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ETHICS

COMMENTARY

**Marshall Breger*

The disciplined study of legal ethics has been an undertaking traditionally consigned to bar association committees and law day lectures.¹ Over the past decade, however, the subject has become the focal point of extensive controversy and intellectual exploration.² As a result, a number of important developments have evolved through both case law³ and legal literature.⁴

Most of this year's developments in the area of legal ethics are a direct response to the recent proposal by the American Bar Association Commission on Evaluation of Professional Standards (Kutak Commission),⁵ to revise the Model Code of Profes-

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¹ See generally ABA COMM. ON EVALUATION OF PROFESSIONAL STANDARDS, DISCUSSION DRAFT OF THE MODEL RULES OF PROFESSIONAL CONDUCT, PREFACE, (Jan. 1980) [hereinafter cited as ABA MODEL RULES DISCUSSION DRAFT].

² For example, the INDEX TO LEGAL PERIODICALS, from 1930-39, listed 171 articles dealing with the subject of legal ethics, 53 appearing in law reviews and 118 appearing in bar association journals. From 1960-69 the INDEX listed 397 published articles. Of these, 158 were published in law reviews and 139 were published in bar association journals. In the decade following 1970 the number of articles published and listed in the INDEX increased to 726, 442 appearing in law reviews and 284 appearing in bar association journals. See also ABA MODEL RULES DISCUSSION DRAFT, *supra* note 1, PREFACE.

³ See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (attorney - client privilege); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (solicitation of clients); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (lawyer advertising); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (minimum fee schedules); *Virginia State Bar v. Surety Title Ins. Agency*, 571 F.2d 205 (4th Cir. 1978) (unauthorized practice of law).

⁴ See generally M. FRANKEL, *PARTISAN JUSTICE* (1980); G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* (1978).

⁵ See ABA COMM. ON EVALUATION OF PROFESSIONAL STANDARDS, PROPOSED FINAL DRAFT OF THE MODEL RULES OF PROFESSIONAL CONDUCT (May 1981) [hereinafter cited as ABA MODEL RULES]. This special commission was appointed by the ABA in late 1977 to undertake a "comprehensive rethinking of the ethical premises and problems of the profession of law" and to accordingly draft a document to replace the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979, with amendments to Feb. 1980) [hereinafter cited as ABA CODE]. The commission bears the name of its chairman, Robert J. Kutak.

sional Responsibility (Code).⁶ The Kutak Commission's published recommendations (ABA Model Rules or Kutak Draft) prompted a host of critical investigations⁷ and led to the formulation of two alternative ethical codes, one promulgated by the American College of Trial Lawyers⁸ and the other by the National Organization of Bar Counsel.⁹ The net result of these various studies has been to focus attention on the fundamental values underlying our system of legal ethics.

A second area of recent interest and activity focuses on the moral responsibility the legal profession assigns to the individual attorney.¹⁰ This inquiry, which questions the validity of separating one's personal from professional life, strikes at the very heart of the traditional understanding of professional ethics. It mandates a reevaluation of the specific norms elucidated in the current code¹¹ and forces us to re-examine the social function of the attorney as well as the meaning and content of attorney-client relationships.

The gravamen of this inquiry into moral responsibility is the extent to which the attorney must identify himself with the attitudes and purposes of his client. Some argue that the attor-

⁶ ABA CODE, *supra* note 5.

⁷ See, e.g., ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE DISCUSSION DRAFT OF MODEL RULES OF PROFESSIONAL CONDUCT (Aug. 1980); NEW YORK STATE BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE TO REVIEW ABA DRAFT OF MODEL RULES OF PROFESSIONAL CONDUCT (Aug. 1980); Patterson, *An Analysis of the Proposed Model Rules of Professional Conduct*, 31 MERCER L. REV. 645 (1980).

⁸ ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUNDATION, PUBLIC DISCUSSION DRAFT OF THE AMERICAN LAWYER'S CODE OF CONDUCT (June 1980). This draft is commonly known as the Freedman draft, named after its reporter, Monroe H. Freedman, Professor, Hofstra University School of Law.

⁹ NATIONAL ORGANIZATION OF BAR COUNSEL, REPORT AND RECOMMENDATIONS ON STUDY OF THE MODEL RULES OF PROFESSIONAL CONDUCT (Tent. Draft, 1980).

