Disqualifying Counsel in Corporate Representation-Eroding Standards in Changing Times

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Disqualifying Counsel in Corporate Representation—Eroding Standards in Changing Times

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The author describes common situations in which a conflict of interest may provide grounds for disqualification of an attorney or a law firm from participating in litigation or other adversary proceedings. The article then traces the movement of some federal courts away from traditional rules and principles of disqualification for conflict of interest. Discussing some of the pressures to change the rules, such as the need of large corporate law firms to conduct business nationwide, the author finally expresses doubt that the organized bar can create clear and demanding ethical rules for itself.

I. INTRODUCTION

Conflicts of interest in corporate law practice have received more than usual attention of late,¹ due in part no doubt to the heightened public consciousness of moral issues in the post-Watergate era. Increasingly, attorneys seek the disqualification of counsel in corporate litigation in the federal courts, not always for the highest motives.² Addressing the implications of recent decisions

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² See, e.g., W.T. Grant Co. v. Haines, 531 F.2d 671, 678 (2d Cir. 1976) (“[S]uch motions and appeals have proliferated. The attention of the district court is thereby diverted to a separate issue and the appeal results in further delay and diversion.”); International Electronics Corp. v. Flam, 527 F.2d 1288, 1289 (2d Cir. 1975) (“Such moves and countermoves by adversaries appear to have become common tools of the litigation process.”); Van
for the large, multi-officed and geographically dispersed law firms that absorb the lion’s share of corporate clients, this article also examines the adequacy of the Code of Professional Responsibility (hereinafter “Code”) in light of those decisions, for maintaining traditional ethical standards in this age of the corporate law firm.

Federal courts have differed in their willingness to tailor a ruling on a disqualification motion to the nature of the law firms in each case. For example, some district courts have yielded to the pragmatic pressure to weaken the rule against an attorney’s simultaneous representation of clients with adverse interests, in applying the rule to law firms with multiple offices or departments. Recently, however, the Courts of Appeals for the Second and the Seventh Circuits reversed such decisions by district courts. But the traditional ban on the successive representation of clients with adverse interests has undergone increasing erosion in the courts, weakening the Code’s protection of the confidences and secrets of clients.

Confusion now clouds the rules on simultaneous and successive representation, the two principal areas of disqualification.

Graafieland, Lawyer’s Conflict of Interest—A Judge’s View, N.Y.L.J., July 20, 1977, at 1: “[T]here is little question but that attorneys are carrying a good thing too far. Disqualification motions [are] . . . being used in many cases for purely strategic purposes.” If found in bad faith, the movant may be taxed under 28 U.S.C. § 1927 (1970) the excess in attorney’s fees, expenses and costs necessitated by the motion to disqualify, as was done by the District Court for the Southern District of New York in North American Foreign Trading Corp. v. Zale Corp., 47 U.S.L.W. 2677 (May 1, 1979). For rare instances in which the court on its own initiative raised the issue of disqualification, see, e.g., Empire Linotype School, Inc. v. United States, 143 F. Supp. 627 (S.D.N.Y. 1956) (court could raise the issue if the movant had delayed in raising it); Porter v. Huber, 68 F. Supp. 132 (W.D. Wash. 1946).


5. Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977), rev’g in part, 435 F. Supp. 84 (S.D.N.Y. 1977). This case will be discussed in Parts II and IV of this article.


7. Traditionally, courts recognized an irrebuttable presumption that in a successive representation of clients with adverse interests, an attorney would share with other members of his firm the confidences and secrets of the former client. Some courts have begun to hold that this presumption is rebuttable. For discussion of this trend, see text accompanying notes 51-100 infra.

8. With rare exceptions it is only in these areas that the Second Circuit, for example, has ordered disqualification. See Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979). The recent Second Circuit cases upholding district courts’ denial of disqualification have been concerned largely with other aspects of the Code. See Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268 (2d Cir. 1975) (alleged violation of ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (1975), forbidding communication with one of adverse in-
The confusion should surprise no one familiar with the Code. Although possessing the special resonance of moral fervor, the Code's broad-brush pronouncements of ethical imperatives do not resolve all ethical issues, for codes (like constitutions) require continual interpretive application to individual cases. The Code nonetheless remains the ultimate frame of reference for the maintenance of professional responsibility by the bar. One or another of Canons 4, 5, and 9 of the Code, or all of them, underlie the court

terest); J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357 (2d Cir. 1975) (alleged violation of ABA Code of Professional Responsibility DR 5-102(A) (1975), forbidding employment in a case in which the lawyer ought to be called as witness); Lefrak v. Arabian Am. Oil Co., 527 F.2d 1136 (2d Cir. 1975) (alleged violation of ABA Code of Professional Responsibility DR 2-103(C)-(E), 2-104(A)(1) (1975), regarding improper solicitation of clients). These decisions evidence a general reluctance to disqualify counsel, notwithstanding apparent ethical misconduct, if the latter "does not infect either the merits, the competence or the ethics of the representation in the pending actions." Id. at 1139.


The ABA Standing Committee on Continuing Education of the Bar has published a practitioner's guide dealing with ethical responsibilities of noncriminal practice, containing chapters by different authors of varying quality on a variety of ethical issues under the Code. ABA Standing Committee on Continuing Education of the Bar, Professional Responsibility—A Guide for Attorneys (1978).


10. ABA Code of Professional Responsibility, Canon 4 (1979), provides: "A lawyer should preserve the confidences and secrets of a client." Canon 5 provides: "A lawyer should exercise independent professional judgment on behalf of a client." Canon 9 provides: "A lawyer should avoid even the appearance of professional impropriety." The so-called Ethical Considerations (EC's) subsumed under each of the Canons purport to provide more specific guidance, and the Disciplinary Rules (DR's) subsumed in turn under the Ethical Considerations state the minimum level of conduct which, if violated, should subject the lawyer to disciplinary action.

As a general rule the federal courts, in the exercise of the traditional judicial authority over attorneys practicing before them, have accepted the Code as providing appropriate guidelines, even where the Code has not by rule of court been made specifically applicable, as it has in some district courts. Code provisions, however, are not necessarily binding on the federal courts. See, e.g., J.P. Foley & Co. v. Vanderbilt, 523 F.2d at 1359-60: "I think a court need not treat the Canons of Professional Responsibility as it would a statute that we have no right to amend." (Gurfein, J., concurring). Violation of the Code need not, therefore, automatically result in disqualification.
decisions discussed in this article. Yet the generalities written by the courts applying Code provisions are hardly more helpful than the Code's pronouncements themselves. The opinions range, even within the same circuit, from ringing declarations of the need to resolve all doubts in favor of disqualification,11 to insistence on proof of a "patently clear" conflict before requiring disqualification,18 and from the most positive affirmations of an overriding duty to enforce ethical standards,19 to the position that it is not the business of the court to oversee the ethics of those practicing before it.14 Some courts have suggested that the continued frequent use of disqualification motions as tactical weapons18 may provoke efforts to limit appellate review of such motions.18 Other courts emphasize the discretion of trial courts in dealing with at-

11. The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case. These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage. Emle Indus., Inc. v. Patentex, 478 F.2d 562, 571 (2d Cir. 1973) (emphasis added).


13. "[N]othing, not even the appearance of impropriety, is permitted to tarnish our judicial process. The stature of the profession and the courts, and the esteem in which they are held, are dependent upon the complete absence of even a semblance of improper conduct." Emle Indus., Inc. v. Patentex, 478 F.2d at 575. Some district courts in the same circuit are not so persuaded; see, e.g., Society for Good Will to Retarded Children, Inc. v. Carey, 466 F. Supp. 722, 724 (E.D.N.Y. 1979) ("The possibility that an attorney's representation in a given case may give rise to an 'appearance of impropriety' is not enough to disqualify.").

14. "The business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it." W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976) (citing Lefrak v. Arabian Am. Oil Co., 527 F.2d 1136, 1141 (2d Cir. 1975)).

15. See note 2 supra.

16. See Allegaert v. Perot, 565 F.2d 246 (2d Cir. 1977): "Orders on disqualification motions have been appealable [under 28 U.S.C. § 1291] in this circuit since Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) (en banc). Appealability has been subject to mounting criticism, however.") 556 F.2d at 247 n.1. The criticism culminated in the Second Circuit's en banc opinion in Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980). The opinion overruled the circuit's earlier en banc position in Silver Chrysler. It is now the rule that district court orders denying disqualification are no longer immediately appealable. The possibility of abuse of disqualification motions had earlier led the Sixth and Eighth Circuits to abandon their previous acceptance of Silver Chrysler. See In re Multi-Piece Rim Prods. Liab. Litigation, 612 F.2d 377 (8th Cir. 1980), cert. granted sub nom. Firestone Tire & Rubber Co. v. Risjord, 48 U.S.L.W. 3726 (U.S. May 13, 1980); Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979) (en banc). See generally Note, The Appealability of Orders Denying Motions for Disqualification of Counsel, 45 U. Chi. L. Rev. 450 (1978).
tempts at disqualification.\textsuperscript{17}

The cases are not alone in manifesting inconsistency and compromise in responding to the pressures of various interests on the rules of ethics. Not only the drafting but also the interpretation of Code provisions reflects the powerful influence of the corporate bar, as in Formal Opinion 342.\textsuperscript{18} Local bar associations can seek amendments to the Code in their own constituencies. Thus, for more than four years the possibility that Code precepts might inhibit the ease of movement of lawyers to and from government service has agitated the prestigious firms that compose the most influential segment of the District of Columbia Bar. It now appears that a self-serving amendment proposed by that local bar association will allay the fears of those opposed to the application of Code rules reaffirmed by the federal courts within the past two years.\textsuperscript{19}

Ever sensitive to the need to advise against potential conflicts on the part of corporate clients, and equally alert to detect violations by adversaries in litigation, many corporate lawyers seem less willing to shape their own conduct to meet the ethical demands of the Code.\textsuperscript{20}

\section*{II. DISQUALIFICATION BECAUSE OF SIMULTANEOUS REPRESENTATION OF ADVERSE INTERESTS OR CLIENTS}

The general rule forbids an attorney or a law firm to represent adverse interests or clients at the same time, unless both clients consent to the dual representation with full knowledge of the con-

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\textsuperscript{17} See, e.g., Allegraert v. Perot, 566 F.2d at 251: "While we do not at this stage request rehearing \textit{en banc} to reconsider the wisdom of \textit{Silver Chrysler} . . . , we continue to emphasize the great reliance we place upon the district court's exercise of discretion."

\textsuperscript{18} See ABA COMM. ON PROFESSIONAL ETHICS AND PROFESSIONAL RESPONSIBILITY, RECENT ETHICS OPINIONS, No. 342 (1975), reprinted in 62 A.B.A.J. 517 (1976) [hereinafter cited as Opinion No. 342].

\textsuperscript{19} See note 128 and text accompanying notes 126-46 \textit{infra}.

\textsuperscript{20} The fee-oriented pressures of large-scale corporate practice seem at times at odds not merely with the ethical demands of membership in a profession, but even with the dictates of simple morality. See \textit{Business and the Law}, N.Y. Times, Dec. 8, 1978, § D, at 4, col. 1:

Just before Mahlon F. Perkins Jr., who had belonged to a large law firm, was sentenced to prison, his lawyer, Harold R. Tyler Jr., a former Federal judge who is currently practicing at another big firm, addressed the court:

"Those in our profession who know about this, if they are honest about it . . . , would admit that, possibly but for the grace of God, go I, because of the pressures which come upon men and women who practice law in big cases."

Mr. Perkins . . . had lied and withheld documents in connection with an antitrust case. . . .
Simultaneous representation of adverse clients constitutes a ground for disqualification even in otherwise completely unrelated matters of representation. Law firms with multiple offices or departments have found themselves simultaneously representing adverse clients without intending to do so. Despite resistance by these large law firms, federal courts have carved out no exceptions in applying to all firms the prohibition of simultaneous representation of adverse interests.

In Fund of Funds, Ltd. v. Arthur Andersen & Co., the Court of Appeals for the Second Circuit reaffirmed the vitality of the Code in regulating simultaneous representation. A securities law case, Funds involved a complaint filed on behalf of the Canadian liquidator of the Fund, alleging that Andersen, as independent auditor of the Fund, had known of fraudulent transactions involving certain assets of the Fund, had neglected to disclose them to the Fund's directors, and had participated in wrongdoing by certifying the Fund's financial statements. Earlier, German investors in the Fund had retained the law firm of Morgan, Lewis & Bockius to bring suit in the United States on causes of action arising out of the same transactions which led to the liquidator's suit after the Fund was placed in liquidation under Canadian law. Morgan Lewis was instrumental on behalf of the German investors in the appointment of the liquidator and its solicitor, who in turn retained Morgan Lewis as United States counsel.

