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Appearance of Impropriety as the Sole Ground for Disqualification

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APPEARANCE OF IMPROPRIETY AS THE SOLE GROUND FOR DISQUALIFICATION

The Fifth Circuit has devolved a two-pronged test to determine whether Canon 9 of the Code of Professional Responibility has been violated. After examining the case in which the test appears, the author concludes that it may become an effective means of halting attempts to disqualify opposing counsel through strategic manipulation of ethical rules.

While on active duty for training, Commander Roger Nichols, a reserve officer with the Navy's Judge Advocate General (JAG) Corps, entered into an investigation in an effort to aid former prisoners of war (POWs) who had lost considerable sums of money in a securities fraud scheme.[1] Following his release from duty and return to private practice, Nichols agreed to a request by one of the ex-POWs and his wife to continue representing their interests in a private class action, on a contingency fee basis. Nichols thereafter filed two suits[2] against the aiders and abettors of the securities fraud.[3] The United States District Court for the Middle District of

1. *See* 32 C.F.R. § 727 (1976) which describes the naval legal assistance program. Among other functions, a legal assistance officer may serve as advocate for eligible personnel in connection with their personal legal problems (§727.6) and may refer the problem to a civilian lawyer (§727.9). For further discussion see note 34 *infra*.

2. Two suits were filed as class actions, as two different series of bonds had been purchased by each group of plaintiffs. The named plaintiff in the suit which is the subject of this casenote was Dean Woods. The named plaintiff in the other suit was Edward Haglund.

3. In order to facilitate a better understanding of the issues presented a more complete statement of the facts is set out below.

In November 1974, a federal district court in Florida enjoined a group of broker-dealers from further perpetration of fraud in the sale of securities to former POWs and civilian investors. *See* SEC v. R. J. Allen & Assocs., Inc., 386 F. Supp. 866 (S.D. Fla. 1974). Several ex-POWs who hoped to recover their investments turned to the Navy's Office of the Judge Advocate General for assistance. The officer who headed the ensuing investigation consulted Nichols because of his expertise in the area of securities fraud. Nichols, then completing his annual two-week tour of duty as a reserve officer in the Judge General Corps., recommended no action be taken at the time. On December 3, 1974, after Nichols had returned to private practice, he was contacted by his superior, Captain Fink, to conduct a further investigation of the matter discussed in November. The following day, Nichols was requested by Commander and Mrs. Woods to represent them and others in a private suit to recover their lost investments. Nichols told them to await the outcome of his investigation before going further.

On December 16, 1974, Nichols returned to active duty and conducted a five-day investigation. He reported to Captain Fink daily and discussed all conclusions with him. When he had completed the investigation on December 20, Nichols was released from active duty and returned to private practice. The Woods contacted Nichols on January 11, 1975, reiterating their request that he serve as private counsel. Nichols agreed. The contingent fee arrangement

Alabama, upon motion by opposing counsel, disqualified Nichols' continued representation as a violation of Canon 9 of the Code of Professional Responsibility,[4] on the grounds that he had accepted private employment for a fee after having had substantial reponsibility in the same subject matter while on active duty for training as a public employee.[5] On interlocutory appeal,[6] the United States Court of Appeals for the Fifth Circuit *held*, reversed: A naval reserve officer on active duty for training who performed an investigation which subsequently became the basis for a private class action should not be disqualified from representation in the private suit on the basis of Canon 9 because there was neither (1) a specifically identifiable appearance of improper conduct nor (2) a likelihood that public suspicion outweighed the social interests served by the attorney's continued involvement in the case. *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976).[7]

Canon 9 requires that a lawyer avoid even the appearance of professional impropriety. This responsibility has received considerable attention in recent years in response to motions for disqualifi-

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was personally approved by the Judge Advocate General of the Navy. Shortly thereafter, the two private class actions were filed.

4. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9 (1975) states that "a lawyer should avoid even the appearance of professional impropriety."

The Code has been used as a guide in the federal courts to decide issues raised by motions to disqualify. *See* Note, *Disqualification of Counsel for the Appearance of Professional Impropriety*, 25 CATH. U.L. REV. 343 (1976). The district courts' power to decide such issues is derived from their supervisory authority over the attorneys who appear before them. *See, e.g.*, Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975) (courts have not only the supervisory power, but also the duty to disqualify counsel for unethical conduct).

5. Nichols' law firm also was disqualified from continued representation. 537 F.2d at 807.

6. 28 U.S.C. § 1291 (1966). An interlocutory appeal based on a disqualification order has been held proper because it involves "a collateral matter severable from the underlying suit, and too important to be denied review at this time." *In re* Yarn Processing Patent Validity Litigation, 530 F.2d 83, 85 (5th Cir. 1976).

