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New Perspectives on the Ethics of Switching Sides*

ETHICS OF SWITCHING SIDES - I

*John Powers Crowley***

Lawyers who have been in private practice are well aware of the significance of the problem that we are addressing today—the issues that face people who go from public service to private practice or vice versa. For those of you who have not studied professional responsibility, let me outline the main ethical issues involved in this area.

Canon 9 of the Model Code of Professional Responsibility (“Model Code”) states that a lawyer should avoid even the appearance of impropriety.¹ Interpretation of that somewhat vague phrase will be one of the topics of today’s discussion. Another important issue for consideration is that of confidentiality.² A lawyer is required to keep a client’s confidences and secrets even after the lawyer has ceased representing the client. The issue of conflicts of interest will also be addressed. A lawyer must exercise independent professional judgment in his or her representation of a client.³ This independence might be compromised in certain situations when the lawyer faces a party who was formerly a client.

Before we move deeper into these specific ethical issues, I wish to reinforce the reason that our profession maintains stringent ethical standards. These stringent principles allow the legal profession

* The following is an edited lecture given by Mr. Crowley at the Baker & McKenzie Foundation Inaugural Lecture Series, Inquiry into Contemporary Problems in Legal Ethics, Spring 1984, Loyola University of Chicago School of Law. Edited lectures given by Jill Wine-Banks and William Martin follow Mr. Crowley’s remarks. Some background information has been provided in footnotes by the Editors.

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1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1983) (“MODEL CODE”).

2. See MODEL CODE Canon 4 (stating that “[a] Lawyer Should Preserve the Confidences and Secrets of a Client”); MODEL RULES OF PROFESSIONAL CONDUCT (“MODEL RULES”) Rule 1.6(a)(1983) (providing that “a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation”).

3. MODEL CODE Canon 5.

to occupy a unique position in our social fabric and in our republic. While searching for a statement that would adequately express my views regarding the status of the bar in our constitutional system, I turned to the words of George Anastaplo, Professor of Law here at Loyola University School of Law and a man whom I regard as a constitutional hero. Professor Anastaplo made the following remarks to the Committee on Character and Fitness of the Supreme Court of Illinois:

I speak of a need to remind the bar of its traditions and to keep alive the spirit of dignified but determined advocacy and opposition. This is not only for the good of the bar, of course, but also because of what the bar means to American republican government. The bar when it exercises self-control is in a peculiar position to mediate between popular passions and informed and principled men, thereby upholding republican government. Unless there is this mediation, intelligent and responsible government is unlikely. The bar, furthermore, is in a peculiar position to apply to our daily lives the constitutional principles which nourish for this country its inner life. Unless there is this nourishment, a just and humane people is impossible. The bar is, in short, in a position to train and lead by precept and example the American people.⁴

Professor Anastaplo's remarks are as meaningful today as they were in 1958. As members of the bar, we must set an example for the American people. The best way to do so is by ethical conduct.

Our focus today is on new perspectives on the ethics of switching sides. This notion of switching sides arises in various contexts. One situation is when a lawyer in private practice changes law firms. This inter-firm movement occurs much more frequently today than it did when I began practicing law in the early 1960's. Another scenario is when a lawyer in public service leaves the government to return to private practice. A lawyer may move from the public to the private sector, return to government service, and then go back to private practice. Finally, the issue of switching sides may arise when a judge leaves the bench and enters private practice. Let us explore the problems underlying switching sides.

In recent years we have become more acutely aware of and sensitive to what we call conflicts of interest. This concept was the subject of judicial attention in an 1878 Supreme Court opinion, where Justice Swayne observed that while "[i]t is always dangerous for counsel to undertake to act in regard to the same thing for

4. *In re Anastaplo*, 366 U.S. 82, 110 (1961) (Black, J., dissenting).

parties whose interests" conflict, such a case merely requires care and circumspection on the part of the lawyer.⁵ What would motivate Justice Swayne to advise a lawyer to go ahead and represent parties with diverse interests, as long as he acted with "care and circumspection"?

Quite simply, in 1878 there was a different perception of the bar. The legal profession was held in greater esteem by the American people than it is today. Justice Swayne had a high opinion of the bar and he believed that, under certain circumstances, one lawyer could represent diverse parties. Today, we do not allow a lawyer to represent two clients with adverse interests.⁶ I think that public sentiment would concur with this prohibition.

