TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 79-622
of	:	October 5, 1979
GEORGE DEUKMEJIAN Attorney General	:	
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SUBJECT: CONFLICT OF INTEREST—FORMER DISTRICT ATTORNEY—Real and apparent conflict of interest would arise if a former district attorney were to associate with a law firm which has the public defender's contract for the same county during the period any criminal prosecution initiated while he was district attorney and defended by the firm is still pending.

The Honorable Christopher G. Money, District Attorney, San Luis Obispo County, has requested an opinion on the following question:

Would a real or apparent conflict of interest exist if a recently retired district attorney of the county became associated with the law firm which has the public defender contract with the county? May any such conflict be waived by the government?

CONCLUSION

Both a real and apparent conflict of interest would arise if a former district attorney were to associate with a law firm which has the contract to provide public defender services in the same county during the period any criminal prosecution initiated while he was district attorney and defended by the firm is still pending. Such conflict may not be waived

by written consent of the parties.

ANALYSIS

The recently retired district attorney of the county is considering associating with a *small* law firm which has the contract with the county to provide public defender services. The extent of the proposed association is somewhat nebulous. For example, in a proposed waiver form drawn up by the law firm for consideration by the county, the proposed association was described as "of counsel, to serve as a member of Attorney's law firm with a concentration on estate planning and business litigation." In correspondence directed to this office by the law firm, the representation was that the ex-district attorney's "association with this firm would be of an 'of counsel' status on a part-time basis . . . [and that] [Me would not have any duties whatsoever relating to criminal law . . . [and that the firm's] intention is to affiliate with . . . [the ex-district attorney] so as to obtain his counsel in probate and business matters."[1]

With respect to criminal cases from which a conflict of interest might arise. the requester advises that "there are many active cases still outstanding from . . . [the ex-district attorney's tenure and] [i]n some of these cases the defendants have not been apprehended as of yet, some cases are in various stages of prosecution, and some are in the appellate courts."[2]

The county has recently renewed the contract with the law firm to render public defender services to the county to terminate on June 30, 1982. The firm, as public defender, represents the majority of criminal cases in the county.

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[1] It is not the function of this office to resolve conflicting facts, or conflicting inferences to be drawn therefrom, nor to investigate the facts with respect to opinion requests.

The use of "of counsel" could mean a variety of things such as use thereof by a retired partner to an occasional association for advice in an area of specialization.

We assume herein that an association intended is of a continuing nature and of sufficient magnitude that the ex-district attorney will be identified with the law firm. See also note 11. *infra*, *re* ABA opinion on the meaning of "of counsel."

[2] Approximately two months after this representation was made by the requester, the law firm indicated that "there are virtually no cases pending in the trial courts which originated while . . . [the subject individual] was District Attorney [and] [a]s a practical matter . . . [soon] there will probably be no cases pending which pose a conflict." It is to be nosed, however, that this characterization does not take into consideration defendants indicted bus not apprehended, nor cases on appeal or possible future appeals. Although a county public defender would not normally handle appeals, he could have some input in the matter. Cases could also be reversed on appeal and retried.

The issue presented is whether the proposed association by the ex-district attorney with the law firm in question would give rise to an actual or apparent conflict of interest. The resolution of this question requires a consideration of (1) conflict of interest statutes; (2) State Bat Rules, judicial decisions and opinions thereunder; (3) canons and other ethical rules of the American Bar Association and; (4) any generally applicable case law.

1. Conflict of Interest Statutes

We note initially that although the law provides for the establishment of the office of public defender in counties (Government Code, § 27700 *et seq*.[3]), if a county elects to contract with a private law firm for such services, no office of public defender is thereby established. (*Phillips v. Seely* (1974) 43 Cal. App. 3d 104. 113; 58 Ops. Cal. Atty. Gen. 725; Atty. Gen. unpublished letter opinion 1.1. 76–124.) Accordingly, the ex-district attorney, were he to affiliate with the law firm, could in no way be said to be a public officer or employee, actually or derivatively, in such status. Additionally, no law contains any blanket prohibition as to a public officer or employee, upon leaving government, being employed by an entity which has a contract with the government.[4] These factors are important, since the general conflict of interest laws require that an individual be the incumbent of a public office or employment at the time the alleged "conflict" arises.

Section 1090 prohibits "contractual conflicts" and prohibits an officer or employee from being financially interested in a contract made by him in his official capacity. The only contract under consideration is the one already in existence between the county ("made" by the board of supervisors and the superior court judges) and the law firm for the rendition by the latter of public defender services. The present contract (the renewal of a prior public defender contract) was awarded by the county on April 23, 1979, almost four months after the district attorney left office. Thus, it appears that the contract was in no way "made" by the ex-district attorney in his official capacity, even under the "adviser" cases.[5]

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[3] All section references are to the Government Code unless otherwise indicated.

