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NOTES

DISQUALIFICATION OF COUNSEL FOR THE APPEARANCE OF PROFESSIONAL IMPROPRIETY

> A lawyer's good faith, although essential in all his professional activity, is, nevertheless, an inadequate safeguard when standing alone. . . . 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.[1]

Courts are occasionally asked to disqualify counsel because of alleged conflicts of interest arising from the attorney's present or former representation of an interest adverse to that of his present client. Such requests have posed difficult problems. To aid in their resolution, the courts have often turned to provisions of the *Code of Professional Responsibility*.[2]

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1. Emle Indus. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973).

Good faith is generally considered irrelevant in evaluating allegedly improper conduct pursuant to a motion to disqualify counsel. *See, e.g.*, E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 400 (S.D. Tex. 1969); T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 271 (S.D.N.Y. 1953).

2. The *Code of Professional Responsibility* was adopted by the American Bar Association (ABA) in 1970 to replace the old ABA *Canons of Professional Ethics* and the supplemental opinions of the ABA Committee on Professional Ethics. The old Canons were generally regarded as insufficiently comprehensive. *See* Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957); Note, *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest*, 73 YALE L.J. 1058 (1964); Note, *Disqualification of Attorneys for Representing Interests Adverse to Former Clients*, 64 YALE L.J. 917 (1955). Unlike its predecessor, the present Code is intended to serve as a complete set of standards. *See Report of the Special Committee on Evaluation of Ethical Standards*, in 94 ABA ANN. REP. 729, Preface (1969); Armstrong, *The Proposed New Code of Professional Responsibility*, 41 N.Y.S.B.J. 591 (1969); Sutton, *The ABA Code of Professional Responsibility: An Introduction*, 48 TEXAS L. REV. 255 (1970).

The Code consists of nine axiomatic Canons. From each Canon are derived several Ethical Considerations (EC), aspirational in character, and Disciplinary Rules (DR), which "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement (1969).

A disqualification motion poses a serious dilemma for a court. Three competing interests can be clearly recognized: the litigant's interest in freely selecting the counsel of his choice; the former client's interest in preventing even inadvertent disclosure of confidential information acquired by the attorney in the course of his former representation; and the public interest in maintaining the highest standards of professional conduct and the scrupulous administration of justice.[3] The competition among these interests can be acute. For example, concern for the integrity of the judicial system is of paramount importance to the court.[4] Yet court-ordered disqualification during the pendency of litigation can work an extreme hardship on the disqualified attorney's client.[5] Furthermore, weighing these interests in terms of the threat posed to them by the attorney's continued participation in the litigation is a highly subjective inquiry. As a result, courts do not so much engage in a balancing of these interests as in an assessment of the particular attorney's role measured by external ethical standards.

General guidelines for evaluating an attorney's conduct are embodied in the *Code of Professional Responsibility*. Canon 4 of the Code incorporates the traditional standard by which alleged conflicts of interest have been judged.[6] However, a determination of when an attorney's current representation breaches this ethical standard can be extremely difficult. When the present Code was adopted in 1970, a new ethical standard was promulgated in Canon 9: a lawyer should avoid even the appearance of professional

3. *See* Hull v. Celanese Corp., 513 F.2d 568, 570 (2d Cir. 1975); Emle Indus. v. Patentex, Inc., 478 F.2d 562, 564-65 (2d Cir. 1973).

4. Hull v. Celanese Corp., 513 F.2d 568, 572 (2d Cir. 1975) (preservation of public trust paramount); Emle Indus. v. Patentex, Inc., 478 F.2d 562, 575 (2d Cir. 1973) (court's duty owed to the public as well as to the parties).

5. Not only does a disqualified attorney's client lose the services of his chosen counsel, but the client also inevitably suffers substantial delay in retaining new counsel and familiarizing him with the case.

Court-ordered disqualification can also have a drastic effect on the disqualified attorney. For example, in Emle Indus. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973), disqualification of plaintiff's attorney, a textile patent specialist, probably foreclosed his participation in any future actions brought against Burlington Industries, the world's largest textile company, or against Patentex, Inc., Burlington's patent-licensing subsidiary. In Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 926 (2d Cir. 1954), disqualification meant virtual exclusion of the attorney from serving as a plaintiff's lawyer in the lucrative motion picture antitrust field in which he specialized.

6. Canon 4 embodies the principle that "a lawyer should preserve the confidences and secrets of a client," a duty long considered fundamental. *See* R. WISE, LEGAL ETHICS 65 (1970). Its admonitions were implicit in old Canons 6 (adverse influences and conflicting interests) and 37 (confidences of a client). *See generally* H. DRINKER, LEGAL ETHICS 103-05, 131-32 (1955).

impropriety.[7] Although Canon 9 is more general in its proscription[8] than Canon 4, courts have increasingly relied upon Canon 9 in ruling on motions to disqualify counsel for alleged conflicts of interest.[9]

This article will examine and assess several recent decisions in the area of disqualification of counsel for alleged conflicts of interest. Four aspects of disqualification in this context will be examined: interlocutory appealability of grants and denials of disqualification motions; simultaneous representation of conflicting interests; subsequent representation of an interest adverse to that of a former client; and private employment of former government attorneys in matters for which they had substantial responsibility while public employees. The disqualification cases will be discussed in light of the courts' growing emphasis on Canon 9 and its admonition to "avoid even the appearance of professional impropriety." The Second Circuit has been particularly active in this area, and its recent decisions will be the focus of this analysis.[10]

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7. Although the "appearance of evil" doctrine was implied in old Canons 29 (upholding the honor of the profession), 32 (the lawyer's duty in its last analysis), and 36 (retirement from judicial position or public employment), *see* H. DRINKER, LEGAL ETHICS 130 (1955), it was never explicitly stated until the promulgation of Canon 9. *See* General Motors Corp. v. City of New York, 501 F.2d 639, 649 n.19 (2d Cir. 1974); R. WISE, LEGAL ETHICS 121-26 (1970).

8. Canon 9 includes two Disciplinary Rules. Disciplinary Rule 9-101 concerns former judicial officers, former government attorneys, and improper influences. *See* pp. 356-60 *infra*. Disciplinary Rule 9-102 concerns preserving the identity of funds and the property of a client. The latter, regarding commingling of funds, is perhaps the most fertile ground for disbarment or suspension from practice, and has no relevance to disqualification of counsel from pending litigation.

9. Courts possess inherent power to enforce ethical rules. Although not formally adopted, the Canons are nevertheless recognized as representative of professional attitudes and standards. *See, e.g.*, Herman v. Acheson, 108 F. Supp. 723, 726 (D.D.C. 1952), *aff'd sub nom.* Herman v. Dulles, 205 F.2d 715 (D.C. Cir. 1953). Traditionally, the Canons have been looked to and relied upon by the courts in evaluating professional conduct. *See, e.g.*, Hull v. Celanese Corp., 513 F.2d 568, 571 n.12 (2d Cir. 1975); Handelman v. Weiss, 368 F. Supp. 258, 261 n.4 (S.D.N.Y. 1973). *See also* U.S. DIST. CT. S.D.N.Y. GEN. R. 3(a), 5(f). Indeed, the Second Circuit in Emle Indus. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973), recognized the importance of court enforcement of the ethical principles embodied in the Canons: " 'Without firm judicial support, the Canons of Ethics would be only reverberating generalities.' " *Id.* at 575, *quoting* Empire Linotype School v. United States, 143 F. Supp. 627, 633 (S.D.N.Y. 1956).

10. Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975); Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), *cert. denied*, 419 U.S. 998 (1975); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) (*en banc*); Emle Indus. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973). Emphasis will also be placed on several trial court decisions within the Second Circuit. Handelman v. Weiss, 368 F. Supp. 258 (S.D.N.Y. 1973); Motor Mart, Inc. v. Saab Motors, Inc., 359 F. Supp. 156 (S.D.N.Y. 1973); Estate Theatres, Inc. v. Columbia Pictures Indus., 345 F. Supp. 93

I. INTERLOCUTORY APPEALS OF DISQUALIFICATION ORDERS

The authority of a trial court to grant relief on a motion to disqualify counsel is based upon the court's broad supervisory powers over the general conduct of litigation[11] and over the conduct of attorneys appearing before it.[12] The appealability of a trial judge's ruling prior to final judgment, however, is a matter of some dispute.

Because a trial judge's ruling on a motion for disqualification is interlocutory and almost always collateral to the main issues in the litigation, some courts have held the ruling to be nonappealable pending final judgment on the merits.[13] But because of its special significance to the litigants and to the former client of the challenged attorney, the disposition of a disqualification motion, though interlocutory with regard to the entire controversy, should be directly appealable as a final decision under section 1291[14] under the Supreme Court's collateral order off-shoot doctrine. Interlocutory appeal of a collateral order was permitted in *Cohen v. Beneficial Industrial Loan Corp.* because it was a "final disposition of a claimed right which [was] not an ingredient of the cause of action and [did] not require consideration with it."[15]

Both grants and denials of motions to disqualify counsel for alleged conflicts of interest involve substantial personal and public interests which

(S.D.N.Y. 1972); Doe v. A Corp., 330 F. Supp. 1352 (S.D.N.Y. 1971), *aff'd sub nom.* Hall v. A Corp., 453 F.2d 1375 (2d Cir. 1972) (per curiam).

11. *See* Flaksa v. Little River Marine Constr. Co., 389 F.2d 885, 888 (5th Cir.), *cert. denied,* 392 U.S. 928 (1968) (inherent power of court to manage its own affairs necessarily includes authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it).

12. *See* Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975) (district court bears responsibility for supervision of members of its bar); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1385-86 (3d Cir. 1972), *cert. denied,* 411 U.S. 986 (1973) (duty of district court to examine alleged violations of attorney's ethical responsibilities); Estates Theatres, Inc. v. Columbia Pictures Indus., 345 F. Supp. 93, 95 n.1 (S.D.N.Y. 1972) (duty of court to supervise attorneys appearing before it); *cf.* Mattice v. Meyer, 353 F.2d 316, 319 (8th Cir. 1965) (disbarment proceedings and duty of court to supervise attorneys).

Exercise of this general supervisory power in disqualification cases is entirely discretionary and will be upset only upon a showing that an abuse of discretion has taken place. *See* Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1385-86 (3d Cir. 1972), *cert. denied,* 411 U.S. 986 (1973); *cf. Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 529-30 (1824) (authority of reviewing court will not be exercised unless conduct of the court below has been unjust and irregular).

13. *E.g.,* Fleischer v. Phillips, 264 F.2d 515 (2d Cir.), *cert. denied,* 359 U.S. 1002 (1959). *See* note 17 *infra.*

14. 28 U.S.C. § 1291 (1970) gives the courts of appeals jurisdiction only over final decisions of the district courts.

15. 337 U.S. 541, 546-47 (1949).

would seem to bring them within the *Cohen* rationale. This was the original view of the Second Circuit, the first federal court to pass on the issue of interlocutory appealability of disqualification orders.[16] However, the Second Circuit reversed its position in 1959 when, in *Fleischer v. Phillips*,[17] a three judge panel refused to assume jurisdiction over an appeal from a denial of a disqualification motion. The court in subsequent cases felt "constrained" to follow this precedent.[18] It remained unclear, however, whether the refusal to assume jurisdiction extended only to denials of disqualification motions or whether it extended to grants of such motions as well.

Despite its holding in *Fleischer*, in the 1973 case of *Emle Industries v. Patentex, Inc.*,[19] the Second Circuit accepted an appeal from an order granting a motion to disqualify, basing its jurisdiction on § 1291 under *Cohen*. The apparent ambiguity was further demonstrated in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*,[20] in which a defendant felt obli-

16. In Consolidated Theatres v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954), a three judge panel affirmed on the merits an order granting disqualification without discussing appealability. One year later, in Laskey Bros. v. Warner Bros. Pictures, 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 938 (1956), disqualification of one attorney was affirmed, as was the denial of disqualification of another attorney. Again, appealability was not discussed. Later, in Fisher Studio, Inc. v. Loew's, Inc., 232 F.2d 199 (2d Cir. 1956), the court assumed jurisdiction over an appeal from an order of disqualification, briefly noting that "since these orders of disqualification are collateral to the main case [the final order of disqualification is] also appropriately treated as a separate and collateral proceeding." *Id.* at 204.

Later that same year, in Harmar Drive-In Theatre v. Warner Bros. Pictures, 239 F.2d 555 (2d Cir. 1956), *cert. denied*, 355 U.S. 824 (1957), the Second Circuit squarely confronted the appealability issue and followed the lead of the court in *Fisher Studio*.

> A majority of the court are of [the] opinion that with respect to appealability no distinction exists between orders granting disqualification and those refusing to do so. We think they fall within the class of orders described in *Cohen v. Beneficial Indus. Loan Corp.*

Id. at 556.

Thus for the decade following *Cohen*, the appealability of disqualification motions appeared to be firmly established in the Second Circuit.

17. 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959). The *Fleischer* court distinguished between denials of motions to disqualify and grants thereof, holding the former nonappealable in light of "the settled federal principle against piecemeal appeals," *id.* at 517, evidenced by the enactment one year earlier of the Interlocutory Appeals Act, 28 U.S.C. § 1292(b) (1970).

18. *See, e.g.*, Marco v. Dulles, 268 F.2d 192 (2d Cir. 1959). Despite his previous opinion in Harmar Drive-In Theatre v. Warner Bros. Pictures, 239 F.2d 555 (2d Cir. 1956), *cert. denied*, 355 U.S. 824 (1957), Judge Swan felt that *Fleischer* was controlling, and dismissed an appeal from an order denying a motion to disqualify counsel.

19. 478 F.2d 562 (2d Cir. 1973).

