DANGERS OF THE "REVOLVING DOOR:" DISQUALIFICATION OF ATTORNEYS BECAUSE OF PRIOR GOVERNMENT PUBLIC SERVICE

I. INTRODUCTION

Real problems exist when attorneys pass through the "revolving door" going in and out of government and private service. Problems occur when private, rather than public interests, motivate attorney's decisions concerning the use of government resources and information collected while in public service.[1] Government resources and information are sometimes used to gain an unfair advantage over a private litigant who does not have access to this information.[2] Depending on whether a jurisdiction adopts the American Bar Association (ABA) Code of Professional Responsibility (Model Code), the ABA Model Rules of Professional Conduct (Model Rules) or is regulated by statute or case law, an attorney may suffer disqualification as well as other punishment for this unethical behavior. This Article deals specifically with the circumstances under which an attorney may be disqualified if he chooses to represent clients in private practice after leaving public practice.

II. MODEL CODE AND MODEL RULES

The analysis of successive government and private representation begins with the Model Code approach. Almost every state has adopted a Code of Professional Responsibility based on the Model Code.[3] Since 1983, more than thirty-five states have adopted the Model Rules, the Model Code's modern counterpart.[4] Although fifteen states retain the Model Code, many of these are considering the adoption of the Model Rules.[5]

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1. Davis v. Southern Bell Telephone & Telegraph Co., 149 F.R.D. 666, 673 (S.D.Fla. 1993).

2. *Id.*

3. STEPHEN GILLERS ET AL., REGULATION OF LAWYERS 349 (1994).

4. *Id.*

5. *Id.* at 34.

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A. *Model Code*

The Model Code has been divided into several different categories. These categories are Canons, Ethical Considerations, and Disciplinary Rules. Canons are "statements of axiomatic norms expressing in general terms the standards of professional conduct expected of lawyers."[6] Ethical Considerations are specific guidelines that are "aspirational in character and represent objectives toward which every member of the profession should strive."[7] Disciplinary Rules are "mandatory in character" and they "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[8] Disciplinary Rule 9-101(B) (hereafter referred to as (DR 9-101(B)), Canon 9, and Canon 4 are among the parts of the Model Code discussed.

1. DR 9-101(B).—ABA Model Code 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."[9] The ABA interprets "substantial responsibility" as "a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question."[10] However, ABA Formal Opinion 342 noted that an attorney could still be disqualified under DR 9-101(B) without a showing of actual or personal involvement, as long as he had such a "heavy responsibility" in the matter in question that it is likely that he had the necessary actual or personal involvement.[11]

In the classic case of *General Motors Corp. v. City of New York*,[12] the Second Circuit disqualified a city attorney from prosecuting a bus

6. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (Preliminary Statement 1983).

7. *Id.*

8. *Id.*

9. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(B) (1983).

10. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975) (quoted in United States v Brothers, 856 F. Supp. 370, 375 (M.D.Tenn. 1992)).

11. Margo L. Frasier, *Comment: Disqualification of Criminal Defense Attorneys Due to Prior Government Service*, 12 FLA. ST. U. L. REV. 95, 98 (1984) (citing ABA Comm. On Ethics and Professional Responsibility, Formal Op. 342, n.29, reprinted in 62 A.B.A.J. 517 (1976)).

12. 501 F.2d 639 (2d Cir. 1974).

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manufacturer in an antitrust action because the attorney was previously employed by the Justice Department and had a substantial responsibility in the investigatory stages of an antitrust case against the same bus manufacturer. The court rejected the city's argument that the attorney had not "switched sides," but was continuing to represent a government entity against the same defendant[13]. The court noted that the goal of the "substantial responsibility" test was to avoid the possibility that a government attorney's actions while in public office might be influenced by the anticipation of being employed privately "to uphold or upset what he had done" while in government practice. Although this is an older case, most jurisdictions, regardless of their interpretation of DR 9-101(B), still strive to achieve this goal.

Different jurisdictions interpret "substantial responsibility" in different ways. In most jurisdictions, criminal cases attract a more broad interpretation resulting in more severe sanctions for violators of DR 9-101(B) than civil cases.[14] Because the outcome of the case is directly related to public interest (the public's interest in a safe environment), the criminal sanctions are more severe. Regardless of whether the case is criminal or civil, some jurisdictions have a very broad interpretation of the "substantial responsibility" test.

