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Robert T. Grueneberg Jr.

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Canon v. United States Acoustics Corp., 398 F. Supp. 209 (N.D. Ill. 1975).

> The *Code of Professional Responsibility* is not designed for Holmes' proverbial "bad man" who wants to know just how many corners he may cut, how close to the line he may play, without running into trouble with the law. Rather, it is drawn for the "good man", as a beacon to assist him in navigating an ethical course through sometimes murky waters of professional conduct.[1]

At no time do the waters of professional conduct become more murky than when an attorney undertakes to represent an interest adverse to a former client. The ethical question presented is not a new one.[2] The courts have long struggled to balance the conflicting interests which come into play: the right of the client to be represented by the attorney of his choice; the attorney's pecuniary interest in obtaining new clients; the former client's interest in protecting past confidential disclosures; the interest of the profession in maintaining public respect and confidence.

The majority of decisions considering the prior representation issue have recognized that the rule regulating such representation must weigh carefully the interests involved. The rule of law which has developed in this area has been enforced through the "substantial relationship test."[3] Briefly, the rule provides that if the former client shows that the matters of the pending suit are substantially related to the matters wherein the attorney previously represented him, the attorney will be disqualified.[4] Although generally accepted, the rule has not been consistently applied by the federal courts.[5] The inconsistent application may be the result of two important

1. General Motors Corp. v. City of New York, 501 F.2d 639, 649 (2d Cir. 1974), *citing* O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 170 (1920).

2. *In re* Boone, 83 F. 944 (N.D. Cal. 1897) (attorney disqualified for opposing former client with whom he had consulted); Henry v. Raimon, 25 Pa. 354 (1855)(discussion of strong obligation owed former client); Bricheno v. Thorpe, 37 Eng. Rep. 864 (1821) (in camera session utilized to determine that it was unnecessary to disqualify young attorney because of past representation of client by his former employer).

3. T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953).

4. *Id.*

5. This article will deal primarily with the rule as adopted and developed in the federal courts. *The ABA Code of Professional Responsibility* has been the basis of most of the decisions regarding this issue and thus the same principles apply in all federal

factors: the broad provision of Canon Nine of the new *Code of Professional Responsibility* directing the lawyer to avoid even the appearance of professional impropriety and increased public concern for ethical reform within the legal profession. The struggle of the courts to incorporate Canon Nine's axiom into precedent founded on the older *Canons of Professional Ethics*,[6] where no such broad dictate existed, has caused confusing, if not contradictory results in many recent cases.

In *Canon v. United States Acoustics Corp.*[7] the district court recently confronted the issues created when an attorney represents an interest adverse to a former client.[8] Weighing case law in conjunction with Canons Four and Nine,[9] the court dismissed one of the plaintiffs, an attorney who had formerly represented the defendant, while denying a motion to disqualify an attorney for the plaintiff even though he had also formerly represented the defendant.

This comment will analyze the district court's decision with special emphasis on the relevant case law and the *Code of Professional Responsibility*. Particular attention will be given to those recent cases which have sought to balance the various interests involved. The discussion will assay the recent decisions in light of the subtle, sometimes contradictory concern of the courts for the public image of the legal profession.

The introduction of the new *Code of Professional Responsibility* in 1970 apparently caused a rebirth of interest in the prior representation issue. The substantial relationship test which had been generally accepted now appears to be undergoing some modification. A trend appears to be underway toward the adoption of a new rule which will better serve to

courts. Some federal court districts have adopted the code as part of their general rules. *See, e.g.*, U.S. DIST. CT., N.D. ILL., R. 8A, 8D.

6. ABA CANONS OF PROFESSIONAL ETHICS (1967). The *Code of Professional Responsibility* was adopted by the House of Delegates of the ABA on August 12, 1969 to become effective for ABA members on January 1, 1970, as amended by the House of Delegates on February 24, 1970. ABA CODE OF PROFESSIONAL RESPONSIBILITY, ii (1971).

7. Canon v. United States Acoustics Corp., 398 F. Supp. 209 (N.D. Ill. 1975), *appeal docketed*, No. 75-1810, 7th Cir., Sept. 4, 1975.

8. The other major issue in this case is an ethics question dealing with dual representation of individual directors and a corporate defendant by the same attorney in a shareholder derivative suit. The district court disqualified the attorneys involved. The ruling seemingly represents a proper application of the *Code of Professional Responsibility* in line with the dominant trend of recent decisions. *See, e.g.*, Weaver v. United Mine Workers, 492 F.2d 580 (D.C. Cir. 1973); Murphy v. Washington Am. League Baseball Club, Inc., 324 F.2d 394 (D.C. Cir. 1963); Lewis v. Schafer Stores Co., 218 F. Supp. 238 (S.D.N.Y. 1963) (All found that multiple representation is improper when the client's interests are adverse).