By mid-1973 when the firm accepted this retainer, its partner in charge of the matter was aware that Andersen was a likely defendant in the upcoming litigation. Andersen was then, and for some fifteen years had been, a client of Morgan Lewis, which as regional counsel of Andersen represented it in a variety of unrelated matters. The law firm, in "partial response to this nascent ethical dilemma," made it the firm's policy that no attorney involved with Andersen matters would work on the Funds case. At the same time the attorneys engaged on that case purported to

22. Professor Stanley A. Kaplan, a corporate law specialist, stated:
[N]ot only are the problems of conflicts of interest expanding because of changes in the character of corporate law practice and the proliferation of business relationships, but the growing contentiousness of lawyers and clients and the fading reluctance to embarrass and disqualify a fellow lawyer have altered the rules of the game. . . .
Tybor, Conflicts: When Big Isn't Better, Nat'l L.J., May 7, 1979, at 17, col. 3.
23. 567 F.2d 225 (2d Cir. 1977).
24. Id. at 229.
avoid considering Andersen's possible wrongdoing. During the nine months of their investigation, however, anything that they came across that was "really hot" as to Andersen was put aside and forwarded to the liquidator's Canadian solicitor. The complaint against Andersen was prepared and filed by the firm of Milgrim, Thomajan & Jacobs. That firm had earlier filed a closely related complaint, against other defendants, with Morgan Lewis designated "of counsel." Relevant portions of the complaint in this related case were used in the complaint against Andersen. Prior to the filing of the complaint the firm had belatedly requested and been denied Andersen's consent to its representation of the Fund. Following the filing, Andersen dropped the firm as counsel in all matters and filed a motion in the Funds case to disqualify the Milgrim firm, alleging that it served as "understudy" to Morgan Lewis by aiding and abetting the latter's breach of its duty of undivided loyalty to Andersen, and thereby violated Canons 4, 5, and 9 of the Code of Professional Responsibility.

The Court of Appeals for the Second Circuit in an opinion by Chief Judge Kaufman agreed with the district court that Morgan Lewis would clearly be disqualified under Canon 5 because Andersen, as an existing client of the firm at the time it accepted the Fund's retainer, had the right to its undivided loyalty without regard to whether the subject matter of the Funds case bore any relationship to the matters in which the firm represented Andersen. The court's holding that a current client had an "absolute right to the firm's undivided loyalty," strengthened an earlier decision which had held that such participation by an attorney in a suit against an existing client was "prima facie improper" under Ethical Consideration ("EC") 5-1 and EC 5-14 of the Code.

Morgan Lewis nevertheless argued against the disqualification of Milgrim and of itself. It contended that it had built a "Chinese Wall" within the firm by adopting the policy that no attorney

25. Id. There were also indications that Morgan Lewis on several occasions inquired of the Canadian solicitor as to the "status of the (Andersen) matter." Id.

26. Id. at 233 n.13; see ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-1, DR 5-105(A) (1979).

27. 567 F.2d at 232-33 (emphasis added).


29. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-1, EC 5-14 (1979). As further grounds for its decision, the court of appeals in Cinema 5 referred to "the appearance of impropriety" (though without specific mention of Canon 9) involved in a lawyer spending half his time with partners defending a client while the other half is spent with partners suing the same client. 528 F.2d at 1387.
working on Andersen's affairs would participate in the *Funds* litigation, and that no information on any matter relevant to that litigation had passed between the two groups of attorneys. The court held that no “Chinese Wall” could be created within a single firm,\(^{30}\) and then proceeded to impute Morgan Lewis's disqualification to Milgrim because Milgrim had come to the attention of the Fund's liquidator through Milgrim's association with Morgan Lewis. Morgan Lewis had referred the Fund to Milgrim previously in connection with other legal matters. Morgan Lewis and Milgrim had worked closely in related cases; Morgan Lewis had referred the Fund’s liquidator to Milgrim for the purpose of prosecuting the suit against Andersen, and Milgrim had accepted the retainer with knowledge of Morgan Lewis’s conflict of interest.\(^{31}\)

More recently, the Court of Appeals for the Seventh Circuit addressed the problem of simultaneous representation in *Westinghouse Electric Corp. v. Kerr-McGee Corp.*\(^{32}\) Westinghouse brought an antitrust suit alleging anticompetitive practices in the sale and pricing of uranium by certain uranium producers. Initially, Westinghouse’s counsel in the litigation was the Chicago office of Kirkland & Ellis. That firm also had an office in Washington, D.C. At that time the two offices employed about 130 and 40 lawyers, respectively. Three oil companies that were defendants in the antitrust suit moved to disqualify Kirkland as Westinghouse’s counsel. They were members of the American Petroleum Institute (API), on whose behalf Kirkland’s Washington office had prepared a “legislative report” advancing the arguments in opposition to proposed congressional legislation designed, among other things, to prohibit oil companies from owning alternative sources of energy such as uranium. The report, issued on the same day that the antitrust action was filed, argued in part that oil companies’ participation in the development of uranium sources had promoted competition in the energy industries, a legal position totally at odds with the allegations in the antitrust complaint prepared by Kirkland’s Chicago office. The oil companies urged the firm’s disqualification under Canons 4, 5, and 9 because of its simultaneous representation of Westinghouse and API. This, they contended, created a substantial conflict of interest, the potential for disclosure and use of confidential information against them, and the appearance of impro-

\(^{30}\) 567 F.2d at 229 n.10.

\(^{31}\) Id. at 234.

priety. Kirkland argued that only API was their client in the matter of the report, and with no attorney-client relationship between it and the oil companies, no conflict of interest could be present. In addition, Kirkland argued, it had received no significant confidential information that had been or would be used in the pending case. Finally, it argued that any prejudice to the oil companies was far outweighed by the hardship upon Westinghouse that would result from Kirkland’s disqualification. The district court refused disqualification. The Court of Appeals for the Seventh Circuit reversed and ordered Kirkland disqualified, holding that Westinghouse could retain Kirkland as its counsel in the case only if the court dismissed the three oil companies as defendants.

The appellate court’s opinion focused initially on the issue of the existence of an attorney-client relationship between Kirkland and the oil companies. The court held that because Kirkland’s work on the legislative report was for the benefit of the oil company members of the API, and because the oil companies had supplied Kirkland with confidential data in the belief that Kirkland was rendering legal services for their benefit, Kirkland had assumed the fiduciary obligations attendant upon an attorney-client relationship with the oil companies. This relationship rendered Kirkland liable for disqualification in the Westinghouse litigation if it had violated the Code with respect to the oil companies.

The Seventh Circuit proceeded to disqualify Kirkland on the grounds that it had violated Canons 4, 5, and 9. Canons 5 and 9, dealing with conflicts of interest and the appearance of impropriety, respectively, are the Canons on which decisions in simultane-

34. 580 F.2d at 1322. The court of appeals ordered reversal presumably as a matter of law on the record before it. No factfinding hearing, however, had been held in the district court. It relied instead on a “plethora of affidavits, counter-affidavits and documentary evidence” to support the factual allegations. 448 F. Supp. at 1290. Other circuits have held that denials of disqualification ordered without a full evidentiary hearing will, on appeal, be remanded for such a hearing. See, e.g., Melamed v. ITT Continental Baking Co., 534 F.2d 82 (6th Cir. 1976); Fullmer v. Harper, 517 F.2d 20 (10th Cir. 1975).
35. See 580 F.2d at 1319. Although the district court agreed that Kirkland’s services inured primarily to the benefit of the trade association’s oil company members, it maintained that the association was “an independent corporate entity . . . not a mere mouthpiece for its members’ interests.” Westinghouse Elec. Corp. v. Rio Algom Ltd., 448 F. Supp. at 1301. Those familiar with Washington trade association activity might disagree with this proposition.
36. The court of appeals avoided “generalized pronouncements of whether an attorney for such an organization . . . represents every member.” 580 F.2d at 1319. It disagreed with the district court’s finding that the “firm’s involvement was that of expert consultant and researcher,” and not that of a lawyer. 448 F. Supp. at 1301.
ous representation cases usually rest. Canon 4, which deals with the lawyer's duty to preserve the confidences and secrets of his clients, is rarely a ground for decision in a simultaneous representation case. The decision of the Seventh Circuit in *Westinghouse* would have been the same had it not considered Kirkland's possible Canon 4 violations at all.

The disqualification of Kirkland on the ground that it had violated Canon 5 by its simultaneous representation of the plaintiff and the defendant in the *Westinghouse* litigation depended on the Seventh Circuit's holding that the conflicts of interest of the Washington branch of Kirkland disqualified its Chicago branch by the process of imputed disqualification. The district court had concluded that the geographic separation of the Chicago and Washington attorneys, combined with the absence of any showing that the Washington attorneys had actually exchanged information with the Chicago attorneys, precluded a finding that any conflicts or ethical improprieties on the part of the Washington office of Kirkland would serve to disqualify the Chicago attorneys. The Seventh Circuit disagreed, refusing to "recognize the wall theory as modifying the presumption that actual knowledge of one or more lawyers in a firm is imputed to each member of that firm." The court held that the same imputation standard must apply to large firms as to small ones.

Having found no attorney-client relationship between Kirkland and the oil companies, the district court had considered the disqualification motion only under Canon 9. The court had held that it would disqualify an attorney for causing an "appearance of impropriety" under Canon 9 only when there was a reasonable possibility that the conduct would be improper under some other Canon. The Seventh Circuit did not openly question the district court's Canon 9 standard. Having imputed any knowledge or conflict of interest the Washington office of Kirkland might have to its Chicago office, the appellate court found that in this case there had been a reasonable possibility of impropriety under Canon 4 on the part of Kirkland's Chicago attorneys. This readiness on the part of the Seventh Circuit to impute to one part of a firm the conflicts of another part indicates that its position on Canon 9 is not very

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37. 448 F. Supp. at 1305.
38. 580 F.2d at 1321 (footnotes omitted).
39. Id.
40. 448 F. Supp. at 1304.
41. 580 F.2d at 1321.
far from the traditional position that Canon 9 requires the disqualification of attorneys when the public might think the conduct of those attorneys improper, regardless of its actual effect on the case in which the attorneys are participating. This traditional test meets the objective of Canon 9—maintaining public confidence in the legal profession—far better than the test the district court in Westinghouse used.\textsuperscript{2}

The Court of Appeals for the Third Circuit likewise held firm in a recent case involving the issue of simultaneous representation. In \textit{International Business Machines Corp. v. Levin},\textsuperscript{43} counsel opposing disqualification sought refuge in an imputation argument without success. IBM, the defendant, sought to disqualify Carpenter, Bennett & Morrissey (CBM), counsel for the plaintiff, in an antitrust suit. The antitrust lawyers in IBM's legal department had not known that labor lawyers in the same department were repeatedly retaining CBM's legal services.\textsuperscript{44} CBM contended that it need not have disclosed the relationship between IBM's labor lawyers and itself to its clients or to IBM, nor did it need to obtain their consent to its dual representation, because all departments of IBM had imputed knowledge of the labor lawyers' activities. This ingenious variation on the imputation theme carried no weight with the Third Circuit. The court emphasized that the attorney engaged in dual representation must under DR 5-105(C) show that he had made full and effective disclosure to the client from whom he sought consent.\textsuperscript{45}

The appellate court in \textit{Levin} also reaffirmed its commitment

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42. \textit{Cf.} Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d at 1387 (simultaneous representation is prima facie improper and attorney must show that there are no actual or apparent conflicts in loyalties). \textit{But cf.} Board of Educ. v. Nyquist, 590 F.2d 1241 (2d Cir. 1979) (Mansfield, J., concurring): “[A]n ‘appearance of impropriety’ is an insufficient ground, by itself, to justify a court's disqualification of an attorney during the prosecution of a case absent a reasonable basis for believing that such an appearance may affect the outcome. . . .” \textit{Id.} at 1250.

43. 579 F.2d 271 (3d Cir. 1978).

44. The court noted that “[a]pparently in IBM's case the practice was to 'let not thy left hand know what thy right hand doeth,' a Biblical injunction directed to almsgiving which is hardly applicable to the internal operations of a corporate legal department.” \textit{Id.} at 282 (footnotes omitted).

45. \textit{Id. Cf.} Pennwalt Corp. v. Plough, Inc., 48 U.S.L.W. 2501 (D. Del. Jan. 18, 1980) (counsel for plaintiff not disqualified on account of brief simultaneous representation of subsidiary of defendant corporation when the subjects of the two representations were unrelated and the simultaneous representation was too brief for any conflict of interest to arise); Whiting Corp. v. White Mach. Corp., 567 F.2d 713 (7th Cir. 1977) (no disqualification when the subjects of the simultaneous representations were unrelated and the nonparty client related to movant raised no objections to dual representation).
\end{flushright}
to the principle that simultaneous representation of adverse interests subjected an attorney or firm to disqualification even if the matters on which it represented the adverse clients were unrelated.\textsuperscript{46} The court reemphasized the importance of Canon 9 in simultaneous representation cases as a means of moving the focus of the court’s analysis away from the effect of an attorney’s or firm’s actions on the litigation itself. The court stated that “[d]isqualification in circumstances such as these where specific injury to the moving party has not been shown is primarily justified as a vindication of the integrity of the bar.”\textsuperscript{47}

No aspect of these cases has greater significance for the current phenomenon of nationwide (and even international) expansion of corporate law firms than the forthright position in the \textit{Westinghouse} decision that the size and geographical spread of the firm should not exempt it from the ethical considerations applicable to lawyers generally.\textsuperscript{48} Faced with a conflict and reluctant to let go of either client, the large firm may, as in \textit{Funds}, lose both clients or, as in \textit{Westinghouse}, face the choice of losing the retainer or having its plaintiff client agree to drop as defendants the more affluent corporations from which it seeks damages. These are “no win” situations for the large firm in terms of both reputation and money.\textsuperscript{49} But the persistence with which the corporate bar contin-

\textsuperscript{46} Id. at 280.
\textsuperscript{47} Id. at 283.
\textsuperscript{48} 580 F.2d at 1321.
\textsuperscript{49} One Washington partner of Kirkland stated that “[t]hese problems raised a basic question about whether our type of firm makes any sense. We were getting less business together than we would have as two separate firms.” Huffman, \textit{Kirkland \& Ellis: Growing Pains \& Convulsions at a Major National Law Firm}, Legal Times of Wash., June 5, 1978, at 24, col. 2. Westinghouse dismissed Kirkland as counsel in the case. \textit{Westinghouse to Dismiss Law Firm in Trust Case}, N.Y. Times, July 27, 1978, § D, at 4, col. 5. Westinghouse also appointed a special committee to consider pursuing litigation against Kirkland. See Tybor, \textit{supra} note 22, at 1, col. 4. A derivative action to recover Kirkland’s fees is also pending.

