Ethical Considerations for the Justice Department When It Switches Sides During Litigation

I. INTRODUCTION

A recent United States Supreme Court case, *Washington v. Seattle School District No. 1,*¹ ("Seattle School District") raises serious ethical concerns regarding the propriety of a government entity changing its position for political reasons during the course of litigation. In this case, the United States repudiated its position as coplaintiff/appellee in the lower courts and aligned itself in the Supreme Court with the appellant State against its former coplaintiffs. During the time involved between the decision of the Ninth Circuit Court of Appeals² and the switch in sides, no new legislation or court decision had effected any change in law. There was, however, a change in presidential administrations, including a new Attorney General and a new Solicitor General.³ Following the realignment, the Supreme Court denied a United States’ motion for expanded time for oral argument, but did allow the Justice Department to file a brief supporting the State.⁴ The appellee school districts requested that the Court disqualify the Justice Department as counsel for the United States, and that the United States be denied party status.⁵ The Court did not respond to these requests.

Because the current ABA Code of Professional Responsibility⁶ ("Code") rarely addresses the government attorney, the con-

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1. 102 S. Ct. 3187 (1982).
2. 633 F.2d 1338 (9th Cir. 1980).
duct of the Justice Department in this situation does not so clearly deviate from the ethical standards of the Code. Yet, the Department’s reversal in position and its decision to litigate against its former coparty violates the spirit of the Code and presents the kind of behavior that undermines public confidence in the justice system. The philosophy underlying the Code allows for no distinctions among attorneys. Automatic withdrawal should be mandatory from cases in which a shift in political power compels the government to switch sides in a lawsuit.

This Comment briefly discusses the history of the case, and then demonstrates the difficulties in applying the present Code to certain ethical questions that can arise when the government changes its allegiance in the midst of litigation. The ethical propriety of the Department of Justice’s actions is examined, and alternatives are proposed for situations in which the United States, represented in court by the Justice Department, switches sides in the same case. 

II. WASHINGTON v. SEATTLE SCHOOL DISTRICT NO. 1

In late 1977, the Seattle School Board voluntarily adopted the “Seattle Plan,” a mandatory busing program designed to reduce racial imbalance in the school system and avert threatened legal action by various groups claiming unlawful segregation in Seattle. Shortly thereafter, a number of Seattle residents formed an organization called the Citizens for Voluntary Integration Committee (“CIVIC”). CIVIC drafted statewide Initiative 350, tailored to eliminate mandatory busing for pur-
poses of racial integration. On November 8, 1978, the initiative passed, supported by sixty-six percent of the vote. Within a month the Seattle School District, joined by the only two other Washington school districts with comprehensive integration programs, filed suit against the State in the United States District Court for the Western District of Washington. The school districts challenged the constitutionality of the initiative under the equal protection clause of the fourteenth amendment and won in both the district court and the Ninth Circuit Court of Appeals.

The United States intervened and obtained standing as a party plaintiff in the district court in accordance with section 902 of the Civil Rights Act of 1964, 42 U.S.C. section 2000h-2.

Service district, or county committee, or the superintendent of public instruction, or the state board of education, or any of their respective employees, agents or delegates shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence within the school district of his or her residence and which offers the course of study pursued by such student, except in the following instances:

1. If a student requires special education, care or guidance, he may be assigned to and transported to the school offering courses and facilities for such special education, care or guidance;

2. If there are health or safety hazards, either natural or man made, or physical barriers or obstacles, either natural or man made, between the student's place of residence and the nearest or next nearest school; or

3. If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities.

11. Wash. Const. art. II, § 1 reserves to the people of the State the power to "propose bills, laws, and to enact or reject the same at the polls, independent of the legislature."

12. 102 S. Ct. at 3191.
15. The statute provides:

Whenever an action has been commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, religion, sex or national origin, the Attorney General for or in the name of the United States may intervene in such action upon timely application if the Attorney General certifies that the case is of general public importance. In such an action the United States shall be entitled to the same relief as if it had instituted the action.


Before obtaining party status, the United States filed an amicus curiae brief in the district court, in which it reiterated the traditional stance of the United States and the Justice Department in enforcing the rights of minorities under the Civil Rights Act:

In summary, the United States has a duty and obligation to insure that public
As counsel for the United States, the Justice Department fully participated in the lower court proceedings. Justice Department attorneys examined and cross-examined witnesses, called witnesses, and briefed and argued the case on the merits. Furthermore, Justice Department attorneys participated in numerous strategy councils with the other plaintiffs, and gained access to the work product of other plaintiff's counsel.  

