliminary statement to the ABA Code states:

> The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and Disciplinary Rules are derived.

ABA Code, Preliminary Statement.

[10] ABA Code, DR 9-101(B) provides: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

The preliminary statement to the Code states:

> The Disciplinary Rules . . . are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities.

ABA Code, Preliminary Statement.

Although the issue was not raised in the instant case, it is interesting to note that courts possess inherent power to enforce ethical rules.

> Whenever an allegation is made that an attorney has violated his moral and ethical responsibility, an important question of professional ethics is raised. It is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar. The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession. This means that a court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance of impropriety.

Richardson v. Hamlin Int'l Corp., 469 F.2d 1382, 1385-86 (3d Cir. 1972), cert. denied, 411 U.S. 986 (1973). See also Handelman v. Weiss, 368 F. Supp. 258, 263 (S.D.N.Y. 1973); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 378 (S.D. Tex. 1969).

[11] City of New York v. General Motors Corp., 60 F.R.D. 393, 401 (S.D.N.Y. 1973).

[12] Id. at 401.

present antitrust claim were not sufficiently similar to the facts alleged in *1956 Bus* to constitute the same matter under DR 9-101(B).[13] The addition of a Clayton Act claim,[14] a four-year statute of limitations[15] running from the date of accrual of the cause of action, and testimony indicating that a preponderance of proof necessarily would consist of events occurring within the past decade,[16] differentiated the cases under DR 9-101(B) in the district court's view, since the *1956 Bus* complaint was filed sixteen years prior to the *General Motors* complaint, and since Reycraft's departure from the Justice Department predated the filing of the *General Motors* complaint by ten years.[17]

In reversing the decision below, the United States Court of Appeals for the Second Circuit HELD: Where an attorney who had substantial responsibility for the initiation of a suit as a government employee, accepts subsequent employment from another governmental unit in a case alleging a sufficient number of similar facts as had been alleged in the former suit to constitute the same matter under DR 9-101(B) and whose compensatory arrangement with the subsequent employer is such that he stands to profit to a degree which qualifies as private employment under DR 9-101(B), his disqualification from the subsequent suit is required to avoid even the appearance of impropriety.[18]

The Second Circuit's conclusion that *1956 Bus* and *General Motors* involved the same matter for purposes of DR 9-101(B) was founded, in part, on a comparison of the complaints issued in each case.[19] Much of the language and the entire substance of almost every allegation of monopoly contained in the *1956 Bus* complaint was repeated in the *General Motors* complaint.[20] The lapse of time between the *1956 Bus* and *General Motors* actions was not, in the court's view, controlling, particularly where a history of G.M.'s operations might prove to be a significant component in the establishment of a violation of section 2 of the Sherman Act.[21] Rather, it was emphasized that the existence of slight variations in arcane matters of proof was an inadequate basis for continued participation by Reycraft, in view of the "nuclear identity" of the suits and the

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[13] Id. at 402.

[14] See note 2 supra.

[15] 15 U.S.C. § 15b (1970).

[16] 60 F.R.D. at 402, quoting Affidavit, supra note 6, at ¶ 14.

[17] 60 F.R.D. at 402.

[18] General Motors Corp. v. City of New York, 501 F.2d 639, 641 (2d Cir. 1974), rev'g 60 F.R.D. 393 (S.D.N.Y. 1973).

[19] 501 F.2d at 650.

[20] See id. at 652-55 (Appendix).

[21] But an equally essential element in proving a violation of Section 2 of the Sherman Act is either an intent to monopolize or an abuse of monopoly power. Moreover, to decide the question whether GM is a passive recipient of monopoly power, a history of its operations will be imperative.
501 F.2d at 650.

crucial importance of appearances in the ethical realm.[22] The court of appeals further reasoned that Reycraft's involvement in *General Motors* typified the category of employment referred to as "private" under DR 9-101(B) because the improper appearance to which that word refers is embodied, under these facts, in the contingent fee.[23]