New Jersey is one of those jurisdictions that broadly interprets the "substantial responsibility" test. The New Jersey interpretation of DR 9-101(B) imposes greater restrictions on professional conduct than does the American Bar Association.[15] In the advisory opinion of the Supreme Court of New Jersey, the Court interpreted the "substantial responsibility" requirement in DR 9-101(B) to mean "responsibility, whether exercised or not, over the subject matter."[16] For example, the Third Circuit in *United States v. Miller* held that New Jersey's more restrictive interpretation of DR 9-101(B) necessitated the disqualification of a defense attorney because of his previous service as assistant United States Attorney.[17] Although the attorney did not participate in the preparation of the case, the court followed New Jersey law and disqualified him because he gave

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13. STEPHEN GILLERS, REGULATIONS OF LAWYERS: PROBLEMS OF LAW AND ETHICS (4th ed. 1995) (citing *General Motors Corp. v. City of New York*, 501 F.2d 639, 649-650 (2d Cir. 1974)).

14. Davis v. Southern Bell Telephone & Telegraph Co., 149 F.R.D. 666, 679 (S.D. Fla. 1993).

15. United States v. Miller, 624 F.2d 1198, 1202 (3d Cir. 1980).

16. *Id.* at 1202 (citing New Jersey Supreme Court Advisory Op. 390).

17. *Id.* at 1198.

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general advice to other attorneys in the government office.[18] The Third Circuit interpreted the phrase "whether exercised or not" to mean that DR 9-101(B) must be imposed even when the attorney has not directly or actively participated in the case while a prosecutor.[19]

Some courts develop their own test to determine when an attorney's previous involvement in public service has risen to the level of "substantial responsibility." The Second Circuit developed a three-prong test to help them with this determination.[20] Under this test, the Second Circuit could grant a motion to disqualify an attorney if the following requirements were met:

> (1) the moving party is a former client of the adverse counsel;
> (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues of the present law suit;
> (3) the attorney whose disqualification is sought had access to, or was likely to have access to, relevant privileged information in the course of his prior representation.[21]

The Second Circuit has also applied this test to criminal cases.[22] Requiring more than just that the attorney was personally and substantially involved in similar matters while in public office, this test is much narrower than the Model Code's DR 9-101(B) and imposes less restrictive standards on professional conduct.

Some courts have created their own Code of Ethics patterned after the Model Code. For example, Canon 36 of the Code of Ethics of the Florida Bar greatly resembles the Model Code's Canon 36 which in turn is closely tied to DR 9-101(B).[23] The Fifth Circuit held that the "prohi-

18. *Id.*

19. The United States District Attorney for the New Jersey has maintained a policy for several years that restricts a former assistant from handling any case that was pending while the assistant was in public office, regardless of if the assistant did not participate in the case nor have any knowledge or responsibility in connection with the case. United States v. Miller, 624 F.2d 1198, 1203 (3d Cir. 1980).

20. Evans v. Artek Sys. Corp., 715 F.2d 788, 791 (2d Cir. 1983).

21. *Id.*

22. *See* United States v. DiTommaso, 817 F.2d 201, 219 (2d Cir. 1987).

23. Both the Model Code Canon 36 and Florida Bar's Canon 36 contain the sentence: " lawyer, having one held public office or having been in 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." However, Florida Bar Canon 36 also contains another phrase not related specifically to public

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bition of Canon 36 is against acceptance of employment 'in connection with any matter which he has investigated or passed upon while in such (public) office or employ.'"[24] In *United States v. Trafficante*, the Fifth Circuit held that it was not necessary that the moving party show that the attorney actually acquired knowledge during his public employment that could be used to gain an advantage over the moving party.[25] The Eighth Circuit in *Allied Realty of St. Paul v. Exchange National Bank of Chicago* followed the Fifth Circuit's holding when the court disqualified an attorney from representing the plaintiff after the attorney investigated and passed upon matters at issue while employed as a government attorney.[26] *Allied Realty* originated in Minnesota. Minnesota had officially adopted the Model Code, including Canon 36.[27]

2. *Canon 9*.—Many courts consider the ethical standards set in Canon 9 when addressing DR 9-101(B) because these courts consider Canon 9 closely related to DR 9-101(B).[28] Therefore, a former government attorney must not only get over the hurdles of the "substantial responsibility" requirement of DR 9-101(B), but he must also meet the requirement that "A lawyer should avoid even the appearance of professional impropriety" stated in Canon 9.[29] Determining what constitutes an "appearance of professional impropriety" is even more controversial than the "substantial responsibility" requirement.[30]

Some courts have a more broad approach to "appearance of professional impropriety" than they do about "substantial responsibility." The Fifth Circuit in *Woods v. Covington Bank* held that "Canon 9 does not require the disqualification of every attorney who has been privately

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employment.