[4] A minor exception, inapplicable herein, is to be found in section 3627 of the Moscone Governmental Conflict of Interests and Disclosure Act. That act, however, itself is inoperative so long as the conflict of interest provisions of the Political Reform Act of 1974 remain valid and operative. (See § 3800.)

[5] The "adviser cases" make section 1090's proscription applicable not only to the officer who actually executes the contract on behalf of the government, but also to those who advised that officer with respect thereto, or those who were otherwise involved in its negotiation. (See *People v. Sohel* (1974) 40 Cal. App. 3d 1035; *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal. App. 2d 222; *Schaefer v. Berinstein* (1956) 140 Cal. App. 2d 278.) If the district attorney had been instrumental in the renegotiation of the contract for public defender services for

Additionally, section 87100 of the Political Reform Act of 1974 would not appear to be applicable. That section essentially prohibits a public official from making or participating in making any governmental decision in his official capacity if he knows or has reason to know that he has a personal financial interest in the matter sufficient to affect his impartiality. The factors which make section 1090 inapplicable would also render section 87100 inapplicable.

Finally, insofar as *general* conflict of interest statutes are concerned, the only remaining one applicable to local officers would be section 1126. That section prohibits a local officer or employee from engaging in any outside activity for compensation which is inimical, incompatible or in conflict with his official duties or with the functions of his public agency. That section is clearly inapplicable, since it would require the district attorney to be *presently* an incumbent of that office before a prohibited "conflict" could arise.

Moving from general conflict of interest statutes to those of a special nature, we consider two which relate to district attorneys in particular. The first is section 26540. That section states that "fa3 district attorney shall not *during his incumbency* defend or assist in the defense of, or act as counsel for, any person accused of any crime in any county." (Emphasis added.) That section is clearly not applicable to an ex-district attorney. A somewhat similar prohibition, but of a broader scope, is found in section 6131 of the Business and Professions Code, in the State Bar Act. It provides:

> "Every attorney is guilty of a misdemeanor and, in addition to the punishment prescribed therefor, shall be disbarred:
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> "(a) Who directly or indirectly advises in relation to, or aids, or promotes the defense of any action or proceeding in any court the prosecution of which is carried on, aided or promoted by any person as district attorney or other public prosecutor with whom such person is directly or indirectly connected as a partner.
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> "(b) Who, having himself prosecuted or in any manner aided or promoted any action or proceeding in any court as district attorney or other public prosecutor, afterwards, directly or indirectly, advises in relation to or takes any part in the defense thereof, as attorney or otherwise, or who takes

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the county while also employed by the law firm, or while knowing that he was to be employed by them, a violation of 1090 might occur. (See *Stigall v. City of Taft* (1961) 58 Cal. 2d 565; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal. App. 3d 201.) No facts have been presented to us indicating any such involvement by the ex-district attorney.

or receives any valuable consideration from or on behalf of any defendant in any such action upon any understanding or agreement whatever having relation to the defense thereof.

"This section does not prohibit an attorney from defending himself in person, as attorney or counsel, when prosecuted, either civilly or criminally."

Subdivision (b), *supra*, of this section is potentially applicable to the ex-district attorney herein. However, so long as the ex-district attorney is scrupulous in avoiding any involvement with criminal cases which were begun when he was district attorney, and in no way shares in the proceeds of the public defender contract, this section would not be violated. (See also, generally, *Phillips v. Seely, supra*, 43 Cal. App. 3d at pp. 118–119: ex-district attorney may be associated with "contract public defender" where assigned cases arose *after* his incumbency.)

2. State Bar Rules, Judicial Decisions and Opinions Thereunder.

Two rules of the California State Bar are potentially applicable to the inquiry herein. These are Rule 4–101 and Rule 5–102(B) of the rules of professional conduct for California attorneys, adopted in 1974. The substance of these rules was formerly found in Rules 5 and 7 respectively.

Rule 4–101 provides:

"A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client."

Rule 5–102(B) provides:

"A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned."[6]

With respect to an ex-district attorney who associates with a law firm which defends

[6] We note ABA Opinion No. 134 (1935) at this point with respect to its prior parallel canon, Canon 6. In that opinion it was held that a member of the state attorney's office could not defend cases which originated while he was in that office. The opinion stated that "[r]epresentation of conflicting interests is forbidden by *Canon 6*" "[and that] *[i]t is forbidden whether it is concurrent or at different times."* (Emphasis added.)

criminal cases such as at issue herein, three basic questions arise with respect to Rules 4–101 and 5–102(B):

1. If the ex-district attorney in fact has no knowledge of, or information concerning the proceedings which were commenced during his incumbency, is he relieved of any responsibility under these rules?