For a critique of the conceptual structure of the existing code, see Sutton, *How Vulnerable is the Code of Professional Responsibility?*, 57 N.C. L. REV. 497, 510-16 (1979); Note, *ABA Code of Professional Responsibility: Void for Vagueness?*, 57 N.C. L. REV. 671 (1979).

¹⁰ Several moral philosophers have addressed this issue. See, e.g., Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975). For an attorney's valuable intervention in this controversy, see Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30.

¹¹ See M. FRANKEL, *supra* note 4 at 36, criticized in Nessen, *Rethinking the Lawyer's Duties to Disclose Information: A Critique of Some of Judge Frankel's Proposals*, 24 N.Y.L. SCH. L. REV. 677 (1979).

ney must maintain a role distance between himself and his client.¹² Others, rejecting role theory, feel that the attorney should bear both the cross of his client's sins and the halo of his virtues.¹³ Reasons advanced in support of this latter view range from a belief that it is psychologically necessary, to a belief that the attorney's professional role, as it is currently understood, is morally ambiguous.¹⁴

Ironically, the demand that the attorney serve as a moral guarantor of his client is often dovetailed with the view that the attorney must serve as his client's agent. Consequently, a lawyer is required to follow his client's dictates until the moral yoke proves too heavy, at which point he can expeditiously withdraw.¹⁵ This combination suggests that the attorney's duty of loyalty to his client is of a limited nature.

Similar concerns with the meaning of attorney loyalty are raised by a problem in legal ethics that has repeatedly vexed the Second Circuit over the past several years is that of the disqualification of an attorney because of a conflict of interest between his past and/or present clients.¹⁶ Rather than analyze the non-

¹² For a good discussion of the concept of role theory, see Sarbin, *Role Theory*, in *HANDBOOK OF SOCIAL PSYCHOLOGY* 223-58 (G. Lindzey ed. 1954). For a discussion of the development of role theory, see E. GOFFMAN, *ENCOUNTERS* 85-91 (1961). For an insightful criticism of the social role theory, see DAHRENDORF, *Homo Sociologicus: On the History, Significance and Limits of the Category of Social Role*, in *ESSAYS IN THE THEORY OF SOCIETY* 19 (1968). For a discussion of role theory as applied to lawyers, see Elkins, *The Legal Persona: An Essay on the Professional Mask*, 64 *VA. L. REV.* 735 (1978). See also Postema, *supra* note 10, at 65-67 for a discussion of the analogous concept of moral distance.

¹³ There was much concern that this view could easily lead to the imputation of a client's moral character to his attorney. In an effort to avoid this problem, provisions were added to the Code forbidding attorneys from commenting on the guilt or innocence of their clients. See DR 7-106 (c) (4) and EC 7-24. See also ABA *CANONS OF PROFESSIONAL ETHICS* No. 15. To do otherwise, it was feared, would place the attorney's personal character into the scales "in proportion to his rank and reputation." *Rex v. Paine*, 22 *How. St. Tr.* 358, 412 (1792).

The collapse of this insulation afforded by role differentiation can affect clients as well as attorneys. For a good discussion of this problem see D. MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 220-69 (1973).

¹⁴ See Fried, *supra* note 10; Postema, *supra* note 10; Simon, *supra* note 10; Wasserstrom, *supra* note 10.

¹⁵ This coupling of client control with the flexibility of attorney withdrawal is a view associated with Professor Freedman. See, e.g., M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 31-32 (1975). For a discussion of the present Code's position on attorney withdrawal, see Postema, *supra* note 10, at 84-5.

¹⁶ See, e.g., *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980), *vacated and appeal*

case law developments just mentioned, this Commentary will attempt to isolate the building blocks for a conceptual understanding of the conflict of interest problem.¹⁷

Some discussion of the proposed revisions to the Code of Professional Responsibility is necessary, however, because the Kutak Commission treats this conflict of interest issue as a central problem for analysis.¹⁸ Indeed, the Kutak Draft dedicates six separate rules to this issue.¹⁹ The Commission's approach to concurrent representation where a conflict of interest exists is substantially similar to that of the existing Code,²⁰ but its approach to successive representation differs, in that the Commission's approach distinguishes private sector attorneys²¹ from for-

dismissed, 101 S.Ct. 1338 (1981); *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated*, 101 S.Ct. 911 (1981); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977); *NCK Organization Ltd. v. Bregman*, 542 F.2d 128 (2d Cir. 1976); *Cinema 5 Ltd. v. Cinerama Ltd.*, 528 F.2d 1384 (2d Cir. 1976); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (en banc); *W.E. Basset Co. v. H.C. Cook Co.*, 302 F.2d 268 (2d Cir. 1962) (per curiam); *Fleischer v. Phillips*, 264 F.2d 515 (2d Cir.), *cert denied*, 359 U.S. 1002 (1959).