7. The standard of review used by some appellate courts in reviewing a lower court's ruling on a disqualification motion has been whether the trial judge abused his discretion. *E.g.*, Lefrakh v. Arabian Am. Oil Co., 527 F.2d 1136 (2d Cir. 1975).

In *Woods*, the court found no distinction between the case before it and any other case where only a question of law was at issue. Consequently, it applied a broader standard of review than "abuse of discretion." It carefully examined the lower court's decision "to determine whether . . . [the] . . . disqualification order was predicated upon a proper understanding of applicable ethical principles." 537 F.2d at 810. Other Fifth Circuit cases which have used this standard of review are: American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971) (disqualification order reversed because it was found to controvert controlling ethical principles), and Uniweld Products, Inc. v. Union Carbide Corp., 385 F.2d 992 (5th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968), (lower court's refusal to disqualify upheld because its findings of fact were not clearly erroneous).

cation. In most cases, the decisions address conduct specifically covered in the Code by another ethical standard[8] in addition to Cannon 9.[9] In *Woods,* the court was faced with an attorney's conduct covered only by the sweeping caution of Canon 9. To resolve the issue of whether the attorney should be disqualified on the facts presented, the court carefully examined Canon 9 in its historic and modern perspective.

Initially, it is significant to recognize that Canon 9 was not explicitly delineated anywhere in the Canons of Professional Ethics, predecessor to the modern Code of Professional Responsibility. However, the "appearance of evil" doctrine is not new. It was implicit in the earlier Code,[10] as illustrated by the following excerpt from the Preamble: "[Justice] cannot be . . . maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men."

The "appearance of evil" doctrine, representing the legal profession's desire for public approval, is also found in pre-Canon 9 case law. In *United States v. Trafficante,*[11] a suit to enforce federal tax liens, defendant's attorney had been employed in the office of the Internal Revenue Service and had handled tax claims against the defendants in the years for which the government was asserting tax deficiencies. The claims were settled and stipulated decisions were entered in the Tax Court during the attorney's employment. Contrary to informal advice from an Assistant Attorney General in the Justice Department, the attorney agreed to represent the defendants in the suit to foreclose the liens.

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8. The most common sections involved in disqualification controversies are Canons 4 and 5, and DR 9-101(B). *See* note 10 *infra.* Canon 4 states that "a lawyer should preserve the confidences and secrets of a client." Canon 5 states that "a lawyer should exercise independent professional judgment on behalf of a client." DR 9-101(B) requires that "a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

9. *See, e.g.,* NCK Org., Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976) (Canon 4); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976) (Canon 5); International Elecs. Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975) (Canons 4 and 5); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975) (Canon 4); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974) (DR 9-101(B)); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973) (Canon 4). *But see* Handelman v. Weiss, 368 F. Supp. 258 (S.D.N.Y. 1973) (only considerations applicable were those underlying Canon 9).

10. The "appearance of evil" doctrine was also implied in the predecessors to Canons 29 (duty to uphold the profession's honor) and 32 (duty to be loyal to the law and to the public trust).

11. 328 F.2d 117 (5th Cir. 1964).

In reversing the district court's denial of a disqualification order, the court stated: "[An attorney's] conduct should not be weighed with hair-splitting nicety. We have found no exceptions to the exhortation to 'abstain from all appearance of evil.'"[12] The court then cleared the record of any intimation of intentional wrong or any suggestion of turpitude by the attorney.

The embodiment of the "appearance of evil" doctrine in the form of Canon 9 did not change the nature or purpose of the concept. Actual wrongdoing is not a factor when evaluating the conduct of the attorney. Rather, the intention of the Code is primarily to maintain the public's trust in the legal profession.[13] To accomplish this goal, the Code specifies certain conduct that would create an appearance of impropriety.[14] However, Canon 9 is not limited to these specifics, it is "all inclusive."[15]

The broad brush of Canon 9 has recently been applied to cases involving alleged disclosure of client confidences. Warning against this, Canon 4 of the Code states that "a lawyer should preserve the confidences and secrets of a client." In *Emle Industries, Inc. v. Patentex, Inc.*,[16] an attorney who had previously represented the parent corporation was suing a subsidiary of that corporation in a matter involving issues identical to those of the first suit. The motion for disqualification asserted that the attorney might consciously or unconsciously disclose confidential information acquired while representing the parent. In affirming the disqualification order, the court held that it need not determine whether the lawyer *actually* received information which could be used to the former client's disadvantage.[17] The considerations underlying Canon 9 required disqualification to avoid "even a semblance of improper conduct."[18] It appears that the attorney was disqualified in the absence

12. *Id.* at 120.

13. *See* General Motors Corp. v. City of New York, 501 F.2d 639, 649 (2d Cir. 1974).

14. *See* DR 9-101(A) (private employment after serving in a judicial capacity upon the same matter); DR 9-101(B) (private employment after being a public employee having substantial responsibility in same matter); DR 9-101(C) (stating or implying ability to improperly influence any tribunal, legislature, or public official).