2. If the ex-district attorney is responsible under these rules for all criminal matters commenced during his incumbency, is such responsibility to be imputed to all members of the law firm with which he proposes to associate?

3. If the answer to both questions above is in the affirmative, would the consent of all parties concerned permit the proposed association with the law firm which acts as public defender in cases commenced during the incumbency of the ex-district attorney?

Several recent California cases have dealt with the basic question whether the disqualification of an attorney will be imputed to his new staff or new associates. In *In re Charles L* (1976) 63 Cal. App. 3d 760, the question was presented as to whether the whole staff of the Los Angeles District Attorney Office, over 400 lawyers, was disqualified to represent a minor in a section 602, Welfare and Institutions Code proceeding where a deputy district attorney who had recently joined the office had previously represented the minor's co-defendant at the arraignment proceedings which gave rise to the section 602 action. The court refused to find that the whole district attorneys office was disqualified, noting a number of factors such as (1) no attorney-client relationship or other confidence had existed between the deputy district attorney and the defendant to bring Rule 4–101 into play; (2) the analogy between a private law firm where knowledge could be imputed, and a district attorney's office of the size of that in Los Angeles County was tenuous, at best, particularly where there was no evidence of the free flow of information among deputies in seven branch offices and seventeen area offices; and (3) to impute knowledge of one deputy to all in the office would give rise to a conflict between the duty to prosecute and the duty to maintain confidences.[7]

On the other side of the coin, is the case of *Younger v. Superior Court* (1978) 77 Cal. App. 3d 892. In that case it was held that the superior court did not abuse its discretion in recusing the District Attorney of Los Angeles County where the former defense attorney had become the Assistant District Attorney, that is, the third ranking member of an office

[7] See also *State v. Miner*, 258 A.2d 815, 818–819 (Vt. 1969), defense attorney joining Attorney General's Office did not disqualify the whole Attorney General's Office; *People v. Loewinger* 323 N.Y.S. 2d 98 (1971), *affd*. 330 NYS. 2d 801 (1972), prior representation of defendant by chief deputy district attorney did not disqualify whole prosecutor's office.

having more than 550 deputies. The case also caused the recusal of the district attorney as to somewhere between 75 and 200 felony cases being handled by the Assistant's former law firm. The court, after reviewing the duties of the Assistant District Attorney, rejected the argument that the Assistant's complete isolation from any of those cases would cure any conflict rind preclude the need for recusal. Two factors were noted: (1) that the Assistant District Attorney helped formulate policy, and hence "he could still quite innocently recommend or otherwise participate in the formulation of prosecutorial policies . . . which could ultimately affect, perhaps substantially, the prosecution of those cases" (*Id*., at 897) and (2) that the Assistant, in evaluating deputies for promotion, could become aware of which deputies were prosecuting his former cases, and such factor could possibly taint the prosecution of the cases by these deputies to be evaluated by him.

Thus, insofar as California case law is concerned, a single working-level prosecutor's disqualification has not been imputed to the whole prosecutorial staff. However, a policy level prosecutor was not permitted to insulate himself from cases handled by other members of the prosecutorial staff, and thus permit the remainder of the office to claim to be free from "conflict."

Also, with respect to a district attorney, it is to be emphasized that his assistants and deputies act for him. He is the principal officer. (§§ 7, 1194, 24100.) As stated in *Sarter v. Siskiyou County* (1919) 42 Cal. App. 530, 536: "In brief, a deputy under a public officer and the officer or person holding the office are, in contemplation of law and in an official sense, one and the same person . . . the deputy acts for and in place of the principal, and his (the deputy's) acts are, therefore, not his, but those of the holder or incumbent of the office." (See also, generally, *People v. Woods* (1970) 7 Cal. App. 3d 382, 387; *People v. Hagan* (1954) 128 Cal. App. 2d 491, 494).

Since an incumbent district attorney necessarily sets prosecutorial policies during his incumbency, and his deputies carry those out *while acting in his stead* as his alter-ego, we cannot reach the conclusion that an ex-district attorney may claim that he has no personal knowledge nor involvement in criminal matters which were initiated during his incumbency. The law essentially presumes that knowledge and involvement. Accordingly, in our opinion, an ex-district attorney may not claim he is immune from Rules 4–101 and 5–102(B), *supra*, on the grounds that he has no personal knowledge of the particular cases.

The second facet of our inquiry is whether under Rules 4–10 1 and 5–102 (B) the ex-district attorney who joins a small law firm which acts as public defender in the county may restrict his practice to purely civil matters and thus permit the other members of the law firm to act as defense counsel in cases commenced during incumbency. Stated otherwise, is the ex-district attorney's conflict to be imputed to all lawyers in the law firm?