Following Kirkland’s disqualification, Westinghouse retained another Chicago firm and subsequently moved to add the Jones, Day, Reavis & Pogue firm of Cleveland as additional counsel. Because two members of that firm had some contact with aspects of a grand jury investigation of the uranium industry while employed in the Antitrust Division of the Department of Justice, the district court urged voluntary withdrawal of the motion, apparently fearing more disqualification motions. Nelson, \textit{Disclosure by Jones Day Firm in Westinghouse Uranium Conflict of Interest Case}, Legal Times of Wash., Aug. 21, 1978, at 17, col. 1. Jones Day proposed to obviate the ethical issues by immuring the former Department of Justice members behind a Chinese Wall, \textit{id.} at 18, col. 4, notwithstanding the fact that the court of appeals opinion in disqualifying Kirkland expressly disavowed the wall theory. The motion to add Jones Day was subsequently withdrawn. \textit{Text of Jones Day Letter Recommending Withdrawal in Westinghouse Uranium Case}, Legal Times of Wash., Sept. 4, 1978, at 26, col. 2.
ues to press the Chinese Wall as the solution to the imputation problem does not leave much hope that the lesson will stick.60

III. DISQUALIFICATION BECAUSE OF SUBSEQUENT ADVERSE REPRESENTATION: "SUCCESSIVE REPRESENTATION"

A major source of conflicts of interest for the large firm, "successive representation" that gives rise to disqualification refers to an attorney's representing at different times two or more clients with adverse interests, in matters substantially related. In recent cases involving disqualification motions, some courts have shown a reluctance to enforce against large law firms the traditional restrictions on successive representation. The resulting inconsistency has fostered confusion in this area of the law.

The rationale for disqualifying counsel in successive representation cases comes from the case of T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.61 The court in T.C. Theatre held that an attorney was subject to disqualification if he sought to represent a client with interests adverse to those of a client whom he had formerly represented in a substantially related matter. Two matters were substantially related if so similar that one could reasonably say that in the course of the first representation the attorney might have acquired confidences or secrets of his client relevant to the subject matter of the second representation. Once the court had established that the prior and subsequent representations were substantially related, the court would presume irrebuttably that the attorney had obtained relevant confidences and secrets in his prior representation. Disqualification would follow automatically.62 The court in T.C. Theatre insisted on an irrebuttable presumption because the court wished to avoid an inquiry into the nature and extent of any confidences or secrets the attorney may actually have acquired. The court believed that it was undesirable to investigate and reveal confidences as part of a procedure meant to protect confidences.63

50. Cf. Messing v. FDI, Inc., 439 F. Supp. 776 (D.N.J. 1977) (The persistent efforts of corporate counsel to represent both the defendant corporation and defendant directors give rise to ethical issues not eliminated by counsel's resigning the defense of the corporation but continuing to represent the defendant directors, which might well cause a successive representation problem. The defense would probably relate to confidences imparted by the corporation to counsel.).
52. See id. at 268.
53. Id. at 269. The Second Circuit adopted the T.C. Theatre rule in Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954). See gen-
In the opinion for *City of Cleveland v. Cleveland Electric Illuminating Co.*, egregious misunderstanding of the *T.C. Theatre* principle abounds. The City, which owns and operates a municipal electric light plant, brought an antitrust suit against a competing private utility company (CEI) and other utility companies. Squires, Sanders & Dempsey (SS&D), the largest law firm in Ohio, represented CEI. The City, alleging a conflict of interest, moved to disqualify SS&D by reason of earlier retainers of that firm by the City. For over sixty years SS&D had represented CEI, on many occasions in adversary proceedings against the City. In 1972 the City had requested SS&D's legal assistance in connection with a bond issue for the benefit of its electric plant while SS&D was at that very time representing CEI in a Federal Power Commission proceeding initiated by the City against CEI. Thereafter, SS&D continued to represent CEI in other proceedings. During all this period the City pressed SS&D to continue to act as bond counsel for the City, which the law firm did. Following the filing of the instant action, the City took the position that SS&D should continue as its bond counsel while withdrawing as counsel for CEI in the case. SS&D instead withdrew as bond counsel and the City then filed its disqualification motion. The district court found as a fact that the City had been fully cognizant of the conflict of interest implicit in SS&D's representing the City as a bond consultant, had not only consented to but had expressly induced it, and was therefore estopped from presenting the disqualification motion. 

Although these findings more than sufficed for decision, the district court next proceeded to consider whether disqualification was required because of a substantial relationship between SS&D's former representation of the City and its present adverse representation. It was the court's conclusion that no substantial relationship existed between SS&D's prior representation as bond counsel and the litigation at hand. This conclusion, sound on the facts of the case, was reached by an analysis of the conceded past attorney-client relationship between the City and SS&D and the question whether in that connection SS&D might have acquired confidences related to its subsequent representation adverse to the City.

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erally Note, Attorney's Conflict of Interests: Representation of Interest Adverse to That of Former Client, 55 B.U.L. Rev. 61 (1975).


56. The court also discussed the propositions that SS&D was not an "advocate" and its
Under the T.C. Theatre rule, if SS&D might have acquired relevant confidences in its prior adverse representation, it would have to be disqualified. The court, however, proceeded to modify the substantial relationship test in a manner hardly in accord with precedent: "This Court concludes that equity demands, and the pragmatics of emerging specialization inherent in contemporary legal practice dictates, that this presumption [that confidences were received] be rebuttable." The court then found that SS&D had successfully produced evidence showing no confidential disclosures had in fact occurred in the prior representation. The court subsequently made the rebuttable presumption part of the accepted test: "The City having failed to carry its burden of proof as to the three elements of the 'substantial relationship' test, it is manifest that disqualification of SS&D is not warranted under this traditional analysis."

Modification of the substantial relationship doctrine is not, however, confined to the district courts, nor is the motivation for attenuating past standards necessarily an undue solicitude for the needs of the large corporate firm. Irritation with the mounting number of appeals involving disqualification motions used as a mere litigation tactic apparently led a Second Circuit panel in Allegaert v. Perot to tinker with accepted doctrine. In that case the trustee in bankruptcy of Walston, a brokerage house, alleged violations of the Securities and Bankruptcy Acts by certain defendants whose counsel the trustee sought to disqualify. The two law firms in question had for many years represented the principal defendant, Perot, and his controlled companies, including another brokerage firm (DGF). When the latter entered into a joint venture agreement with Walston in effect combining their operations while maintaining their separate identities, the two law firms had repre-

57. 440 F. Supp. at 209. T.C. Theatre was quite clear on the point that the court would not inquire into whether relevant confidences were in fact reposed, once it appeared they might have been received. That court's language, however, taken out of context, might be used to support an inquiry into whether in fact confidences were reposed. See T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 269 (S.D.N.Y. 1953).


59. Id. at 211 (emphasis added).

60. 565 F.2d 246 (2d Cir. 1977).
resented DGF and thereafter had performed services for Walston under the joint venture agreement. The law firms continued to represent DGF and the other Perot interests in matters related to the joint venture agreement.

Both the district and the appellate court avoided the issue of a substantial relationship between the prior and subsequent representations. Finding that counsel had not changed sides, the appellate court concluded that Walston could not reasonably have expected that information given the attorneys in matters related to the joint venture agreement would be kept secret from its joint venturer. On such “peculiar facts,” the court needed nothing more to decide the disqualification motion. The appellate court, however, expressly adopted as the basis for decision the thesis expounded by the district court that “before the substantial relationship test is even implicated, it must be shown that the attorney was in a position where he could have received information which his former client might have reasonably assumed the attorney would withhold from his present client.” In light of the holding that counsel had not, in fact, changed sides, it was unnecessary for the court to consider this weakened version of the substantial relationship test.

Taken literally, the court’s formulation in Allegaert suggests that the content of the substantial relationship test, once implicated, requires something more than an inquiry into whether an attorney could have learned confidences in a prior representation because the court must establish an affirmative answer to that inquiry before the substantial relationship test even comes into play. The test itself then must encompass consideration of the nature of the matters involved in the past and present representations, an inquiry which the T.C. Theatre test was framed to avoid. The circuit court acknowledged the principle of T.C. Theatre as “our
but the formulation of the test in T.C. Theatre focused the inquiry simply on whether the attorney might previously have acquired information related to the subject matter of the later representation. Allegaert would add a new first step, requiring proof that the former client could have given the attorney information that the client might reasonably have assumed would later be withheld. This requirement, ultimately adds little to T.C. Theatre. An affirmative answer to a substantial relationship inquiry itself implicates the possibility that confidences were imparted in the prior relationship, of course. But if, under the T.C. Theatre formulation, counsel could not earlier have acquired information related to the subject matter of the subsequent representation, then he could not have acquired information the prior client might reasonably have assumed would be withheld from the present client. The Allegaert emphasis on the latter as an initial and separate hurdle in the disqualification process contributes only to conceptual confusion.

The odd twists in doctrine continue in the Second Circuit, as exemplified in a case sustaining a disqualification for successive representation, Government of India v. Cook Industries, Inc. This case is particularly interesting when compared with Allegaert because of the way the majority opinion in Government of India formulates yet another version of the substantial relationship doctrine. The Government of India case held that the former client seeking disqualification has the burden of showing that “the issues in the prior and present cases were substantially the same” and that the attorney’s “involvement in the prior case was such that he was likely to have come across relevant privileged information.” To find the issues in the two representations “substantially the same,” the court must find a “patently clear” relationship between the issues. The court in Government of India required this stringent test out of solicitude for the client’s right freely to choose his counsel, and concern for the loss of time and money that would

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67. 565 F.2d at 250.

68. In contrast, the Seventh Circuit’s comment in Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (1978), as to why it is inappropriate to inquire into whether actual confidences were disclosed, should apply as well to this aspect of the Allegaert formulation: “This inquiry might for example consist of the questionable reliance on ex parte representations made in camera by the party seeking disqualification as to communicated confidences.” Id. at 224 n.3.

69. 569 F.2d 737 (2d Cir. 1978).

70. Id. at 739 (emphasis added).
The splitting of the *T.C. Theatre* test by the court in *Government of India* is of particular import. The court in *T.C. Theatre* assumed that when the issues in successive representations are substantially related, the attorney in the former representation "might have acquired information" related to the subject matter of his subsequent representation. *Government of India* changed this assumption into a separate component of the doctrine that merited a separate inquiry from the inquiry into the relationship of the issues. What, then, satisfied this separate component, however worded? The court stated only that the attorney had been "deeply involved" and was "in day-to-day charge" of the substantially related prior case. This scarcely says more than that he acted as the attorney in the prior representation. The question remains why the court felt it necessary to indulge in a more exacting requirement for disqualification, one apparently making inroads into prior doctrine.

The concurring judge asserted that although it was "hardly" an abuse of discretion to disqualify the attorney because of "the probability that he received confidential information in the prior representation," the court should reject the *T.C. Theatre* approach by permitting the attorney, even where a substantial relationship between the prior and subsequent representations existed, to show that in fact he had gained no confidential information from the earlier representation. The concurring judge, concerned

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71. Id. at 740.
72. Id. at 739.
73. 113 F. Supp. at 268.
74. 569 F.2d at 740.
75. As noted above, *T.C. Theatres* inquired whether the attorney "might have acquired" information. *Government of India* inquired whether he was "likely to have come across relevant privileged information." *Id.* at 739. Later in the same opinion the inquiry is whether he "would have had access" to such information. *Id.* at 740. The differences are more than a word game. *But see TCS Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

The *Government of India* reference above is not to "confidences and secrets" that the Code protects, but to "privileged information," a more limited term. *Cf. ABA Code of Professional Responsibility EC 4-4* ("the attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client").