24. United States v. Trafficante, 328 F.2d 117, 120 (5th Cir. 1964) (quoting Canon 36 of Code of Ethics of the Florida Bar).

25. United States v. Trafficante, 328 F.2d 117, 120 (5th Cir. 1964) (quoting 5 Am. Jur. 297-298, Attorneys at Law sec.) (holding that an attorney must be disqualified from representing defendants because he had handled income tax claims against defendant's while serving in the Office of Regional Counsel of the Internal Revenue Service.)

26. Allied Realty of St. Paul, Inc. v. Exchange National Bank of Chicago, 408 F.2d 1099, 1101 (8th Cir. 1969).

27. *Id.* at 1100.

28. Margo L. Frasier, *Comment: Disqualification of Criminal Defense Attorneys Due to Prior Government Service*, 12 FLA. ST. U. L. REV. 95, 100 (1984).

29. MODEL CODE OF PROFESSIONAL CONDUCT Canon 9 (1983).

30. Frasier, *supra* note 26, at 101.

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retained in a matter for which he had substantial responsibility while associated with the Government."[31] If Canon 9 was construed too narrowly, its application would hinder certain social interests such as a client's right to counsel under the Sixth Amendment, an attorney's choice to freely practice his profession, and the government's need to attract skilled attorneys.[32] Relying on this rationale, the Fifth Circuit held that although the "appearance of professional impropriety" standard does imply that no actual proof of wrongdoing has to be shown, there must be a showing of at least a "reasonable possibility that some specifically identifiable impropriety did in fact occur" and that "the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case."[33]

The District of Columbia Circuit also used the Fifth Circuit's test and rationale when analyzing Canon 9.[34] The D.C. court disqualified a former attorney of the Commodity Future Trade Commission (FTC) from representing a client in a suit against the FTC although there was little indication that the attorney gained any actual advantage from previous government employment.[35] The United States District Court for the Middle District of Tennessee also relied on Fifth Circuit's interpretation of Canon 9 when it held that a former United States Attorney should be disqualified from representing the defendant based on his involvement with the issuance of search warrants on a codefendant while in public office.[36]

New Jersey, on the other hand, has a very different standard than the circuits previously discussed. It uses an objective standard. The New Jersey Supreme Court's interpretation of Canon 9 requires that the court view the conduct from the perspective of an "informed and concerned private citizen."[37] The New Jersey courts then must decide whether the attorney's conduct, if permitted, would damage the reputation of the New

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31. Woods v. Covington County Bank, 537 F.2d 804, 812 (5th Cir. 1976) (finding that a government military attorney's participation in a class action representation did not impugn his conduct while on active duty with the Navy and does not improperly disadvantage appellees).

32. *Id.*

33. Woods v. Covington County Bank, 537 F.2d 804, 812 n.12 (5th Cir. 1976).

34. Kessenich v. Commodity Future Trade Commission, 684 F.2d 88, 97-98 (D.C. Cir. 1982).

35. *Id.* at 90.

36. United States v. Brothers, 856 F. Supp. 370 (M.D. Tenn. 1992).

37. United States v. Miller, 624 F.2d 1198, 1202 (3d Cir. 1980).

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Jersey Bar.[38] The Third Circuit used this interpretation in *United States v. Miller* to disqualify a former United States assistant attorney from representing a defendant in a tax case because the attorney, while in government practice, had general responsibilities over tax cases at the time the Government prosecuted the defendant.[39] This objective test is not shared by most circuits.

3. Canon 4.—Canon 4 is also closely connected with Canon 9 and DR 9-101(B). An attorney's conduct must also get passed the hurdle of Canon 4 to avoid disqualification. Canon 4 states: "A Lawyer Should Preserve the Confidences and Secrets of a Client."[40] The Second Circuit interpreted Canon 4 to mean that disqualification motions should be granted where the attorney in question is in the position to use privileged information obtained during prior representation of the movant.[41] The ABA acknowledged that proving actual involvement or receipt of confidential information can often be burdensome.[42] If proof of actual involvement were required, then the party seeking disqualification may have to choose between divulging the privileged information and disqualifying the attorney.[43] Choosing to divulge the confidences would destroy the purpose of Canon 4.[44] This is a concern among several courts. The Second Circuit uses the following standard to determine if there is potential for confidences and secrets to be revealed: "An attorney is disqualified from representing a party adverse to his former client in the same or in a substantially related matter."[45] The client does not have to demonstrate that actual confidences were revealed to the attorney he wants to disqualify.[46] The court presumes that these confidences were revealed

38. *Id.*

39. *Id.* at 1198.

40. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1983).

41. United States v. Ostrer, 597 F.2d 337, 339-340 (2d Cir. 1979) (holding that former government attorney was disqualified from representing the defendant after he had participated in a criminal investigation that was so related to the defendant's case that the attorney could attack the government's witness).

42. United States v. Trafficante, 328 F.2d 117, 120 (5th Cir. 1964). *See, e.g.*, Note, *Attorney Disqualification and Access to Work Product: Toward a Principled Rule*, 63 CORNELL L. REV. 1054, 1059 (1978).

43. Frasier, *supra*, note 12, at 98 (citing Government of India v. Cook Indus., Inc., 569 F.2d 737, 740 (2d Cir. 1978)).

44. *Id.*

45. United States v. Uzzi, 549 F. Supp. 979, 982 (S.D.N.Y. 1982).

46. *Id.*

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during prior representation.[47]

Other courts have different standards for determining if an attorney should be disqualified for violating Canon 4. For example, the United States District Court for the Middle District of Tennessee held that a court must make the following three inquiries before deciding to disqualify the former government attorney:

> Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation. Second, it must be determined 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. Finally, it must be determined that information is relevant to the issues raised in the [current] litigation.[48]

The court also held that relevance must be obtained by looking at the violations in the indictment and determining what evidence will be useful to prove the violation occurred.[49]

B. *Model Rule 1.11*

Model Rule 1.11 is the Model Rules' counterpart to DR 9-101(B). Model Rule 1.11(a) states that "a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation."[50] Obviously, the biggest difference between DR 9-101(B) and Model Rule 1.11(a) is that a private attorney who participated substantially in a matter while in government practice may still be able to represent a client in the same matter under the Model Rules as long as the government agency consents after consultation.[51] This difference can be examined by returning to the *General Motors* case,[52] Model Rule 1.11 partly rejects the *General Mo-*

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47. *See id.* at 982 (citing NCK Organization, Ltd. v. Bregman, 542 F.2d 128, 132 (2d Cir. 1976)).

48. United States v. Brothers, 856 F. Supp 370, 379 (M.D. Tenn. 1992) (citing Westinghouse Elec. Co. v. Gulf Oil Corp., 588 F.2d 221, 226 (7th Cir. 1978)).

49. *Id.*

50. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1983).

51. *See* State v. Romero, 578 N.E.2d 673 (Ind. 1991) (holding that a former prosecutor was disqualified from defending accused where he had consulted on case while a prosecutor and the current prosecutor would not consent).

52. *Supra* note 12.

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tor's holding because as long as the Justice Department would have consented to the city attorney prosecuting the bus manufacturer (the same bus manufacturer the city attorney prosecuted while in the Justice Department), then the city attorney would not have been disqualified.[53] Rule 1.11(a) is also not limited to situations where the former government attorney remains on the same side in private practice.[54] However, when the former government attorney has switched sides, the government agency is less likely to consent to representation.[55]

Model Rule 1.11(b) imposes limits on when an attorney can pass through the "revolving door" from government practice to public practice even after the government agency consents. Model Rule 1.11(b) prohibits the government agency from consenting when a lawyer has information that the lawyer knows is confidential government information about a person, which could be used in representing a private client whose interests are adverse to that person.[56] However, the attorney must have *actual knowledge* of the information; thus, the attorney will not be disqualified if the government agency consents as long as the information is merely imputed to the attorney (emphasis added).[57]

III. POLICY CONSIDERATIONS

Although the courts should pay close attention to the detailed requirements of the Model Code and Model Rules, it should not "lose sight of the need to balance the broad and sometimes contrasting polices involved in a motion to disqualify."[58] Some courts have even abandoned *per se* disqualification based on Canons 4 and 9 when an actual conflict of interest exists; these courts demand an evaluation of the interests of the defendant, government, the witnesses in the case, and the public.[59]

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53. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (4th ed. 1995).

54. *Id.*

55. *Id.*

56. *Supra* note 51. Model Rule 1.11(b) states in part that "a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person."

57. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 cmt. (1983).