This note will begin with a consideration of former Canon 36[24] of the Canons of Professional Ethics (former Canon 36), the progenitor of DR 9-101(B). The judicial interpretations of that Canon will be examined, in an attempt to develop a proper understanding of the effect of the Code of Professional Responsibility and, specifically, of present Canons 4 and 9 on current standards of ethical behavior. An analysis of whether Reycraft's involvement in *General Motors* should be construed as private employment within the meaning of DR 9-101(B) will follow. The objective differences and similarities in the factual settings of *General Motors* and *1956 Bus* will then be discussed in an effort to determine whether they constitute the same matter as that term is used in DR 9-101(B). Finally, the impact of *General Motors* upon the future employment opportunities of the former government attorney will undergo evaluation. A comparison between *General Motors* and prior case law, and an additional inquiry into the meaning of "substantial responsibility" in DR 9-101(B) will follow, in an effort to focus more properly on the extent and limitations of the "appearance of evil" doctrine.

The district court and the Second Circuit adopted widely variant views in construing the proper scope of present Canon 9 and DR 9-101(B). Present Canon 9 provides: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."[25] Disciplinary Rule 9-101(B) provides: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."[26]

In refusing to find that Reycraft's employment in *General Motors* constituted a violation of DR 9-101(B), the district court emphasized that the consistency of legal positions adopted by Reycraft in the two cases could not give rise to the appearance of evil to which Canon 9 pertains.[27] However, the Second Circuit's reversal, suggesting a broader construction of DR 9-101(B), apparently is more consistent with the history of Canon 9, and its relation to other present Canons.

An indication of the desirability of interpreting Canon 9 and

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[22] Id. at 651.

[23] Id. at 650 n.20. The City's damage claim amounted to $12,000,000. Id. at 641.

[24] ABA Canons of Professional Ethics No. 36 [hereinafter cited as ABA Canons], provided, in pertinent part: "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

[25] ABA Code, Canon 9.

[26] ABA Code, DR 9-101(B).

[27] 60 F.R.D. at 401.

DR 9-101(B) to disqualify Reycraft can be found in the rationale behind the promulgation of present Canon 4[28] and DR 4-101(B),[29] which require the preservation of confidences and secrets of a client. One significant reason for their existence is to prevent breaches of the relationship of trust established between attorney and client in order to promote total disclosure of relevant facts to the attorney. Such breaches are likely in situations involving a client's retention of an attorney who has formerly counselled the adverse party.[30] Present Canon 4's relevance to this note is reflected by the fact that, in promulgating DR 9-101(B), the ABA broadened the public employment doctrine beyond the proscriptions of Canon 4.[31] Therefore, in order to have a meaningful existence, DR 9-101(B) must contemplate other breaches of the public trust. An analysis of the ethical restrictions placed on government attorneys by Canon 36 of the Canons of Professional Ethics may provide some assistance in determining those breaches which present Canon 9 and DR 9-101(B) were intended to encompass.

Although the Code of Professional Responsibility replaced and superseded the Canons of Professional Ethics,[32] both present Canon 9 and DR 9-101(B) carry forward the ethical precepts of former Canon 36,[33] the prior statement of the public employment doctrine.

[28] ABA Code, Canon 4 provides: "A Lawyer Should Preserve the Confidences and Secrets of a Client."

[29] ABA Code, DR 4-101(B) provides:

> Except when permitted under DR 4-101(C), 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 secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

[30] 501 F.2d at 650 n.20.

[31] It is worthy of note that the ABA Code was promulgated as a response to the need for a concise set of ethical standards. The ABA Canons lacked the precision, clarity and order essential to a proper enunciation of legal ethics. "By contrast the disciplinary rules of the Code of Professional Responsibility are intended to constitute a complete set of standards for disciplinary action." Sutton, The American Bar Association Code of Professional Responsibility: An Introduction, 48 Texas L. Rev. 255, 263 (1970). See generally Report of the Special Committee on Evaluation of Ethical Standards, ABA Ann. Rep. 729, Preface (1965); Armstrong, The Proposed New Code of Professional Responsibility, 41 N.Y.S.B.J. 591 (1969).

[32] The original ABA Canons of Professional Ethics were adopted in 1908. The Code of Professional Responsibility was adopted by the House of Delegates of the American Bar Association on August 12, 1969 to become effective for American Bar Association members on Jan. 1, 1970.