9. Canon Four provides, "A lawyer should preserve the confidences and secrets of a client." ABA CODE OF PROFESSIONAL RESPONSIBILITY at 51 (1969). Canon Nine provides, "A lawyer should avoid even the appearance of professional impropriety." *Id.* at 111.

balance the interests of the attorney, his new client, his former client, the public, and the profession. While this discussion will examine this trend in depth, it will also present alternatives to the traditional rule and will posit a new, more flexible rule which realistically reflects the balance which must exist among the divergent interests.

Canon v. United States Acoustics Corp.

Canon v. United States Acoustics Corp.[10] was a shareholder derivative suit[11] brought against United States Acoustics and its wholly-owned subsidiary. Plaintiff Canon had acted as counsel for defendant United States Acoustics in varying capacities for twelve years. One of the plaintiff's attorneys, Giambalvo, had acted as counsel for the defendant subsidiary. The defendants alleged that Canon and Giambalvo had represented them in prior matters substantially related to the issues in the present litigation and moved that plaintiff Canon be dismissed and attorney Giambalvo be disqualified.[12]

In summarizing the relevant precedent, the *Canon* court observed that the common law had fashioned the law of disqualification to assure the public that any disclosure made by a client would be confidential.[13] The court cited the substantial relationship test formulated in *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.*,[14] where the court held:

> [T]he former client need show no more than the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matter or cause of action wherein the attorney previously represented him, the former client. The court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation.[15]

After reviewing application of the *T.C. Theatre* rule in subsequent cases,[16] the *Canon* court adopted the "substantial relationship" test but with some modification under Canons Four and Nine of the *Code of Professional Responsibility*.[17]

10. 398 F. Supp. 209 (N.D. Ill. 1975).

11. The nature of the derivative suit was not discussed by the court in *Canon*.

12. The *Canon* court used the term "dismissal" when referring to one of the parties and used "disqualify' when referring to an attorney for one of the parties.

13. 398 F. Supp. at 221. *See generally* Comment, *Disqualification of Attorneys for Representing Interests Adverse to Former Clients*, 64 YALE L.J. 917 (1954); Annot., 52 A.L.R.2d 1243 (1954).

14. 113 F. Supp. 265 (S.D.N.Y. 1953).

15. *Id.* at 268.

16. The rule developed in *T.C. Theatre* was adopted by the Second Circuit in Consolidated Theater Corp. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954). Later decisions followed the rules as stated in these two cases. See *infra* notes 21-30 and accompanying text.

17. *See supra* note 9.

The court determined that attorney Canon had represented the defendant during the period in which the wrongs alleged in the derivative suit had taken place. He had handled all contracts, had reviewed all mailings to stockholders, and was the sole general counsel for four of the twelve years he was employed by defendant. On this basis the court held that there was "no question that he might have acquired information which is substantially related to the pending suit."[18] Finding that the rule of *T.C. Theatre* applied to counsel turned litigant,[19] the court granted the defendant's motion to dismiss Canon as a plaintiff.

Attorney Giambalvo had represented the corporation in one or two matters for a total of two or three months. He had prepared a pre-organization subscription for United States Acoustics to establish its subsidiary as a Swiss corporation. The subsidiary had not been incorporated at that time; however, it was later incorporated in Panama. The defendants alleged no other specific incidents where Giambalvo had acted as their attorney. The court denied the motion to disqualify Giambalvo, holding that the defendants had not met the burden of showing that the former representation rendered by Giambalvo was substantially related to matters embraced in the pending suit.

To determine if *Canon* represents a proper application of both preceding case law and the relevant Canons of the *Code of Professional Responsibility*, it is necessary first to explore the adoption and development of the substantial relationship test. Secondly, and more importantly, it is necessary to examine the balance of interests involved in relation to the new *Code of Professional Responsibility*[20] and current public attitudes toward the legal profession. This review is designed to indicate a shift in emphasis in the balancing process that may prompt the Seventh Circuit Court of Appeals to adopt a modified rule respecting the attorney's relationship with former clients.

EARLY DEVELOPMENT OF THE RULE

Subsequent to *T.C. Theatre*, two cases were decided which sought to explain the substantial relationship test, *Consolidated Theaters, Inc. v. Warner Brothers Circuit Management Corp.*[21] and *United States v. Standard Oil Co.*[22] The substantial relationship test generally adopted by later cases is a synthesis of the holdings in these cases. While *T.C. Theatre* stated the rule, *Consolidated* and *Standard Oil* explained and clarified it.

18. 398 F. Supp. at 228.
19. As authority the court cited Richardson v. Hamilton Int'l Corp., 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973).
20. The code was adopted and became effective January 1, 1970.
21. 216 F.2d 920 (2d Cir. 1954).
22. 136 F. Supp. 345 (S.D.N.Y. 1955).