58. United States v. Brothers, 856 F. Supp. at 375.

59. United States v. O'Malley, 786 F.2d 786, 789 (7th Cir. 1985); *See* United

Therefore, courts should balance these conflicting interests when determining to disqualify an attorney based on his involvement in public service. Discouraging attorneys from entering the public sector must be weighed against a government attorney's unfair advantage over the private litigant.[60] Several courts are concerned that an attorney while in public office will use his government position and resources to develop a suit that he could later bring against the government while in private practice.[61] Thus, these courts may choose to disqualify an attorney for violation of DR 9-101(B) "even where an attorney's representation of a private client does not impugn the position he took in a particular matter while in public employment."[62] Some courts are also concerned that an attorney who previously worked for the government may use his governmental power to the "prejudice of one side in a private suit."[63] After examining these reasons to disqualify an attorney, the Fifth Circuit held in *Woods v. Covington County Bank* that a government military attorney's participation in a class action representation "did not impugn his conduct while on active duty with the Navy and does not improperly disadvantage the appellee."[64] In *United States v. Brothers*, the United States District Court for the Middle District of Tennessee addressed the following, similar considerations:

> The treachery of switching sides; the safeguarding of confidential government information from future use against the government; the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service; and the professional benefit derived from avoiding the appearance of evil.[65]

Some courts have even held that these same policy considerations are not only important where the issues involved in the attorney's public and private practice are the same, but also where the privileged information obtained during public practice might be

States v. James, 708 F.2d 40, 44 (2d Cir. 1983).

60. *See* United States v. Brothers, 856 F. Supp. at 375 (M.D. Tenn. 1992).

61. Woods v. Covington County Bank, 537 F.2d 804, 814 (citing General Motors Corp. v. City of New York, 501 F.2d 639, 650 (2d Cir. 1974).

62. *Id.* at 814 n.14.

63. *Id.* at 816.

64. *Id.* at 819.

65. United States v. Brothers, 856 F. Supp. 370, 375 (M.D. Tenn. 1992) (quoting ABA Comm. On Ethics and Professional Responsibility, Formal Op. 342 (1975).

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used to impeach Government witnesses in a closely related case.[66]

On the other hand, some jurisdictions are concerned about the image of government employment. These courts address the negative effect of a strict interpretation of DR 9-101(B) on the attractiveness of government employment. In *Brothers*, the court addressed this negative affect when it stated the following:

> If service with the government will tend to sterilize an attorney in too large an area of law for too long a time, or will prevent him from engaging in practice of the very specialty for which the government sought his service . . . the sacrifices of entering government service will be too great for most men to make.[67]

Relying on these considerations in *Brothers*, the United States District Court for the Eastern District of New York held in *United States v. Escobar-Orejuela* that "it would be unwise to discourage attorneys from seeking Government positions out of fear that any future in private practice would be unduly circumscribed because of the matters they worked on while with the Government."[68] After balancing competing interests, the Court in *Escobar-Orejuela* held that defense counsel's familiarity with the background information of the case due to previous prosecution of the defendant did not require disqualification.[69]

The public's interest is another important concern of the legal profession.[70] The public's trust in the legal system and in the administration of justice is crucial in civil cases, but is of even greater importance in criminal cases.[71] In criminal cases, the public has a direct interest in the outcome of the case because they are the ones who must suffer the consequences of criminals walking the streets.[72] Lawyers have a duty to secure the public's confidence in the legal system and must "avoid even the appearance of an impropriety."[73] Although most jurisdictions recognize the public's interest, this policy argument is not always overwhelming. In *United States v. Miller*, the Third Circuit recognized that public confidence in the government's prosecutors is essential, but this confidence

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66. United States v. Ostrer, 597 F.2d 337, 340 (2d Cir. 1979).

67. United States v. Brothers, 856 F. Supp. 370, 375 (M.D. Tenn. 1992) (quoting Standard Oil Co., 136 F. Supp. 345).

68. United States v. Escobar-Orejuela, 910 F. Supp. 92, 97 (E.D.N.Y. 1995).

69. *Id.* at 92

70. *Supra* note 12, at 107.

71. *Id.*

72. *Id.*

73. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1983).

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will be lost if former prosecutors represent private clients in matters that appear to involve conflicts of interest.[74]

Finally, the courts must address one last policy consideration in criminal cases. In criminal cases, a court must consider the defendant's interest. The Sixth Amendment guarantees a defendant the right to be represented by the counsel of his choice.[75] However, most courts agree that the defendant's right is not absolute and must yield to the courts interest in maintaining an ethical and effective administration.[76]

The Fifth Circuit held that the trial courts have discretion when limiting the defendant's right because it is the courts duty and responsibility to regulate the conduct of attorneys practicing before it.[77] The Second Circuit also recognized that "even the constitutional dimension of a criminal defendant's right to counsel of his choice does not give the defendant the right to take advantage of his preferred attorney's confidential knowledge gained from prior representation of the witness."[78] Therefore, courts must use their discretion to determine if the conduct rises to the unethical level where the public's interest outweighs the defendant's right to choose his counsel.