15. R. WISE, LEGAL ETHICS 125 (2d ed. 1970). *See also* J. P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1359, (2d Cir. 1975) (Gurfein, J., concurring), where it was observed that the Code of Professional Responsibility should not be treated as a statute that the court has no right to amend.

16. 478 F.2d 562 (2d Cir. 1973).

17. *Id.* at 571.

18. *Id.* at 575.

of an apparent breach of Canon 4 because of the added caution of Canon 9.[19]

Comparable to the cases involving conduct by an attorney which is directly covered by an ethical standard in the Code,[20] are those cases in which disqualification is based soley on the considerations which underlie specific standards. This was the situation in *Handelman v. Weiss.*[21] The plaintiffs, purchasers of securities, alleged deceptive or negligent practices in violation of the antifraud provisions of the federal securities laws. Plaintiffs' attorney previously had been counsel to a trustee who was liquidating the corporation involved in the alleged securities fraud. The court said that Canon 4 was not applicable because the defendants had not been clients of the attorney. DR 9-101(B) was not directly involved because the attorney had not been employed by the government. However, the court found that the attorney was in many respects "representative of governmental interests,"[22] and accordingly disqualified him because of many of the same considerations which prompted the adoption of DR 9-101(B).

Woods shows an attenuation of Handelman's principle of basing a disqualification on considerations underlying a specific ethical standard. In *Woods,* the court found that the attorney's conduct was covered neither by a specific ethical standard nor by considerations underlying any specific standard.[23] Yet the case was on appeal from an order disqualifying the attorney.

The basis of defendants'[24] motion for disqualification in the lower court was DR 9-101(B), which prohibits a lawyer from accepting private employement in a matter in which he had substantial

19. *See,* 25 CATH. U. L. REV., *supra* note 4, at 356.

20. *See, e.g.,* cases cited in note 9 *supra.*

21. 368 F. Supp. 258 (S.D.N.Y. 1973).

22. *Id.* at 263. The attorney was acting in his capacity as counsel for the Securities Investor Protection Corporation (SIPC), a non-profit organization authorized by Congress to protect the public investor. SIPC is not a federal agency but its Board of Directors is appointed by the federal government, including five directors appointed by the President with the Senate's advice and consent.

23. Appellants had characterized opposing counsel's brief as echoing throughout "with the hollow allegation of an appearance of impropriety." Reply Brief for Appellant at 45.

24. The defendants in this case were not the broker-dealers who originally were tried by the SEC. These earlier actions had resulted in the recovery of only a small percentage of the total amount lost. Brief for Appellant at 3. To enable the plaintiffs to recover more of their lost investments, suit was filed against aiders and abettors in the fraudulent scheme. Covington County Bank, the named defendant, was the trustee bank, disbursing portions of the bond proceeds and delivering the bonds upon payment.

responsibility prior to his leaving government employment.[25] The order of the lower court stated that "it is not essential to the Court's findings that Nichols was, in fact, a public employee while acting as a Naval legal assistance officer."[26] The appellate court disagreed with this reasoning and found that Nichols was not a "public employee" within the meaning of DR 9-101(B). It relied upon a federal statute which declares that "inactive reservists and those on active duty for training are not federal employees."[27]

The court did not halt its consideration of the ethical issues at this point.[28] Upon observing that the federal statute did not exempt reservists from the caution of Canon 9, the court developed a comprehensive two-part test designed to determine when an attorney should be disqualified for an appearance of impropriety. First, the congressional policy underlying the statute requires that disqualification orders under Canon 9 "be based on a specifically identifiable appearance of improper conduct."[29] After this threshold issue is resolved, and before the attorney can be disqualified, "a court must also find 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."[30]

The court applied this two-part test to the facts before it. First, it concluded that there was no reasonable possibility that Nichols had violated the public trust while on active duty[31] or that he had

25. *See also* EC 9-3.

26. Brief for Appellant at 5, quoting from the district court's opinion.

27. 537 F.2d at 810-11, *quoting* 5 U.S.C. § 2105(d) (1970).

28. The Amicus Curiae brief filed by the Judge Advocates Associaton had expressed the hope that the court would address itself to the broader aspects of the case, rather than simply handing down a "reversed on other grounds" decision. Brief for Judge Advocates Association as Amicus Curiae at 3 n.1.

29. 537 F.2d at 812. After the court developed this standard it evaluated the situation assuming the absence of the federal statute. The court considered the role of Canon 9 in general and warned that an attorney's conduct should not be judged by cynical members of the public. In realizing the possibilities for abuse of Canon 9's "appearance of evil" doctrine, the court concluded that the "specifically identifiable" test should be applied whenever Canon 9 is asserted as a basis for disqualification.