> After substantial study and a number of meetings, we concluded that the present Canons needed revision in four principal particulars: (1) There are important areas involving the conduct of lawyers that are either only partially covered in or totally omitted from the Canons; (2) Many Canons that are sound in substance are in need of editorial revision; (3) Most of the Canons do not lend themselves to practical sanctions for violations; and (4) Changed and changing conditions in our legal system and urbanized society require new statements of professional principles.

Report of the Special Committee on Evaluation of Ethical Standards, ABA Ann. Rep. 729, Preface (1969).

[33] See note 24 supra.

The restrictions imposed by former Canon 36 were intended to prevent the possible charge "that the public employee's action . . . might otherwise be influenced or be thought to have been influenced by the hope of later being employed privately *to uphold or to upset* what he had done . . . ."[34] Canon 36 did not require the existence of a conflict of interest as a condition precedent to its application, since public confidence in government attorneys may deteriorate despite the absence of conflict. In *Allied Realty of St. Paul, Inc. v. Exchange National Bank,*[35] plaintiff's attorney, while an employee of the United States Attorney's Office, had participated in an investigation of a mortgage transaction which became the subject of the private dispute. No conflict of interest was involved since in both cases the attorney attempted to prove that the mortgage transaction was fraudulent. Nevertheless, the Eighth Circuit, in affirming the disqualification of plaintiff's attorney, concluded that "[t]he purpose of [Canon 36] appears to be to prohibit an attorney from gaining financial advantage through the use of information which he obtained as a public official."[36]

The problem envisioned in *Allied Realty* was the possibility that government attorneys, while exercising public power, might be influenced by the potential for future private gain when determining the desirability of investigating a particular matter.[37] Former Canon 36, as interpreted in *Allied Realty,* was intended to avoid such a possibility, and was logically interpreted as proscribing both consistent and inconsistent positions involving subsequent employment, since financial attractions could arise in either case. Under that analysis, it would seem that DR 9-101(B), the Disciplinary Rule relevant to *General Motors,* requires a similar interpretation because the possibility of lucrative financial gain, without more, raises the appearance of evil.[38]

On the facts of *General Motors,* it appears that the Second Circuit properly concluded that Reycraft's employment by the City was private within the meaning of DR 9-101(B), despite the fact that Reycraft was actually subsequently retained by a public entity. His assistance in *General Motors,* though devoid of conflicts or breach of confidence infirmities, remains susceptible to the equally damning allegation that his intention to profit substantially arose

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[34] H. Drinker, Legal Ethics 131 (1953) (emphasis added). Contra, ABA Comm. on Professional Ethics, Informal Opinions, No. 937 (1966). See also Hilo Metals Co. v. Learner Co., 258 F. Supp. 23, 28-29 (D. Hawaii 1966); ABA Comm. on Professional Ethics, Opinions, No. 49 (1931); ABA Comm. on Professional Ethics, Opinions, No. 37 (1931).

[35] 408 F.2d 1099 (8th Cir. 1969).

[36] Id. at 1102.

[37] See Allied Realty v. Exchange Nat'l Bank, 283 F. Supp. 464, 469 (D. Minn. 1968).

[38] In a recent case in the Second Circuit, Ceramco, Inc. v. Lee Pharmaceuticals. — F.2d — (Civil No. 74-1757) (2d Cir., decided Jan. 30, 1975), the court interpreted the reason for Reycraft's disqualification as fulfilling the need to enforce the duty of confidentiality. Id. at 1548. That principle is not at issue under these facts.

during his former employment in the public domain.[39] Adoption of the district court's narrower view that private employment does not encompass the case where the attorney has maintained consistent positions would create an immunity from the precepts of present Canon 9 whenever an attorney is subsequently retained by a public entity in a non-conflict of interest posture, regardless of the nature of the fee accompanying his employment.

However, the mere fact that a former government attorney subsequently joins a private firm, and thereupon undertakes to represent a public entity in a matter in which he had substantial responsibility while a public servant, may not, of itself, be sufficient to warrant his disqualification under DR 9-101(B). The phrase "private employment" should be interpreted in the light of the evil it is apparently intended to prevent; namely, that government attorneys might concentrate only on *potentially lucrative* cases, with a view toward subsequent private gain.[40] Had Reycraft been paid at the same hourly rate as that received by full-time attorneys in the City's Office of Corporation Counsel, rather than on a contingent fee basis, any inference that his motives while a public employee were compromised would be removed. In effect, he would be receiving no greater remuneration for his participation in *General Motors* as a result of his position in the private sector than he would have received as a full-time employee of the City.