At this juncture we note some of the principles set forth in the case law under Rules 4–101 and 5–102 (B) and their predecessors, Rules 5 and 7, and in opinions of this office. The recent case of *Ward v. Superior Court* (1977) 70 Cal. App. 3d 23, summarizes some of the basic concepts, drawing upon prior cases:

> "We turn then to a consideration of the applicability of rule 4–101 in the context of the case before us. As was said by the court in *Kraus v. Davis*, 6 Cal. App. 3d 484, at page 490 [85 Cal. Rptr. 846:1, quoting from *Galbraith v. The State Bar,* 218 Cal. 329 [23 P.2d 2911 '"A reasonable construction of this rule [rule 5 of the Rules of Professional Conduct, now rule 4–101) suggests that the subsequent representation of another against a former client is forbidden not merely when the attorney will be called upon to use confidential information obtained in the course of the former employment, but in every case when, by reason of such subsequent employment, he may be called upon to use such confidential information. In subdivision 5 of section 282 of the Code of Civil Procedure it is declared to be the duty of an attorney 'to maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client.' [Now found in Bus. & Prof. Code, § 6068, subd. (e) 1 (See, also, *Anderson v. Eaton*, 211 Cal. 113 . . .) In *Watchumna Water Co. v. Bailey*, 216 Cal. 564 . . ., it is declared that 'an attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship.'" (218 Cal. at pp. 332–333 . . .)'" (*Id*., at pp. 30–3 1.)

Clearly, under these principles an ex-district attorney could not represent criminal defendants as to cases which were pending during his incumbency (not considering, of course, the possibility of consent by the county, to be discussed *infra*). May members *of the law firm* with whom he is associated do so? Although there is no case law in point, a recent ethics opinion of the California State Bar is helpful. (Formal Opinion No. 1977–46; 54 State Bar J. 60 (1979).) In that opinion it was concluded (1) that a city councilman could not represent an individual who was being prosecuted by the city in a criminal matter; (2) that a city councilman could not represent a client in contract negotiations with his city; and (3) *that a partner or associate of the attorney was subject to the same limitations.* In reaching all three of these conclusions, the Committee on Professional Ethics of the State Bar relied heavily upon American Bar Association (ABA) Canons, Ethical Considerations and Opinions.[8] With respect to the third conclusion, the Committee stated:

[8] We consider this significant in that prior Rule 1 of the California State Bar specifically

"Finally, it is the Committee's view that a partner or office associate stands in the same position as the attorney-councilman insofar as the propriety of representing clients in the situations described above. *ABA DR Code 5–105(D)* states:

> 'If a lawyer is required to decline employment or to withdraw from employment under DR 5–105, no partner or associate of his or his firm may accept or continue such employment.'

See also, *ABA Opinions No. 33* (1931), 49 (1931), 104 (1934); *L.A. Opinion No. 242* (1957)."[9]

Accordingly, we conclude on this authority that it would be a violation of both Rules 4–101 and 5–102 (B) for the associates of an ex-district attorney to represent criminal defendants in matters which were commenced during the latter's incumbency, at least without the informed consent of the county and the criminal defendants. The fact that the public defender contract would antedate the association of the ex-district attorney would also be immaterial. With respect to indigent defendants, the firm's *professional employment* is with the defendants, not the county, although the county pays for the services. (See *Phillips v. Seely, supra*, 43 Cal. App. 2d at pp. 113–117; Atty. Gen. unpublished letter opinion I.L. 76–124.) Each criminal defendant would constitute new and separate "employment."

The third facet of our inquiry under Rules 4–101 and 5–102(B) is whether the county, through the present district attorney, could consent to the law firm's handling of public defender cases which were initiated during the ex-district attorney s incumbency should the latter become associated with the firm. In this regard, we note certain exceptions to Rule 4–101 set forth in *Ward v. Superior Court, supra,* 70 Cal. App. 3d at p. 31, quoted at length above, including "where the client expressly or impliedly consents to the adverse representation.

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referred California Attorneys to ABA Canons for guidance (see also, e.g., Formal Opinion No. 1971–27; 47 State Bar J. 251, 252 (1972)) whereas the current State Bar Rules contains no such specific admonition.

We also will discuss and rely upon ABA matters, *infra*. in concluding that the ex-district attorney will place himself and his associates in an ethical conflict should he affiliate with the firm.

See also, e.g., *People v. Municipal Court (Wolfe)* 69 Cal. App. 3d 714, 720 (1977).

[9] LA. Opinion No. 242 (1957) held that "neither the City Attorney, his assistant nor their respective partners nor office associates can ethically undertake so defend persons in criminal actions, whether the arresting officers are city policemen or not, during the lawyer's tenure as City Attorney or Assistant City Attorney." (Ethics Opinions, L.A. County Bar Assn. (1968), p. 328.)