20. 496 F.2d 800 (2d Cir. 1974). Following the denial of its motion to disqualify plaintiff's counsel, defendant Chrysler sought to have the district court judge amend his order to include a section 1292(b) statement that an immediate appeal might "materially advance the termination of the litigation." *Id.* at 802. After this was refused, Chrysler

gated to file four separate motions, each with a distinct procedural basis, in an attempt to obtain review of a denial of a motion to disqualify plaintiff's attorney. The Second Circuit took this opportunity "to dispel the needless uncertainty as to the law and procedure relating to the appealability of disqualification orders."[21] No sufficient basis was found for distinguishing between grants and denials of motions to disqualify: "[i]n both situations the order is collateral to the main proceeding yet has grave consequences to the losing party, and it is fatuous to suppose that review of the final judgment will provide adequate relief."[22] The Second Circuit thus ultimately adopted the *Cohen* rationale.

The jurisdictional question, however, continues to be somewhat muddled in other circuits. Some courts have accepted direct appeals under the *Cohen* doctrine.[23] Other courts have utilized writs to effect review of lower court decisions,[24] while still others have assumed jurisdiction without discussing appealability.[25]

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filed its notice of direct appeal and sought to stay the district court proceedings until the appeal was determined.

Chrysler then petitioned the appeals court for permission to appeal pursuant to 28 U.S.C. § 1292(b) (1970) and Rule 5, FED. R. APP. P. After this motion was granted, the dealer moved to dismiss Chrysler's appeal. Chrysler responded by filing a petition for an extraordinary writ pursuant to 28 U.S.C. § 1651 (1970) and Rule 21, FED. R. APP. P., requesting the district court judge to vacate his original order denying the motion to disqualify, and to dismiss the complaint.

21. 496 F.2d at 805.

22. *Id.*

23. *See, e.g.*, Tomlinson v. Florida Iron & Metal, Inc., 291 F.2d 333 (5th Cir. 1961), in which the Fifth Circuit held that an order denying appellant's motion to disqualify his opponent's counsel was appealable under the *Cohen* principle. *Id.* at 334. *Accord*, Uniweld Prod., Inc. v. Union Carbide Corp., 385 F.2d 992, 994 (5th Cir. 1967), *cert. denied*, 390 U.S. 931 (1968). *See also* United States v. Hankish, 462 F.2d 316 (4th Cir. 1972). The court in *Hankish*, citing Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, 239 F.2d 555 (2d Cir.), *cert. denied*, 355 U.S. 824 (1957), held that an order granting disqualification would be appealable under *Cohen* and section 1291. *Id.* at 318. The petitioner, however, had filed no notice of appeal and therefore the court declined to take jurisdiction. The court also considered issuance of a writ of mandamus but declined to adopt that approach for effecting review. *Id.* at 318-19.

24. *See, e.g.*, Cord v. Smith, 338 F.2d 516 (9th Cir. 1964), in which the court held that an order denying disqualification was not directly appealable. However, the court accepted that appeal as a petition for a writ under the All Writs Act, 28 U.S.C. § 1651 (1970), and reversed on the merits, ordering disqualification. *Accord*, Chugach Elec. Ass'n v. United States Dist. Ct. for the Dist. of Alaska, 370 F.2d 441 (9th Cir. 1966) (disqualification effected by mandamus after denial thereof by the district court).

In Yablonski v. United Mine Workers, 454 F.2d 1036 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), the District of Columbia Circuit held that while denial of a disqualification motion was appealable, circumstances might be sufficiently extraordinary to justify issuance of a writ of mandamus.

25. *E.g.*, Greene v. Singer Co., 461 F.2d 242 (3d Cir. 1972).

That direct appeals should be permitted in both grants and denials of motions to disqualify counsel is a most logical and practical result. An allegedly improper representation poses a proximate threat to the confidences of the former client. If the motion to disqualify is denied and the attorney is permitted to continue his representation of an adverse interest, disclosure or misuse of client confidences could result, for which post-trial review could give but little remedy. Furthermore, if the integrity of the judicial process is to be maintained, and the appearance of impropriety to be scrupulously avoided, the issue of an allegedly improper representation should be resolved at the outset, "lest a costly and protracted trial be tainted on the merits by an issue collateral thereto."[26]

II. DISQUALIFICATION CASES

The scope of this article is limited to disqualifications of counsel for alleged conflicts of interest arising from a present or former representation of an interest adverse to that of a current client.[27] When there exists adversity between the interests of a current and a former client, there exists the possibility that confidential information obtained in the former representation will be used to advance the current interest.[28] Such a situation poses a

26. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800, 803 (2d Cir. 1974).

27. To find a conflict of interest, it must be established that at one time an attorney-client relationship existed which is jeopardized by the attorney's current representation. There are no formal prerequisites to establishing the existence of this relationship. In light of the fundamental policies served by disqualification in the conflict of interest context, *e.g.*, protection of client confidences reposed in the attorney, *see* note 29 *infra*, it need only be shown that the attorney had access to confidential information in the course of some legal representation. *See, e.g.*, Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954). Furthermore, if an attorney has appeared with the movant in a legal proceeding, there is a presumption that his appearance involved a professional representation. *See, e.g.*, E.F. Hutton & Co. v. Brown, 305 F. Supp. 371 (S.D. Tex. 1969).

In disqualification cases involving former government attorneys, the standards of propriety are somewhat different. The movant in such a situation need only show that the attorney was a public employee with substantial responsibility over the same matter at issue in the pending litigation. There is no requirement of adversity. See p. 357 *infra*.

28. The existence of a prior attorney-client relationship is not enough, in itself, to warrant disqualification. There must be, in addition, adversity between the interests of the attorney's former and present clients which has created a climate for disclosure of relevant confidential information. *See In re* Boone, 83 F. 944, 952-53 (C.C.N.D. Cal. 1897).

The appearance of adversity will be enough to fulfill this requirement even if no conflict exists in fact. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL ETHICS OPINIONS No. 885 (1975); H. DRINKER, LEGAL ETHICS 103-29 (1955). The former client cannot, however, invent an issue to create a conflict when none exists

substantial threat to the privileged nature of the attorney-client relationship.[29]

The protection of that relationship, through enforcement of the attorney's ethical responsibilities to his client as set forth in Canon 4, has long been the basis for disqualification of counsel in the conflict of interest situation.[30] Canon 9 has created a much broader basis for disqualification. As a result, it has been increasingly used as the determinative standard in all types of disqualification situations.

A. Simultaneous Representation of Conflicting Interests

The most obvious situation giving rise to a conflict of interest is the concurrent representation of two clients whose interests may clash. Three illustrative possibilities exist. First, the attorney could represent two clients in the same litigation. The most common is a joint defense in a criminal prosecution. If the defenses of the individual defendants diverge or clash, the attorney may be disqualified from representing either one or both of the defendants.[31] However, this result is mandated by constitutional, not merely ethical, requirements.[32]

More usual is the representation of joint clients who subsequently appear on opposite sides in litigation.[33] The question becomes which of the clients

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in fact. *See, e.g.*, Fleischer v. A.A.P., Inc., 163 F. Supp. 548 (S.D.N.Y. 1958), *appeal dismissed sub nom.* Fleischer v. Phillips, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959).