The underlying concept in the representation of any client is confidentiality.⁷ Whatever is said to you or disclosed to you by a client can never be disclosed to anyone else without that client's authority or permission. Canon 4 of the Model Code very succinctly expresses this obligation to maintain confidentiality.⁸

Colleagues have sometimes accused me of being a person who does not tell my left hand what my right hand is doing. Over the years I have developed the habit of not talking about any of my client's affairs in order to avoid talking about something that was related to me in confidence. And why do lawyers do that? We do it to foster trust in the attorney-client relationship, thereby encouraging people to seek legal advice. Effective representation by counsel, in turn, promotes the goal of full disclosure.

The duty of confidentiality is an ongoing one. Although there are exceptions in certain circumstances,⁹ we must understand that the lawyer's obligation to maintain a client's confidences continues after the termination of his or her employment.¹⁰ This obligation

5. *Baker v. Humphrey*, 101 U.S. 494, 501-02 (1878).

6. See MODEL CODE DR 5-105(A) (lawyer shall decline proffered employment if his or her exercise of independent professional judgment will be, or is likely to be, adversely affected by his or her representation of another client; or if it would be likely to involve him in representing differing interests). However, DR 5-105(C) permits a lawyer to represent multiple clients if it is obvious that the lawyer can adequately represent each client's interest, and if each consents to the representation after full disclosure of the possible consequences of such representation.

7. See *supra* note 2 and accompanying text.

8. See *supra* note 2.

9. For example, a lawyer may reveal his client's confidentially expressed intention to commit a future crime, and the information necessary to prevent the client from committing the crime. MODEL CODE DR 4-101(C)(3).

10. A lawyer should provide for the protection of his client's confidences and secrets following the termination of the lawyer's practice, whether the termination is due to disability, retirement or death. One means of doing so is for the lawyer to provide that the

exists whether or not the lawyer's fee has been paid, for we are after all professionals, not merchants.

Another consideration in the problem of switching sides is the requirement of independent decision-making. Canon 5 of the Model Code provides that "a lawyer should exercise independent professional judgment on behalf of a client."¹¹ The Canon serves to promote the fiduciary relationship that exists between attorney and client. It assures the client that, contrary to Justice Swayne's advice to simply act with care and circumspection when representing diverse interests, the lawyer should not represent diverse interests. A lawyer must act independently so that the only person or entity with which he or she is concerned is that client.¹²

An additional element to consider is Canon 9 of the Model Code, which states that a lawyer should avoid even the appearance of impropriety.¹³ The purpose of this Canon is to promote public confidence in our system of justice, as well as to protect the integrity of our profession.¹⁴

Thus, several basic rules have evolved in order to protect the attorney-client relationship. First, a lawyer cannot simultaneously represent adverse parties.¹⁵ He or she cannot serve two masters.¹⁶ Another established principle is that a lawyer cannot represent an adversary of a previous client if the subject matter of the current representation is "substantially related" to the former representation.¹⁷ Finally, under certain circumstances, a lawyer's knowledge of a former client's confidences will be imputed to members of the

client's personal papers be returned to the client, and that the lawyer's papers be delivered to another lawyer or destroyed. MODEL CODE EC 4-6.

11. MODEL CODE Canon 5.

12. In order to maintain the independence of professional judgment required of members of the bar, a lawyer may not accept or continue employment that will adversely affect his judgment on behalf of a client, or that will dilute his loyalty to a client. MODEL CODE EC 5-14.

13. MODEL CODE Canon 9.

14. The Connecticut Supreme Court has expressed the view that "[i]ntegrity is the very breath of justice. Confidence in our law, our courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of justice a doubt or distrust of its integrity." *Erwin M. Jennings Co. v. DiGenova*, 107 Conn. 491, 499, 141 A. 866, 868 (1928).

15. *See* MODEL CODE EC 5-15 (an attorney should never represent in litigation multiple clients with differing interests). Furthermore, since the lawyers within a firm are usually regarded as a single unit for conflict of interest purposes, different lawyers in the same firm must not represent adverse parties in a civil case. *See* MODEL CODE DR 5-105(A) (lawyer shall decline proffered employment if it would be likely to involve him in representing different interests).

16. *Matthew* 6:24.

17. *See infra* notes 19-23 and accompanying text.

lawyer's new firm, resulting in disqualification of the firm.¹⁸ Any time a lawyer attempts to do so, the danger arises that one client's confidences may be imparted to another. Even if no confidences are actually shared, the rules help lawyers avoid the appearance of impropriety.