In *Consolidated*, an anti-trust case, the defendants moved to have one of the plaintiff's attorneys disqualified. The attorney had served as a clerk and associate in a large firm which had represented an alleged co-conspirator of the defendant. In restating the *T.C. Theatre* test the court held that "the former client need show no more than that the matters of the pending suit are substantially related to the matters wherein the attorney previously represented him".[23] *Consolidated* raised a question concerning the extent to which a court could investigate the prior representation in order to determine if it was substantially related to the current litigation. In clarifying the applicable evidentiary test, *Consolidated* ruled that the former client need only establish "by reasonable inference" that confidences might have been reposed in the attorney during the prior representation.[24] Once an attorney-client relationship regarding a certain matter was established, it would be irrebuttably presumed that confidences were disclosed regarding that matter. If a substantial relationship was shown to exist between the prior representation and the current matter, the attorney would be disqualified whether or not any confidences had been actually reposed. The court recognized, however, that the attorney could rebut the substantial relationship alleged by the former client.

United States v. Standard Oil expanded *Consolidated*, holding that the complainant need only show access to "substantially related" material and the inference that confidences were communicated would follow. The court reasoned that confidences must be protected if the public was to have reverence for the law and confidence in its guardians. The *Standard Oil* court stated that if a client could be required to reveal confidences at a hearing then "the very purpose of the rule of secrecy would be destroyed, and the free flow of information from client to attorney, so vital to our system of justice, would be irreparably damaged."[25]

While the attorney would be permitted to rebut the existence of a substantial relationship between the prior matter and the current one, *Consolidated* and *Standard Oil* made it clear that no rebuttal proof could be offered by the attorney which would disclose any confidences between the attorney and the former client. The court would only examine the nature of the representation and infer that confidences were disclosed regarding the subject matter. But the important element under the *T.C. Theatre* test remained—the former client had to prove a substantial relationship between the prior representation and the instant matter.

The decisions confronting this issue subsequent to *Standard Oil* applied the substantial relationship test to resolve the question of disquali-

23. 216 F.2d at 924.
24. *Id.*
25. 136 F. Supp. at 355.

fication.[26] Although few new elements have entered into a consideration of the problem until recently, it was recognized that, in order to obtain an ethical result, a consideration of a prior representation issue must balance the interests involved.[27] Prior to the adoption of the new *Code of Professional Responsibility*, the balancing done under the substantial relationship test ostensibly favored the attorney's interest in obtaining clients and the new client's interest in freely choosing counsel. This balance has undergone significant change in recent cases because of two important factors. One is the adoption of the new *Code of Professional Responsibility*, particularly Canon Nine's directive to "avoid even the appearance of professional impropriety."[28] The second significant factor is the changed public attitude towards the legal profession. More than ever before, the public has demonstrated a growing concern for ability of lawyers to regulate their own ethics.[29] As a result of incidents like Watergate, public esteem for the legal profession has dipped to an all-time low.[30] These new factors have caused the courts in recent decisions involving the prior representation issue to shift the traditional balance towards a greater emphasis on the public interests involved. While the recent decisions have not been consistent, they do indicate that a change in the traditional rule may be necessary in order to better balance these new interests with those emphasized under the traditional substantial relationship test.

THE SUBSTANTIAL RELATIONSHIP TEST AND THE EMERGENCE OF CANON NINE

Recent decisions exhibit a new regard for the propriety of an attorney representing an interest adverse to a former client. These cases, while echoing the rule established under *T.C. Theatre* and its progeny, also confront the emergence of a new *Code of Professional Responsibility*.[31] Significantly, the new code contains an axiom not found in any of the forty-

26. *See, e.g.*, Fisher Studio, Inc. v. Loew's Inc., 232 F.2d 199 (2d Cir. 1956) (anti-trust action in which plaintiff's attorney, who had formerly represented nine of the defendants in previous anti-trust actions, was disqualified as to the nine defendants); Shelley v. The Macabees, 184 F. Supp. 797 (E.D.N.Y. 1960) (suit for recovery of purchase price in which defendant, a fraternal beneficial insurance society, sought to have the attorneys for the plaintiff disqualified because the firm had formerly represented the plaintiff in a number of matters. Motion to disqualify denied); Fleischer v. A.A.P. Inc., 163 F. Supp. 548 (S.D.N.Y. 1958) (attorneys, who had previously represented plaintiffs in general matters for a number of years, now represented defendant in a suit for dissolution. Motion for disqualification denied).

27. 163 F. Supp. at 552.

28. ABA CODE OF PROFESSIONAL RESPONSIBILITY No. 9.

29. *See, e.g.*, BLOOM, THE TROUBLE WITH LAWYERS at 157-91 (1968); Commentary, *A Crisis of Double Standards at the Bar*, BUSINESS WEEK, Oct. 27, 1973, at 33.

30. *See, e.g., Awful Lot of Lawyers Involved: Watergate Case*, 102 TIME, July 9, 1973, at 50.

31. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1971).

seven canons of the old *Canons of Professional Ethics*.[32] Canon Nine directs that "a lawyer should avoid even the appearance of professional impropriety."[33] After the adoption of the new code, the courts began to consider whether an attorney who represented a client in a matter adverse to a former client was acting within the mandate of Canon Nine—avoiding even the appearance of impropriety.