76. 569 F.2d at 740 (Mansfield, J., concurring) (emphasis added).
77. Id. at 741. The United States District Court for the Northern District of New York followed Judge Mansfield's concurring opinion in *Government of India* in the recent case of *Rossworm v. Pittsburgh Corning Corp.*, 468 F. Supp. 168 (N.D.N.Y. 1979). The district court first distinguished *T.C. Theatre* as an antitrust action which by its nature involved the
for the reputation of the attorney, stated that he may "needlessly suffer" great professional harm, an "undeserved and unfair stigma," unless he is given the opportunity "to clear his name." 78

This would of course put in issue the nature of the information disclosed in the prior representation. Although the majority opinion emphasized that the former client should not have to disclose the confidences to obtain disqualification, the concurring opinion's approach would require the client to do so once the attorney sought to show he had gained no confidential information. 79

These recent Second Circuit opinions undeniably reflect a chipping away at past standards of Code enforcement in successive representation cases. The pejorative nature of the comment by the concurring judge in Government of India that "we have not hesitated in the past to exalt the 'appearance of impropriety' over actual acquisition of confidential information" 80 suggests that, depending on the panel's composition, some future Second Circuit cases may show less concern with the appearance of impropriety, at least in successive representation cases.

For a time the Court of Appeals for the Seventh Circuit seemed made of sterner stuff, its adherence to established doctrine more steadfast. Thus, in Westinghouse Electric Corp. v. Gulf Oil Corp. 81 the court stated that doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualifi-
cation. To avoid disqualification the Seventh Circuit would require it be "clearly discernable" that the issues in a current case do not relate to matters in an earlier representation—a far cry from the Second Circuit's insistence on a "patently clear" relationship between the issues as a requirement for disqualification.

In Novo Terapeutisk Laboratorium v. Baxter Travenol Laboratories, Inc. the Seventh Circuit en banc rejected the notion that "substantial relationship" was to be gauged by degrees. In that case the opposing attorneys had at one time belonged to the same firm, the defendant in Novo being a client of the firm at the time. The firm now represented the plaintiff in the pending action, and the defendant was represented by a former partner of the firm who, upon leaving the firm, had taken the defendant with him as a client. The defendant moved to disqualify the firm as plaintiff's counsel, alleging that matters in the case at bar were substantially related to matters on which his counsel, while a member of the firm, had represented him, although those matters had constituted at the time a very small percentage (two percent) of the total earlier representation by the firm. Said the court: "Even the briefest conversation between a lawyer and a client can result in the disclosure of confidences. It is the relationship between the prior representation and the present litigation that must be evaluated rather than simply the duration and extent of the past representation."

The court's persuasive emphasis on this strict view makes all the more surprising the second part of the opinion, which reverses the previously accepted position that in a successive representation case, disqualification of individual counsel is irrebuttably imputed to the other members of his firm. The court admitted that if this were the more frequent case, i.e., if the former partner were representing the plaintiff, the attorney would clearly be disqualified. Agreeing that "[i]t is reasonable to presume that members of a law firm freely share their client's confidences with one another" and that the "application of the presumption recognizes not only the realities of law practice but also the ethical considerations of Ca-

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82. Id. at 224-25.
83. 607 F.2d at 194, 195 (7th Cir. 1979) (en banc).
84. Id. Cf. In re Airport Car Rental Antitrust Litigation, 470 F. Supp. 495 (N.D. Cal. 1979) (disqualification despite "extremely limited" prior representation).
85. 607 F.2d at 197. (The en banc court, by five to three, reversed the panel decision that had sustained the irrebuttable presumption). For discussions of the traditional position, see the cases and committee opinions cited in Opinion No. 342, supra note 18, at n.2.
86. Id. at 196.
non 9, the court nevertheless rejected a "rote reliance" on an irrebuttable presumption that members of the firm exchanged confidences with each other, in order to preserve the "flexibility needed to reach a just and sensible ruling on ethical matters." 89

The court did not explain why the need to shield clients' confidences from judicial scrutiny did not require an irrebuttable presumption that an attorney who possessed confidences of his client exchanged them with all members of the firm of which he was a member when he received the confidences, while this same policy did require that knowledge of a client's confidences on the part of an individual attorney who had formerly represented that client in a substantially related matter be irrebuttably presumed. Members of a disqualified attorney's firm trying to avoid imputed disqualification by rebutting the presumption that they obtained confidences from the disqualified attorney would have to develop the nature and extent of the client's communications with his attorney, if only to establish what confidences they could not have received. The inconsistency of this second part of the court's opinion with the first part of the opinion becomes even clearer in light of the

87. Id.
88. Id. at 197.
89. Id. An earlier case in the same circuit, Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706 (7th Cir. 1976) offers an interesting variation of facts. There, the Cleveland attorneys for the defendant were disqualified because a former partner of the firm's Washington office had in that capacity represented plaintiff earlier in a substantially related matter. Had the former partner attempted to represent the defendant in the current action, his disqualification would have been required, and were he still a member of the firm the confidential information presumptively held by him would be imputed to the other members of the firm. Did the fact that he was no longer a partner make the presumption rebuttable? The issue was not faced in Schloetter, the lower court having found that even if the presumption was rebuttable in this special situation, the rebutting evidence was insufficient.

90. 607 F.2d at 197. An earlier en banc opinion in the same circuit drew a distinction between disqualifying the lawyer and disqualifying his work product, indicating that at times a disqualification order may have elements of a Pyrrhic victory for the successful movant. In First Wis. Mortgage Trust v. First Wis. Corp., 584 F.2d 201 (7th Cir. 1978), successor counsel to a firm disqualified for prior adverse representation sought access to the firm's work product. The en banc court reversed both the panel opinion, 571 F.2d 390 (7th Cir. 1978), and the district court, 74 F.R.D. 625 (E.D. Wis. 1977), and granted the requested access. The en banc court found that the work product was "routine lawyer work" unaided by confidential information acquired by the disqualified counsel. Under that finding it would be an unmerited sanction on the client, said the court, to refuse the desired access. The lower court had made no finding on the nature of the work product. Because actual possession of confidential information is not a prerequisite to disqualification of the attorney in a successive representation case, the court had considered actual inquiry into the nature of the work product equally inappropriate. The panel majority agreed, disparaging the hairsplitting view that failure to disqualify a firm would give rise to an appearance of impropriety, although failure to disqualify the firm's work product would not.
court's admission that Canon 9 would require, in some situations, an irrebuttable presumption of imputation in order to avoid even the appearance of impropriety. 91

The court in Novo also did not explain why it did not disqualify the plaintiff's counsel in that case, as a matter of fairness and the realities of law practice, aside from stressing that the movant's failure to allege the sharing of confidences with others in the firm during the past representation was "very significant." 92 This omission would have been significant if the presumption of imputation was rebuttable, but that was not a reason for making it so. The omission could have no significance if the avoidance of even the appearance of impropriety provided the basis for the general rule. If Canon 9 was the basis of the rule, it was irrelevant whether confidences in fact were exchanged with other members of the firm; the situation alone created an appearance of impropriety. It is ironic that, in support of a position rejecting precedent, the opinion quotes earlier dictum to the effect that "the conclusion in a particular case [dealing with ethical principles] can be reached only after painstaking analysis of the facts and precise application of precedent." 93

The dissent emphasized the reasons behind the traditional rule:

Policy considerations require the erection of an irrebuttable presumption in a situation like this. Once the sharing of a relevant confidence is presumed, that presumption ought not to be the subject of rebuttal. To allow rebuttal is to invite casuistry and, even worse, a swearing contest. Courts should keep out of that thicket. The overall policy of maintaining the vitality of Canons 4 and 9 and discouraging "subtle" but enervating interpretations

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91. 607 F.2d at 197. Presumably, this constituted the "unusual circumstances" that the Fifth Circuit subsequently said it viewed as the basis for the decision in Novo Terapentisk. See General Elec. Co. v. Valeron, 608 F.2d 265, at 268 (5th Cir. 1979), cert. denied, 100 S. Ct. 1318 (1980). Similarly, in First Wis. Mortgage Trust v. First Wis. Corp., 584 F.2d 201 (7th Cir. 1978), the en banc court's position was apparently aided by movant's concession that no confidential information in the evidential sense was involved. Id. at 210. But as the en banc dissent made clear, movant never conceded that confidences and secrets in the Code sense were not involved. Id. at 212. Knowledge of the adverse party's corporate finances, structure, and operations received in prior representation could suffice as confidences in the Code sense. See Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 236 (2d Cir. 1977); Richardson v. Hamilton Int'l Corp., 465 F.2d 1382, 1385 (3d Cir. 1972).

92. 607 F.2d at 197.

of these Canons demands nothing less.  

Novo has major significance because of the credence its approach may lend to such extreme views of the imputation of disclosure as those expressed in City of Cleveland v. Cleveland Electric Illuminating Co.  

The court in City of Cleveland would adapt the imputation doctrine to the perceived realities of the large, departmentalized law firm by limiting the imputation of confidential disclosures, actual or presumed, to attorneys practicing in the disqualified attorney’s area of concentration within a firm. Even then, the imputation of confidential disclosures to firm members would be only rebuttably presumed, as in Novo.  

If the lawyer that the movant sought to disqualify had practiced in a department of the firm other than the one in which the already disqualified attorney practiced, the movant would have to overcome a rebuttable presumption that the disqualified attorney had not disclosed confidences to the attorney the movant sought to disqualify. As the court said: “Absent direct proof to the contrary, the attorney would not be deemed to have shared confidential information relating to matter and services exclusively within the sphere of rep-

94. 607 F.2d at 197-98 (Swygert, C.J., dissenting). Echoing that dissent, a panel of the Eighth Circuit during the same week reaffirmed the applicability of Canon 9:

We think a member of the public or of the bar would see an impropriety in the continued representation of C against B by staff lawyers whose supervisor had been disqualified because his former firm represented B in a related suit. The public perceives, a client has the right to expect, and the goals of the Code require us to assume, that members and staff of a law firm working on a suit do so collectively rather than individually. 

Arkansas v. Dean Food Prods. Co., 605 F.2d 380, 387 (8th Cir. 1979).

Rebuttal of the presumption of intrafirm imputation has hitherto been recognized in only two special situations: (1) it has been used to place outer limits on imputation as the “taint” moves through successive firms. The classic case is Laskey Bros. v. Warner Bros. Pictures, Inc., 224 F.2d 824 (2d Cir. 1955). There an attorney who was disqualified from bringing the same suit that a former associate would have been disqualified from bringing against his last employers, was allowed to rebut the presumption of impropriety when a different suit was brought against the employer, “lest the chain of disqualification be endless.” Id. at 827. (2) The Second Circuit has also permitted rebuttal of the presumption in the case of a young associate of an 80-member law firm who after leaving the firm represented plaintiff in a suit against one of the firm’s major clients, with whose matters the associate had only peripheral contact while with the firm. The court stressed “[t]he importance of not unnecessarily constricting the careers of lawyers who started their practice of law at large firms simply on the basis of their former association. . . .” Silver Chrysler, 518 F.2d at 754. This policy consideration also affected the decision in Laskey Bros., 224 F.2d at 827. See Liebman, The Changing Law of Disqualification: The Role of Presumption and Policy, 73 N.W. L. Rev. 996 (1979); Note, 73 YALE L.J. 1058 (1964).

95. 440 F. Supp. 193 (N.D. Ohio 1977); see notes 54-59 and accompanying text supra.

96. Id. at 211.
representation of another department or section of his firm. To do otherwise might "severely limit the scope of the private attorney's future career and the effective operation of his firm, as well as the individual's right to legal counsel of choice."

The supposed needs of the large firm seemed to the court in City of Cleveland to supersede the traditional demands of professional responsibility. The subversion of these demands was simply a matter of applying "realistically equitable logic." Cases such as Novo and City of Cleveland reflect the continuing erosion of traditional ethical doctrine in cases involving successive representation.

IV. DISQUALIFICATION OF COUNSEL OUTSIDE THE FIRM BECAUSE OF PREVIOUS RELATIONSHIPS

Outside the confines of any one firm, counsel otherwise unrelated may confront the possibility of imputed disqualification in a number of special situations. An entire law firm may suffer disqualification because of previous contacts with another law firm. Courts disqualifying firms or independent counsel on this ground usually rely on Canon 9, the rule against the appearance of impropriety. These courts have generally applied Canon 9 less stringently than Canons 4 and 5, thus further complicating the law of conflicts of interest.

For example, the issue of disqualification may arise after independent counsel have represented separate codefendants in a prior case. If one of the attorneys takes on a subsequent representation in a substantially related matter against the codefendant whom the other attorney had represented, the court may have to decide whether to disqualify the attorney in the second case, based on a

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97. Id. SS&D comprises five sections: litigation, public law, estate and taxes, labor and corporate. Its public law section includes a municipal bond subsection which had acted as bond counsel for the City on various issues, including the financing of the City's electric plant. Id. at 202.

98. Id. at 211.

99. Id. at 210.

100. But see General Elec. Co. v. Valeron, 608 F.2d at 267-68, dismissing as dictum the argument of the district court for a rebuttable presumption. In the only other opinion that has confronted City of Cleveland as a precedent, the Third Circuit gave the case short shrift, characterizing it as simply a waiver case. International Bus. Machs. Corp. v. Levin, 579 F.2d 271, 280 (3d Cir. 1978). For other cases involving the waiver issue, see Central Milk Producers Coop. v. Sentry Food Stores, Inc., 573 F.2d 988 (8th Cir. 1978); In re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 89 (5th Cir. 1976); Marketti v. Fitzsimmons, 373 F. Supp. 637, 641 (W.D. Wis. 1974).