¹⁷ For an excellent discussion and analysis of the Second Circuit's views on attorney disqualification, see Comment, *Attorney Disqualification and the Former Government Employee*, 47 BROOKLYN L. REV. 979 (1981).

¹⁸ See ABA MODEL RULES DISCUSSION DRAFT, *supra* note 1, PREAMBLE ("Virtually all difficult ethical problems arise from conflict in a lawyer's responsibilities. . . .").

¹⁹ ABA MODEL RULES, *supra* note 5, rules 1.7-1.12. Rule 1.7 provides that:

(a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.

(b) When a lawyer's own interests or other responsibilities might adversely affect the representation of a client, the lawyer shall not represent the client unless:

- (1) The lawyer reasonably believes the other responsibilities or interests involved will not adversely affect the best interest of the client; and
- (2) The client consents after disclosure. When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved.

Id. rule 1.7.

²⁰ Compare *id.* with ABA CODE, *supra* note 5, CANONS 4 & 5.

²¹ ABA MODEL RULES, *supra* note 5, rule 1.9 states that:

A lawyer who has represented a client in a matter shall not thereafter:

(a) Represent another person in the same or a substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure; or

(b) Use information relating to the representation to the disadvantage of the former client unless the former client consents after disclosure or the information has become generally known.

mer government attorneys.²² In addition, the Commission's proposal upholds the current standard which affirms that the attorney's duty of loyalty continues long after the termination of his relationship with the client, but does so in modified form.²³ Most important, the Kutak Draft suggests new limits to the concept of attorney loyalty to client and the protection of client confidences;²⁴ limits which inevitably affect any conflict of interest analysis.

The renewed philosophical interest in legal ethics has had an impact on the problem of conflicts of interest. The concern for moral autonomy leads away from an objective theory of professional conduct to which all attorneys must adhere and leads toward a subjective "Gillette Brothers Rule"²⁵ according to

²² Rule 1.11 of the ABA MODEL RULES, *supra* note 5 provides that:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after disclosure.

(b) A lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable the agency to ascertain compliance with the provisions of the rule.

The Code deals with the appearance of conflict problem in Canon 9. ABA CODE, *supra* note 5, CANON 9. Canon 9 discusses the responsibilities of government and former government attorneys. See *id.* DR 9-101. Canon 5 deals with concurrent representation of adverse clients, see *id.* EC 5-14 to 5-20, and Canon 4 deals with concurrent representation problems in general. While Canon 4 accepts that "the obligation . . . to preserve the confidences and secrets of . . . the client continues after the termination of . . . [an attorney's] employment," see *id.* EC 4-6, the issue of successive conflict is not addressed.

²³ See ABA MODEL RULES, *supra* note 5, rule 1.9, Comment.

²⁴ See *id.*, rule 1.6, Comment; *id.*, rule 1.7, Comment.

²⁵ The Gillette Brothers Rule of Professional Ethics states that "if you shave with a razor you have to look in the mirror, and if you can look at yourself in the mirror every morning without shame, then you have met the ethical standard of society and of the Bar generally." Gordon, *Professional Responsibility in Civil Litigation*, in PROFESSIONAL RESPONSIBILITY OF THE LAWYER 133 (N. Galston ed. 1977).

which the preferences of individual attorneys govern. Such a trend threatens to create a situation in which the murky divide between right and wrong in the conflicts area will become almost impossible to ascertain. A "bright line" approach to this issue would seem more sensible—for attorneys will agree to accept objective restraints in their own conduct only when they are assured that their adversaries are accepting similar restraints.