29. The policy behind disqualification in a conflict of interest situation involves the court's desire to preserve the inviolability of client confidences. *See* EC 4-1; ABA Canons 6 & 37; ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, *supra* note 28, at No. 287. The policy is also intended to encourage free disclosure within the attorney-client relationship. *See* Emle Indus. v. Patentex, Inc., 478 F.2d 562, 570-71 (2d Cir. 1973); Baird v. Koerner, 279 F.2d 623, 635 (9th Cir. 1960); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 395 (S.D. Tex. 1969).

30. By scrupulously avoiding potential risks of disclosure of client confidences, even through the extreme measure of disqualification, it is hoped that public faith in the integrity of the legal profession will be strengthened. *See* Emle Indus. v. Patentex, Inc., 478 F.2d 562, 575 (2d Cir. 1973); Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 926 (2d Cir. 1954); Fleischer v. A.A.P., Inc., 163 F. Supp. 548, 552 (S.D.N.Y. 1953).

31. *Cf.* Glasser v. United States, 315 U.S. 60 (1942) (denial of sixth amendment right to effective assistance of counsel).

32. *Id.*

33. *See, e.g.*, E.F. Hutton & Co. v. Brown, 305 F. Supp. 371 (S.D. Tex. 1969). In *E.F. Hutton*, the plaintiff's corporate counsel had represented one of its regional officers in SEC and bankruptcy proceedings. When the firm appeared as counsel in a subsequent suit by the corporation against its former officer, disqualification was ordered. The authorities seem to agree that disqualification is the only proper course in such a situation. *See* H. DRINKER, LEGAL ETHICS 112 (1955); R. WISE, LEGAL ETHICS 255-56 (1970).

the attorney should continue to represent, or whether disqualification from representing either party is necessary in order to protect both clients.

Finally, an attorney might accept a retainer to represent an interest adverse to that of another of his clients. Although the clients may never become actual adversaries in litigation, the concurrent representation of these parties with differing interests could substantially impair the attorney's ability to effectively represent either client while fulfilling his ethical obligations to both.[34]

This latter issue was treated by the United States District Court for the Southern District of New York in *Estates Theatres, Inc. v. Columbia Pictures Industries*.[35] In that case, plaintiff, an independently-owned theatre, brought an antitrust action against several motion picture distributors and theater chains. The defendants challenged the right of the plaintiff's attorney to participate since he was defending a theatre chain in another pending antitrust action. That theatre chain was not named as a party defendant in *Estates Theatres* but was cited as a co-conspirator therein. Furthermore, although not a party, the chain had explicitly objected to the attorney's representation of the plaintiff in *Estates Theatres*.

Initially, the court had to resolve the important issue of standing, since the client whose interests were threatened by the attorney's participation in *Estates Theatres* was neither a party to the litigation nor the movant in the case.[36] The court held that public interest in the integrity of the Bar required permitting the named defendants to raise the issue for the client.[37]

Although the client theater chain's refusal to consent to the attorney's participation would seem to have resolved the disqualification issue,[38] the

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34. Canon 5 of the Code, which provides that "a lawyer should exercise independent judgment on behalf of a client," addresses this problem. *See also* EC 5-14 to 5-20; DR 5-105 (simultaneous conflicts).

35. 345 F. Supp. 93 (S.D.N.Y. 1972).

36. Normally it is the former client who is the movant in disqualification cases. *See* E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 376-77 (S.D. Tex. 1969); Murchison v. Kirby, 201 F. Supp. 122 (S.D.N.Y. 1961). *Contra*, Empire Linotype School, Inc. v. United States, 143 F. Supp. 627, 631 (S.D.N.Y. 1956).

37. When the propriety of professional conduct is questioned, any member of the Bar who is aware of the facts which give rise to the issue is duty bound to present the matter to the proper forum, and a tribunal to whose attention an alleged violation is brought is similarly duty bound to determine if there is any merit to the charge.

345 F. Supp. at 98.

38. It is generally agreed that informed consent to the adverse representation can be effective, except when the public interest is involved. *See* EC 4-2; DR 4-101(C)(1); H. DRINKER, LEGAL ETHICS 120-21 (1955). However, there is a heavy burden on the attorney to warn his client of possible conflicts of interest and of the need to retain independent counsel, if desired. *See* E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 398

court in *Estates Theatres* indicated that even had there been no objection, disqualification would have been required for reasons of public policy.[39] Moreover, that the alleged conflict of interest was not substantial was found to be immaterial.[40] In the *Estates Theatres* situation, one client was likely to be adversely affected by the dual representation, and the attorney was ultimately disqualified from the later suit.[41]

Disqualification was required in *Estates Theatres* because the dual representation there involved could have seriously impaired the attorney's ability to effectively represent both clients. But "considerations of public policy, no less than the client's interests" were also factors in the decision.[42] Thus, although a breach of the attorney's ethical duty to his client may be present, a broader concern—the integrity of the judicial system—may also mandate the result. An attorney must not only fulfill his ethical responsibilities to his client, but must also avoid conduct potentially damaging to his profession. In addition to the proscriptions of Canon 4, then, the attorney must comply with the more sweeping admonition of Canon 9.

(S.D. Tex. 1969); EC 5-16; ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 160 (1975); H. DRINKER, LEGAL ETHICS 120-21 (1955); R. WISE, LEGAL ETHICS 255-73 (1970). Such consent must be express. *See In re* Trinidad Corp., 229 F.2d 423, 430 (2d Cir. 1955); H. DRINKER, LEGAL ETHICS 107 (1955). And absent a clear waiver, failure to present undivided fidelity will require disqualification. Marketti v. Fitzsimmons, 373 F. Supp. 637, 641 (W.D. Wis. 1974); Fleischer v. A.A.P., Inc., 163 F. Supp. 548, 550 (S.D.N.Y. 1958), *appeal dismissed sub nom.* Fleischer v. Phillips, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959); ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, *supra* note 28.

Mere knowledge of an adverse representation is not enough to impute waiver to all potential conflicts arising from a former representation, *see* Marketti v. Fitzsimmons, 373 F. Supp. 637, 641 (W.D. Wis. 1974), but mutual clients with notice of such a conflict cannot complain. *Cf.* Harry Rich Corp. v. Curtiss-Wright Corp., 233 F. Supp. 252, 254 (S.D.N.Y. 1964). Any claim of consent to an adverse representation will be strictly construed and any doubt will be resolved against finding a waiver. Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 927 (2d Cir. 1954); H. DRINKER, LEGAL ETHICS 107 (1955).

39. 345 F. Supp. at 97.

40. The court refused to evaluate the extent of the conflict:

> Once a conflict of interest appears from the facts, and where the matters embraced in the pending action are substantially related to those in the other actions, the law will not inquire into the force of the impact or its potential damage.

345 F. Supp. at 98-99.

41. Although the attorney contended that the choice of which client he would continue to represent rested with him and that he opted for the present plaintiff, the court held that under Ethical Consideration 2-32 (withdrawal of attorney justifiable for compelling circumstances only), and Disciplinary Rule 2-110 (withdrawal from employment), the attorney could not properly withdraw from his representation of his former client to pursue a current claim involving an adverse interest. *Id.* at 100.