IV. STATE AND FEDERAL STATUTES

Oklahoma is the only state that has enacted a statute that prohibits all public prosecutors from engaging in the private practice of law.[79] In *Aldridge v. Capps*,[80] the Court upheld the statute that provided that "the county attorney shall not engage in private practice of law" because the court felt that the county attorney's position in the governmental office could unduly influence jurors who may have high respect for his office and thus prevent a fair and impartial trial.[81]

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74. United States v. Miller, 624 F.2d 1198, 1202 (3d Cir. 1980).

75. U.S. CONST. amend. VI.

76. United States v. Kitchin, 592 F.2d 900, 903 (5th Cir. 1979) (citing Gandy v. Alabama, 569 F.2d 1318 (5th Cir, 1978); *See also* United States v. Ostrer, 597 F.2d 337 (2d Cir 1979).

77. *Id.* at 903.

78. United States v. James, 708 F.2d 40, 46 (2d Cir. 1978).

79. B.C. Ricketts, Annotation, *Constitutionality and Construction of Statute Prohibiting a Prosecuting Attorney from Engaging in the Private Practice of Law* 6 A.L.R. 3d 562 (1995).

80. 156 P. 624 (1916).

81. *Id.* at 563.

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One Federal Statute, 18 U.S.C. § 20, addresses successive government and private practice.[82] Because this statute does not punish by disqualification, there has been little case law determining the interpretation of exactly what "participated substantially and personally." However, this level of involvement looks very similar to the "substantial responsibility" requirement of the Model Code's DR 9-101(B).

V. CONCLUSION

Whether an attorney is disqualified after switching sides from public to private practice depends on the extent of the attorney's participation and involvement in a similar matter while in public office. Because many attorneys practice law in several different states, it is important to have a uniform professional conduct system across the states. The idea of all states having the same rules is unrealistic and not in the best interests of the states; however, the states need guidance by similar standards of professional conduct. Although the Model Code and Model Rules are not mandatory, they provide guidelines for states' legislatures to follow. The Model Code's "substantial responsibility" test is an efficient and reasonable guideline for states to use in creating disqualification rules. Because the "substantial responsibility" test does not require actual or personal involvement, but does require involvement to a material degree, it covers a broad range of conduct without disqualifying an attorney just for knowing the former client's name. Model Rule 1.11 expands the scope of this conduct by prohibiting disqualification of an attorney who fails the "substantial responsibility" test if the government agency consents. However, this broad scope is limited if the attorney has acquired confidential infor-

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82. Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for anyone other than the United States in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participate personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed. . . shall be fined not more that $5000, or imprisoned not more than one year, or both.

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mation about a person and is using that information against that person when representing a private client.

Many states have formed their own profession rules. Some states, like New Jersey, have more restrictive guidelines for professional conduct. Thus, an attorney can be disqualified even with minimal involvement in a similar matter while in public practice. Because New Jersey focuses on whether or not an attorney had responsibility in a similar matter while in public office, and not the degree of responsibility nor whether the responsibility was exercised, too many "innocent" attorneys will be disqualified. In choosing his counsel, but it also overlooks the public's and government's interest. On the other hand, some courts' interpret the "substantial responsibility" test very narrowly and require maximum prior participation in order to be disqualified. These states are overlooking the importance of the public's interest in a fair justice system.

The Model Code's Canons 9 and 4 are other hurdles an attorney must jump in order to avoid disqualification. If states fail to adopt the Model Code, they should use Canons 9 and 4 as guidelines in forming their own rules. The Fifth Circuit's interpretation of Canon 9's "appearance of impropriety" test is fair and efficient because it involves a "reasonable possibility" standard and considers the public's interest deciding to disqualify. Canon 4 is an efficient and fair rule also. Canon 4, unlike some other state rule, does not require actual proof of a violation of confidentiality. If actual proof were required, then the attorney/client privilege and purpose of the confidentiality would be destroyed.

Regardless of which test the courts may use to determine whether an attorney should be disqualified, important policy issues must always be considered. The courts must balance the public's interest, the government's interest, and parties' interests when making this decision. Failure to balance these interests will result in rules of conduct that are arbitrary and not fair.

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