Numerous California cases as well as opinions of this office have dealt with the question of consent to and disclosure of such "adverse representation" under Rules 4–101 and 5–102(B) and their predecessors in various contexts.[10] However, an additional consideration appears to arise with respect to the authority of a public official to waive a conflict and to proceed despite the conflict.

In the recent California State Bar Formal Opinion No. 1977–46, described at length above, one of the apparent grounds for the Committee's ruling that the city councilman could not represent clients in matters adverse to the city was *that the city had no power to consent to such conflict.* Thus, the Committee stated:

> " . . .Consent to representation of conflicting interests is considered unavailable where the public interest is involved. *ABA Opinion No. 77 (1932); Los Angeles County Bar Assn., Ethics* Opinion, Opinion Code No. 273 (1962); *Drinker, Legal Ethics* (1953), page 120."

Additionally, in the final analysis, were the law firm involved herein to defend cases commenced during the incumbency of the ex-district attorney, this would essentially mean that the ex-district attorney would be attorney on both sides of the same cases, since his disability would be imputed to the law firm. With respect to this eventuality the court stated in *Klemm v. Superior Court, supra*, 75 Cal. App. 3d at page 898, albeit in dicta:

> "though an informed consent be obtained, *no case we have been able to find sanctions dual representation of conflicting interests if that*

[10] As to case law, see, e.g., *Pepper v. Superior Court* (1977) 76 Cal. App. 3d 252, attorney member of country club could represent co-member in action against club; *Klemm v. Superior Court* (1977) 75 Cal. App. 3d 893, attorney could represent both parties to a divorce in subsequent proceedings between the wife and county relating to AFDC reimbursement; *Goldstein v. Lees* (1975) 46 Cal. App. 3d 614, former corporation general counsel could ,soz represent minority shareholders and director in a proxy light under particular facts; *Jacuzzi v. Jacuzzi Bros, Inc.* (1963) 218 Cal. App. 2d 24, former corporate counsel *could* represent minority stockholders in action against corporation under particular facts.

As to opinions of this office, see, e.g., 61 Ops. Cal. Atty. Gen. 18 (1978), "contract" public defender could represent clients against county in *unrelated* matters with consent of county; 60 Ops. Cal. Atty. Gen. 206 (1977), problems regarding Joint Exercise of Powers Agreement with one attorney representing a number of school districts discussed; 59 Ops. Cal. Atty. Gen. 27 (1976), separate division of public defender's office could not be established to handle cases where public defender has conflicts as to particular defendants; Atty. Gen. unpublished letter opinions I.L. 77–164, district attorney could prosecute minor he formerly represented in Welf. and Inst. Code proceedings, and I.L. 75–110, attorney could act as attorney for both city and redevelopment agency, with appropriate consent being required if arms length transactions arose.

> *representation is in conjunction with a trial or hearing where there is an actual, present, existing conflict and the discharge of duty to one client conflicts with the duty to another.* (See *Anderson v. Eaton* (1930) 211 Cal. 113 [293 P. 788); *Hammert v. Mcintyre* (1952) 114 Cal. App. 2d 148, 153–154 [249 P.2d 885]; *McClure v. Donovan* (1947) 82 Cal. App. 2d 664, 666 [186 P.2d 718].) As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. Such representation would be per se inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.
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> "However, if the conflict is merely potential, there being no existing dispute or contest between the parties represented as to any point in litigation, then with full disclosure to and informed consent of both clients there may be dual representation at a hearing or trial . . . ." (Emphasis added.)

(See also, Wise, *Legal Ethics* (2d ed. 1970), pp. 261–273; ABA Opinion No. 134 (1935).)

Accordingly, although no case law or opinions of the State Bar have been found in point, existing case law and State Bar opinions lead us to conclude that an ethical question would arise if the ex-district attorney were to associate with a law firm which will be handling public defender cases which were commenced during his incumbency. Existing State Bar opinions indicate that this conflict may not be waived by the government. This rule has, however, been relaxed to some extent by a recent ABA opinion as to ex-government lawyers, as will be seen in the discussion within. However, for reasons to be discussed *infra*, such relaxation of the rule is not applicable under our facts.

3. American Bar Association Canons, Ethical Consideration, Disciplinary Rules, and Opinions.

As noted already, at one time the State Bar Rules specifically admonished California attorneys to be guided by the Canons of the American Bar Association (ABA). Although no such specific admonishment has been carried forward into the revised State Bar Rules, it is evident that the State Bar's Committee on Professional Ethics still relies heavily upon the ABA rules and opinions.