This concern of attorneys for moral autonomy also threatens to create a heterogeneous legal profession devoid of that initial solidarity responsible for the development of common professional norms.²⁶ The resultant tension between professional and personal demands which would inevitably flow from such heterogeneity could lead to the development of a legal counterculture based on dissonant social values,²⁷ thus complicating efforts to create a viable professional ethic.²⁸

In the late nineteenth century, the discord between professional norm and professional reality led to the creation of the Canons of Professional Ethics²⁹ and a variety of other restrictive rules designed to raise the ethical level of the bar and to exclude "undesirable" elements from the profession.³⁰ Contemporary recognition of this cleavage has prompted a number of disparate reform suggestions. Some of these, which have underscored the structural inability of the solo practitioner or "little lawyer" to

²⁶ See E. DURKHEIM, *PROFESSIONAL ETHICS AND CIVIL MORALS* (1957). Similar heterogeneity results from the mobility afforded by liberal societies which do not limit entry into a profession by caste or class.

²⁷ The counterculture lawyer views legal processes as avowedly political and sees his professional function as pressing for changes in the social structure. See Bucher, *Pathology: A Study of Social Movements Within A Profession*, 10 Soc. PROB. 40 (1962); Bucher & Strauss, *Professions in Process*, 66 AM. J. Soc. 325 (1961). For a description of the position of the legal counterculture in America, see M. JAMES, *THE PEOPLE'S LAWYERS* (1973). For a discussion of the structural strains within the solicitor profession in England, see Padmore, *Bucher and Strauss Revisited—The Case of the Solicitor's Profession*, 7 BRIT. J. L. & Soc'y 1, 2 (1980) (modern professions contain different 'segments', groups which share values, interests and identities which are distinctive and different from other groups within the same professions").

²⁸ It has been noted that "if the radicalism of the radical lawyer is ever challenged he can protect himself by invoking the canons of professionalism." Z. BANKOWSKI & G. MUNGHAM, *IMAGES OF LAW* 106 (1976). This paradox within the legal counterculture has been insufficiently explored.

²⁹ The ABA Canons of Professional Ethics were adopted in 1908. See H. DRINKER, *LEGAL ETHICS* 23-26 (1953) for a discussion of the development of the canons. See also Armstrong, *A Century of Legal Ethics*, 64 A.B.A. J. 1063 (1978).

³⁰ J. AUERBACH, *UNEQUAL JUSTICE* 102-29 (1976).

simultaneously adhere to articulated standards and earn a living,³¹ have recommended that most of the professional norms be discarded.³² Others have urged that the ethical norms currently embodied in the Code be reformulated into a regulatory code of conduct articulating principles of positive law.³³

This tension between the real and the ideal is a major source of conflict of interest problems. Potential for conflicts exists as a consequence of the large growth in American law firms, the concomitant shedding of smaller clients for larger clients, and as a result of the growth in the number of multi-state, multi-office, law firms.³⁴ This potential exists also as a consequence of the "revolving door" between employment in government and employment in the private sector.³⁵ Finally, in the noncorporate context, the potential for conflict exists whenever, due to high legal costs, joint counsel is sought to handle such matters as routine divorces³⁶ and property transactions.³⁷ Al-

³¹ Shuchman, *Ethics and Legal Ethics: The Propriety of The Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244, 245 (1968).

³² *Id.* at 268-69; FREEDMAN, *supra*, note 15, at 116-18 (1975) (stating that there are forms of solicitation "carried on with impunity by lawyers seeking to represent those of wealth and privilege" that have been deemed inappropriate for the attorney who serves the poor and unsophisticated).

³³ See Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L. J. 909, 955-60 (1981); Patterson, *A Preliminary Rationalization of the Law of Legal Ethics*, 57 N.C. L. REV. 519, 525-28 (1979); Note, *The Lawyer's Moral Paradox*, 1979 DUKE L. J. 1335, 1337-39. This position has also been urged in England. See Miller, *Advocate's Duty to Justice: Where Does it Belong?*, 97 L.Q. REV. 127, 129-38 (1981).

³⁴ See *Leis v. Flynt*, 439 U.S. 438, 449 (1979) (Stevens, J., dissenting) ("Interstate law practice and multistate law firms are now commonplace."). As of June, 1981, over two hundred and ten out-of-state law firms have opened branch offices in Washington, D.C. Nelson, *Washington Law Firms Report Continued Growth*, LEGAL TIMES, June 8, 1981, at 29, col. 1. See also Note, *Regulating Multistate Law Firms*, 32 STAN. L. REV. 1211, 1214 (1980).