After the court of appeals’ decision, the State petitioned the Supreme Court for review. Prior to argument in the Court, Washington State Attorney General Ken Eikenberry, representing the State, contacted several members of the new Reagan administration, including United States Attorney General William French Smith. In his correspondence, Eikenberry expressed his belief that the United States should not continue to align its interests with those of the school districts. In a letter to Lyn Nofziger, Assistant to the President for Political Affairs, and Dick Richards, Chairman of the Republican National Committee, Eikenberry urged the administration to

...do whatever possible to make sure that the analysis of this case and the decisions about the position of the United States be made by personnel in the Civil Rights Division of the Justice Department and in the Solicitor General’s office who are sympathetic to the policies and goals of President Reagan rather than the administration of President Carter.

One month after receipt of this letter, the United States

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school students are afforded equal educational opportunities. The voluntary adoption of desegregation plans by local school districts aids the United States in effectuating this enforcement responsibility. As such it is in the interest of the United States to protect the ability of the plaintiff school districts to continue implementation of their desegregation plans.


repudiated its earlier position as coplaintiff to the school district. The Justice Department filed a brief on the merits as an appellee supporting the appellant State, and also asked for expanded time for oral argument. The Justice Department attorney who had worked on the case since its inception was removed from the case and the case file was given to another attorney in the Appellate section of the Civil Rights Division. The school districts filed briefs in opposition to the United States' motion for expanded argument, and also asked the Court to deny the United States party status in the case. The Court denied the motion for oral argument, but simply failed to address the question of party status. Subsequently, the Court upheld the position of the school districts and affirmed the lower court decision.

III. CANONS 4, 5, AND 9

A. Introductory Analysis

Traditionally, conflicts of interest and resulting attorney disqualifications are dealt with under Canons 4, 5, and 9 of the Code. The Canons themselves are statements of "axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the pub-

19. The school districts and other amici argued that the statute was intended to allow the United States to intervene only as a plaintiff in civil rights actions. See supra notes 5 & 16. The United States filed its brief as an "appellee supporting the appellant." Motion, supra note 4. It did not attempt to reintervene as an appellant.

The language of the intervention statute, the stated intent of the provision, and its traditional usage all seem to preclude intervention as a defendant, although that course of action is not specifically denied in the statute. See supra note 15. See also H.R. Rep. No. 914, 88th Cong., 1st Sess. 16 (1963), reprinted in 1964 U.S. Code & Ad. News 2391: [T]he Bill, as amended, is designed primarily to protect and provide more effective means to enforce the civil rights of persons . . . [It] authorizes the Attorney General to initiate suits and to desegregate public facilities . . . and to intervene in suits charging equal protection of the laws. Until this action, the United States had never used the statute to intervene as a defendant in a civil rights suit.


Canon 5: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Id. at Canon 5.

Canon 9: "A Lawyer Should Avoid Even the Appearance of Impropriety." Id. at Canon 9.
lic, with the legal system, and with the legal profession.” 22 Each Canon is further divided into Ethical Considerations (“EC”) and Disciplinary Rules (“DR”). Ethical Considerations are merely considered “aspirational,” while Disciplinary Rules are mandatory and state the “minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.” 23 Although government attorneys are equally guided by and subject to the provisions of the Code, 24 the language appears directed to lawyers involved in more traditional attorney-client roles. Because of this emphasis on customary attorney-client relationships, the provisions of the Code are often difficult to apply in situations involving government attorneys.

DR 4-101(B), 25 which prohibits a lawyer from revealing his client’s secrets, and DR 5-105(A), 26 which mandates that a lawyer decline employment likely to interfere with already existing clients and interests, are the Disciplinary Rules most commonly employed in conflicts of interest cases. Canon 9, which advises against even the appearance of impropriety, is also used in this area.

Canon 4 focuses primarily on cases in which an attorney accepts employment against a former client. The purpose of the Canon is to promote an attorney-client relationship of trust and candor, public confidence in the legal profession, and an efficient system of justice. 27 Ethical deviations thereunder are measured by determining whether the matters embraced by the adverse representation are “substantially related”; if so, then there is an irrebuttable presumption that confidences had been disclosed in