42. 345 F. Supp. at 99.

B. Subsequent Representation of Interests Adverse to Former Client[43]

The ethical duty embodied in Canon 4 to "preserve the confidences and secrets of a client" persists even after the attorney-client relationship from which it arose has ceased.[44] Thus, although actual representation has terminated, the attorney's liability for breaches of his ethical duties to his former client continues. The subsequent representation of an interest adverse to that of a former client engenders the most difficult questions and has been perhaps the most common cause of disqualification.

The movant in such cases is normally the former client, who, as a party, is directly threatened by its former attorney's continued participation in the pending litigation.[45] When the movant establishes that the attorney-client relationship once existed,[46] the potential prejudice to him because of the participation of his former counsel becomes apparent. However, for the risk of disclosure or misuse of client confidences to be authentic, it must further be shown that there existed a "substantial relationship" between the subject matter of the current litigation and that of the former representation.[47] Once such a relationship is demonstrated, it is irrebuttably presumed that the attorney acquired confidential information relevant to the pending case.[48]

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43. For a general discussion of this particular area under the old ABA Canons, see Note, *Disqualification of Attorneys for Representing Interests Adverse to Former Clients*, 64 YALE L.J. 917 (1955).

44. *See* EC 4-6; ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 154 (1936); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 376 (S.D. Tex. 1969); H. DRINKER, LEGAL ETHICS 131 (1955); R. WISE, LEGAL ETHICS 285 (1970).

45. It is not required, however, that the former client actually be a party to the pending litigation nor that he be the movant. *See* discussion of the standing requirement p. 351 & notes 36 & 37 *supra*.

46. See note 27 *supra*.

47. This rule was first announced in T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953). The *T.C. Theatre* doctrine has been followed consistently. *See, e.g.*, Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 924 (2d Cir. 1954); Doe v. A Corp., 330 F. Supp. 1352, 1355 (S.D.N.Y. 1971); Empire Linotype School, Inc. v. United States, 143 F. Supp. 627, 632 (S.D.N.Y. 1956).

An incidental connection will not be enough. *See* Fleischer v. A.A.P., Inc., 163 F. Supp. 548 (S.D.N.Y. 1958), *appeal dismissed sub nom.* Fleischer v. Phillips, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959). *See also* note 28 *supra*.

48. *See, e.g.*, Laskey Bros. v. Warner Bros. Pictures, Inc., 224 F.2d 824, 827 (2d Cir. 1955); Marco v. Dulles, 169 F. Supp. 622, 629-30 (S.D.N.Y.), *appeal dismissed*, 268 F.2d 192 (2d Cir. 1959); Fleischer v. A.A.P., Inc., 163 F. Supp. 548 (S.D.N.Y. 1958), *appeal dismissed sub nom.* Fleischer v. Phillips, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959); T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953). *Cf.* E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 394 (S.D. Tex. 1969) (receipt of confidential information prerequisite to disqualification).

If the issues are unrelated, the movant has the burden of proving actual acquisition

Thus, if the issues are closely connected, and if the attorney is subsequently representing the opposite side, there is a risk that the attorney may use, albeit unconsciously or inadvertently, confidential information obtained from his former client to that client's detriment.

The most obvious situation calling for disqualification in this context is one in which the attorney brings suit against his former client on matters related to his former representation. In *Doe v. A Corp.*,[49] the attorney had been a tax specialist in a firm retained by the corporate defendants and, in this capacity, had access to their confidential files. Just prior to his termination of employment, he bought one share of stock in A Corporation. Upon leaving the firm, he filed a stockholder's derivative suit. It was conceded that every fact alleged in his complaint was acquired by him while engaged in legal work for the defendant corporation. Upon a motion by A Corporation to disqualify the attorney and bar his participation in the suit, the court found that the attorney's prosecution of the suit was a blatant violation of Canon 4 and ordered him disqualified.[50]

The *Doe* court went further, articulating a rule for evaluating an attorney's participation in litigation in terms of his Canon 4 responsibilities:

> The test under the Canon is whether in this litigation [the attorney] would be required to do anything which might injuriously affect his former clients in any matter in which he formerly represented them, or whether he would be called upon to use against these former clients any knowledge or information acquired through his former connection with them.[51]

Rarely is the breach of Canon 4 so clear.

The facts of *Emle Industries v. Patentex, Inc.*[52] demonstrate how applica-

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of confidential information by the attorney during the previous representation. *Cf.* Shelley v. The Maccabees, 184 F. Supp. 797, 800 (E.D.N.Y. 1960).

A possible alternative would be an *in camera* investigation by the trial judge. Such a procedure was considered by the court in Consolidated Theatres Corp. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954), but was rejected as unfeasible in that case. *Contra*, United States v. Wilson, 497 F.2d 602 (8th Cir. 1974) (*in camera* session facilitated by the availability of Secret Service files).

49. 330 F. Supp. 1352 (S.D.N.Y. 1971), *aff'd sub nom.* Hall v. A Corp., 453 F.2d 1375 (2d Cir. 1972) (per curiam).

50. 330 F. Supp. at 1355. The attorney had argued that disqualification was not required since none of the information upon which he had relied was privileged under the basic rules of evidence. *Id.* The court found that the evidentiary privilege was not coextensive with Canon 4. *Id.* at 1355-56. *See* EC 4-4 (attorney-client privilege more limited than ethical obligation of lawyer to guard confidences and secrets of his client).

51. 330 F. Supp. at 1355.

52. 478 F.2d 562 (2d Cir. 1973).

tion of the *Doe* test can be rather difficult. In *Emle*, plaintiff's attorney was a textile patent specialist who 15 years earlier had represented the defendant's parent company, Burlington Industries.[53] The Second Circuit found that at issue in both cases was Burlington's control of Patentex, and that the connection between the two actions was substantial enough to warrant disqualification of plaintiff's attorney.[54] Because he had once represented the parent company, the attorney was barred from participating in a suit against the subsidiary.[55]

Application of Canon 4 was far from clear, however. The control question, upon which the *Emle* court based its finding of a "substantial relationship," was in fact only collateral to the main issues in each case.[56] Although the court in *Emle* managed to find a sufficient link to justify its decision on Canon 4 grounds, it is apparent that a much broader basis existed on which the disqualification was predicated. The court explicitly recognized its duty to protect the public interest by exercising its discretionary powers "to insure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process."[57] The court reasoned that the

53. Patentex was jointly owned by Burlington and Chadbourne Gotham, Inc., the two largest textile manufacturers. It operated to acquire title to textile patents and to license other manufacturers under such patents. In 1958, several of these licensees joined in an action to declare certain patents of a competitor invalid. At its own request, Burlington had intervened as a party plaintiff in the action. Plaintiff's attorney in *Emle* had represented the licensees and Burlington in the 1958 declaratory judgment action.

54. 478 F.2d at 574. The defendants in the 1958 action had filed a counterclaim alleging, *inter alia*, that Burlington had acquired Patentex for the purpose of unlawful exploitation of its textile patent rights. Plaintiffs in *Emle* alleged that Patentex was attempting to monopolize the entire yarn processing industry for Burlington.