101. See text accompanying notes 102-17 infra.
presumed sharing of confidences in the prior representation. In *Fred Weber, Inc. v. Shell Oil Co.*¹⁰² the Court of Appeals for the Eighth Circuit put the question succinctly: "Does a lawyer's representation of A, codefendant with B in a prior suit, disqualify the lawyer as representative of C against B in a subsequent, related suit?"¹⁰³ The court in *Weber* held that neither Canon 4 nor Canon 5 applied in the absence of an attorney-client relationship between the lawyer and B in the prior suit. The court in *Weber* focused instead on Canon 9.¹⁰⁴ In the view of the court, the lawyer's representation of B's codefendant in the prior suit raised no presumption that the lawyer thereby obtained confidential information detrimental to B, nor did the court believe that confidential information which B may have imparted to his own counsel should be imputed to his codefendant's counsel, because the relationship of the lawyers was not that of partners in a law firm. The court thus made the applicability of Canon 9 turn on whether in fact the codefendant's lawyer had obtained such information in the prior representation; if he had not, the court would find no appearance of impropriety.

The analysis of Canon 9 conducted by the court in *Weber* was as dubious as that of the Fifth Circuit in *Woods v. Covington County Bank.*¹⁰⁵ The Fifth Circuit held in *Woods* that although Canon 9 implies there need be no proof of actual wrongdoing, "there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur," as it was not "socially advantageous to substitute a presumption of non-integrity."¹⁰⁶ If, as the court in *Woods* properly assumed, Canon 9 implies there need be no proof of actual wrongdoing for that Canon to apply, it was a questionable sequitur to require a reasonable possibility of some specifically identifiable impropriety, such as the actual receipt of confidences, as a condition to finding a Canon 9 violation.¹⁰⁷

A more recent Fifth Circuit opinion, *Wilson P. Abraham Con-

¹⁰³. Id. at 606.
¹⁰⁵. 537 F.2d 804 (5th Cir. 1976).
¹⁰⁶. Id. at 813 (emphasis added).
¹⁰⁷. The *Woods* analysis of Canon 9 was subsequently disavowed by the Fifth Circuit, at least in a class action context. Zylstra v. Safeway Stores, Inc., 578 F.2d 102 (5th Cir. 1978).
Construction Corp. v. Armco Steel Corp.,\textsuperscript{108} agreed on facts similar to those in Weber\textsuperscript{110} that counsel for a codefendant in a prior case should not be disqualified unless the trial court determines that he was actually privy to confidential information; but, curiously, the court made no reference to Woods. Instead, it held that where information has been exchanged between codefendants and their counsel in the prior proceeding, an attorney who received such information "breaches his fiduciary duty"\textsuperscript{109} if later, in representing another client, he is able to use information to the detriment of one of the codefendants. In such a case, the court in Wilson P. Abraham held, the attorney has an obligation similar to that imposed in successive representation cases. Because of the absence of a "direct" attorney-client relationship in Wilson P. Abraham, however, the court did not permit the usual presumption that the attorneys had exchanged confidential information; the court required proof of the exchange.\textsuperscript{110} An appropriate Code rubric might describe the court's opinion as a "quasi-Canon 4" analysis, based on an attorney's fiduciary obligation to preserve confidences and secrets of his former client's codefendant, rather than on a Canon 9 approach, since a finding of receipt of confidences would require something more than just the appearance of impropriety.\textsuperscript{111}

A subsequent Fifth Circuit opinion, Brennan's Inc. v. Brennan's Restaurants, Inc.,\textsuperscript{112} applied the reasoning of Wilson P. Abraham to a case involving current co-counsel from a firm different from that of the initially disqualified attorney. In Brennan's an attorney who had previously represented both the present plaintiff and the defendant in a related matter was disqualified from representing the defendant in the present action. The court refused to disqualify the disqualified attorney's current co-counsel, who had no prior connection with the matter. The appellate court reasoned that the co-counsel could not have learned from the disqualified counsel anything the other side did not already know. Thus, there

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\item 108. 559 F.2d 250 (5th Cir. 1977).
\item 109. Id. at 253.
\item 110. Id.
\item 111. What if A and B have been co-counsel for a single party, and A now proceeds against that party in a related matter? The situation is no different than if A alone had been counsel in the prior representation, or if A and B had been partners. The court wrote in Fred Weber, while distinguishing the facts in that case: "The relationship between individual counsel for separate codefendants differs in structure and function from the relationship between partners in a law firm and from the relationship between co-counsel for a single party." 566 F.2d at 609.
\item 112. 590 F.2d 168 (5th Cir. 1979).
\end{enumerate}
was no Canon 4 basis for disqualifying co-counsel. This left only Canon 9, and according to the court, there was not such an appearance of impropriety as to warrant co-counsel’s disqualification because if the disqualified attorney had jointly represented the current plaintiff and defendant in a previous case, the attorney’s communications to co-counsel could not prejudice the plaintiff. Even if there had been no prior joint representation by the disqualified attorney, the co-counsel should not be disqualified unless he had in fact obtained confidences and secrets from the disqualified counsel. The cases seem to point in this latter direction for a general rule governing disqualification of current co-counsel in successive representation cases.

*Funds* offers perhaps the paradigm of recent opinions on the disqualification of co-counsel by reason of current association with disqualified counsel in a simultaneous representation case. In *Funds* the Second Circuit held that the involvement of Milgrim in the *Funds* litigation was an extension of Morgan Lewis’s earlier involvement with the German investors’ litigation against the Fund. This left the difficult question of determining what facts would cause a court to label a co-counsel’s involvement in a case an extension of a disqualified attorney’s involvement. Would it suffice that the new counsel was retained on the former counsel’s recommendation? The Second Circuit did not refer to this fact in isolation, but coupled it with the disqualified attorney’s assistance to the new counsel and the new counsel’s knowledge of the disqualified counsel’s ethical dilemma. The court presumably found that the fact of recommendation should not of itself transmit the disqualified attorney’s taint. Whatever the merits of the court’s con-

113. The fact of joint representation did not lessen the basis for disqualifying the counsel who had earlier represented both parties. The mandate of EC 4-5 that “a lawyer should not use information acquired in the course of representation of a client to the disadvantage of the client” operates without regard to whether someone else may be privy to it.” Id. at 172 (citing NCK Organization v. Bregman, 542 F.2d 128, 133 (2d Cir. 1976)).
114. 590 F.2d at 174.
117. 567 F.2d at 234.
clusion on the facts in *Funds*, this approach offers little guidance for the perplexed.

While Canon 5 provided the major ground for the decision in *Funds*, the court cited Canon 9 as an additional reason for disqualifying Milgrim. The appearance of impropriety required to implicate Canon 9 arose from the firm’s “close association” with Morgan Lewis in a factually related suit.118 The former “close association” between the firms could have supported the court’s Canon 5 rationale, but the value of the former association as precedent for a Canon 9 disqualification was discounted by the court’s insistence on not deciding whether Canon 9 alone would warrant disqualification.119

The court in *Funds* then went further to find that disqualification was required “with even greater clarity in the context of Canon 4’s admonition that an attorney must not disclose the confidences of his client.”120 Canon 4 applied, according to the court in *Funds*, because it was possible that Milgrim had learned of confidences which Andersen had disclosed to Morgan Lewis. The court’s path to this Canon 4 position traverses the series of cases in the Second Circuit dealing with disqualification of counsel representing a client with interests adverse to those of a former client—successive representation cases.121 An inquiry into whether the new counsel was in a position to receive confidences would perhaps still be relevant if pursued in a Canon 9 context of the appearance of impropriety, although cases such as Wilson P. Abraham122 would then require that co-counsel had in fact received the confidences.

Because the facts in *Funds* supported disqualification on other grounds, the search for an analogy to the successive representation cases only introduced more conceptual confusion into an area which could do with less. The familiarity of the large corporate firm with the practices, procedures, and internal papers of its long-

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118. Id. at 235.
119. Id. at 233 n.15.
120. Id. at 235.
121. Id. at 235-37. The cases on which the *Funds* court relied for its Canon 4 analysis were NCK Organization v. Bregman, 542 F.2d 128 (2d Cir. 1976) (former house counsel of plaintiff corporation disqualified from consulting with defendant’s counsel about documents the former house counsel had drafted for the corporation), and Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1973) (plaintiff’s counsel disqualified after attorney for defendant corporation became a plaintiff). See also Cutner v. Atlantic Richfield Co., 27 Fed. R. Serv. 2d 363 (E.D. Pa. 1979).
standing clients is commonplace. To permit this familiarity to suffice as a basis for disqualification of new counsel should the firm in the future become counsel for an adversary, though in a matter totally unrelated to its earlier representation, would indeed break new ground. Of course, a court might justify taking that step by concluding that the extent and intimacy of a firm's prior association with a corporate client would afford the firm's present client an apparent advantage in litigation against the former client. In any event, although cases involving independent co-counsel justifiably permit the use of a rebuttable (rather than an irrebuttable) presumption of the exchange of client confidences, efforts to extend the application of that rebuttable presumption to other situations persist to the detriment of the Code.

V. DISQUALIFICATION OF FORMER FEDERAL GOVERNMENT ATTORNEYS

In the case of former government attorneys now working for private firms, an important issue of imputation arises. Assuming that a court disqualifies a particular attorney from representing a client in a government matter because he had substantial responsibility for the matter when he had worked for the government, should the court impute the disqualification to the other members of the firm? This issue has generated much alarm and disagreement among attorneys; the conflict seems far from resolved.

Disciplinary Rule ("DR") 5-105(D) of the Code as amended in 1974 appeared to clarify the subject of disqualification by imputation, by requiring disqualification of all members of a firm when one of its attorneys was required to withdraw from representation pursuant to some other Disciplinary Rule. Less than two years

123. According to the Legal Times of Washington, in one case a party (Company B) abandoned without decision an effort to rely on this ground to disqualify counsel for Company A seeking to take over Company B, because counsel had earlier represented B in seeking to take over Company C. Legal Times of Wash., Sept. 24, 1979, at 6.

124. See text accompanying notes 112-15 supra.

125. See ABA Code of Professional Responsibility, DR 9-101(B). Many of the broader aspects of the "revolving door" problem are beyond the scope of this article. These concerns were addressed by the Ethics in Government Act of 1978, Pub. L. No. 95-521, § 501(a), 92 Stat. 1864 (amending 18 U.S.C. § 207 (1962)). Section 207 was further amended by S. 869, also effective July 1, 1979.


127. As amended in February, 1974, ABA Code of Professional Responsibility, DR 5-
later, however, the ABA Committee on Ethics and Professional Responsibility issued its Formal Opinion 342 in which it qualified the rule in DR 5-105(D). The Committee stated that if a firm screened the former government attorney from participation in the firm’s work and from compensation from the retainer, the firm might not suffer disqualification. The government agency concerned could then waive disqualification if satisfied that the screening of its former employee was adequate. Previously, the construction of a “Chinese Wall” had been deemed ineffective insulation in simultaneous or successive representation cases not involving a former government employee. Are there different ethical considerations in conflict of interest cases involving former government employment? Or are the ethical considerations the same but outweighed by various pragmatic pressures? The continuing efforts by the District of Columbia Bar to dilute DR 9-101(B) may offer some answers to these questions.

The version of DR 5-105(D) in force in the District did not include the amendment generally adopted in 1974 until July 28, 1978. Nevertheless, the issuance of Opinion 342 was occasioned by the reaction of the District of Columbia Bar to that 1974 amendment. The bar’s desire for an “escape hatch” from imputation predicated upon “screening” with agency approval was founded upon the assumption that any alternative rule would discourage the entry by lawyers into government service by drastically limiting their private employment opportunities after leaving that service. Valid or not, this assumption served the personal interests both of Washington law firms and of government attorneys. Consequently, the issue remained at rest until July 1976,
when, ironically, it was reopened by the Committee on Legal Ethics of the District of Columbia Bar.

In that month, in response to a request, the Committee issued a draft opinion holding that when an attorney in private practice is disqualified from representing a client in a matter because he had substantial responsibility with respect to that matter while a government employee, the partners and associates of that lawyer should also be disqualified.181 In Opinion 342, the ABA had acknowledged this to be the general rule while providing an exception from the restrictions of that rule upon appropriate "screening" with agency approval. The 1976 Draft Opinion of the District of Columbia Committee proposed to adopt the rule without the qualification.182 As might be anticipated, the bar responded to the draft opinion much the same as it had to the 1974 amendment to DR 5-105(B). The opponents of the views expressed in both the 1974 amendment and the draft opinion directed their efforts towards their local bar committee. They generated some fierce rhetoric183 and caused tactical delays which contributed to the defeat of the draft opinion.184

In 1977, the District of Columbia Bar Committee published proposed amendments to the local Code and asked for comment by the local Bar. These amendments provided that the agency lawyer having principal operational responsibility for the matter could waive imputed disqualification. The waiver was subject, however, to approval by a judge or other official independent of the agency or department involved.185 Again, the local Bar expressed strong opposition.186

The Bar committee responded with a second proposed amendment, which also allowed waivers of imputed disqualification of the former government employee's firm, with certain restrictions. The requirement that any waiver be reviewed by a judge or other independent official was dropped. Instead, the disqualification of a lawyer with respect to a particular matter in which he or she participated "personally and substantially" while in public office or employment would not be imputed to partners and associates of

132. Id.
his firm if a waiver were granted (1) upon filing of affidavits attesting to the screening of the lawyer from the matter and the fees associated with it, and a finding by the public employee in charge of the matter for the agency that "a waiver is not inconsistent with the public interest," or (2) in accordance with the rules of the agency for the granting of waivers. This, too, was ultimately unacceptable to the Bar.