It is submitted that a member of a private firm who receives compensation at the public attorney's level or lower should be permitted to represent the public interest in such situations. An overly broad interpretation of private employment in DR 9-101(B) would preclude an attorney's use of his expertise even though the appearance of impropriety could not fairly be said to arise by way of his compensatory arrangement.

An additional condition precedent to the disqualification of an attorney in a pending case is that both past and pending cases must comprise the same matter under DR 9-101(B). The trial court and the appellate court agreed on the proper test for determining this issue as related to the *1956 Bus* and *General Motors* cases.[41] Yet, in the application of that test, divergent results emerged. The crucial

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[39] The Second Circuit reasoned that:

> There lurks great potential for lucrative returns in following into private practice the course already charted with the aid of governmental resources. And, with such a large contingent fee at stake, we could hardly accept 'pro bono publico' as a proper characterization of Reycraft's work, simply because the keeper of the purse is the City of New York or other governmental entities in the class.

501 F.2d at 650.

[40] Id.

[41] "In determining whether this case involves the same matter as the *1956 Bus* case, the most important consideration is not whether the two actions rely for their foundation upon the same section of the law, but whether the facts necessary to support the two claims are similar." Id. at 651 n.22, quoting City of New York v. General Motors, 60 F.R.D. 393, 402 (S.D.N.Y. 1973).

factor responsible for the discrepancy in result was the weight accorded the time lag between the respective suits, measured by the relevancy to *General Motors* of the information obtained in *1956 Bus*. In holding that the two cases did not constitute the same matter,[42] the district court noted that the applicable statute of limitations[43] extended four years from the date of the accrual of the cause of action. The court reasoned that "it is clear that only recent violations of the law will be sufficient to sustain [the City's] cause of action."[44] It is true that without evidence of attempted monopolization amassed within the period of the statute of limitations, the City's case would fail. Specific intent to exclude competition or build monopoly is essential to a finding of an attempt to monopolize under section 2 of the Sherman Act.[45] Presumably, a violation might have been established if such intent was based solely upon recent evidence. However, a comparison of the complaints issued in *1956 Bus* and *General Motors* leaves the unremitting impression that much of the matter alleged in the *General Motors* complaint was lifted verbatim from the *1956 Bus* complaint.[46] The fact is that Reycraft did appear to make use of the information he obtained in *1956 Bus*. To delve into the relative weight to be accorded the knowledge gained in *1956 Bus* for purposes of establishing a basis for disqualifying the attorney in the instant case would be an overly technical exercise. Public confidence in government attorneys would surely suffer if allegations could be stricken from a complaint to fulfill an ethical obligation *retroactively*. It is submitted that whenever allegations are set forth in a complaint, an estoppel should arise against the argument that they are neither essential, necessary, nor desirable.

As noted previously, there was a ten year interval between Reycraft's departure from the Antitrust Division, resulting in his relinquishment of responsibility in *1956 Bus*, and the filing of the *General Motors* complaint. The passage of time, though necessarily a factor to be accounted for in considering the relevancy of information previously obtained,[47] has not, of itself, been construed as an absolute bar to a finding that the same matter exists. Rather, it must be viewed in the light of variations in the subject matter[48] or other considerations of policy.[49]

[42] 501 F.2d at 651.

[43] 15 U.S.C. § 15b (1970).

[44] 60 F.R.D. at 402.

[45] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953).

[46] 501 F.2d at 652-55 (Appendix).

[47] Id. at 650 n.21.

[48] See Motor Mart, Inc. v. Saab Motors, Inc., 359 F. Supp. 156, 157-58 (S.D.N.Y. 1973) (laspe of 12 years does not permit counsel to continue in the case where the principle of confidentiality is at stake); Control Data Corp. v. International Bus. Mach. Corp., 318 F. Supp. 145, 147 (D. Minn. 1970) (the computer industry had changed so completely in 15 years that disqualification would not be warranted); Gillett v. Gillett, 269 Mich. 364, 368, 257 N.W. 719, 720 (1934) (11 years had passed, the two suits bore no relationship whatsoever to one another).