30. *Id.* at 813 n.12.

31. The possibility of violating the public's trust usually manifests itself in those situations where a government attorney is in a position to follow into private practice what he began with government resources. For example, in General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974), the City of New York had sued a bus manufacturer, alleging unlawful monopoly. The City's attorney had formerly been employed by the Justice Department. In this position, he had had substantial responsibility in the investigation of an earlier antitrust action against the defendant. After finding that the issues involved in the two cases

used imporper imformation acquired while on active duty to the disadvantage of the defendants. The court also rejected the district court's contention that the defendants would be economically[33] and strategically disadvantaged by the knowledge Nichols had obtained while a reservist and brought into the private litigation. It found the district court's reasoning overlooked the fact that the very essence of a public legal aid program is that the recipient is *entitled* to the services rendered on his behalf.[34]

Because the court found no reasonably identifiable possibility of improper conduct by Nichols, the second part of the test technically did not have to be applied. However, application of the test to the *Woods* facts illustrates how Cannon 9's broad caveat can be abused and "ultimately be self-defeating."[35] The social interests contemplated by the court were "the client's right to counsel of his choice, the lawyer's right freely to practice his profession, and the government's need to attract skilled lawyers."[36]

In this case, the clients were, among others, ex-POWs defrauded of their back pay, who sought legal assistance from the naval reserve organized for this purpose. They were entitled to choose counsel most familiar with the case[37] and best qualified, in

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were sufficiently similar, the court held that the appearance of impropriety must be avoided by disqualification. For further discussion of this general subject see Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957).

32. In *Woods*, Nichols obtained no more information than he could have obtained working in a purely private capacity. In fact, during the investigation he specifically stated to the present defendants that the purpose of his investigation was to determine if there were any basis for recovery by the ex-POWs against aiders and abettors in the fraudulent scheme. 537 F.2d at 817.

33. The district court was also concerned with the problem of "double remuneration," i.e., that Nichols would, in essence, be paid twice. The appellate court pointed out that the fees in the class action would be set by the district court which could make an adjustment for the prior investigation. *Id.* at 817-18.

34. *See* 32 C.F.R. § 727 (1975). The Navy's legal assistance program was instituted to maintain morale and efficiency by making resources available to eligible military personnel in need of legal advice. Among other provisions, the officers who perform the legal assistance duties are to be guided by the Code of Professional Responsibility (§727.3), are to exercise independent professional judgement on behalf of their clients (§727.6), and are to preserve the confidences and privileged character of the services rendered, even in the face of contrary disclosure orders by superiors (§727.8).

35. 537 F.2d at 813.

36. *Id.* at 812.

37. Familiarity with the case was crucial since the statute of limitations was to have run out on some of the claims twelve days after Nichols agreed to private representation. The court took note of appellant's contention that it would have been virtually impossible for another lawyer to have taken the case. *Id.* at 809 n.5.

their judgment, to successfully handle the suit. Attorney Nichols had the right to practice his profession as long as he did not conduct himself in a manner which would violate the public trust. Lastly, it was deemed vital to the continued operation of the navy's legal assistance program that reserve officers not be prohibited from taking cases which went beyond the limited function of the assistance program and on to in-court representation.[38]

The facts and circumstances presented in *Woods* are unique and will rarely present themselves again. The value of the case does not lie in its fact pattern, but in the two-part test developed by the court to evaluate an alleged appearance of impropriety. The test appears to be sufficiently broad so as not to defeat the purpose of the ABA in promulgating Canon 9, yet it provides a degree of guidance that is necessary to prevent Canon 9 from becoming "a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules."[39]

The new test mandates a finding of a specifically identifiable appearance of impropriety and a balancing of public suspicion against social interests. Its success in preventing abuse of legal process will only be determined in its application. The degree of objectivity injected into the reading of Canon 9 by the "specifically identifiable" standard should operate to suppress purely strategic motions for disqualification founded on no real ethical concern, because the movant will know what he must prove to carry the motion.

More importantly, time consuming and expensive appeals arising from tactical diversions should become less frequent. Both judges and attorneys now have a definitive standard by which to determine appearance of impropriety. The Fifth Circuit has made it clear that it stands ready to challenge the lower courts for abuse of discretion in applying the test it has pronounced.

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38. *Id.* at 819. *See also* Brief for Judge Advocates Association as Amicus Curiae at 2, where it was asserted: "[I]t is the conviction of this association that the lower court's opinion, if permitted to stand, will constitute a serious obstacle to uniformed lawyers in performing their function of providing legal assistance services to eligible personnel."

39. International Elecs. Corp. v. Flanzer, 527 F.2d 1288, 1295 (2d Cir. 1975). In the course of seeking grounds to justify disqualification in this case, the court refused to use Canon 9 as a basis because the appearance of impropriety was not serious.