During the 1960's the original 32 Canons of Professional Ethics of the ABA underwent study and revision, and have evolved into 9 basic canons which are each supplemented by discussions known as Ethical Considerations (EC) and then by

Disciplinary Rules (DR).

As material to our consideration herein Canon 9, with its EC's and DR's, supplemented by Canon 5, with its EC's and DR's, are the most pertinent.

Canon 9 provides:

> "A Lawyer Should Avoid Even The Appearance Of Professional Impropriety."

EC 9–1 provides in part:

> " . . . A lawyer should promote public confidence in our system and in the legal profession."

EC 9–2 provides in part:

> " . . . When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner which provides public confidence in the integrity of the legal system and the legal profession."

EC 9–3 provides:

> "After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."

DR 9–101 provides:

> "Avoiding Even The Appearance of Impropriety.
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> . . . . . .
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> "(B) A lawyer shall not accept private employment in a matter in which he has had substantial responsibility while he was a public employee."

Canon 5 provides:

> "A Lawyer Should Exercise Independent Professional Judgment On Behalf Of A Client."

DR 5–105(D), as amended February 1974, provides:

> "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any lawyer affiliated with him or his firm, may accept or continue such employment."

All the above Canons, Ethical Considerations and Disciplinary Rules are germane to our inquiry herein. However, one need only read DR 9–101 (B) together with DR 5–105 (D) to see that at least under a literal reading of the regulations neither an ex-district attorney, nor his legal partners, legal associates, or affiliates may defend criminal cases which are carried over from his incumbency.[11]

In Formal Opinion 342, November 24, 1975, the American Bar Association Committee On Ethics And Professional Responsibility concluded however, that the foregoing disciplinary rules, that is, DR 5–105 (D) and DR 9–10 1 (B) when read together

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[11] This rule should clearly include the "of counsel" relationship. In Opinion No. 330 (1972) the ABA Committee held:

"The lawyer who is described as being 'of Counsel' to another lawyer or law firm must have a continuing (or semipermanent) relationship with that lawyer or firm, and not a relationship better described as a forwarder-receiver of legal business; see DR 2–102 (A) (4), and cf. DR 2–107 (A). His relationship with that lawyer or firm must not be that of a partner (or fellow member of a professional legal corporation) nor that of an employee; see DR 2–102 (A) (4). His relationship with the lawyer or law firm must be a close, regular, personal relationship like, for example, the relationship of a retired or semiretired former partner, who remains available to the firm for consulting and advice, or a retired public official who regularly and locally is available to the firm for consultation and advice; see Informal Opinion 678.

"While it would be misleading to refer to a lawyer who shares in the profits and losses and general responsibility of a firm as being 'Of Counsel,' the lawyer who is 'Of Counsel' may be compensated either on a basis of division of fees in particular cases or on a basis of consultation fees; see Informal Opinion 710. He is compensated as a *sui gesneris* member of that law office, however, and not as an outside consultant. Generally speaking, the close, personal relationship indicated by the term 'Of Counsel' contemplates either that the lawyer practice in the offices of the lawyer or law firm to which he is 'Of Counsel' or that his relationship, for example, by virtue of past partnership of a retired partner that has led to continuing close association, be so close that he is in regular and frequent, if not daily, contact with the office of the lawyer or firm; see Informal Opinion 1134. The term obviously does not apply to the relationship which is merely that of a forwarder and receiver of legal business.

"In short, the individual lawyer who properly may be shown to be 'Of Counsel' to a lawyer or law firm is a member or component part of that law office, but his status is not that of a partner or an employee (nor that of a controlling member of a professional legal corporation)."

did not necessarily mean that former government attorneys were always to be precluded from employment in law firms handling matters against their former government employer. The Committee explained the purpose and policy considerations behind these rules and concluded that some accommodation had to be made with respect to former government attorneys:

> "The Disciplinary Rules of Canon 5 bring into professional regulation, and with some specificity, the ancient maxim that one cannot serve two masters. The Disciplinary Rules of Canon 5 are concerned largely with the effect of dual representation upon the quality of the professional service rendered to a client. Therefore the rules generally require a lawyer to refuse employment or to withdraw from employment when his exercise of professional judgment on behalf of a client may be affected; see DR 5–105; EC 5–14; and EC 5–15. The rules also forbid a lawyer to switch sides even in situations where the exercise of the lawyer's professional judgment on behalf of a present client will not be affected. To this extent, the Disciplinary Rules of Canon 5 regulate the employment a lawyer may undertake after concluding or terminating past employment, whether the past employment was as a private or as a public lawyer.
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> "DR 9–10 1 (B) appears under the maxim of Canon 9, 'A Lawyer Should Avoid Even the Appearance of Professional Impropriety.' It is obvious, however, that the 'appearance of professional impropriety' is not a standard, test or element embodied in DR 9–101 (B). DR 9–101 (B) is located under Canon 9 because the appearance of professional impropriety' is a policy consideration supporting the existence of the Disciplinary Rule. The appearance of evil is only one of the underlying considerations, however, and is probably not the most important reason for the creation and existence of the rule itself.
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> "The policy considerations underlying DR 9–101 (B) have been thought to be the following: the treachery of switching sides; the safeguarding of confidential governmental 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.
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> "There are, however, weighty policy considerations in support of the view that a special disciplinary rule relating only to former government