[49] ABA Comm. on Professional Ethics, Opinions, No. 37 (1931) (representation denied

The Second Circuit, in alluding to the similarities, rather than the differences in the facts involved in the two cases,[50] properly emphasized that, in ethical matters, the public interest requires the eradication of all inferences of impropriety.[51] The legal profession suffers a loss of prestige whenever it appears to the public that attorneys may be skirting their self-promulgated ethical regulations by interposing overly technical distinctions in matters which might reasonably appear to involve the same or similar facts.

If the only issue in *General Motors* was the actual impact of Reycraft's former employment by the federal government upon the outcome of that particular litigation, a different result might have been reached. However, the Second Circuit recognized that the courts' duty relative to questions of an ethical nature extends to promotion of the "public's trust in the integrity of the Bar."[52] Though at times the application of a disqualifying rule will cause harsh results,[53] "[t]he stature of the profession and the courts, and the esteem in which they are held, are dependent upon the complete absence of even a semblance of improper conduct."[54]

It is submitted that, on these facts, the Second Circuit properly held that *General Motors* and *1956 Bus* comprised the same matter under DR 9-101(B). In *General Motors,* the "appearance of impropriety" arose because the evidence indicated that a sufficient nexus of similarities existed between that case and *1956 Bus* to indicate the presence of a repeated factual pattern. Certainly, where a substantial number of allegations are transferred from one complaint to another, the inference is strong that the same matter is involved. Even in situations where the similarities are less apparent, it is unlikely that the test[55] applied by the district court and the court of appeals can be improved. The approach must be essentially *ad hoc,* but, in close cases, a rebuttable presumption should arise that the

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where the attorney had been employed ten years previously as an assistant chief title examiner, and had issued an administrative decision on the same matter for which his subsequent representation was sought).

[50] In referring to a second cause of action brought by the City, the Second Circuit stated:

> The addition of the Clayton Act claim, based solely on the same 1925 Yellow Coach acquisition which was part of the Sherman Act violation alleged by both the United States and the City, hardly alters the nuclear identity of these two suits. Both, after all, allege monopolization or attempted monopolization of the same product line—city buses—and, in the same geographical market—the United States.

501 F.2d at 651.

[51] Id. "Nowhere is Shakespeare's observation that 'there is nothing either good or bad, but thinking makes it so,' more apt than in the realm of ethical considerations." Id., quoting Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973).

[52] 501 F.2d at 649, quoting Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 564-65 (2d Cir. 1973).

[53] See Consolidated Theatres, Inc. v. Warner Bros. Cir. Mgmt. Corp., 216 F.2d 920, 926 (2d Cir. 1954) (attorney disqualified even though his prior representation of motion picture corporations in antitrust actions came close to precluding him from serving as a plaintiff's attorney in the entire field in which he had specialized during most of his professional life).

[54] Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 575 (2d Cir. 1973).

[55] See note 37 supra.

matters involved are the same. Otherwise, the technicalities of proof may offer the opportunity for minute distinctions leading to the denial of a motion to disqualify, despite the continued existence of the appearance of impropriety.

Perhaps the most important aspect of the Second Circuit's interpretation of DR 9-101(B) in *General Motors* is its practical effect upon the future desirability of public service for attorneys. Emphasis on the appearance of evil doctrine rather than on the fact of propriety, evident in the Second Circuit's finding that *General Motors* and *1956 Bus* consist of the same matter under DR 9-101(B), might lead the current or prospective government attorney to fear that ethical infringements shall be imputed to him despite his efforts to avert them.[56] In order to obtain a proper perspective on the effect of the *General Motors* decision, it should be read in conjunction with *United States v. Standard Oil Co.*[57] (*Esso Export*), the leading case involving a former government attorney and the appearance of evil doctrine.

In *Esso Export*, a civil suit to recover refunds from Standard Oil for alleged overcharges in Economic Cooperation Administration (ECA) financed transactions, the United States moved for the disqualification of a law firm, a partner of which had previously been a government attorney for the Paris Office of the Special Representative (OSR) of the ECA during the period of the alleged infraction.[58] Evidence was introduced to show that a specific division of duty existed between ECA/Washington and OSR/Paris, and that the Washington General Counsel's Office had exclusive responsibility for the drafting, promulgation and enforcement of the procurement and price provisions of the ECA regulations. Seizing upon this division of authority, the court stated that "it is hardly reason-

[56] "Unless courts delineate the various policy considerations motivating their decisions, precedents offer little guidance to attorneys seeking to fulfill their ethical obligations." Note, 64 Yale L.J. 917, 928 (1955).