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22. Code, supra note 6, at Preliminary Statement.
23. Id.
24. See supra note 7.
25. The full text of DR 4-101(B) states:
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.
Code, supra note 6, at DR 4-101(B) (footnotes omitted).
26. The full text of DR 5-105(A) states:
A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing different interests, except to the extent permitted under DR 5-105(C).
Id. at DR 5-105(A) (footnotes omitted).
27. Id. at EC 4-1.
the earlier representation.\footnote{28}{The "substantial relationship" test was devised in T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953). Although formulated under the earlier Canons of Professional Ethics, the courts today continue to adhere to the test. See, e.g., Heathcoat v. Santa Fe Int'l Corp., 532 F. Supp. 961, 964 (E.D. Ark. 1982).} The presumed disclosure of confidences coupled with the adverse representation violates DR 4-101(B). Before the "substantial relationship" test is reached, however, an attorney-client relationship must be shown to have existed in the earlier representation.\footnote{29}{Furthermore, the presumption of knowledge extends to all members of the firm of the attorney who previously represented a now adverse client.} Furthermore, the presumption of knowledge extends to all members of the firm of the attorney who previously represented a now adverse client.\footnote{30}{Canon 5 concerns the duty of loyalty owed by an attorney to his client. EC 5-1 states that the professional judgment of an attorney should be exercised solely for the benefit of his client, free of compromising loyalties and influences. Most conflict of interest cases employing the Disciplinary Rules of Canon 5 arise out of a concurrent representation by a lawyer or his firm of two adverse clients.\footnote{31}{When the relationship between an attorney and both clients is a continuing one, the adverse representation is considered prima facie improper.} The premise of this assertion is the oft-quoted biblical maxim that "no man can serve two masters,"\footnote{32}{The broad maxim of the profession's interest, as set forth by Canon 5, may appear self-evident to the non-attorney from his fundamental notions of integrity and ethics. The list of cases cited here reflect that the maxim can be applied to virtually all practice settings. The maxim is of value in that it provides a rule of conduct which allows the practicing attorney a minimum standard against which he may test his own actions and which is a guide to him, to the client, and to the profession. See, e.g., Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 460 (2d Cir. 1975).} formalized in DR 5-105(A).\footnote{33}{Canon 9 reflects the bar's concern that an attorney's actions may be misunderstood by the public, thereby eroding confidence in the integrity of the legal profession.} The broad maxim of the

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\item See Arkansas v. Dean Foods Prods. Co., 380 F.2d 380, 385 (8th Cir. 1979), overruled on other grounds, Firestone Tire & Rubber Co. v. Risjord, 612 F.2d 377 (8th Cir. 1980); Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 608 (8th Cir. 1977), cert. denied, 436 U.S. 905 (1978); Laskey Bros. v. Warner Bros. Pictures, Inc., 224 F.2d 824, 827 (2d Cir. 1955), cert. denied, 350 U.S. 392 (1956). The basis of this rule is that the lawyers within a firm work so closely together, and access to files and work product is so readily available, that the attorney might even inadvertently or subconsciously transmit confidences to other members of his or her firm. Recently, however, there has been some movement away from the notion of an irrebuttable presumption of imputed knowledge. See, e.g., Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975). See also Note, The Second Circuit and Attorney Disqualification—Silver Chrysler Steers in a New Direction, 44 FORDHAM L. REV. 130 (1975) [hereinafter cited as Note, Silver Chrysler].
\item E.g., Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976).
\item Id. at 1387.
\item Matthew 6:24.
\item See supra note 26.
\item Code, supra note 6, at EC 9-2.
\end{enumerate}
Canon—avoiding the appearance of impropriety—is meant to be followed when no other explicit ethical guidance exists; that is, when no other disciplinary rule applies. Some courts have used Canon 9 as the sole basis for attorney disqualification, even when no clear wrongdoing occurred. Other courts require that there be at least a "reasonable possibility that some specifically identifiable impropriety did in fact occur." The manner in which Canon 9 should be applied is a matter of some controversy.

B. Canon 4 Analysis

As mentioned above, both DR 4-101(B) and DR 5-105(A) are defined in terms of the traditional attorney-client relationship. Although at first that requisite relationship appears to exist in Seattle School District, a closer examination reveals that this may not be so. The apparent situation is analogous to a firm (the Justice Department) corepresenting a client (the school districts) in the district court and the court of appeals, and suddenly, at the Supreme Court, withdrawing as counsel for the first client to support the opposing client. Under a typical Canon 4 analysis, because the subject matter is not only "substantially related" but in fact identical, there would be an irrebuttable presumption that confidences were disclosed in the earlier representation. DR 4-101(B), prohibiting an attorney from using a client's confidences to the client's disadvantage, would apply. Furthermore, any confidences presumed to be

36. Id. John F. Sutton, who was reporter for the committee drafting the Code, claims that some interpreters of Canon 9 have misunderstood the purpose of the Canon. There is no rule stating that a lawyer should avoid the appearance of impropriety, rather the Canon merely provides guidance concerning situations not addressed in the other Canons. Sutton stressed that an attorney's duty to avoid the appearance of impropriety was of a much lower order than other duties specified in the Code. AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 398 (1979) (based on interview with John F. Sutton, Jr., by Olavi Maru, Director of Annotation Project, in Houston (Dec. 20, 1976)).

37. See, e.g., Kessenich v. Commodity Futures Trading Comm'n, 684 F.2d 88, 99 (D.C. Cir. 1982); Arkansas v. Dean Food Prods. Co., Inc., 605 F.2d 380, 386 (8th Cir. 1979), overruled on other grounds, Firestone Tire & Rubber Co. v. Risjord, 612 F.2d 377 (8th Cir. 1980); General Motors Corp. v. City of New York, 501 F.2d 639, 641 (2d Cir. 1974).

38. Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976).


40. See supra note 28 and accompanying text.
within the knowledge of the attorney would be imputed to all members of the firm.41 In this case, attorney and firm disqualification would be mandated.