One of the first decisions to contemplate this question was *Richardson v. Hamilton International Corp.*,[34] which presented a fact situation similar to *Canon*. The plaintiff, an attorney formerly employed by the defendant corporation, brought an action against the corporation. The Third Circuit determined that the *T.C. Theatre* test was applicable whether the attorney acted as plaintiff's counsel or was the plaintiff himself. While purportedly applying the substantial relationship test, the *Richardson* court found only that there was "*some* relationship" between the former representation and the current litigation.[35] Judge Vanartsdalen held that "it is a close question but to avoid the 'appearance of evil' disqualification must be directed."[36] The court was faced with the dilemma of contradictory rules—How to apply a substantial relationship test and still avoid the "appearance of evil."[37] The court labeled its holding an application of the established substantial relationship test, but actually employed a test less burdensome on the former client in order to obtain an ethical result.

Green v. Singer Co.[38] pointed up the need for a change in emphasis among the interests involved in the prior representation issue. The Third Circuit split four to three, the majority weighing the interests of the attorney in denying disqualification and the dissenters emphasizing the appearance of impropriety and favoring disqualification. *Greene* involved an action for unfair competition and patent infringement. The plaintiff's patent attorney had been formerly employed by a subsidiary of the defendant corporation and had handled some patent applications which were involved in the instant action. The *Greene* majority held that the trial judge had not exceeded his discretion in limiting the attorney's role as counsel for plaintiff yet allowing

32. This fact was recently acknowledged by the Second Circuit in General Motors Corp. v. City of New York, 501 F.2d 639, 649, n.19 (2d Cir. 1974). Although certain of the ethical considerations under Canon Nine are embodied in the old code, the general axiom directing the avoidance of even the appearance of impropriety is not. *Compare* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 9-3, *with* ABA CANONS OF PROFESSIONAL ETHICS No. 36.

33. ABA CODE OF PROFESSIONAL RESPONSIBILITY No. 9.

34. 333 F. Supp. 1049 (E.D. Pa. 1971), *aff'd*, 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973).

35. *Id.* at 1054 (emphasis added).

36. *Id.*

37. Because the trial took place before the adoption of the new code, the decision was founded on old Canons Six and Thirty-seven. The appellate court decided the case after the new code went into effect. The language and stress on "appearances" indicated that the court recognized the mandate of new Canon Nine.

38. 461 F.2d 242 (3d Cir. 1972), *cert. denied*, 409 U.S. 848 (1972).

him to act as co-counsel. The dissenters disagreed, recognizing that the court's duty in protecting attorney-client confidences must take into consideration appearances of impropriety. The three dissenting judges were troubled by the large number of charges being made concerning moral and ethical considerations affecting the bar. Their opinion cited the ABA Standing Committee on Professional Ethics which stated, "[T]he lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a conflict of interest or a possible violation of confidence, even though this may not in fact be true."[39] The dissenting judges recognized that Canon Nine directed a test which would weigh the appearance of impropriety heavily.

While the decisions in *Richardson* and *Green* indicate a growing emphasis on the application of Canon Nine in order to preserve public respect for the legal profession, they also indicate the problems involved in reconciling Canon Nine with the traditional substantial relationship test. A series of recent cases decided by the Second Circuit Court of Appeals have also sought to balance the interests involved. These cases further demonstrate the difficulties encountered in attempting to strike such a balance.

The Second Circuit gave extensive consideration to the prior representation issue in *Emle Industries, Inc. v. Patentex, Inc.*[40] The court recognized the issue as "a question of acute sensitivity and importance, touching the vital concerns of the legal profession and the public's interest in the scrupulous administration of justice."[41] In considering whether to uphold the disqualification ordered below, the *Emle* court articulated the balancing hinted at in *Greene*.[42] The decision underscored the importance of preserving "the balance between an individual's right to his own freely chosen counsel and the need to maintain the highest ethical standards of professional responsibility."[43] Although the case for disqualification was clear,[44] the court acknowledged that because of the importance of preserving public respect for the law and lawyers, disqualification may be necessary where there was only the appearance of a possible violation of confidence, even though it may not be true in fact.[45]

Emle is significant because it was the first case which sought to justify the application of the *T.C. Theatre* rule, determined under the old *Canons of Professional Ethics*, to a situation covered by the new *Code of Professional*

39. *Id.* at 243.
40. 478 F.2d 562 (2d Cir. 1973).
41. *Id.* at 564.
42. 461 F.2d 242 (3d Cir. 1972).
43. 478 F.2d at 565.
44. The attorney in question had first represented Burlington Industries, Inc. as a client and then proceeded to represent a client suing a Burlington subsidiary. The matter involved in each controversy was identical.
45. 478 F.2d at 571.