In 1979, the Board of Governors of the District of Columbia Bar Association proposed yet another Canon 9 rule on imputed disqualification of firms employing a former government employee in matters for which he had substantial responsibility while he was working in government. The Bar submitted to the Court of Appeals for the District of Columbia for its approval a rule that would sanction the Chinese Wall and would paper over the underlying issues with a firm's own affidavits: the rule would have upheld screening if the individually disqualified lawyer and at least one of his affiliates submitted affidavits attesting to the efficacy of the screening. Ordinarily, the affidavits would conclusively determine the existence of "sufficient" screening. After more than a year, the court promulgated its own revision of the proposal, accepting the affidavit procedure but adding the requirement of agency waiver, a condition previously rejected by the bar.

137. See id., Aug./Sept. 1978, at 44. In proposed rule 1.11 the ABA Committee on Evaluation of Professional Standards has resurrected the waiver alternative in the case of the lawyer himself. The rule would permit the appropriate government agency to waive disqualification otherwise applicable to a lawyer seeking to represent a private client in a matter in which the lawyer had participated personally and substantially while a government employee. See Discussion Draft supra note 9, rule 1.11.

138. District Law., Apr./May 1979, at 47.

139. The Administrative Conference of the United States, whose composition largely reflects the same corporate and government lawyer interests, lent its prestige in support of the proposed amendment. See Legal Times of Wash., Dec. 31, 1979, at 27.

140. In an order dated April 17, 1980, the court announced its forthcoming adoption of the following amendments to the Code of Professional Responsibility, taking effect in the District of Columbia:

DR 5-105(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, other than DR 2-110(B)(3) or (B)(4) or DR 6-101(A)(1), or, in appropriate cases, DR 5-101(A), no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment, provided that any imputed disqualification or restrictions that attach because a lawyer was a public employee shall be determined under Canon 9. (Emphasis added.)

DR 9-101 Avoiding Even the Appearance of Impropriety.

(B) A lawyer shall not at any time accept private employment in connection with any matter in which he or she participated personally and substan-
The implications of the proposed rules on imputed disqualifi-

DR 9-102 Imputed Disqualification of Partners, Associates, and of Counsel Lawyers.

(A) If a lawyer is required to decline or to withdraw from employment under DR 9-101(B), on account of personal and substantial participation in a matter, no partner or associate of that lawyer, or lawyer with an of counsel relationship to that lawyer, may accept or continue such employment except as provided in (B) below.

(B)(1) The imputed disqualification of one or more lawyers under DR 9-102(A) may be waived by the employing public agency or department, but only if the following procedures are followed and determinations made.

(a) The waiver shall be made in writing by the lawyer or other official who has principal operational responsibility for the matter for the public agency or department (or by a governmental department or agency having supervisory responsibility over that lawyer or other official) upon a determination by that official (or department or agency) that the waiver is not inconsistent with the public interest. The written waiver shall state clearly the basis for the decision and shall immediately be made public insofar as publication is not inconsistent with Canon 4 or provisions of law.

(b) Prerequisites to granting the waiver shall include but not be limited to:

(1) an affidavit by the former public officer or employee attesting (i) that he or she will not participate in the matter in any way, directly or indirectly, and (ii) that he or she will not share, directly or indirectly, in any fees in the matter, and

(2) an affidavit by at least one private lawyer who would be participating in the matter but for the imputation of the disqualification of the disqualified lawyer, attesting (i) that he or she and all affiliated lawyers are aware of the requirement that the former public officer or employee be screened from participating in or discussing the matter or the representation and describing the procedure being taken to screen the personally disqualified lawyer; (ii) that the client or clients have been so informed; and (iii) that at least one affiliated lawyer will file and serve, promptly upon final disposition of the matter or upon expiration of the period of personal disqualification, whichever occurs sooner, a further affidavit describing the actual compliance by the affiliated lawyer with the procedures for screening the personally disqualified lawyer.

(B)(2) The procedures and determinations prescribed by DR 9-102(B)(1) shall apply in the absence of other procedures adopted by the department or agency in question within its authority to prescribe rules regarding practice of present or former officials or employees of the department or agency. If a department or agency adopts procedures and specifically indicates that they are in lieu of the provisions of DR 9-102(B)(1), such procedures shall thereafter be applicable to the conduct of lawyers with respect to matters within the jurisdiction of the department or agency.

(C) If a personally disqualified lawyer or affiliated lawyer has stated in accordance with DR 9-102(B) that further affidavits describing compliance with screening procedures will be filed and served upon final disposition of the matter or upon expiration of the period of disqualification, such affidavits shall be filed and served as soon as practicable after they are due.

(D) Affidavits filed pursuant to DR 9-102(B) and (C) shall be public except to the extent that a lawyer submitting an affidavit shows that disclosure is inconsistent with Canon 4 or provisions of law.
cation that freely authorize agency waivers of imputed disqualification become clearer when one considers the choices actually open to an agency deciding whether to grant a waiver. The waiver would pose to the authorized government official the following alternatives, among others: (1) If on the facts he were convinced that the former employee had no information adverse to the government's interests, he presumably would grant the waiver without regard to the bona fides of the proposed screening. The official would then have gone behind the usual presumption that the former government lawyer had acquired confidences during his employment. (2) If on the facts the government official believed that the former employee had information adverse to the government's interests, or if he proceeded merely on the presumption that the employee had such knowledge, the official would then have to determine the adequacy of the screening process as a protection for the government's interests. A decision to grant the waiver would then rest on the conclusion that the screen was nonpermeable. How would the government official know this? How could he police the screen? He would not and he could not.\textsuperscript{141}

Few devices seem more calculated to convey the appearance of impropriety than the two that have now emerged as components of the solution for the District of Columbia Bar: (1) self-serving affidavits by those who would otherwise be presumed to possess the proscribed conflicts of interest and (2) a perfunctory threshold waiver by agency personnel, which is not policed thereafter. Nor are such personnel devoid of conflicts in granting waivers. These efforts hardly represent a reasonable balancing of the ethical and personal interests involved. Rather, they reflect an accommodation to the personal concerns of the bar. The rule obscures the capitol-

\textsuperscript{141} The waiver procedures of the Securities and Exchange Commission provide a good example of agency attitudes toward waiver. In 1978, the SEC announced a codification of its informal procedure with respect to the appearances before the Commission of partners and associates of former SEC employees. \textit{Sec. Reg. & L. Rep. (BNA) No. 467, at E-1 (1978)}. The Commission stated that waivers of imputed disqualifications are granted so long as the disqualified person was "screened," but acknowledged that the Commission has never questioned a firm's representation as to the appropriateness of the screening. Unless the firm had few or no securities attorneys before the former SEC employee joined the firm, the affidavits of the firm would be accepted at face value. \textit{Id.} at E-2.
tion with language traditional enough to avoid the appearance of outright repeal. The language preserves the facade of Canon 9 while gutting its content.

The interim regulations promulgated under the Ethics in Government Act of 1978 do no more to protect traditional ethical principles than the proposed Canon 9 disciplinary rules of the District of Columbia Bar. In general, the Act ostensibly prohibits any former government employee from acting as attorney or agent or otherwise representing a private client before the “United States” (the latter a defined term that includes federal courts as well as executive departments and agencies) in a particular matter in which, while a government employee, he participated personally and substantially. The Act and the regulations purport to bar acts by former government employees that suggest the employees are exploiting their prior affiliation with the government and to bar “switching of sides” on a particular matter, a practice that undermines confidence in the fairness of a proceeding. Despite the stated policy of the Act, however, the regulations go beyond the mere withholding of imputation to sanction the very practices the Act seems to proscribe. For example, section 737.21(b) of the interim regulations provides that “[n]either the Act nor these regulations impute the restrictions on former employees to partners or associates of such employees.” Another regulation contains a limited sanctioning of “in-house assistance” by a former government employee in connection with the representation of a client in a government matter.

143. 5 C.F.R. § 737.1(c) (1979).
144. Id. § 737.1(b).
145. Id. § 737.5(b)(5) provides: “Assistance. A former employee is not prohibited from providing in-house assistance in connection with the representation of another person unless he or she was a Senior Employee when participating in the particular matter.” Presumably, the enactment of S. 869 (approved in June 1979) will lead to the deletion of the exception for senior employees. See 126 Cong. Rec. 3870 (1979). As originally enacted, section 207(b)(ii) of the statute contained language barring “assistance” by a former senior employee for a specified period, in representing someone in connection with an appearance before the United States, concerning matters in which he personally and substantially participated or for which he had official responsibility. The draftsmen of the regulations took this bar as in effect sanctioning “assistance” by all other former government employees. Thus, section 737.21 of the regulations states that “[i]mputation of the restriction of section . . . 207(b)(ii) . . . to partners of former employees would be inappropriate for the additional reason that section 207(b)(ii) itself restricts secondary-level activity” (emphasis added). S. 869 removes the restriction on the secondary-level activity of senior employees; i.e.,
vation of confidences and secrets (the mandate of Canon 4) but the avoidance of direct agency contact that might give the appearance of unfair use of prior government affiliations (a Canon 9 consideration). Permitting a former government employee to render offstage advice and assistance appears to conflict with Canon 9, although in the interplay of the Act and the Code the latter would take precedence. But if modified as now proposed, the Code would no longer inhibit screening in the District of Columbia.

For the bar outside the District, the screening issue was revived with new intensity in the past year by the panel opinion of the Second Circuit in Armstrong v. McAlpin. The issue was whether a law firm could pursue the same defendants in a securities fraud derivative suit against whom a member of the firm proceeded earlier while working for the government. The receiver of a mutual fund brought suit to recover assets of the fund. A partner of the firm representing the receiver had been the SEC official with substantial responsibility for an investigation of the securities laws violations that became the bases of the receiver's suit. Although the firm conceded that the partner was disqualified under DR 9-101(B), the district court found support for screening in ABA Opinion 342, inter alia, and refused to disqualify the entire firm. The panel of the court of appeals disagreed, finding that screening the statute as amended applies only to assistance which former employees give while personally present during an appearance before the government.

146. 5 C.F.R. § 737.1(c)(9) (1979): "These regulations do not incorporate restrictions contained in the code of conduct of a profession of which an employee may be a member."

The Administrative Conference of the United States has proposed a further amendment to section 207 of the Act so as to "preempt the rules of professional organizations or courts imposing additional post-employment restrictions" beyond those that would be left in the amended Act (emphasis added). Legal Times of Wash., Apr. 28, 1980, at 24. Presumably, the proposal seeks to void section 737.1(c)(9) of the regulations under the Act, which recognizes that the Act does not affect the restrictions contained in the Code of Professional Responsibility. It is doubtful that Congress could limit a court's inherent power to regulate the conduct of attorneys practicing before it, as such power is not a matter of the federal courts' jurisdiction.

147. 606 F.2d 28 (2d Cir. 1979), rev'd en banc, 625 F.2d 433 (2d Cir. 1980).

148. Armstrong v. McAlpin, 461 F. Supp. 622 (S.D.N.Y. 1978), rev'd, 606 F.2d 28 (2d Cir. 1979), rev'd en banc, 625 F.2d 433 (2d Cir. 1980). Before the firm instituted the litigation, the disqualified partner had obtained from the New York office of the SEC a statement that there was no appearance of impropriety because the SEC and the plaintiff had no adverse interests, and if the partner were screened, the SEC did not believe the firm would be disqualified. The district court did not find this dispositive, because the SEC, not a party to the case, could not waive the defendants' objections to the qualifications of the plaintiff's counsel. Id. at 625. Since this should have been obvious to the SEC official who accommodated his former association, the question remains whether a grant of waiver in these circumstances would necessarily represent a considered decision.
procedures do not apply to this type of case. The court held that the firm was disqualified because of the partner’s previous governmental employment, having had substantial responsibility and active, direct participation in the very matters involved in the pending suit. In a case such as this one, urged the panel, the values served by the Disciplinary Rule outweigh concerns over a client’s free choice of counsel and the possibility that post-employment prospects of government lawyers would be restricted unduly by fears of imputed disqualification on the part of firms they may seek to join. In this situation, the panel found a substantial appearance of impropriety not “diminished by an internal arrangement insulating fees from the disqualifying case, an arrangement that would most likely be unknown to casual observers and unper-

149. The court explained: “Reversal occurs here because of our disagreement with the District Court that the principle of using screening procedures to enforce DR 9-101(B) is applicable to this type of case rather than any disagreement over the significance of the particular facts.” 606 F.2d at 34 n.7. See also ASSOCIATION OF THE BAR OF THE CITY OF N.Y. COMM. ON PROFESSIONAL AND JUDICIAL ETHICS, Op. No. 889, reprinted in 31 THE RECORD 552, 571:

We emphasize that we are not proposing that the problem of firm disqualification can be cured by proper screening and undertakings in every case. There will, for example, be cases in which the disqualified lawyer’s relationship with the subject matter while in government was so close, and the significance of his role was so great, that no degree of screening of any character and no manner of undertaking will suffice to remove the appearance of impropriety.