55. The attorney in *Emle* claimed that Burlington had agreed in 1958 that his representation of Burlington in the declaratory judgment action would not disqualify him from any future matter in which he represented an interest opposing Burlington. However, the court read Burlington's consent narrowly, finding that it applied only to the attorney's participation in two actions against Burlington then pending. 478 F.2d at 573-74. "In light of the strict prophylactic purposes of Canon 4's injunction to preserve a client's confidences," *id.* at 574, the court in *Emle* refused to find an all-inclusive waiver.

Additionally, the attorney in *Emle* urged that Burlington's motion to disqualify him was barred by the doctrine of laches, since three years had passed between the filing of the complaint and the motion to disqualify. The court held, however, that because "disqualification is in the public interest, the court cannot act contrary to that interest by permitting a party's delay in moving for disqualification to justify the continuance of a breach of the Code of Professional Responsibility." *Id.* *Accord*, Empire Linotype School, Inc. v. United States, 143 F. Supp. 629, 631 (S.D.N.Y. 1956). Only in an extreme case will such a motion be given weight. *See* Marco v. Dulles, 169 F. Supp. 622, 632-33 (S.D.N.Y. 1959) (19-year delay).

56. *See* 478 F.2d at 564.

57. 478 F.2d at 575.

attorney's ethical duties were to be read broadly, thus easing the application of Canon 4 to the difficult facts of that case.[58] Although an actual violation of Canon 4 was not readily apparent, the appearance of one would have been sufficient to require disqualification under Canon 9.[59]

The decision in *Emle* indicates that an allegedly improper representation may be judged under a broader standard than that suggested by the court in *Doe*.[60] The attorney's conduct in *Doe* came as close as possible to a per se violation of Canon 4: client confidences acquired by the attorney during a former representation were used as the basis of a suit against the former client. In *Emle* there was no apparent breach of Canon 4, but the decision clearly indicates that the absence of an actual breach may not be dispositive. Concern for the integrity of the judicial process and public confidence therein may require disqualification under Canon 9 "to insure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process."[61]

C. Former Government Attorneys

Canon 9 creates a special niche for former government attorneys.[62] Because of their status, they are subject to additional ethical constraints to prevent potential abuse of public office.[63] Disciplinary Rule 9-101(B) states that "[a] lawyer shall not accept private employment in a matter in

58. *Id.* at 571.

59. *Id.* at 575.

60. Subsequent to the decision in *Emle*, at least one district court relied heavily on the *Emle* rationale in ruling on a motion to disqualify plaintiff's counsel. In Motor Mart, Inc. v. Saab Motors, Inc., 359 F. Supp. 156 (S.D.N.Y. 1973), defendant manufacturer alleged that plaintiff dealer's attorney had once represented it in similar litigation 12 years earlier and that he had thereby acquired confidential information, requiring his disqualification from the present suit. The attorney acknowledged his former representation but contended that he had acquired no confidential information relevant to the instant action. Although the court found that Canon 4 was applicable to the facts in *Motor Mart*, it specifically based its disqualification order on the broader policy outlined in *Emle*: "The ruling made is firmly grounded on the potential violation lurking herein and on the necessity for preserving the appearance of propriety." 359 F. Supp. at 158. Without delving into the apparent violation of Canon 4, the court in *Motor Mart* found that *Emle* required disqualification to remove the shadow raised by the attorney's present involvement. *Id.* at 158.

61. 478 F.2d at 575.

62. The provisions of Canon 9 pertaining to former government attorneys are the successors to the provisions of old ABA Canon 36 (retirement from judicial positions or public employment). *See* H. DRINKER, LEGAL ETHICS 122 n.2 (1955).

63. *See* EC 9-3. Additionally, a federal statute imposes criminal penalties on a former government attorney who subsequently represents a party other than the United States in a matter in which the United States is directly and substantially interested. 18 U.S.C. § 207 (1970).

which he had substantial responsibility while he was a public employee." The purpose of this limitation is primarily to eliminate any possibility that the prospect of financial gain will influence a public official's conduct while he or she is in the employ of the government.[64] Public interest in the integrity of the judicial system is especially sensitive to the conduct of government officials. As a result, the admonition of Canon 9 to "avoid even the appearance of professional impropriety" is especially pertinent in disqualification cases involving former government attorneys.

The significance of the broader concerns of Canon 9 in this context was evident in *General Motors Corp. v. City of New York.*[65] There a former Justice Department attorney who had been involved in the investigatory and preparatory stages of an antitrust action against General Motors in 1956 was retained by New York City on a contingent fee basis to represent it in a similar suit against General Motors in 1972. Based upon the prohibitions of Canon 9, the Second Circuit held that his disqualification was warranted.[66] At the onset, the court dismissed the contention that because the attorney's representation was consistent with his earlier position while employed by the government, his participation in the city's suit could not give rise to an appearance of impropriety. That the attorney was advocating a position consistent with that of his earlier case was held to be immaterial in light of the purpose of the specific restrictions on former government attorneys.[67]

The court found in *General Motors* that the criteria for disqualification established in Disciplinary Rule 9-101(B) were met. Although he had not had actual supervisory responsibility over the 1956 antitrust action, the former government attorney in *General Motors* had worked extensively in the preparation of the case and had in fact signed the complaint. This was deemed enough to satisfy the requirement that the former attorney have had "substantial responsibility" in the matter while a public employee.[68]

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64. *See* Allied Realty v. Exchange Nat'l Bank, 283 F. Supp. 464 (D. Minn.), *aff'd*, 408 F.2d 1099 (8th Cir. 1969).

65. 501 F.2d 639 (2d Cir. 1974).

66. *Id.* at 641.

67. *Id.* at 649-50. *See* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 37 (1931).

68. 501 F.2d at 649. A doctrine of "vertical responsibility" has been utilized in determining whether the former government attorney had "substantial responsibility" for a matter while a public employee. *See* United States v. Standard Oil Co. [Esso Export], 136 F. Supp. 345 (S.D.N.Y. 1955). In *Esso Export*, the government sought to disqualify defendant's counsel, a former government attorney. The action involved a suit to recover alleged overcharges in Economic Cooperation Administration (ECA) financed transactions. The attorney had been employed in the Paris office of ECA during the period of the alleged overcharges. However, it was shown that the Washington office had exclusive responsibility in the area of ECA price regulation. This

Disciplinary Rule 9-101(B) also requires that the subsequent representation involve the "same matter" as that for which the former government attorney had "substantial responsibility" while in the public employ. The *General Motors* court addressed this issue by comparing the complaints in the two cases. It found that they were nearly identical in many parts.[69] Based upon this analysis, the court found that the cases alleged a sufficient number of similar facts to constitute the "same matter" as stipulated in Disciplinary Rule 9-101(B). The *General Motors* court noted that the 16-year interval between the two suits was a factor in this determination, but would not be dispositive in itself.[70]

A more difficult question was whether the former government attorney's retainer by the city constituted "private employment" within the meaning of Disciplinary Rule 9-101(B). The contingent fee arrangement was seen as determinative, however, since the potential remuneration in this class action treble damage suit was far beyond what a government attorney, including an attorney for the city, would have earned in similar circumstances.[71] The opportunity to earn a substantial fee made the retainer "private employment" of the former government attorney within the meaning of Canon 9.[72]

Although disqualification of the former government attorney in *General Motors* was required by Disciplinary Rule 9-101(B), it is clear that the Sec-

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division of authority prevented the government from carrying its burden of proving that the former government attorney had "substantial responsibility" over the matter while a public employee. It thus appears that former government attorneys can be held responsible for matters handled below them in the chain of command, but not for matters handled at the same level in other departments. *See* Kaufman, *supra* note 2, at 663-69, in which Judge Kaufman comments on the *Esso Export* case.