Let us imagine the following common scenario. A lawyer is an associate in Firm *A*, and Firm *A* represents the Widget Company. The lawyer leaves Firm *A* to join Firm *B*, which represents the Yo-Yo Company. Yo-Yo wants to sue Widget. Can Firm *B* be prohibited from representing Yo-Yo because one of its lawyers was formerly associated with Firm *A*? The resolution of this question has become very sophisticated. The analysis involves two considerations. First, is the current representation substantially related to the former representation so that it is likely that the lawyer previously has obtained confidential information from Widget which now may be used to Widget's detriment? Second, if the answer to the previous inquiry is yes, should the lawyer's knowledge be imputed to the other members of the new firm, Firm *B*?

The first step is to examine the lawyer's position. In the original representation, confidences and secrets were presumably obtained from Widget which cannot be used against Widget. Indeed, the lawyer must not use or disclose that information for *any* purpose. But does this prohibit the lawyer from ever assuming any representation adverse to Widget? The answer to this question revolves around the likelihood that the lawyer previously received confidential information that could be used against Widget for the benefit of the new client, Yo-Yo.

In *Westinghouse Electric Corp. v. Gulf Oil Corp.*,¹⁹ the Seventh Circuit indicated that substantial relationship "is determined by asking whether it could reasonably be said that during the former representation [that] attorney might have acquired information related to the subject matter of the subsequent representation."²⁰ The court noted that disqualification analysis involves three steps. The trial court must first make a factual reconstruction of the

18. See *infra* notes 24-29 and accompanying text.

19. 588 F.2d 221 (7th Cir. 1978).

20. *Id.* at 225 (quoting *Cannon v. United States Acoustics Corp.*, 398 F. Supp. 209, 223 (N.D. Ill. 1975), *adopted and aff'd*, 532 F.2d 1118 (7th Cir. 1976)).

The substantial relationship test also is applied in the concurrent representation setting. See, e.g., *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1322 (7th Cir.), (court determined that two contrary undertakings by a Chicago-based firm and its Washington, D.C.-based attorneys, each substantially related to the other, outweighed the client's interest in continuing with its chosen attorney), *cert. denied*, 439 U.S. 955 (1978).

scope of the previous legal representation.²¹ Second, the judge must determine "whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters."²² Finally, the court must decide if that information is relevant to the issues raised in the current litigation pending against the former client.²³

Returning to our scenario, let us assume that our hypothetical lawyer may be disqualified from the *Yo-Yo v. Widget* case because of the possession of confidential knowledge. The next inquiry is whether there is automatic disqualification of the other 200 members of the new law firm.²⁴ The Model Code incorporates this concept of imputed disqualification. Disciplinary Rule 5-105(D) provides that "[i]f a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment."²⁵ Although the provision appears clear on its face, courts have formulated different rules in order to mitigate the harsh effect of a literal interpretation. Judicial analysis in this area utilizes two presumptions.

First, there is a presumption that an attorney who worked on a substantially related matter received confidential information.²⁶ This presumption is rebuttable, although a very strict standard of proof must be applied.²⁷ The second presumption is that particular

21. *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir. 1978).

22. *Id.* One consideration would be the status of the lawyer within the firm. For example, it is not very likely that a very junior associate in a large firm would have received confidential information from a client.

23. *Id.* Relevance is to be measured by the violations alleged in the complaint, and assessment of the evidence useful in establishing those allegations. *Id.*

24. For a general discussion of imputed disqualification, see Peterson, *Rebuttable Presumptions and Intra-Firm Screening: The New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel*, 59 NOTRE DAME LAW. 399 (1984); Note, *Attorney Disqualification: The Case for An Irrebuttable Presumption Rebutted*, 44 ALB. L. REV. 645, 650-60 (1980).

25. MODEL CODE DR 5-105(D).

26. If the court finds a substantial relationship between the two matters, then it is unnecessary for the movant to prove that the lawyer in question actually received during his former employment confidential information relevant to matters involved in the subsequent representation. *LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252, 255 (7th Cir. 1983); *Schloetter v. Railoc of Ind., Inc.*, 546 F.2d 706, 710 (7th Cir. 1976).

27. *LaSalle Nat'l Bank v. County of Lake*, 673 F.2d 252, 256 (7th Cir. 1983). However, requiring such a strict standard of proof may result in such a presumption being akin to an irrebuttable one. *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1577 n.19 (Fed. Cir. 1984); *Novo Terapeutisk v. Baxter Travenol Lab.*, 607 F.2d 186, 196-97 (7th Cir. 1979); *cf.* *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 223 n.3 (7th Cir. 1978) (inquiry into whether actual confidences were shared between client and counsel should be avoided whenever a presumption can be utilized); *Emle*

lawyers in a law firm share their clients' confidences.²⁸ This presumption is clearly rebuttable.²⁹ Courts have approved the use of a screening device — a "Chinese wall" — that separates the disqualified attorney from the other lawyers in the firm.³⁰

I would now like to comment briefly on the switch from the public to the private sector. Although the basic concepts are analogous to those principles underlying transfers between private firms, public policy concerns come into play when governmental matters are involved. One concern is that any information obtained from the government will not be used against the government in the future.³¹ Moreover, the rules must discourage a government lawyer's handling a particular assignment in such a way as to encourage prospects of future employment.³² We want to avoid any possibility that a government lawyer's actions as a public official might be influenced, or open to a charge of influence, because of a desire for particular subsequent employment.