> lawyers should not broadly limit the lawyer's employment after he leaves government service. Some of the underlying considerations favoring a construction of the rule in a manner not to restrict unduly the lawyer's future employment are the following: the ability of government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraints upon future practice nor should too great a sacrifice be demanded of the lawyers willing to enter government service; the rule serves no worthwhile public interest if it becomes a mere tool enabling a litigant to improve his prospects by depriving his opponent of competent counsel; and the rule should not be permitted to interfere needlessly with the right of litigants to obtain competent counsel of their own choosing, particularly in specialized areas requiring special, technical training and experience.
>
> "DR 9–101(B) itself, while presumably drafted in light of the above policy considerations, does not embody any of them as a test. The issue of fact to be determined in a disciplinary action is whether the lawyer has accepted 'private employment' in a 'matter' in which he had 'substantial responsibility' while he was a 'public employee.' Interpretation apparently is needed in regard to each of the quoted words or phrases, and each should be interpreted so as to be consistent, insofar as possible, with the underlying policy consideration discussed above."

The Committee in its opinion then interpreted "private employment" to mean employment as a private practitioner, and "matter" "to contemplate a discrete and isolatable transaction or set of transactions between identifiable Parties." These tests would clearly be met with respect to an ex-district attorney affiliated with a law firm which defends cases which began during his incumbency. The Committee then took on the task in its opinion of attempting to determine under what circumstances a former government attorney himself should be disqualified with the disqualification being imputed to all his associates, noting that in certain instances the basic disqualification had been extended in the past to government lawyers who merely "rubber stamped" others' work or to those who "should have passed" upon a particular matter. With these observations, the Committee then continued its "interpretation" of DR 9–101(B) as follows:

> "Apparently the new language of DR 9–101(B), 'substantial responsibility,' was designed to alleviate some of the difficulties discussed above. The new language is, however, not without its own difficulties.
>
> "As used in DR 9–10 1 (B), 'substantial responsibility' envisages a much closer and more direct relationship than that of a mere perfunctory

approval or disapproval of the matter in question. It contemplates 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. *Thus, being the chief official in some vast office or organization does not ipso facto give that government official or employee the 'substantial responsibility' contemplated by the rule in regard to all the minutiae of facts lodged within that office. Yet it is not necessary that the public employee or official shall have personally and in a substantial manner investigated or passed upon the particular matter, for it is sufficient that he had such a heavy responsibility for the matter in question that it is unlikely he did not become personally and substantially involved in the investigative or deliberative processes regarding that matter. With a responsibility so strong and compelling that he probably became involved in the investigative or decisional processes, a lawyer upon leaving the government service should not represent another in regard to that matter.* To do so would be akin to switching sides, might jeopardize confidential government information, and gives the appearance of professional impropriety in that accepting subsequent employment regarding that same matter creates a suspicion that the lawyer conducted his governmental work in a way to facilitate his own future employment in that matter.

"The element of 'substantial responsibility' as so construed should not unduly hinder the government in recruiting lawyers to its ranks nor interfere needlessly with the right of litigants to employ technically skilled and trained former government lawyers to represent them."

And finally, as its ultimate conclusion and test, the Committee concluded:

"Accordingly, it is our opinion that whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interests of the government, the government may waive the disqualification of the firm under DR 5–105(D). In the event of such waiver, and provided the firm also makes its own independent determination as to the absence of particular circumstances creating a significant appearance of impropriety, the result will be that the firm is not in violation of DR 5–105 (D) by accepting continuing the representation in question.

> Although this opinion has dealt explicitly and at length with the interpretation and application of DR 9–101(B), it is not amiss to point out that on the ethical rather than the disciplinary level of professional responsibility, each lawyer should advise a potential client of any circumstances that might cause a question to be raised concerning the propriety of his undertaking the employment *and should also resolve all doubts against the acceptance of questionable employment.* See EC 5–15 and EC 5–16." (Emphasis added.)

Thus it is seen that if he had "substantial responsibility" for a matter or matters, an ex-government attorney should not engage in private practice with a law firm which is to handle such matter or matters. Although being in charge of such matters does not ipso facto trigger the disqualification *in a vast organization*, "heavy responsibility" for the matter or matters will still trigger the disqualification.