Responsibility. While reconciling the application of Canon Four with the substantial relationship test, the court did not recognize that Canon Nine is a new provision, not embodied in the old code.[46] Notwithstanding this oversight, the *Emle* court's strong discussion stressing the importance of avoiding the appearance of impropriety shifted the balance of the interests involved toward the importance of maintaining public respect and confidence and away from the traditional emphasis on the interests of the attorney in obtaining new clients and the interest of the new client in securing the attorney of his choice.[47]

One year after *Emle*, in *General Motors Corp. v. City of New York*,[48] the same court recognized that the "appearance of impropriety" consideration was not embodied in the old code, stating that "it was not until the adoption of Canon Nine of the *Code of Professional Responsibility* that the canons of ethics expressly enunciated that doctrine."[49] In *General Motors* a former Justice Department attorney represented the City of New York in an anti-trust action against General Motors. The court found that the attorney had had "substantial responsibility" in formulating a previous anti-trust complaint against General Motors which was "sufficiently similar" to the present action.[50] In upholding the disqualification of the attorney the *General Motors* court noted, "[W]e must act with scrupulous care to avoid any *appearance* of impropriety lest it taint both public and private segments of the legal profession."[51] Thus the balance in this case was markedly shifted towards maintaining public respect and confidence, while the interests of the attorney and the new client appear to have been given less weight than in earlier cases.

In *Hull v. Celanese Corp.*[52] the Second Circuit confronted a situation where an attorney who had switched sides in the course of the same litigation sought to prove that he had never had access to any confidences. The court rejected his defense because it overlooked "the spirit of Canon Nine as interpreted by this court in *Emle*."[53] Although the case for disqualification was clear, the *Hull* court reiterated that any doubts should be resolved in favor of disqualification.[54]

46. *See* note 32 *supra.*

47. The strength of the argument that at all times the attorney has the right to the attorney of his choice would appear to be diminished by the official court rules of some courts. Rule 6.1(a), RULES OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS (1975), provides that a continuance in a trial will be granted only where the attorney is engaged in another trial. By implication, the court forces the litigant to obtain an attorney other than the one of his original choice.

48. 501 F.2d 639 (2d Cir. 1974).

49. *Id.* at 649.

50. *Id.* at 650-51.

51. *Id.* at 650 (emphasis by the court).

52. 513 F.2d 568 (2d Cir. 1975).

53. *Id.* at 571-72.

54. *Id.* at 571.

It would appear from *Emle, General Motors*, and *Hull* that the Second Circuit was clearly moving towards modifying the traditional substantial relationship test in order to align the rule with Canon Nine and to regain lost public respect. Most recently, *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*[55] appears to have reversed the course taken by these three previous cases. An attorney had formerly been employed by a large firm which represented Chrysler Motors. While with the firm, he had done legal research and had written briefs on a number of auto-dealer disputes. He could prove that he had never actually come in contact with the client and that he had actually received no confidences. In the pending suit the attorney represented an auto dealer in a contract dispute with Chrysler which involved many of the same issues that were involved in the earlier suits. Chrysler moved to have him disqualified because of this past relationship.

In denying the motion the trial judge sought to balance the interests involved. In an apparent rejection of the recent trend toward a greater emphasis on the avoidance of impropriety, the trial court stressed the importance of avoiding "an excess of ethical fervor that unnecessarily restricts freedom of attorneys, clients and our system of free enterprise."[56] In reviewing the decision the Second Circuit reiterated the importance of preserving the balance between an individual's right to his own freely chosen counsel and the need to maintain the highest ethical standards. The *Silver* court, apparently weighing the former consideration heavily, reviewed the cases which had resulted in disqualification and decided that in most, the substantial relationship had been "patently clear."[57] The court did not elucidate further but, by implication, held that disqualification would be granted only where a patently clear substantial relationship was proved. Although the court was faced with a case where there was at least some appearance of impropriety, the court apparently ignored the course it had laid in *Emle, General Motors*, and *Hull*. Although Canon Nine was given some reference, the emphasis on an "appearance of impropriety" and public confidence generally was greatly diminished and contradicted by this decision.

While the Seventh Circuit Court of Appeals has not specifically dealt with the prior representation issue, a Wisconsin district court has recently considered the problem in *Marketti v. Fitzsimmons*.[58] A firm which had previously represented a union "local" was representing the "international" in a suit against individual members of the union local. In disqualifying the

55. 518 F.2d 751 (2d Cir. 1975).
56. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 591 (E.D.N.Y. 1973).
57. 518 F.2d at 754.
58. 373 F. Supp. 637 (W.D. Wis. 1974).

firm the court placed special emphasis on Canon Nine and the importance of retaining public respect. Although the court assertedly applied the substantial relationship test, no clear relationship is indicated by the facts. The court did not expressly balance the interests involved, but its decision clearly emphasized concern for public trust and confidence.