150. 606 F.2d at 34.

151. The rule reflects the concern of the court in General Motors Corp. v. City of New York, 501 F.2d 639, 648-49 (2d Cir. 1974), that a government lawyer’s actions in his capacity as a public legal officer might be, or appear to be, influenced by the prospect of later employment upholding or upsetting what he had done earlier for the government, the court noted that “Other concerns, not present in all cases, are that the former government lawyer might take a position adverse to the government agency, might disclose confidential information, . . . might receive or appear to be pursuing a governmental objective in private practice, free of restrictions imposed upon government personnel.” 606 F.2d, at 32-33. Because the matter involved was not always one to which these concerns related or was not sufficiently extensive to give rise to these concerns, the panel opinion rejected a rule that would disqualify a law firm whenever DR 9-101(B) required disqualification of a particular member of the firm. On this analysis, a court could reach the result in Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977), without resorting to the indiscriminate application of screening found in Kesselhaut.

152. The panel observed that

[t]he number of matters in which the government attorney has a direct, personal involvement, as distinguished from a formal, supervisory role, would seem to be sufficiently small so that disqualification of the firm would not significantly impair the government attorney’s employment prospects nor impair the government’s ability to recruit lawyers from private practice.

606 F.2d at 33 n.4.

153. Id. at 33.
suasive to the more informed.”

Notwithstanding the limited scope of imputed disqualification sanctioned by the panel opinion, a mass attack on the opinion followed, led by the SEC, other federal agencies, and a coterie of former government lawyers seeking as amici curiae a reconsideration.

154. Id. at 34.

155. The SEC's brief concedes that its former employee was properly disqualified. The SEC contended that there could be no “taint” on the firm if it screened the former employee “effectively.” This position comes with questionable force from an agency whose practice is to accept, at face value, a law firm's representations that a lawyer will be screened appropriately. See note 141 and accompanying text supra. Even more disturbing is the brief's merely perfunctory reference to the appearance of impropriety as an ethical factor.

In the absence of “taint” or special circumstances (not defined), the SEC brief leaves ethical improprieties to the disciplinary machinery of the “traditional” bar. This is the same agency that seeks to impose penalties under its own rule 2(e) on lawyers it deems guilty of ethical improprieties that do not necessarily taint SEC proceedings. For example, the SEC attempts to discipline attorneys in their “office practice” of securities law even if they do not personally appear in SEC proceedings. See Legal Times of Wash., Dec. 17, 1979, at 2.

156. The Department of Justice and a number of other executive branch agencies filed memoranda that gave ethical aspects nominal consideration at best and, like the SEC brief, emphasized the supposed negative effects of the panel decision on future government hiring of lawyers. The lengths to which the Department's lawyers will go to push screening was demonstrated in United States v. McDonnell Douglas Corp., Legal Times of Wash., June 16, 1980, at 21 (D.D.C. June 4, 1980). In McDonnell Douglas the law firm representing a target of a federal grand jury investigation hired a new associate who had participated in the Department's prosecution and pre-indictment review of the case. On the basis of affidavits that the associate had made no disclosures about the case to the firm, the court found that the screening of the associate sufficed to avoid disqualification of the entire firm, since the Department had refrained from “assert[ing] that a waiver of the firm's disqualification would not be appropriate at this instance.” Id. at 23.

157. Finally, a group of former senior lawyers at the Department and the Federal Trade Commission filed a memorandum differing from the others principally in the breadth of its unsupported generalities. Thus, for the writers of the memorandum the panel opinion erred in rejecting “the traditional approach of screening and agency approval” (emphasis added). As a tradition, the approach had its birth in the memorandum. The latter, like the Department of Justice memorandum and the SEC brief, cites cases and quotes dicta without regard to the widely different contexts from which each derived, and without distinguishing between individual and firm disqualification. The memorandum also ignores cases contrary to its position, aside from listing them in an appendix purportedly showing that disqualification motions are a “markedly increasing burden on the courts.” Like the others, this memorandum shows little concern with the public's image of the profession. The authors of the memorandum, including two former solicitor-generals, see in the panel opinion an “underlying assumption that government lawyers cannot be trusted—trusted to discharge their public responsibilities faithfully while in office, or to abide fully by screening procedures afterwards.” This rhetoric diverts the eye from the real point at issue, which is not the trustworthiness of government lawyers, but the public's trust in the legal profession and the
ation en banc. In granting a rehearing, the Second Circuit's order directed the parties to brief the question of the appealability of disqualification orders,\textsuperscript{158} intimating an interest as much with the delay aspects of such appeals as with the screening issue. Previous expressions in the Second Circuit's opinions, noted earlier in this article,\textsuperscript{158} foreshadowed the court's change of position.

Change came with the court's en banc opinion,\textsuperscript{160} which qualified the panel's position by limiting appeals to orders granting disqualification.\textsuperscript{161} On the merits, partly in response to the professed concerns of the prestigious amici over the chilling effect the panel opinion allegedly would have had on government hiring of quality lawyers,\textsuperscript{162} the en banc court vacated the panel opinion and approved the district court's resort to screening. The court purported to settle the merits of the case, in order not to "leave the law of the circuit on attorney disqualification in a muddled state."\textsuperscript{163} It may not have altogether succeeded.

To begin with, the case deals only with a firm representing the same side of the issues, so to speak, that its disqualified partner represented for the government. Indeed, the court makes the point that the attorney had been on the "same side" and that all the government's files had been turned over to the firm's client even before he retained the firm.\textsuperscript{164} In this context the firm's potential use of confidential information garnered by a former government employee did not pose the risk that it often would. In apparent acknowledgment of this difference, the en banc opinion refers to \textit{Funds of Funds}\textsuperscript{165} and \textit{Cinema 5}:\textsuperscript{166} "[T]his is not a case where a law firm, by use of a 'Chinese Wall,' is attempting to justify representation of conflicting interests at the same time. . . . Nor is the . . . firm 'potentially in a position to use privileged information' need to avoid even the appearance of impropriety to lessen that distrust. \textit{See} Price v. Admiral Ins. Co., 481 F. Supp. 374, at 377-79 (E.D. Pa. 1979).

\textsuperscript{158} See \textit{Armstrong v. McAlpin}, 625 F.2d 433, 434-35 (2d Cir. 1980) (en banc).

\textsuperscript{159} See note 16 \textit{supra}.

\textsuperscript{160} 625 F.2d 433.

\textsuperscript{161} The issue of appealability now awaits determination by the Supreme Court. Firestone Tire & Rubber Co. v. Risjord, 100 S. Ct. 2150 (1980) (No. 79-1420), granting cert. to \textit{In re Multi-Piece Rim Prods. Liab. Litigation}, 612 F.2d 377 (8th Cir. 1980).

\textsuperscript{162} Counsel for one firm and a lawyer for the SEC thought that the en banc majority was influenced by its knowledge that so distinguished a group had made this prediction. \textit{See} Legal Times of Wash., June 30, 1980, at 20.

\textsuperscript{163} 625 F.2d at 441.

\textsuperscript{164} \textit{Id.} at 445.

\textsuperscript{165} 567 F.2d 225 (2d Cir. 1977); \textit{see} notes 23-30 and accompanying text \textit{supra}.

\textsuperscript{166} \textit{Cinema 5, Ltd. v. Cinerama, Inc.}, 528 F.2d 1384 (2d Cir. 1976).
obtained through prior representation of the other side."\textsuperscript{167} Although the en banc court declared that the firm is not potentially in a position to use privileged information in this case, the court did not attribute the absence of risk to the effectiveness of screening; that would have begged the question. Instead, the court's approach suggests that screening might not have sufficed in \textit{McAlpin} had there been prior adverse representation\textsuperscript{168} or if the client had not already gotten all the government's information before he hired the firm. Certainly, the language just quoted would carry the disqualification to the firm in both the areas delineated by the court, without regard to whether a prior adverse representation had been public or private. Of course, in a disqualification case involving only private employment, the concern for government attorneys' employment opportunities would be irrelevant. In any event, the en banc opinion is no clear-cut mandate for universal application of screening, nor can it be said to have unmuddled the law of the circuit on the subject.

The determination that, henceforth, orders denying disqualification motions are not appealable in the Second Circuit will lessen appellate oversight of Code enforcement by the district courts. By the same token, the pressures of crowded dockets and complex corporate litigation on district courts possessing unhampered discretion to deny disqualification will inhibit such enforcement. How effective the en banc action will be in expediting the progress of litigation, in the continuing context of other litigating tactics that contribute to delay, remains to be assessed. More questionable is the role of this court in eroding ethical standards by lending its prestigious, if limited, support to the device of screening. True, unlike the amici\textsuperscript{169} the court did not altogether abandon Canon 9 as a guide for ethical conduct by the lawyer, but the court thought that the appearance of impropriety in \textit{McAlpin} was not very clear.\textsuperscript{170}

\textsuperscript{167} 625 F.2d at 445 (emphasis added). The sentence derives from an earlier opinion by the same judge in Board of Educ. v. Nyquist, 590 F.2d at 1246, from which he quotes at great length in \textit{McAlpin}.

\textsuperscript{168} Cf. Trane v. Smith, SEC. REG. & L. REP. (BNA) No. 561, at A-8 (1978) (firm was disqualified because of the possibility that lawyer may have received confidential information in the first representation relevant to the subsequent adverse representation).

\textsuperscript{169} The proponents of screening have urged overly sophisticated criteria for the application of Canon 9. For example, to require a \textit{real} danger of some specific impropriety that would reasonably appear improper to a fully informed observer, as the touchstone for the application of Canon 9, is to detach the subject from reality, positing a wholly impractical gauge of public reaction. \textit{See Lacovara, Restricting Private Practice of Former Government Lawyers}, 20 Ariz. L. Rev. 369, 384 (1978).

\textsuperscript{170} 625 F.2d at 445.
By reaffirming the relevance of Canon 9, the court avoided the degree of abdication otherwise suggested by its stress on avoiding "taint" of the underlying trial as the criterion for disqualification and by its cautiously "adopting a restrained approach to ethical issues that focuses primarily on preserving the integrity of the trial process." Nonetheless, the McAlpin decision retreated far from earlier ringing declarations against leaving the slightest doubt about the ethical propriety of a lawyer's representation in a given case. The court's desire to relegate the resolution of "non-taint" issues to "both federal and state comprehensive disciplinary machinery" gives scant promise of vigorous enforcement of traditional standards, in view of the bar's record to date. Nor can one join in the court's applause for "the efforts of the organized bar to educate its members as to their ethical obligations," when that education seems for the most part retrogressive, as Part VI will make clear.

VI. ABA Model Rules—Erosion Through "Clarification"

With some exceptions, the federal courts have adequately dealt with the problems of simultaneous and successive representation despite the deficiencies of the Code. True, judges who seek "patently clear" identity of subject matter in successive representation cases may be relegating to secondary importance the wholesome principle of resolving doubts in favor of disqualification. Formerly, the salutary presumption of a conflict of interest often sufficed for disqualification. Courts that now insist on positive proof of an attorney's receipt of confidences before considering disqualification are ignoring the interest of the judicial system in improving the public's image of the profession. The judiciary's traditional oversight of the ethical standards of counsel practicing

171. Id at 446. See the dissenting opinion, id. at 449 (Mulligan, J.), for a discussion of reasons why the facts of the case warrant disqualification of the firm, even by the "taint" criterion.
172. Id. at 444. A restrained approach might also involve applying the Code as written. Although the majority rejected "a plain meaning approach to disqualification motions," because of "the continuing uncertainty and disagreement over the meaning and application of the Code's provisions, id. at 444 n.22, disagreement by the bar over their application might be better characterized as resistance to their plain meaning.
173. See note 11 supra.
174. 625 F.2d at 444 (quoting Nyquist, 590 F.2d at 1246).
176. 625 F.2d at 446.
before the courts and their maintenance of those standards (whatever their content) would suffer major dilution were judicial concern only with the question whether counsel's conflicts might affect the outcome of the suit. Total abandonment of such control would result from the view that the enforcement job belongs to the bar, not the bench. That dilution has been avoided because the courts for the most part continue to resist the relaxing of basic professional standards.

The efforts of the bar may ultimately have an adverse impact on those standards because the bar is more persistent and unremitting than the judiciary. Indeed, the Discussion Draft of the Model Rules of Professional Conduct prepared by the ABA Commission on Evaluation of Professional Standards foreshadows a major alteration of those standards in the categories of conduct on which this article has focused. The general scheme of the draft is to state black letter rules followed by extended commentary and minimal references. Though the chairman of the Commission described the draft as consisting of "specific" rules, these rules are for the most part generalities given content by the attendant commentary, and the rules and the commentary do not always move in tandem. The proposed rule regarding imputed disqualification in relation to simultaneous and successive representation affords a prime example of the deficiencies of the Proposed Rules.