There are some awkward notions in the above analysis, however. It is not so clear that the school districts were the clients of the Justice Department. The Department intervened and acted as coplaintiff and participated in both trial and strategy aspects of the proceedings; the Code, however, does not address the relationship between coparties and their counsel. That the United States helped represent the district’s interests does not necessarily constitute an attorney-client relationship, because the relationship is undefined in the Code. Although the districts did not engage the Justice Department as counsel in a typical agency sense by employing the Department, there still was an appearance of an attorney-client relationship; that appearance should control the definition of “client” under the Code, and trigger the application of DR 4-101(B).

An attorney-client relationship need not always arise in the typical agency situation. The privilege of confidentiality between an attorney and his client hinges upon the client’s belief that he is consulting a lawyer in that capacity.42 Thus, information exchanged between codefendants and their respective attorneys in a criminal case has been held to be confidential; an attorney later using that information against another of the codefendants has breached his fiduciary duty.43 Logically, the same reasoning

41. See supra note 30 and accompanying text.

42. W. McCORMICK & C. TILFORD, McCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE 179 (2d ed. 1972). See also H. DRINKER, LEGAL ETHICS 106 (1953):

The spirit of this rule is to be observed rather than the letter, and where counsel is aware that confidence had been reposed in him by someone not his client, but who has been assisting his client with information, he should not afterwards act against that person in any matter in which such information would be material.

See also Note, Attorney’s Conflict of Interests: Representation of Interests Adverse to that of Former Client, 55 B.U.L. Rev. 61, 66-68 (1975) [hereinafter cited as Note, Conflict of Interests].

43. Wilson P. Abraham Const. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977). An attorney serving as cocounsel for plaintiff in this Louisiana case formerly represented the Whitlow Steel Company. Whitlow had been a codefendant in an antitrust suit involving the present defendants, and a joint defense had been discussed in that case. Furthermore, a civil suit was subsequently brought in Texas against the same defendants while the attorney still represented Whitlow. The plaintiff’s attorney in that case was the other cocounsel for plaintiff in this suit, which defendants alleged was virtually identical to the Texas civil suit. The defendants moved to disqualify the attorney who had earlier represented Whitlow. In remanding the case back to the district court
should apply in a coplaintiff situation; yet, there is authority suggesting otherwise.

In Black v. State of Missouri,\textsuperscript{44} a desegregation case in which the court refused to disqualify a law firm, the district court held that communications between codefendants or coplaintiffs and their attorneys were not confidences or secrets within the contemplation of Canon 4.\textsuperscript{45} Black is easily distinguished, however. In that case, although the original coplaintiffs were realigned, and an original coplaintiff was made a defendant, the party's interests remained the same. Furthermore, the attorney targeted for disqualification—the plaintiff's attorney—had never had any direct contact with the attorney for the other party, nor with the other party itself. Even the targeted attorney's present clients were not the original parties to the suit. The entire relationship between all parties and attorneys was tenuous. In contrast to Black, however, the connection between the districts and the Justice Department in Seattle School District is substantial and immediate. The former coplaintiff (the United States) and its law firm (the Justice


\textsuperscript{44} 492 F. Supp. 848 (W.D. Mo. 1980). In Black, the plaintiffs, a school district and minor school children, brought suit against various state and federal defendants claiming that defendants were responsible for creating segregative conditions within the school district. The federal district court judge determined that it was possible that the segregative conditions might have been caused by the plaintiff school district itself, so he realigned the district as a party defendant. Because the parent next friends of the students were officers of the school district, they were replaced by other persons as next friends. And because the attorney for the school district represented the children as well, the court ordered that the plaintiff children obtain separate legal representation. However, new counsel for the children (who were later also replaced by new children) briefly retained a professor of law to assist him in the suit. At no time was there any "employment" or "associate" relationship between the two attorneys. The professor, however, had also served as an advisor to the school district while it was still a plaintiff. Because of this relationship, the defendants filed a disqualification motion seeking removal of the new plaintiff counsel.

\textsuperscript{45} \textit{Id.} at 870.
Department) took their files and supported the opposing party. There was a sudden and unexpected shift in interest. The parties had worked closely together, and the information in the Justice Department's files had been obtained with the cooperation of the school districts and their attorneys in the expectation that the information would be used for the districts' benefit. Instead, it was used against them.

Black notwithstanding, other indicia of the government's position with respect to the school district favor the existence of the attorney-client relationship in Seattle School District. An ABA Opinion\(^46\) states that a government lawyer assigned to represent a litigant has an attorney-client relationship with the litigant, and that the attorney's status as a government employee does not excuse him from the requirement of preserving the client's confidences. The opinion further provides that the obligation of confidentiality cannot be abrogated by the attorney's superiors.\(^47\) Although the holding is persuasive, the case is not factually similar to Seattle School District. The ABA opinion dealt with a government lawyer directly representing a government employee. The attorney's dilemma there concerned a conflict between his client's confidences and the opposing party's rights under the Freedom of Information Act. It does not address the question of coparty and counsel relationships. Yet, it clearly supports the proposition that when the government chooses to represent a litigant it creates an attorney-client relationship.