69. The two complaints are compared line by line in the Appendix to the court's opinion. 501 F.2d at 652-55.

70. *Id.* at 650 n.21. That the passage of time can be a factor in determining whether the same matter is at issue in both cases was demonstrated in Control Data Corp. v. IBM Corp., 318 F. Supp. 145 (D. Minn. 1970). Plaintiff's attorney in *Control Data* had participated in a government antitrust suit against IBM in 1955. Because of the tremendous technological changes in the computer industry, however, the former government attorney's prior involvement was held not to bar him from prosecuting a treble damage suit against the same defendant 14 years later when he was in private practice.

71. 501 F.2d at 650. It has been suggested

> that where a former government attorney is subsequently employed by a public entity on a remunerative basis which brings him no greater pay than he would receive if he were solely under the employ of that public entity, such an arrangement should not be construed as private employment under DR 9-101(B).

16 B.C. IND. & COM. L. REV. 651, 662 (1975).

72. The policy behind the special restrictions on former government attorneys mandated this finding, for "there lurks a great potential for lucrative returns in following into private practice the course already charted with the aid of governmental resources." 501 F.2d at 650.

ond Circuit read the specific standards of the Disciplinary Rule in light of the much broader language of Canon 9. That Canon 9 has been used to give a broad reading to the well-defined ethical standards applicable to former government attorneys is further demonstrated in *Handelman v. Weiss.*[73] That case involved a suit against a securities company undergoing liquidation under the Securities Investors Protection Act [SIPA].[74] The law firm representing plaintiffs had been formed by an attorney who previously had acted as counsel to the trustee who was supervising the liquidation under the SIPA. The attorney actually interviewed several of the defendants concerning the defendant corporation's activities which had given rise to the receivership.

Canon 4 was deemed inapplicable since the defendants had never been the clients of plaintiff's attorney. Furthermore, Disciplinary Rule 9-101(B) did not directly apply since the attorney had not been a public employee. Nevertheless, on motion by the defendant corporation to disqualify plaintiff's attorney, the court in *Handelman* found the "considerations" of Canon 9 applicable and ordered the attorney and his law firm disqualified.[75] Questionable behavior was not to be permitted merely because it was not directly covered by the Canons. The attorney had been able to obtain information that he would not have been able to obtain in a private capacity;[76] his representation of plaintiffs in the present suit against the corporation he had previously investigated in a quasi-public capacity thus created, at the very least, an appearance of impropriety sufficient to require his disqualification.[77]

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73. 368 F. Supp. 258 (S.D.N.Y. 1973).

74. 15 U.S.C. §§ 78aaa-*lll* (1970).

75. 368 F. Supp. at 263-64. The court noted that the United States District Court for the Southern District of New York had not adopted the *Code of Professional Responsibility,* but determined the lawyer's disqualification to be required for the "same considerations" which necessitated the adoption of Canon 9. *Id.* at 263.

76. Although the attorney in *Handelman* was not, strictly speaking, a public employee, his position had given him "a real advantage in learning of any illicit activities in which defendants may have been engaged." *Id.* at 263. The attorney argued that the information he obtained was currently available to the public and that therefore the defendants were not prejudiced. The court rejected this contention, holding that the availability of the confidential information elsewhere was immaterial since the attorney's conduct still gave rise to an appearance of impropriety. *Id.* at 264; *accord,* Emle Indus. v. Patentex, Inc., 478 F.2d 562, 572-73 (2d Cir. 1973); Doe v. A Corp., 330 F. Supp. 1352, 1355 (S.D.N.Y. 1971); Marco v. Dulles, 169 F. Supp. 622, 630 (S.D.N.Y. 1959); Fleischer v. A.A.P., Inc., 163 F. Supp. 548, 551 (S.D.N.Y. 1958), *appeal dismissed sub nom.* Fleischer v. Phillips, 264 F.2d 515 (2d Cir.), *cert. denied,* 359 U.S. 1002 (1959). *See* H. DRINKER, LEGAL ETHICS 135 (1955); R. WISE, LEGAL ETHICS 283-84 (1970); Note, *Disqualification of Attorneys for Representing Interests Adverse to Former Clients,* 64 YALE L.J. 917, 919-20 (1955).

77. 368 F. Supp. at 264.

Canon 9's sweeping admonition to "avoid even the appearance of professional impropriety" has thus afforded the courts wide latitude in which to evaluate alleged improper representations. Though the attorney's conduct may not in fact run counter to some specific ethical prohibition, if in the court's view even a semblance of improper conduct exists, disqualification may be ordered. It is arguable that this development has imported much needed common sense into the area of professional ethics. While the abandonment of technical guidelines may be laudatory, it has sometimes been difficult to perceive where the courts are willing to draw the line under Canon 9.

III. The Outer Limits of Canon 9

Although the scope of Canon 9's prohibition has been liberally interpreted by the courts, at least one limit has been defined. In *Meyerhofer v. Empire Fire & Marine Insurance Co.*,[78] a former attorney for the defendant conveyed confidential information concerning his former representation to the plaintiff's attorneys. Because he had done so in response to his being named as a defendant in the suit, the Second Circuit held that he had not violated his ethical duty to his former client.[79] The court indicated that because Canon 4 specifically recognizes a lawyer's right to defend himself or herself against "an accusation of wrongful conduct,"[80] the attorney had acted properly under the circumstances. The "irrebutable [*sic*] presumption of *Emle*" was held not to apply "because [the attorney] never sought to 'prosecute litigation,' either as a party . . . or as counsel for a plaintiff party."[81] Canon 9 should not be read so broadly, the *Meyerhofer* court stated, "as to eviscerate the right of self-defense . . . ."[82]

The key to the *Meyerhofer* decision is that because the attorney's conduct had been proper, plaintiff's attorneys were not required to withdraw, despite

78. 497 F.2d 1190 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974).

79. *Id.* at 1194-95. The former attorney, Goldberg, had been employed in a firm retained by the defendant corporation. He had worked on a prospectus and stock registration statement for the corporation but left the firm in a dispute over the disclosure of certain fees therein. Following his resignation, Goldberg appeared before the SEC and filed an affidavit concerning the nondisclosures and other matters relating to his work while with the firm. Thereafter, the plaintiffs brought suit against the corporation, the firm, and Goldberg, alleging materially false and misleading statements in the corporation's stock registration statement and prospectus. In order to clear himself, Goldberg went to the plaintiff's attorney, explained his position in the matter, and gave him a copy of his SEC affidavit. *Id.* at 1193.