The cases which have decided the prior representation issue since 1970, with the possible exception of *Silver*, have increasingly emphasized the application of Canon Nine. Although Canon Nine has not been the sole criterion, the decisions have recognized that the courts must guard against the appearance of impropriety and protect the confidences of a former client. The decisions have given different weight to the various interests involved and have therefore reached different conclusions as to what a "substantial relationship" is. In the Second Circuit alone the court strongly weighed public considerations in light of Canon Nine in upholding disqualification in *Emle*, *General Motors*, and *Hull*, but in *Silver* diametrically shifted the balance to an emphasis on the importance of the attorney's right to obtain new clients and the client's right to freely chosen counsel in order to deny disqualification. The recent cases do not define a substantial relationship. While the language of the cases indicates that this traditional test may not avoid the appearance of impropriety criterion, it is not clear exactly what the test should be.

Canon v. United States Acoustics Corp.[59] is the most recent case to consider the issue. The court recognized the importance of the issue and weighed the public interests involved heavily by applying Canon Nine. But a significant question arises from *Canon* and the other recent decisions stressing the appearance of propriety: When a former client fails to bear the burden of proving a "substantial relationship" between the prior representation and the instant litigation, but does establish some, or a reasonable relationship, is the appearance of impropriety avoided where the attorney is not disqualified? An answer may lie in an analysis of the language of recent case law, a realistic application of Canon Nine, and a recognition of the public's changed attitude toward lawyers.

The Ethical Dilemma

Recent decisions which have confronted the prior representation issue have been faced with a significant dilemma. While precedents established the substantial relationship test as the apparently applicable rule, the courts have strained to reconcile a rule which favors the interests of the new client and the attorney with the recently adopted Canon Nine and the current public attitude toward the legal profession. Although recent decisions have

59. 398 F. Supp. 209 (N.D. Ill. 1975).

shifted the emphasis of the interests involved, the shift has caused an inconsistent application of the substantial relationship test.

The substantial relationship test adopted in *T.C. Theatre*[60] was applied to a fact situation in which it was fairly obvious that the attorney should have been disqualified.[61] In a case such as *T.C. Theatre* or, more recently, *Hull v. Celanese Corp.*,[62] where the attorney has done little more than switch sides in virtually the same litigation, the substantial relationship test is adequate and the result avoids the appearance of impropriety. But in a case such as *Richardson v. Hamilton International Corp.*,[63] where the court could determine only "some relationship," or *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*,[64] where the attorney had done three and a half years of legal work for the former client, the application of the substantial relationship test fails to avoid the appearance of impropriety.

The majority of decisions considering the prior representation issue since the adoption of the new *Code of Professional Responsibility* have recognized that Canon Nine should be applied. Only one of the decisions, however, has expressly recognized that no similar canon existed under the old *Canons of Professional Ethics*.[65] The majority of courts have overlooked the fact that the substantial relationship test as originally developed did not incorporate the appearance of impropriety as a significant or determinative factor. A recognition of this fact and a more aggressive application of Canon Nine should result in a modified rule requiring less emphasis on the interests of the attorney and the new client and more emphasis on the broader interests of the public, as well as the specific interest of the former client.

Richardson,[66] the dissent in *Greene*,[67] *Emle*,[68] *Hull*,[69] *General Motors*,[70] and, most recently, *Canon* indicate a trend toward a new rule. Although the *Silver* decision[71] did not acknowledge this trend, its confusing and contradictory result points up the need for a new rule that would give more weight to the "appearance of impropriety" and place less emphasis on the client's right to the attorney of his choice and the effect of a disqualifica-

60. See note 15 *supra* accompanying text.

61. This is clearly indicated by the facts as stated by the court: "[P]resent counsel for the plaintiff would necessarily be called upon to prove against . . . his former client the very charges against which he had earlier defended it." T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268 (S.D.N.Y. 1953).

62. 513 F.2d 568 (2d Cir. 1975).

63. 333 F. Supp. 1049 (E.D. Pa. 1971).

64. 518 F.2d 751 (2d Cir. 1975).

65. 501 F.2d 639, 649 n.19 (2d Cir. 1974).

66. 333 F. Supp. 1049 (E.D. Pa. 1971).

67. 461 F.2d 242 (3d Cir. 1972).

68. 478 F.2d 562 (2d Cir. 1973).

69. 513 F.2d 568 (2d Cir. 1975).

70. 501 F.2d 639 (2d Cir. 1974).

71. 518 F.2d 751 (2d Cir. 1975).

tion on an attorney's ability to obtain new clients.[72] While none of the cases have expressly adopted a new rule, it is manifest that a modified rule that reaches a more ethical balance among all the interests should be adopted.