In general, discussions regarding who the government attorney actually represents generate several conclusions. Perhaps this is owing to the nature of the Justice Department itself, being both a political and legal arm of the Executive.\(^48\) This dichotomy is reflected in the United States Government Manual, where it is stated:

As the largest law firm in the Nation, the Department of Justice serves as counsel for its citizens. It represents them in enforcing the law in the public interest. . . . It represents the government in legal matters generally, rendering legal advice and opinions, upon request, to the President and to the heads

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47. Id.
of the executive departments. 49

Other opinions identify the government’s client as the government itself; 50 another asserts “the client is but an abstraction.” 51 Given the amorphous role of the government attorney and the Code’s failure to define the term “client,” confusion in this area is understandable. Yet in Seattle School District the appearance or image of the attorney-client relationship is conveyed not only to the “client,” but to the public as well. Although that relationship may not clearly exist, a policy of fairness alone should prevent the government from denying its existence, especially when the relationship was relied upon by the school districts and cultivated by the Justice Department. Based on a Canon 4, DR 4-101(B) analysis, the Department of Justice breached its fiduciary duty of confidentiality when it reversed its position in Seattle School District.

C. Canon 5 Analysis

An examination of Canon 5 and DR 5-105(A) 52 reveals similar language and definitional problems when applied to the Department’s conduct. The question is whether the Justice Department, assuming that it represents the United States’ interest as well, can continue to represent the United States against its former coparty and, arguably, client.

DR 5-105(A) requires that a lawyer decline “proffered employment” if that employment will adversely affect an already existing client’s interests. 53 Again, the rule does not expressly address the government attorney’s role at all. The Justice Department was not really employed by either the school districts, or later, by the State. Yet the image presented to both the client and the public is that of a government advocate repre-

49. United States Government Manual 330 (1982). See also Note, Conflict of Interests, supra note 42, at 73, where the author states that it “is helpful to view the public as the client of a government attorney,” and Clark, Crisis of Justice, in R. Nader & M. Green, Verdicts on Lawyers 226-23 (1977) [hereinafter cited as Clark], where former United States Attorney General Ramsey Clark asserts that the Justice Department “ultimately represents the public not the President.”

50. Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv. L. Rev. 657 (1957). Judge Kaufman is inclined to view the government as being both the client and the law firm of a government attorney. Id. at 665.

51. F. Biddle, In Brief Authority 97 (1962). Francis Biddle is a former Solicitor General of the United States.

52. See supra note 26.

53. Id.
senting both the districts' and the public's interest. Although not necessarily "employment" in the traditional sense,\textsuperscript{54} certainly the Department's representation of both the school districts in the lower courts and of the State in the Supreme Court fell within the meanings of the words and the general intentions of the Disciplinary Rule. Policy considerations should have mandated government withdrawal from the suit, rather than support of the opposing client.

The Second Circuit discussed those policy considerations in \textit{Cinema 5, Ltd. v. Cinerama, Inc.}\textsuperscript{55} There the court felt that at least until the litigation ended, the client could depend on the attorney's absolute loyalty as advocate and champion, and rely on the attorney's "undivided allegiance and faithful, devoted service."\textsuperscript{56} An ABA Formal Opinion,\textsuperscript{57} discussing DR 9-101(B),\textsuperscript{58} compares the policy considerations underlying Canons 5 and 9, and speaks of the "treachery of switching sides."

ABA Formal Opinion 71\textsuperscript{59} considered a "switching sides" question similar to that in \textit{Seattle School District}. Although the opinion was formulated under the old Canons of Professional Ethics, the ethical considerations involved in the cases are alike. A city attorney undertook legal work in connection with a municipal bond issue, including a successful validation suit. The attorney was later asked by the City Commission, after a change in personnel in the Commission, to attack the validity of the bonds. The ABA Ethics Committee determined that it would be unethical for the attorney to switch his position on the validity of the bonds, despite the request by the Commission.\textsuperscript{60} The Committee determined that such action would be unethical if