[57] 136 F. Supp. 345 (S.D.N.Y. 1955). Judge Kaufman, who wrote the *Esso Export* opinion, recognized the ethical problems inherent in employment in the public domain when he stated:

> The appearance-of-evil doctrine is based on the desire to maintain a high regard for the legal profession in the public mind. This policy, I believe, will also be better served by not transferring the inferences applied to the private attorney to the government attorney. First, if the Government's efforts to recruit able lawyers are hindered by restrictive interpretations given to the Canons of Professional Ethics, it will reflect adversely on the entire bar and its public-service traditions. Second, when an attorney has acquired a knowledge of government procedure and an understanding of the Government's viewpoint through employment with it, he will be of greater value to future private clients. This should be encouraged rather than discouraged. Third, since most attorneys in certain specialized technical areas of the law gained their initial experience with some government agency, an unrealistic application of the various disqualifying inferences might sterilize so many lawyers in those fields that it would be difficult for a litigant to obtain proper counsel.

Kaufman, The Former Government Attorney And The Canons Of Professional Ethics, 70 Harv. L. Rev. 657, 668 (1957).

[58] 136 F. Supp. at 348.

able to hold that an appearance of evil can be found . . . where there is not some closer factual relationship between his former job and the case at hand other than that the same vast agency is involved."[59]

In effect, the government had failed to prove that its former employee had actually worked with materials "substantially related" to the *Esso Export* controversy, since any reference to the issues raised in that case would have been inconsistent with the division of functions existing within the ECA at that time.[60] Such issues had never been surveyed by the former government attorney, despite the fact that jurisdiction over the enforcement of the regulations was under the aegis of his former employer, the ECA, during the period of his employment.

General Motors leaves the division of authority concept intact. Where a recognizable separation of duties is shown, the fact that one government attorney may have had access to files in a matter in which he took no actual part, or, by the nature of his position, should have taken no part, will not cause his disqualification. In that case, no inference of the appearance of impropriety will be raised.[61] In fact, a case for disqualification under *General Motors* and DR 9-101(B) will actually require a greater showing of personal involvement than did *Esso Export* and former Canon 36.

Under DR 9-101(B), the attorney in *Esso Export* would have had a clearer basis for continued involvement in that matter. DR 9-101(B), unlike former Canon 36,[62] requires that a government attorney must have substantial responsibility in a matter before the appearance of impropriety will arise with respect to any future representation.[63] This language should curtail the possibility of disqualification by inference in government offices at the trial staff level. An attorney in a specific trial section coincidentally working in the same office in which a case arose, but who took no part in the actual handling of the case, will not be disqualified from subsequent employment involving the same matter, because he clearly lacked substantial responsibility under DR 9-101(B). In addition, if any meaning is to be given to the word "substantial," even an attorney who was *actually* involved in a specific case should not necessarily be disqualified. The question then becomes one of degree: how much responsibility must a trial attorney possess before he will be barred from future litigation involving the same matter?

Perhaps it could be stated as a general rule, that an attorney on the trial staff level who signs a complaint should be irrebuttably

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[59] Id. at 364.

[60] Id. at 357.

[61] 501 F.2d at 652.

[62] Compare ABA Code, DR 9-101(B), note 10 supra, with ABA Canons, No. 36, note 24 supra.

[63] Perhaps the addition of this language is the "clarifying amendment" advocated by Judge Kaufman in his article. Kaufman, supra note 57, at 669.

presumed to have substantial responsibility for the matter contained therein. The appearance of impropriety is too strong in this situation to permit a showing that such responsibility did not, in fact, exist. With respect to all other trial attorneys in a particular office, the disqualifying inference should not arise without additional substantiation of the nature of their involvement. An attorney who might merely research a particular legal point, or offer advice on legal issues, would lack a necessary quantum of discretion or authority to have *substantial* responsibility for the case.