As will appear, this proposed rule would contribute neither to the preservation of traditional professional standards for imputed disqualification, nor to clarity in the matter. These flaws result more from the commentary than from the rule itself. The latter reads as follows:

7.1 Vicarious Disqualification
(a) A law firm shall not represent multiple clients when a lawyer practicing alone would be prohibited from doing so.
(b) When lawyers terminate an association in a firm, neither a lawyer remaining in the firm nor one who has left it, nor any other lawyer with whom either lawyer subsequently becomes associated, shall undertake representation that involves:

177. Discussion Draft, supra note 9. The preface to the draft describes it as "a fundamental clarification of the ethical judgments lawyers must daily make in the practice of the law."

(1) a significant risk of disclosing confidences of a client in violation of rule 1.7 ["Confidential Information"], or making use of information to the disadvantage of a former client in violation of rule 1.10 ["Representation Adverse to a Former Client"]; or
(2) a lawyer's assuming significant participation in representing a person in the same or a substantially related matter if the interest of that person is adverse in any material respect to that of a client in whose representation the lawyer had previously participated in a significant way.

(c) Subject to the limitations of rule 1.8 ["Conflict of Interest"], a disqualification prescribed by this rule may be waived by the consent of the affected client upon adequate disclosure.179

The commentary then proceeds in general terms (for example, by contrasting “extensively represented” with “represented only for limited purposes”). More significantly, the commentary relies on these generalities as the basis for not applying traditionally accepted rules of disqualification to the large firm. Of the conclusive presumption that a partner has access to the confidences of all clients of his firm, the commentary says:

Under this analysis, if a lawyer has been a partner in one firm, and then becomes a partner in another firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption could properly be applied when both firms are relatively small and all the clients extensively represented, but may be unrealistic when the firms are large or where the clients are represented only for limited purposes.180

The reasons why courts have refused to distinguish between large and small firms, and between limited and extensive representation, were discussed earlier in this article.181 The argument that the presumption is “unrealistic” in the case of the large firm deserves special attention at this point. The presumption was never intended to be realistic, as the draftsmen of the commentary presumably

179. DISCUSSION DRAFT, supra note 9, rule 7.1, at 25, col. 1 (original printed in all capitals). Rules 1.7 and 1.10, referred to above, would introduce new limiting factors on disqualification of the individual lawyer by requiring “significant risk” of disclosure of confidences as a determining factor. Rule 1.10 would not disqualify the individual lawyer despite prior related adverse representation unless adverse in a “material respect.” Both these requirements are repeated in proposed Rule 7.1, above.
180. Id. (emphasis added).
181. See text accompanying notes 23-49 supra.
know. Rather, the presumption arose from a desire to protect confidences whether or not in fact conveyed in the particular case and whether or not all partners had actual access to them, to facilitate maximum disclosure of relevant information by the client.

The commentary next discusses “vicarious disqualification” as a facet of the “appearance of impropriety” proscribed by Canon 9 of the present Code. The commentary mounts a major attack on the concept of the “appearance of impropriety,” ostensibly in pursuit of “specific standards shorn of aspirational or hortatory language.” The commentary begins the assault by setting up a straw man: “[P]rohibiting the appearance of impropriety can be taken to prohibit any new client-lawyer relationship that might make a former client feel uncomfortable. If that meaning is adopted, disqualification becomes little more than a question of subjective judgment by the former client.” To this writer's knowledge no one had suggested, before this revelation, that this is the meaning of “appearance of impropriety” as used in the cases that have given it substance.

Purported difficulties with the “appearance of impropriety” next become the springboard for another argument on behalf of the rebuttable presumption:

[S]ince “impropriety” is undefined, the term “appearance of impropriety” is question-begging. It therefore has to be recognized that the problem of vicarious disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety. On the contrary, the interrelationships between and among the persons involved occur in complex variety.

A rule based on a functional analysis of these relationships is more appropriate for determining the question of vicarious

182. Statement by the Chairman of the ABA Commission reported in Winer, supra note 178, at 23, col. 4. He is also quoted as saying the present Code “includes a lot of talk in terms of high-flown, noble principles. That's over-reaching. The lawyer does not know what he is really held to.” Id. at 48, col. 1.

183. Discussion Draft, supra note 9, at 25, col. 2.

184. For a current indication that all courts do not share the commentary's difficulties with the appearance of impropriety, see the opinion of the New Jersey Supreme Court in In re Opinion 415 of Advisory Committee on Professional Ethics, 48 U.S.L.W. 2385 (N.J. Nov. 16, 1979). Responding to the contention that “the appearance of impropriety . . . is in many instances too ephemeral and remote to warrant prohibition of joint representation,” the court in In re Opinion 415 disagreed: “We have upheld frequently the principle that an attorney should avoid even the appearance of impropriety that may arise when he acts as an adversary against a former or existing client. The appearance doctrine is intended to instill public confidence in the integrity of the legal profession.” Id.
disqualification.\textsuperscript{185}

Most courts have taken the contrary position that in simultaneous and successive representation cases, an inquiry into whether in fact there was access to information is incompatible with the maintenance of proper professional standards, for the reasons fully explored in the cases discussed earlier. To make the result in every disqualification case turn on an analysis of the particular law firm's size, type of practice, filing systems, and the like would impose on the courts an impractical and self-defeating requirement ultimately destructive of enforcement.

The portion of the commentary just quoted appears within a discussion of the issue created when lawyers "dissolve their association."\textsuperscript{186} Thus, the comment seems to deal with imputation where the second representation involves a firm different from the first, and the imputation problem arises for the second firm. Nevertheless, the emphasis in the commentary on the nature and organization of the firm—with the large, multi-branched firm obviously in mind—could lead to consideration of firm organization in other contexts. The commentary's concern could apply equally to the first firm, \textit{i.e.}, the one the lawyer left. And the "functional analysis" could similarly be extended to the simultaneous representation case. That this may be more than conjecture becomes clear as the commentary continues with its discussion of the need to avoid positions adverse to a former client, with emphasis on considerations capable of such extension:

\begin{quote}
[A] lawyer who prepared isolated legal memoranda for a client while in one firm should be able to reassociate with another firm representing an opposing party without disqualifying the latter firm, if the lawyer thereafter takes no part in the matter on which he worked.

\ldots The question is whether the lawyer was a participant in the work involved for one client and whether the lawyer has become such a participant for the second client.\textsuperscript{187}
\end{quote}

This emphasis on the nature and extent of the particular lawyer's responsibility in addition to the existence of the attorney-client relationship, and on the individual lawyer rather than the firm, would lay the basis for reversing the hitherto accepted rule of automatic disqualification in simultaneous representation cases. Al-

\begin{flushleft}
\textsuperscript{185} \textit{Discussion Draft, supra} note 9, at 25, col. 2.
\textsuperscript{186} \textit{Id.} at col. 1.
\textsuperscript{187} \textit{Id.} at 25-26.
\end{flushleft}
though restated in proposed section 7.1(a), the accepted rule may not withstand the “logical” extension and application of the commentary.\textsuperscript{188} And the reader should not overlook the allusion to “screening” in the commentary. Under the rule, screening would suffice “if the lawyer thereafter took no part in the matter on which he worked.”\textsuperscript{189}

The conclusion one may well reach is that the commentary is not an objective, disinterested analysis on behalf of the profession, but a partisan brief advancing the personal interests of one segment of the bar. The ultimate thrust of the proposed rule would make the rebuttable presumption of disqualification the preferred approach in all cases, and then permit in rebuttal some of the very considerations that until now have been irrelevant to the determination of disqualification.\textsuperscript{190} Previously, access to information

\textsuperscript{188.} Further quotation may underscore this point:
A lawyer may have general access to files of all clients of a firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all the confidences of all the firm’s clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to the confidences of the clients he has served but not those of other clients.

\textit{Id. at} 25, col. 2. Since no lawyer in the large firm could find it possible to participate regularly in discussions of the affairs of all the firm’s clients, the distinction is meaningless in the case of the large firm.

\textsuperscript{189.} \textit{Id.} Although Funds of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977) and Westinghouse Elec. Co. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), \textit{cert. denied}, 439 U.S. 955 (1978), are cited in the commentary as references, presumably in support of proposed rule 7.1(a), both decisions expressly rejected the Chinese Wall within a firm in simultaneous representation cases. The language quoted in the text would sanction screening in its least restrictive form in a successive representation case. The draft antedates the en banc decisions in both \textit{Novo Terapeutisk Laboratorium}, 607 F.2d 186 (7th Cir. 1979) and \textit{McAlpin}. For a discussion of \textit{Novo Terapeutisk}, see text accompanying notes 83-100 \textit{supra}; for a discussion of \textit{McAlpin}, see text accompanying notes 147-76 \textit{supra}.

\textsuperscript{190.} There is a seeming lack of candor in the commentary’s summary treatment of the courts’ contrary positions, a trait common to the less admirable type of partisan brief. So also is the citation of cases out of context or without necessary qualification. Besides \textit{Funds} and \textit{Westinghouse}, the commentary’s list of references for proposed rule 7.1 added only Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602 (8th Cir. 1977); Akerly v. Red Barn Sys., Inc., 551 F.2d 539 (3d Cir. 1977); and Gas-A-Tron v. Union Oil Co., 534 F.2d 1322 (9th Cir. 1976). Only the last case involved imputed disqualification within the firm and the so-called “peripheral representation exception.” See Arkansas v. Dean Food Prods. Co., 605 F.2d 380, 382 (8th Cir. 1979). Akerly did not involve intrafirm disqualification; it dealt with imputation between co-counsel. \textit{Fred Weber} did not even involve co-counsel; it was concerned with the representation of a client C against a defendant B by a lawyer who in a prior related suit represented B’s codefendant. In these limited situations, as previously discussed in this article, the use of a rebuttable presumption had a rationale not present in the intrafirm imputation context.
within the firm has been presumed in the interest of maximizing protection of clients' confidences, the size of the firm being irrelevant in that connection. Making access an issue of fact in every case, as now proposed, will necessarily attenuate that protection. In the long term, appellate court review will probably be lessened or even lost, if the issue of imputation turns primarily on the factual issue of access. The guiding hand of the courts of appeal, until now so significant, would be lacking. With this as a foreseeable consequence of the ABA Commission's proposals, the further erosion of standards seems the likely consequence of their adoption.

As corporate firms grow larger, with a variety of specialities and branches the better to serve clients as well as to increase income, the pressures for relief from the ethical demands of the present Code will continue to increase as the firms' potential conflicts of interest multiply. In response, the firms are marshalling the skills of advocates to anticipate and skirt the problems created by the growth of the firms. They proffer new assumptions on which to predicate professional responsibility, in place of accepted ethical standards. If the latter principles do not go by the board, they may survive as mere generalities at best, with content gutted or attenuated by facile commentary and resort to such makeshifts as screening. The effort of the firms may forge a new ethics that would have as its first priority the retention of the client. Although the problems of the large firm are posing as new dilemmas, they are neither new nor true dilemmas. The essential ethical issues remain


New legal needs of varying types will require equally diverse specialization. It is hard, therefore, to visualize their expeditious satisfaction by single practitioners. Larger groups of lawyers, with their multiplied resources of information and specialization, will be better situated to deal with these variegated pressures. Thus the large firms are likely to survive and grow larger.

Of course, the large firms of the future must retain the basic legal postulate of all partnerships that each member is personally liable for the action of the others. Otherwise, size would become a trick to deny full protection to the public. Internally, this postulate is to be cherished as a means of intensifying the spirit of essential unity in the firm.

(Emphasis added.) In Arkansas v. Dean Food Prods. Co., 605 F.2d 380 (8th Cir. 1979) the court noted that the need for multiple specialists to solve the problems of a client often serves as the justification for practice as a firm and the very reason for the client's decision to retain the firm. If the reputation and status of the legal profession, and more importantly the freedom and opportunity of the public to obtain adequate legal counseling, are to be preserved, a client must have every reason to expect that disclosures to "his" law firm will not be used against him by any member or associate lawyer in that firm.

Id. at 385-86.
the same as in the past, but the cost of resolving them now seems to some too great a price to pay for the preservation of traditional values. When dollars underlie the decision, enhancing public respect for the profession becomes the least of relevant concerns.

The current corporate legal scene, with its apparent primary emphasis on the bottom line, suggests that the standards of the marketplace are being carried into the temple, though our professional goal is the converse.\(^{192}\) If the ABA Commission's effort at stating "[c]lear and current ethical standards"\(^{193}\) ignores that goal, it will further underline the question that can no longer be ignored—whether the corporate bar's financial self-interest itself implicates a pervasive and continuing conflict of interest that should disqualify the bar from attempting to regulate itself.

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192. "It is our burden and our glory that we are expected to live by a high professional standard and earn a living at the same time. We do not have the luxury of the clergy who can live in the temple and condemn the market place. We have to carry the standards of the temple into the market place and practice our trade there." Redlich, *Lawyers, the Temple and the Market Place*, 30 The Record 200 (1975).

193. ABA President Tate has so characterized the mandate of the ABA Commission. Tate, *The President's Page*, 65 A.B.A.J. 1001 (1979). Though undeniably current, the proposals are hardly clear. In any case, an emphasis on high standards would seem equally important.