These policy considerations have led to federal legislation regulating the practice of former government lawyers.³³ A former government lawyer is permanently prohibited from switching sides in any case in which that lawyer participated personally and substantially while employed by the government.³⁴ Additionally, for two years after leaving government service a lawyer may not be involved in any case in which he served in a supervisory capacity in the year prior to leaving the government.³⁵ Violation of these pro-

Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973) (inquiry into whether lawyer received confidential information during previous employment would prove destructive of Canon 4 of the Model Code).

28. LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 257 (7th Cir. 1983); Novo Therapeutisk v. Baxter Travenol Lab., 607 F.2d 186, 196 (7th Cir. 1979).

29. LaSalle Nat'l Bank, 703 F.2d at 257.

30. See *infra* notes 47-48 and accompanying text for discussion of the Chinese wall concept.

31. See MODEL RULES Rule 1.11 comment[3].

32. One commentator expresses the view that the most significant risks arising from post-government service conduct occur *during* the period of government employment. Although DR 9-101(B) of the Model Code prevents a former government attorney from working on a matter with which he or she had dealt directly while in the government, the rule does not prevent the lawyer from manipulating some matters in order to ingratiate himself or herself with a potential future employer. Note, *The Former Government Attorney and the Code of Professional Responsibility: Insulation or Disqualification?* 26 CATH. U.L. REV. 402, 406 (1977).

33. See 18 U.S.C. § 207 (1982). Section 207 is one of the provisions of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1864 (1978), as amended by Pub. L. No. 96-28, 93 Stat. 76 (1979).

34. 18 U.S.C. § 207(a), (c) (1982).

35. 18 U.S.C. § 207 (b), (c) (1982).

visions may result in incarceration as well as the imposition of a fine.³⁶

From the perspective of the former government attorney, stringent restrictions on subsequent private practice are undesirable. The government is not static; lawyers enter and re-enter government service. If a lawyer knew that there would be a complete prohibition against participating in a particular area of law upon return to private practice, that lawyer would think long and hard about entering government service at the outset.

The experience of the first lecturer in this series, Thomas Sullivan, illustrates the problem faced by one former government attorney. When Mr. Sullivan left the office of the United States Attorney for the Northern District of Illinois, he was of course prohibited from handling any cases in private practice that were pending in the Northern District of Illinois when he was United States Attorney. But he was confronted with another rule as well. Since he had held one of the four "super" United States Attorney positions,³⁷ he was prohibited from representing anyone against the United States in any district court in the country for one year after leaving the Department of Justice.³⁸ Mr. Sullivan brought a lawsuit challenging that provision;³⁹ Chief Judge McGarr struck the law down.⁴⁰ Although the Supreme Court granted certiorari, the issue was mooted because by that time Mr. Sullivan had served his one year of exile outside of government service and was allowed to practice in federal district court.⁴¹

In my view, an overly strict approach to the issue of attorney

36. 18 U.S.C. § 207(c) (1982) (violator shall be fined not more than \$10,000 or imprisoned for not more than two years, or both).

37. The heads of the four largest offices of United States Attorneys—the Northern District of Illinois, the Southern District of New York, the Central District of California and the District of Columbia—are paid under Level IV of the Executive Schedule, 5 U.S.C. § 5315 (1982). The remaining United States Attorneys are paid a lower salary. *Sullivan v. Director, Office of Personnel Management of United States*, No. 81 C 3810 (N.D. Ill. Jan 7, 1982) (available on LEXIS, Genfed Library, Dist. File).

38. Persons in positions designated under 18 U.S.C. § 207(d)(1)(A) (1982) are automatically restricted from practicing in proceedings involving the entire Department of Justice for one year after their departure from the agency. *Sullivan v. Director, Office of Personnel Management of United States*, No. 81 C. 3810 (N.D. Ill. Jan. 7, 1982) (available on LEXIS, Genfed Library, Dist. File).

39. *Sullivan v. Director, Office of Personnel Management of United States* No. 81 C 2810, slip op. (N.D. Ill. Jan 7, 1982) (available on LEXIS, Genfed Library, Dist. File).