It is submitted that Reycraft was properly disqualified in *General Motors*. Analysis of the relevant ethical doctrines, old and new, embodied in case law, ethics texts and bar association opinion letters indicates that a government attorney's use of his public power has always been closely scrutinized.[64] In keeping with that tradition, a finding that Reycraft's subsequent employment was private in nature was required because his participation in *1956 Bus* may have been predominantly motivated by a *personal* desire to profit substantially at a later date from the specific factual information he obtained therein. Moreover, in keeping with the exhortation of present Canon 9 to avoid the appearance of impropriety, and upon comparison between the *1956 Bus* and *General Motors* complaints, it appears that a sufficient number of similar factual allegations exist in the two cases under examination to conclude that, for purposes of DR 9-101(B), Reycraft's participation in *General Motors* afforded him the opportunity to pass upon the same matter that he had investigated in *1956 Bus*. However, it is submitted, as a suggestion for the proper circumscription of the appearance of evil doctrine, that where a former government attorney is subsequently employed by a public entity on a remunerative basis which brings him no greater pay than he would receive if he were solely under the employ of that public entity, such an arrangement should not be construed as private employment under DR 9-101(B). Finally, where the meaning of substantial responsibility under DR 9-101(B) is at issue in the future, a suggested interpretation is that it should encompass only those government attorneys who either sign a complaint or possess sufficient discretion to determine the course of a suit.

A government attorney need not fear that his subsequent private career will be shattered by inferences raised from issues and cases in which he did not participate. *General Motors* does not horizontally impute knowledge across the breadth of a government agency,[65] nor even within a specific office of such agency. Rather, the *General Motors* decision establishes a rule that a former gov-

[64] Twenty years after the enactment of the original canons in 1908, Canon 36 of the ABA Canons was adopted to deal specifically with the ethical problems encountered by government attorneys. United States v. Standard Oil Co., 136 F. Supp. 345, 361 (S.D.N.Y. 1955).

[65] For further discussion regarding the application of the doctrine of imputed knowledge to government attorneys, see 136 F. Supp. at 360-63; Kaufman, supra note 57.

ernment attorney who is delegated substantial responsibility for a particular case may be subject to disqualification in a pending case, if a reasonable number of connecting factors exist between the cases, and the financial attractions in the pending case are sufficiently lucrative, to raise the appearance of impropriety.[66]

ROBERT LLOYD RASKOPF

Environmental Law—Definition of Major Federal Action Under the National Environment Policy Act (NEPA) As Applied to Projects Partially Completed At the Date of NEPA's Enactment —*Minnesota Public Interest Research Group v. Butz.* [1]—For twenty years prior to passage of the National Environmental Policy Act (NEPA)[2] the Department of Agriculture and its subordinate agency, the United States Forest Service, had entered into numerous sales contracts with private lumbering concerns whereby the private companies were permitted to cut an extensive amount of timber[3] in part of a Wilderness Area[4] known as the Boundaries Waters Canoe Area (BWCA).[5] Subsequent to January 1, 1970, the date NEPA became effective, the Forest Service continued to play an active role in eleven of the pre-NEPA timber sales, although it did not award any new contracts for this area. For example, the Forest Service granted extensions of the land area to be cut under certain timbering contracts and engaged in some administration of logging operations, as by mapping out logging roads. The Forest Service did not file a separate environmental impact statement (EIS) with regard to these lumbering activities because it intended to include an analysis of

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[66] The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case.
Motor Mart v. Saab Motors, Inc., 359 F. Supp. 156, 158 (S.D.N.Y. 1973).

[1] 498 F.2d 1314 (8th Cir. 1974) [hereinafter referred to as *MPIRG*].

[2] 42 U.S.C. §§ 4321-47 (1970). The National Environmental Policy Act was signed into law on New Years Day, 1970. Pub. L. 91-190, 83 Stat. 852 (1970).

[3] "In recent years about 45,000 cords of timber on about 3,000 acres of land has been cut in the Portal Zone [area where timbering is permitted] each year." Minnesota Pub. Interest Research Group v. Butz, 358 F. Supp. 584, 594 (D. Minn. 1973).

[4] A Wilderness Area is defined in the Wilderness Act, 16 U.S.C. § 1131(c) (1970), as follows:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to perserve its natural conditions . . . .

[5] The Secretary of Agriculture is authorized to manage the BWCA. 16 U.S.C. § 1133(d)(5) (1970).