Crisis in Confidence—The Need for a New Rule

A modified rule is not only indicated by the recent trend, but is also needed because public confidence in the ability of the legal profession to regulate itself is eroding.[73] The public looks upon the profession as a "self-defined, self-regulating monopoly" which brooks no lay interference and avoids disciplining even the most venal and inept lawyers.[74] Indeed, their is doubt within the profession whether lawyers can successfully regulate their own conduct.[75]

In view of the phenomenon of "Watergate" and the distrust, lack of confidence—even disdain—it has evoked amont elements of the public in their view of the legal profession,[76] the courts could look to Canon Nine as a starting point in seeking a rule which properly balances the interests involved in the prior representation problem. The canons are general axioms which must be applied to partcular factual instances to ensure effectuation of their expressed goal of aiding the lawyer in attaining the "respect and confidence of the members of his profession and of the society which he serves."[77] If applicable canons such as Canon Nine are merely discussed by the courts without becoming the grounds of decision, public confidence in the legal profession, its institutions, and inevitably law itself will continue to diminish. As the *Emle* court opined, "[E]thical problems cannot be resolved in a vacuum."[78]

A commentary written in the wake of Watergate may reflect the importance of a realistic application of Canon Nine. Stating that "lawyers are supposed to be above suspicion," the author continued, "[But] thanks in no small part to the sorry failure of the bar to put teeth into its own enforcement machinery, its 'ethics' have permitted this nation to come to the brink of constitutional disaster . . . ."[79] The article concluded, "[L]aw-

72. For an argument in favor of the rights of the attorney and the new client, see Comment, *Disqualification of Attorneys for Representing Interests Adverse to Former Clients*, 64 YALE L.J. 917, 927-28 (1954).

73. *America's Lawyers: A Sick Profession?*, 76 U.S. NEWS AND WORLD REPORTS, March, 1974, at 23; Waltz, *Some Thoughts on the Legal Professions Public Image*, 23 DEPAUL L. REV. 651 (1974) [hereinafter cited as Waltz].

74. Waltz, note 73 *supra*, at 653.

75. *See* Brink, *Who Will Regulate the Bar*, 61 A.B.A.J. 936 (1975).

76. *See generally Awful Lot of Lawyers Involved: Watergate Case*, 102 TIME, July 9, 1973, at 50; *Lawyers and Ethics*, 103 INTELLECT, October, 1974, at 16; *Complaints About Lawyers: Are They Justified?*, 79 U.S. NEWS, July 21, 1975, at 46.

77. The *Preamble and Preliminary Statement* to the *ABA Code of Professional Responsibility* contains a statement of the intended goals of the code.

78. 478 F.2d at 565.

79. Commentary, *A Crisis of Double Standards at the Bar*, BUSINESS WEEK, Oct. 27, 1973, at 33.

yers cannot expect the public to believe they will seriously enforce their own code of ethics against members of their own fraternity."[80] Such views may not be unrealistic in light of the district court opinion in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*,[81] where the judge castigated the movant to avoid "an excess of ethical fervor" and in a substantial segment of the opinion maintained that courts should not make it difficult for young attorneys who specialize to obtain clients.[82] Clearly there is reason for a modified rule. But merely stating that the application of Canon Nine will solve the problem is not enough. It is necessary to examine the alternatives and develop a rule which balances the interests in a manner designed to reach ethical results.

AN ALTERNATIVE TO THE SUBSTANTIAL RELATIONSHIP TEST

Given the inconsistent application of the substantial relationship test in recent cases, the courts cannot continue to utilize this traditional rule. An ethical solution which equitably balances the interests involved is necessary. Because of the wide discretion permitted the trial judge in controlling the attorneys before his court,[83] a test must be provided which the judge can apply to reach a solution which does not unfairly restrict the attorney or his new client, but which at the same time falls within the mandate of Canon Nine. The following is a three-part test which seeks to balance these diverse interests.

First, where a prior attorney-client relationship has been proven regarding a certain matter or matters, the trial judge should determine whether there is a reasonable likelihood that the issue or issues involved in the prior representation will be placed in issue in the current litigation. If such a likelihood is determined, then to protect prior confidential disclosures involving those issues, the attorney should be disqualified. No breach of confidence need be proved, for it is presumed in order to preserve the spirit of Canon Nine.[84] Such a test, while relieving some of the burden that the former client assumed under the substantial relationship test, protects the attorney from disqualification at the former client's whim. Thus an attorney who had formerly drawn up a will for a client could not later be disqualified for opposing that client in a personal injury suit. This rule takes into

80. *Id.*

81. 370 F. Supp. 581.

82. See the section of the opinion entitled "Dangers of Unnecessary Restrictions on Young attorneys," 370 F. Supp. at 589-91 for the complete text of this argument.

83. *See, e.g.*, Greene v. Singer Co., 461 F.2d 242 (3d Cir. 1972).

84. A similar test was recently adopted in Alpha Investment Co. v. City of Tacoma, 13 Wash. App. 532, 536 P.2d 674 (1975), where the court used the test to uphold the disqualification of an attorney. The atorney had formerly been a deputy prosecutor for the county, during which time he had access to civil suit files. Therefore, he was prevented from representing a private company in an action against the city and county.

consideration the interest of the attorney who wishes to obtain new clients as well as the interest of the client who wishes to freely choose his counsel. It also reflects the mandate of Canon Nine and thus seeks to preserve public respect and confidence in the legal profession.