In our case we are not involved with the ex-head of a vast organization, but an ex-district attorney in a medium sized county, who had about one dozen prosecutors working for him, and who would have or should have been aware of and have been kept informed personally of all important matters pending in his office. Additionally, under the tests set forth in the ABA Opinion, *both* the government and the law firm must be satisfied that the circumstances are such that there is no significant appearance of impropriety in the employment arrangement.

Assuming there are still cases pending which were commenced during the incumbency of the ex-district attorney, it is our opinion that the current district attorney could not waive the firm's disqualification. In our opinion, (1) the exdistrict attorney would have had "substantial responsibility" for cases commenced during his incumbency and (2) there would still be an "appearance of significant impropriety" (using the Committee's language) so as to prohibit such a waiver. (See also, generally, Drinker, *Legal Ethics* (1953), pp. 106, 130–131; Wise, *Legal Ethics* (2d ed. 1970), pp. 261–273, discussing ABA ethics opinions on prior ABA canons.) Finally, even assuming *arguendo* that some discretion might repose in the present district attorney under the ABA opinion to waive the conflict or apparent conflict, it is our opinion that the California cases to be discussed below in section 4 *in and of themselves* would prevent such a waiver.

4. Additional Generally Applicable Case Law

Recent cases in California have been strict in serving forth the general proposition that criminal proceedings should not only be free from conflict of interests on the part of the attorneys but that even the appearance of impropriety must be avoided in order to assure that defendants receive a fair trial and that the public's confidence in our criminal justice

system is not shattered. (See *People v. Superior Court (Greer)* (1977) 19 Cal. 3d 255; *People v. Rhodes* (1974) 12 Cal. 3d 180; *Younger v. Superior Court, supra,* 77 Cal. App. 3d 892. *People v. Municipal Court (Wolfe) supra*, 69 Cal. App. 3d 714.) As stated in *Younger v. Superior Court*:

> "In any event the district attorney's office would always be 'on the spot' in the public's mind as regards its handling of any of the Cochran cases. The problem is a 'Caesar's wife' problem. Not only must evil itself be avoided but any significant appearance thereof must likewise be avoided. The presence of a former leading criminal defense attorney, near the top of a public prosecutor's office, suggests to those of a paranoid and conspiratorial turn of mind the presence of a fox in the hen house. We do not think that such abnormal suspicion has any reasonable basis in fact whatsoever, but since a public prosecutor must 'perform his functions with the highest degree of integrity and impartiality, and with the appearance thereof' (*People v. Superior Court (Greer), supra,* 19 Cal. 3d at pp. 266–267) for appearance's sake, the basis for this suspicion must be eliminated. (*Id*. at 897.)"

Likewise, the presence of the recently retired district attorney as an associate or affiliate of the law firm handling public defender cases commenced during his incumbency could well give the appearance of the "fox in the hen house," and undermine the public's confidence in the criminal justice system within the county. The public could never be assured that criminal defendants were receiving a fair and impartial trial.

In our opinion, these cases alone lead to the conclusion that the ex-district attorney should not become affiliated with the law firm in question herein so long as they are defending criminal cases commenced while he was district attorney.

CONCLUSION

Although there is no California case law precisely in point, it is the opinion of this office, based upon all the materials, cases and considerations discussed above that were the ex-district attorney of the county to associate as a member of the law firm in question "of counsel," a real and apparent conflict of interest would arise within the firm as to public defender cases which were initiated during the ex-district attorney's incumbency. It is also our opinion that the parties may not waive such conflict or apparent conflict.[12]

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[12] We also note the original dichotomy in the opinions of the Committee on Legal Ethics of the Los Angeles Bar Association where such opinions have made a distinction between partners and employees with respect to the imputation of the conflicts of interest as to matters of ex-government attorneys, and also other attorneys (compare Opinions No. 246, 1of 28/75 and No. 252, 8/5/58, with Opinion No. 269, 1/17/62). Opinion No. 246, which involved an ex-government attorney, however, involved a civil, not criminal, matter. Likewise, the opinion permitting "conflicting employment" did not mention the then existing rule of the ABA's opinions against waiver of the conflict by the government. Additionally, L.A. Opinion No. 363 (1976) disapproved Opinion No. 252 insofar as inconsistent therewith. Such disapproval would appear to apply to (1) the distinction made between an associate and a partner, making both similarly liable for conflicts in representation and (2) the holding that a private attorney could change sides by changing employment so long as he completely insulated himself from the matter with his second employer. L.A. Opinion No. 363 (1976), however, left open and did not purport to rule upon the problems of the former government attorney, although it referred to ABA Opinion No. 342 (1945), *supra*, in this respect.