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\item \textsuperscript{54} Webster's New Twentieth Century Dictionary 595 (2d ed. 1975) defines an employee as "one who is hired by another . . . to work for wages or salary."
\item \textsuperscript{55} 528 F.2d 1384 (2d Cir. 1976). This case involved an attorney who was a partner in two firms, one in Buffalo, New York, and the other in New York City. He found himself in the position of having his Buffalo firm defending an earlier client against a suit brought by a client of his New York City firm. \textit{Id.} at 1385.
\item \textsuperscript{56} \textit{Id.} at 1387 (quoting Von Molcke v. Gillies, 332 U.S. 708, 725 (1948)).
\item \textsuperscript{57} ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975).
\item \textsuperscript{58} 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." Code, supra note 6, at DR 9-101(B).
\item \textsuperscript{59} ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342, at 3.
\item \textsuperscript{60} ABA Comm. on Professional Ethics and Grievances, Formal Op. 71 (1932).
\item \textsuperscript{61} The Committee stated: "Having devoted himself and his professional efforts to the preparation and validation of the bonds, the attorney cannot, with propriety, thereafter attempt to have them declared invalid . . . . [T]he change in personnel does not release him from his professional obligations." \textit{Id.}
\end{itemize}
the attorney represented either the municipality or a private taxpayer in advocating invalidity. Although in this case reversal of position by the attorney might have resulted in financial hardship to third parties uninvolved in the prior litigation, which would not be the case in Seattle School District, the principle involved is the same. The government attorney in both cases, with the approval of the current governmental administration, undertook to represent an issue in the public interest, and was later asked to actively refute that position after a change in administration. The ABA Ethics Committee in 1932 deemed such action unethical.

As demonstrated with Canon 4, analysis of Canon 5 is difficult because of the vagueness of the Code's language. However, the client in Seattle School District was no "abstraction." Whether that client was the public interest or the school district, the Justice Department bound itself to its initial position by its advocacy of that position in the lower courts. The school districts and those members of the public who believed their interests were being served in the litigation were entitled to the Department's "undivided allegiance and faithful, devoted service," at least until the suit had ended.

D. Canon 9 Analysis

Whereas the ambiguity of the Code in Canons 4 and 5 tends to make their application difficult, the vagueness of Canon 9 lends itself to a more flexible interpretation. Courts have increasingly turned to Canon 9 as a source of attorney disqualification. Advising the "avoidance of the appearance of professional impropriety," it can be broadly applied without an actual showing of wrongdoing by the attorney. It has been hailed as

62. See supra note 51 and accompanying text.
63. See supra text accompanying note 56.
64. Canon 9 states: "A Lawyer Should Avoid Even the Appearance of Impropriety." Code, supra note 6, at Canon 9.
66. See cases cited supra note 37. There has been much controversy over whether to apply Canon 9 narrowly on the basis of its few Disciplinary Rules, or broadly and concomitantly with violations of other Disciplinary Rules (generally those under Canons 4 and 5). See Annotated Code of Professional Responsibility 400-11 (1979).
"all-inclusive, perfectionist, and unmerciful";⁶⁷ it has been criticized for these very same reasons.⁶⁸ Opponents of Canon 9 find it a dangerous weapon that tempts the "courts to apply it in an unpredictable and sometimes bizarre manner."⁶⁹

Those who support disqualifications based on Canon 9 argue that public trust must be preserved both in the administration of justice and in the integrity of the bar.⁷⁰ These are significant considerations, even when measured against such countervailing factors as delays and increased expenses of justice, denial of a client's counsel of choice, and possible disqualification of an attorney when there has been no actual wrongdoing. The need for unqualified confidence in the legal system is essential. As stated in EC 9-1, "[c]ontinuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system."⁷¹ This admonition should be borne in mind before cautioning against an "excess of ethical fervor," as has one court.⁷²

Canon 9, lacking in compulsory, disciplinable rules, captures within its broad mandate the essence and spirit of the Code: the duty to uphold the integrity of the legal system. It should be freely utilized to promote that goal.

⁶⁹. Kramer, supra note 68, at 264. Kramer seems to feel that the public's perception of impropriety is not always accurate, and that the attorney's actions might in fact actually be "in the highest tradition of the bar: for example, representing unpopular clients, defending the guilty, and being courteous to opposing counsel during the course of the trial." Id. at 265. The author overstates his case, however. Those "highest traditions of the bar" are not likely to cause most people to view the attorney's actions as involving an impropriety. In conflict of interest situations, though, neither the professional nor the public perspective is so penetrating as to always distinguish the fine line between what is right and what is wrong.
⁷¹. Code, supra note 6, at EC 9-1. See also Erwin M. Jennings Co. v. Di Genova, 107 Conn. 491, 499, 141 A. 866, 868 (1928) where the court said: "Integrity is the very breadth of justice. Confidence in our law, our courts, and in the administration of justice is our supreme interest."
That duty to maintain the integrity of the legal system applies equally to government attorneys.73 Under Canon 9, the shortcomings of the Code as applied to government attorneys are not as apparent as they are under Canons 4 and 5.74 In fact, the salvo of criticism hurled at the Canon focuses largely on the vagueness of its language and its potential for abuse.75 Yet, it is in situations where no clear violation has occurred, but where the taint of abuse stains the proceedings, that Canon 9 is so important.