40. *Id.* The court held that 18 U.S.C. § 207(d)(1)(A) as made applicable to the four executive level United States Attorneys by 18 U.S.C. § 207(c) violated the equal protection component of the due process clause of the fifth amendment. *Id.* The statute was declared unconstitutional as it applied to those four United States Attorneys. *Id.*

41. *See Devine, Director Office of Personnel Management v. Sullivan* 456 U.S. 986

disqualification may lead to the disqualification motion merely becoming a means by which a litigant hopes to improve the prospects of depriving his opponent of competent counsel. Many disqualification motions are made with the hope that the next lawyer the opponent gets will not be quite as good as the first one. Another reason for limiting the use of such motions is their frequent use for the purpose of delaying a lawsuit.

My final remarks concern the switch from the judiciary to private practice. Judges are also involved in the phenomenon of switching sides. Justice Cardozo may have presaged that when he observed that "the great tides and currents which engulf the rest of men, do not turn aside in their course and pass the judges by."⁴² The concern in this area revolves around the impartiality of the judge. While serving on the bench, a judge may not hear any case in which the judge's impartiality may reasonably be questioned.⁴³ This certainly would include any case in which the judge's former firm or a former client was appearing.⁴⁴ But once a judge leaves the bench, the governing standard is "the appearance of impropriety." The Model Code provides that "a lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity."⁴⁵

Upon my departure from the bench and return to private practice in 1981, I devoted considerable thought to the question of which clients I could represent. Obviously, I know that I would not take any case in which I had acted in a judicial capacity, or any case pending on my calendar. But I also decided that I would refuse to accept any case that was pending in the district court while

(1982). The Court vacated the judgment below, and remanded the case with instructions to dismiss the cause as moot.

42. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

43. 28 U.S.C. § 455(a) (1982). A judge shall also disqualify himself in specified circumstances, such as where he has a personal bias or prejudice concerning a party; where in private practice he served as lawyer in the matter in controversy, or an attorney with whom he previously practiced law served during such association as a lawyer concerning the matter; and where he knows that he, or his spouse or minor child, has a financial interest in the subject matter in controversy or in a party to the proceeding. 28 U.S.C. § 455(b)(1), (2), (4) (1982), *see also* ABA CODE OF JUDICIAL CONDUCT Canon 3C.(1), 3D. (1972) (judge should disqualify himself from sitting in any proceeding in which his impartiality may reasonably be questioned; however, a judge of a relative in the proceeding may still hear the case if he discloses the disqualifying facts on the record and the parties and their lawyers agree in writing that the judge's financial interest is insubstantial or that his relationship is immaterial).

44. *But see* ABA Comm. on Ethics and Professional Responsibility Informal Op. 1306 (1974) (decision regarding whether or not former associates of judge may appear before him rests with the judge).

45. MODEL CODE DR 9-101(A).

I was sitting as a member of that court. This decision was based upon the possibility that I might have discussed the case with my colleagues. I felt that even though I might have no conscious recollection of discussing the particular matter, I might have done so, and that this could raise the appearance of impropriety.

I would like to share a personal experience regarding the notion of the appearance of impropriety. Shortly after I left the court, there was an indictment returned relating to the Teamster pension fund. My firm was retained to appear before Judge Prentice Marshall in that case on behalf of one of the defendants. I did not participate in the pension fund case. I felt that I just was not ready to appear before Judge Marshall. About six or nine months later, I received in the mail a form letter from Judge Marshall, informing me that I had been appointed to represent a plaintiff in a Title VII sex discrimination case. I called Judge Marshall and thanked him for the appointment, telling him that my firm certainly needed the business. And he let me know that this was his invitation to appear in his courtroom. I have since appeared in Judge Marshall's courtroom, and have appeared before several of the other judges with whom I had previously sat. I have never found it to be an impediment, as long as I keep in mind and try to live up to Justice Black's observation that "undivided allegiance and faithful devoted service to a client are the prized traditions of the American lawyer." If we lawyers conduct ourselves in accordance with those traditions, we will successfully resolve most of our ethical problems.

ETHICS OF SWITCHING SIDES - II

*Jill Wine-Banks**

Although it would be much more exciting if I picked apart something that Judge Crowley told you, I cannot do that because I agree with just about everything that he said. But perhaps I can make more real, particularly to students, some of the problems Judge Crowley discussed which lawyers are likely to encounter eventually. These problems may now seem rather esoteric, but they are serious and real problems in the private practice of law.

Because governments change, any rule concerning the revolving

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