80. DR 4-101(C) also recognizes that a lawyer may reveal confidences or secrets necessary to defend himself against "an accusation of wrongful conduct."

81. 497 F.2d at 1195.

82. *Id.* at 1196.

the attorney's revelation to them of confidential information highly damaging to the defense in the suit. The defendant corporation's client confidences had been disclosed to an adverse party in pending litigation, but because that adverse party had joined defendant's former attorney in the suit, the breach was justified on the grounds of self-defense.[83]

A different result was reached in *Hull v. Celanese Corp.*,[84] a case involving a claim of sex discrimination in employment. After institution of the suit, five additional plaintiffs sought to intervene, one of whom, as a member of the corporate legal staff of the defendant employer, had previously worked on preparation of the defense in the suit. Unlike the more usual situation of the lawyer switching sides to represent an interest adverse to his initial client, in *Hull* the in-house counsel for the defendant switched sides to become a plaintiff. In this sense the case resembled *Doe v. A Corp.*[85] In both cases, the court ordered plaintiff's attorneys disqualified. The cases can be distinguished, however; as a plaintiff, the attorney in *Hull* had neither prepared the suit nor filed the complaint. Furthermore, Hull's attorneys had carefully cautioned her not to reveal any information received in confidence, but rather to confine her revelations to the facts of her own case.

Despite the claim that no confidential information had been obtained either directly or indirectly, the court in *Hull* found that Canon 9 required disqualification of plaintiff's attorneys. "The breach of confidence would not have to be proved; it is presumed in order to preserve the spirit of the Code."[86] Even if plaintiff's attorneys could have proven that no ethical violation had occurred, then, disqualification would still have been the result in *Hull*. In order to prevent "even the appearance of impropriety," the court presumed that unethical conduct had taken place. This finding contrasts with *Meyerhofer*, in which plaintiff's attorneys admittedly received confidential information from their adversary's former counsel. Yet plaintiff's attorneys were permitted to continue prosecution of the suit. In *Hull*, even had plaintiffs' attorneys been able to prove that there had been no actual disclosures of confidential information, disqualification would still have been ordered. In both cases, plaintiffs' attorneys had never been

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83. It has been suggested that

> [t]he consequence of the holding . . . in *Meyerhofer* is the encouraging of attorneys who are bringing suit against public corporations to name the defendant's counsel, involved in the issuance of securities, as a party defendant. Joining defendant's counsel thus might force the revelation of confidential information at the expense of the counsel's corporate client.

29 U. MIAMI L. REV. 376, 383 (1975).

84. 513 F.2d 568 (2d Cir. 1975).

85. 330 F. Supp. 1352 (S.D.N.Y. 1971). *See* p. 354 *supra*.

86. 513 F.2d at 572.

retained by the defendants and therefore had never had access to any client confidences of the defendants.

Obviously, the breach of client confidences was not determinative. Nor would it appear that Canon 9 was dispositive, since the former attorneys' conduct in both cases certainly raised "an appearance of impropriety." Rather, it seems that the motivations behind the former attorneys' behavior decided the issue. The corporate attorney in *Hull* had a claim of illegality against her employer, but this was not enough.[87] Only the right of self-defense in *Meyerhofer* was sufficient to overcome the irrebuttable presumption of *Emle*.[88]

IV. CONCLUSION

In ruling on motions to disqualify counsel for alleged conflicts of interest, courts have universally recognized the pertinence of the ABA *Code of Professional Responsibility*. Yet application of its definitive ethical proscriptions to any particular set of facts has sometimes proven difficult.

The promulgation of Canon 9 provided the courts with a broad standard by which questionable conduct, perhaps not constituting clear violations of other ethical rules, can be evaluated in broader terms. Since its adoption, the courts have increasingly relied on Canon 9's admonition to "avoid even the appearance of professional impropriety" in measuring an attorney's allegedly improper representation of an interest adverse to that of another client.

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87. The attorney in Doe v. A Corp., 330 F. Supp. 1352 (S.D.N.Y. 1971), had a similar claim of illegality against his former client. The court there addressed the question of the attorney's proper course of conduct in such a situation and concluded that the only course open to the attorney was to bring "to the attention of the defendants the fact that their conduct was wrongful." *Id.* at 1356.

In *Hull*, the court stated that its decision "should not be read to imply that [corporate counsel] cannot pursue her claim of employment discrimination based on sex." 513 F.2d at 572. However, it seems likely that her remedy would be limited in a manner similar to that of the attorney in *Doe*. *See* ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, *supra* note 28, at No. 202 (1940).

88. *Meyerhofer* and *Hull* can be further distinguished. The corporate counsel in *Hull*, as a plaintiff in the sex discrimination action, was clearly asserting a legal claim against her employer (client). The decision in *Meyerhofer* rested in part upon the fact that the attorney there had not "sought to 'prosecute litigation', either as a party . . . or as counsel for a plaintiff party." 497 F.2d at 1195. However, it is believed that "prosecuting litigation," in the sense that term is used in *Meyerhofer*, means participating in the litigation as an attorney, *i.e.*, counsel for a plaintiff party or counsel on one's own behalf as a plaintiff party, as was the attorney in *Doe*. If that is so. then the corporate counsel in *Hull* did not seek to "prosecute litigation" since she never participated in the action as an attorney, but only as a plaintiff.

Thus, when the more definitive Canon 4, traditionally applicable in cases of alleged attorney conflicts of interest, cannot be made precisely to fit the facts, Canon 9 has been used to expand the other Canon's coverage. *Emle Industries v. Patentex, Inc.*,[89] provides a clear example of a court utilizing the more sweeping language of Canon 9 to justify disqualification under Canon 4 even though Canon 4 did not clearly apply.

Even when no provision of the Code seems to apply, Canon 9 has been relied on to provide a separate, much broader standard by which conduct can be judged. Thus in *Handelman v. Weiss*,[90] although no Canon or Disciplinary Rule covered the challenged attorney's conduct, the court applied Canon 9 and ordered disqualification since the attorney's participation raised at least the appearance of impropriety.

Canon 9 has been used to liberally interpret established ethical guidelines, to evaluate disqualification motions in a much broader context of public policy, and to maintain the integrity of the judicial system. The liberal standard embodied in Canon 9, however, poses a problem in determining its limits. Thus far only the traditional right of the attorney to defend himself against accusations of wrongdoing, an exception to Canon 4 specifically stated in Disciplinary Rule 4-101(C), has been held to withstand judicial scrutiny under Canon 9.[91] Otherwise, it seems that attorneys must be mindful that not only will they be expected to avoid specific acts of professional impropriety as outlined in the *Code of Professional Responsibility*, but they must also avoid even the appearance of such impropriety under the general standard of Canon 9.

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89. 478 F.2d 562 (2d Cir. 1973). See pp. 354-56 *supra.*

90. 368 F. Supp. 258 (S.D.N.Y. 1973). See p. 359 *supra.*

91. Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974). See pp. 300-62 *supra.*