Traditionally, courts employ Canon 9 in conjunction with either Canon 4 or 5.76 Some courts, however, find the mere appearance of impropriety sufficient to warrant an attorney's disqualification, regardless of whether any actual violation is found.77 The controlling factor in these decisions is not whether any violation occurred, but rather the potential adverse public perception of the transaction, because the public "deals in images and appearances."78 As the Second Circuit observed in Hull v. Celanese Corp.,79 "the preservation of public trust both in the scrupulous administration of justice and in the integrity of the bar is paramount."80 The court, though recognizing other factors, such as a client's right to counsel of choice and the consideration of judicial economy, held that those considerations must ultimately yield to the integrity of the judicial process.81

Nowhere is the appearance of impropriety more sensitive an

73. See supra note 7.
74. In fact, DR 9-101(B), one of only three Disciplinary Rules concomitant with Canon 9, is also one of the few Disciplinary Rules that deals specifically with the government attorney. Code, supra note 6, at DR 9-101(B). It does not apply in the context of this Comment, though. It is concerned, rather, with former government employees involved in private employment related to their previous public employment.
75. See supra notes 68 & 70.
78. Arkansas v. Dean Prods. Co., 605 F.2d 380 (8th Cir. 1979), overruled on other grounds, Firestone Tire & Rubber Co. v. Risjord, 612 F. 2d 377 (8th Cir. 1980).
79. 513 F.2d 568 (2d Cir. 1975).
80. Id. at 572.
81. Id.
area than in the workings of government. "Watergate" is now the watchword for governmental impropriety. Most of the central characters in the Watergate affair were attorneys—and government attorneys.\textsuperscript{83} The "images and appearances" of Watergate are visions of a few government figures infusing politics into the justice system.\textsuperscript{83}

That is precisely the same image that is conveyed to the public when the government switches sides in the middle of a lawsuit, deserting its coparty and zealously advocating in one court exactly the opposite of what it advocated in another.\textsuperscript{84} The image perceived by the public is that of a "hired gun"—the lawyer working at the whim of a political administration, advocate-

\textsuperscript{82} Id. See Note, Removing Politics from the Justice Department: Constitutional Problems with Institutional Reform, 50 N.Y.U. L. Rev. 366 (1975) [hereinafter cited as Note, Justice Department] where the author states:

Except, perhaps, for the Presidency itself, no government institution suffered greater dishonor from Watergate revelations than did the Justice Department. The criminal conduct of incumbent and former Attorneys General, the early mishandling of the Watergate investigation and discriminating testimony before the Watergate committee—such factors produced a widespread perception that politics and Justice had become intolerably intertwined.

Id.

\textsuperscript{83} In 1976 an American Bar Association Committee found that "[t]he close connection between partisan politics and the Office of Attorney General has seriously reduced the effectiveness of the Department of Justice, inflamed fears about the integrity of the administration of justice, and created a substantial credibility gap in the minds of the public. Preventing Improper Influence on Federal Law Enforcement Agencies. A Report of the American Bar Association Special Committee to Study Federal Law Enforcement Agencies 12 (1976). Former U.S. Attorney Whitney North Seymour is quoted in the above report as saying "[t]he divergent roles [of the Attorney General] of political advisor and chief law enforcement officer must be definitely and sharply separated. Until they are, we will always be haunted by the possibility that the awesome powers of the nation's major law enforcement agency will be used for political purposes." Id. at 35-36.

\textsuperscript{84} The Justice Department, in its brief before the Ninth Circuit, asserted that the "initiative is unconstitutional for three reasons: (1) it is overly inclusive because it interferes with the constitutional obligations of school districts; (2) it creates a racial classification without a compelling state interest; and (3) it was adopted with an invidious purpose." Brief for plaintiff-intervenors-appellees at 10-11, Seattle School Dist. No. 1 v. Washington, 633 F.2d 1338 (9th Cir. 1980). Before the Supreme Court, the Department took a different approach. It argued there that "[c]ontrary to the conclusion of the courts below, it [the initiative] does not embody an explicit racial classification . . . . [Ard] although the district court found that Initiative 350 was unconstitutional because it was enacted for a discriminatory purpose and was overbroad, neither of these grounds justifies invalidating the enactment." Brief for the United States at 12-14, Washington v. Seattle School Dist. No. 1, 102 S. Ct. 3187 (1982). A lawyer is certainly entitled to advocate for either side, provided he does not breach any of the Disciplinary Rules of Canons 4 or 5 or assert a position in litigation that is frivolous. See generally Code, supra note 6, at Canon 7. It is the switching of causes in "mid-stream" and deserting the former co-plaintiff that breeds the appearance of impropriety.
ing without conviction whatever is the prevailing sentiment of the prevailing administration.\textsuperscript{85} Whether confidences are in fact betrayed, the appearance of betrayal breeds public distrust of the legal profession and of government ethics in particular.\textsuperscript{86} After Seattle School District, one must wonder whether communications between plaintiffs and government intervenors will be as open as before, especially in civil rights suits under the present administration. Distrust between the two parties will result in an impairment of the efficient administration of justice, exactly the opposite of the ends sought by the Canons.