While the first part of this test will be applicable in the majority of situations, there is one area where the attorney should almost always be disqualified. Where an attorney has been the general counsel for a corporation for a substantial length of time and then seeks to represent a party opposing that corporation, the attorney should then be disqualified. Inner knowledge of the corporation and its officers must give rise to a presumption of confidential disclosures regarding diverse matters such that the appearance of impropriety could not be avoided unless the attorney was disqualified. The *Canon* court took this approach in disqualifying attorney Canon, holding that "even if defendants had been unable to persuade the court that there was a substantial relationship, Canon's representation was so lengthy and pervasive that he would have to be disqualified under Canon Nine."[85] Thus Judge Marshall recognized both the inadequacy of the substantial relation test and the importance of Canon Nine.

Finally, a flexible test must provide the former client with the option of holding an in camera session in order to demonstrate that confidences were reposed in the attorney which may be used against him in the present litigation. It is recognized that the in camera session may bring out those confidences which the former client is seeking to protect.[86] Nevertheless, the in camera session has been utilized in at least one recent case dealing with a prior representation issue.[87] While the client may be obligated to disclose past confidences to the trial judge, he will thus avoid having them used against him. The in camera session should be employed only in unusual situations where the issues in the prior representation indicate that there is no reasonable likelihood that confidences would be disclosed during the current litigation and then only at the option of the former client.

It should be noted that while disqualification has been the generally accepted remedy, an entirely different remedy will apply where the attorney opposes the former client with intent to harm by using previously disclosed confidences. Courts have found disbarment[88] or suspension from practice[89]

85. 398 F. Supp. at 228-29.

86. Consolidated Theaters, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d at 926 (2d Cir. 1954) (dicta).

87. United States v. Wilson, 497 F.2d 602 (8th Cir. 1974) (a criminal case where the in camera session included the examination of Secret Service records).

88. Thatcher v. United States, 212 F. 801 (6th Cir. 1914), *appeal dismissed*, 241 U.S. 644 (1914) (a criminal case in which an attorney was guilty of intentionally misleading a client in the making of a promissory note, and then representing the payee in an action against the maker).

89. United States v. Kegley, 8 F. Supp. 327 (N.D. Cal. 1934) (attorney, appointed to investigate the theft of public bonds, accepted employment from the party accused of

to be applicable remedies in such circumstances. A consideration of the prior representation issue should make inquiry as to the intent of the attorney involved.

CONCLUSION

In reviewing *Canon*, the Seventh Circuit Court of Appeals has a forum in which to recognize the contradictory trend established in recent case law. While there is no question that attorney Canon was properly dismissed, there may be an issue as to whether attorney Giambalvo should not have been disqualified. Under the suggested test, if there is a reasonable likelihood that the issue involved in the prior representation will be placed in issue in the current litigation, then he should have been disqualified.

The "substantial relationship test" adopted in *T.C. Theatre* should be recognized as having been adopted under the old *Canons of Professional Ethics*, which contained no axiom concerning the appearance of impropriety. It is also necessary for the courts to pay heed to the climate of public confidence and recognize the dramatic change since *T.C. Theatre*. These interests must be weighed realistically in balancing them against the traditionally weighted interests of the attorney and his new client.

In view of the trend in recent decisions exhibiting a greater emphasis on the appearance of impropriety, the fact that the general principle embodied in Canon Nine is not found in the old code under which the substantial relationship test was developed, and the public lack of confidence in the legal profession, it would appear that the time is right for the adoption of a new or modified rule. Avoiding even the appearance of impropriety is a moral obligation faced by the legal profession and the courts. It is a moral obligation assumed because of the sensitive and integral role a lawyer plays when a client confides in him. The general public may never know of a particular situation where an attorney represented an interest adverse to a former client. But because of his unique position in society, the lawyer must operate as if the public eye is upon him at all times. Too many attorneys have recently attempted the illegal and improper believing the public would never know.

Canon Nine would seem to be a public-oriented mandate. Its apparent purpose is to preserve public respect and confidence in the legal profession. Every decision construing it has come to this conclusion. This public respect can be instilled through particular examples of ethical conduct. The prior representation situation is an instance where the courts may demonstrate the ability of the legal profession to police itself. By truly seeking to avoid the

complicity in the theft of the bonds. Suspension from practice for three years.).

appearance of impropriety in such instances the courts may begin to reinstill public confidence in the legal profession. The past application of the substantial relation test in these circumstances has often given the appearance that the court is practicing legal fraternalism. A new or modified rule along the lines of the one suggested may prevent this appearance. It is recognized that such a rule may be considered as "an excess of ethical fervor"[90] by some members of the bar, but it is seriously doubted that such an application would appear excessive to members of the public.

ROBERT T. GRUENEBERG, JR.

90. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 591 (E.D.N.Y. 1973).