In Seattle School District, the breach of confidence seems more jarring because it involves civil rights litigation.\textsuperscript{87} From the time of the birth of the legislation in 1964, until the time of the Justice Department’s switch, the stated policy of the statute, and its consistent application, was to enforce civil rights and to aid in school desegregation.\textsuperscript{88} The school districts here had reason to trust and confide in the government attorneys. The government’s decision to change its course was a political and not a judicial decision and should have been made in a legislative or administrative context. It would be naive, of course, to believe that the Attorney General’s position is free of political bias. The Attorney General is a “political officer charged with legal duties.”\textsuperscript{89} But as the nation’s ranking lawyer, he should be most aware of the ethical responsibilities that are concomitant with the job. For the Justice Department to change its stance and switch sides in mid-litigation in light of the attendant circumstances appears suspect and unethical and should not have occurred. The broad ethical command of Canon 9, despite the absence of an appropriate Disciplinary Rule that specifically applies here, should have been observed.

IV. Remedies

There are two possible remedies available in situations simi-

\textsuperscript{85} See, e.g., Borden v. Borden, 277 A.2d 89 (D.C. 1971). Although the agency involved was a legal services group as opposed to the Justice Department, the court refused to distinguish between the private and government attorneys. The court stated: “We should avoid always any action that would give the appearance that government attorneys are ‘legal Hessians’ hired ‘to do a job’ rather than attorneys at law.” Id. at 93.

\textsuperscript{86} See supra note 83.

\textsuperscript{87} See supra note 15 and accompanying text.

\textsuperscript{88} See supra note 19.

\textsuperscript{89} L. Huston, supra note 48, at 51 (emphasis in original).
lar to the *Seattle School District* case. The best alternative is for the government to completely withdraw from a case in these situations. A change in the government's position in a suit, absent a change in law or new facts coming to light, is based on political considerations, not on the desire to pursue justice. Actions of this kind undermine confidence not only in government, but in the ideals of justice. It wrongly intertwines the workings of the legal system with the political system. It is with this in mind that a former United States Attorney General suggested a rule prohibiting the President or any member of the White House staff from interfering in cases or matters in the Department of Justice. Others have long called out for a completely independent Justice Department, insulated from the political control of the executive branch.

The other alternative is attorney disqualification, which is commonly employed by the courts. The court system may disqualify an attorney if it finds the attorney violated the Code. If the Justice Department had been disqualified, the United States would have been free to pursue its new position by appointing a special prosecutor. This would have eliminated much of the appearance of impropriety, and although the former coparty would still have likely felt betrayed, disqualification probably would have minimized feelings of unfairness. The government would have withdrawn its support, but would not have been in a position to impart information to the opponent. This procedure might have meant a delay in litigation while the special prosecutor "reassembled" the case, but the integrity of the judicial process far outweighs that consideration.

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90. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958). Although this idea was expressed in the context of the government's duties as prosecutor, it seems equally applicable in a civil context.

91. See Clark, *supra* note 49, at 226: "The Department of Justice is not part of a political administration. It is place of law, enforcing the laws in accordance with the purpose of Congress. . . . It can only participate in the policy views of a President when action is consistent with law, for it ultimately represents the public, not the President." See also *supra* notes 82-83.


93. For a good representation of those views, See Note, *Justice Department, supra* note 82.


95. 28 U.S.C. § 543(a) (1976) provides that: "The Attorney General may appoint attorneys to assist United States attorneys when the public interest requires."

96. For a case in which a court deemed that the work product of a disqualified attorney was to be made available to substitute counsel, see First Wisconsin Mortgage
V. Conclusion

The public recognizes the power of the government, and must feel secure and protected against the arbitrary misuse of that power. It must have confidence in the workings of the government, the legal system, and the legal profession. The government must recognize the "larger interest at stake, which may warrant conceding a momentary advantage that would ultimately distort or retard the achievement of a greater goal." In Seattle School District, that is precisely what the United States did not do. In selecting its new course, the Justice Department chose to betray coparties with which it had constructed a bond of trust, thereby jeopardizing the public's confidence in the administration of justice. In the future, should the government decide to change its position in the midst of litigation in which it is a party, it should be forced to withdraw from the case.

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Trust v. First Wisconsin Corp., 584 F.2d 201 (7th Cir. 1978). Judge Castle's well-reasoned dissenting opinion states that:

I believe the public would be at least disheartened by the knowledge that although a lawyer who deserts a former client can be disqualified, the attorney can still turn over all of his work to substitute counsel. Popular belief in the strong fiduciary relationship between attorneys and their clients would undoubtedly be shaken when the clients realized that the lawyer whom they once took into their strictest confidence and in whom they placed ultimate trust on the very matters at issue in the case is permitted to prepare the secret materials which are now being used by the opposing party in the suit.

Id. at 220 (Castle, J., dissenting).