³⁵ See Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency*, 1980 DUKE L.J. 1, 25-63.

³⁶ See *Klemm v. Superior Ct.*, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977); *Halvorson v. Halvorson*, 3 Wash. App. 827, 479 P.2d 161 (1970).

³⁷ See *Blevin v. Mayfield*, 189 Cal. App. 2d 649, 11 Cal. Rptr. 882 (1961); *Craft Builders, Inc. v. Ellis D. Taylor, Inc.*, 254 A.2d 233 (Del. 1969).

Surprisingly, although the practice is frowned upon by the courts, the British legal profession has traditionally allowed one solicitor to act for both parties in a real estate conveyance transaction. See *Smith v. Mansi* [1963] 1 W.L.R. 26, 30 (Ch.); *Goody v. Baring* [1956] 1 W.L.R. 448 (Ch.). As part of a 1972 agreement to abandon conveyancing scale charges, the Law Society agreed to a practice rule prohibiting joint representation. SOLICITORS' PRACTICE RULE 2 (October 6, 1972), cited in COUNCIL OF THE LAW SOCIETY, A GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS 186 (1974) [hereinafter cited as So-

though some have claimed that the economic conflict of interest between lawyer and client is inexorable,³⁸ the conventional view is that the attorney can and should hew to the ideal of rendering disinterested service to the client and placing the client's interests before his own.³⁹

The traditional rule, based on the view that only an "*ambidexter*" can serve two masters,⁴⁰ was and is clear—a lawyer cannot represent two opposing parties at the same time.⁴¹ Modern developments have placed pressure on these traditional attitudes,⁴² however, prompting a number of suggestions to modify this rule. One suggestion is that the traditional rule should be relaxed in non-profit contexts.⁴³ A second is that the rule should be limited in scope to apply only to actual conflicts and not to mere appearances of conflict.⁴⁴ A third suggestion is that the

LICITORS' PROFESSIONAL CONDUCT]. This rule reversed the Law Society's earlier position that there was "nothing inherently improper . . . in a solicitor working for both purchaser and vendor." 53 L. Soc'y GAZ. 374, 374 (1956). Background on this decision to alter the rule may be found in H. KIRK, PORTRAIT OF A PROFESSION 151-52 (1976).

³⁸ D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 111 (1974). Rosenthal argues that "in all but the largest claims an attorney makes less money by thoroughly preparing a case and not settling it early." *Id.* at 105. Cf. EC 5-1 (Personal interests of the lawyer should not interfere with the loyal fulfillment of his obligations to his client).

³⁹ ABA CODE, *supra* note 5, CANON 5.

⁴⁰ See *Mason's Case*, 89 Eng. Rep. 55 (Ch. 1672) (attorney was struck off the rolls because "he had been an *ambidexter*, vix. after he was retained by one side he was retained on the other side").

⁴¹ The wisdom of *Matthew* 6:24 (King James) is apposite here. "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other." *Id.* See *Kelly v. Greason*, 23 N.Y.2d 368, 378, 244 N. E.2d 456, 462, 296 N.Y.S.2d 937, 945-46 (1968) (the likelihood of misconduct is increased when a lawyer represents parties on both sides); *Jedwabny v. Phila. Trans. Co.*, 390 Pa. 231, 233, 135 A.2d 252, 254 (1957) (lawyer who originally represented driver and passenger in a negligence action, prohibited from representing both when driver was subsequently joined as a defendant).

⁴² In *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 448 F.Supp. 1284 (N.D. Ill.), *rev'd sub nom.* *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978), *cert denied*, 439 U.S. 955 (1979), the district court argued that "with the modern-day proliferation of large law firms representing multi-billion dollar corporations in all segments of the economy and the governmental process, it is becoming increasingly difficult to insist upon absolute fidelity to rules prohibiting attorneys from representing overlapping legal interests." *Id.* at 1287-88. *Contra*, *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir. 1978), *cert denied*, 439 U.S. 955 (1979) ("there is no basis for creating separate disqualification rules for large firms even though the burden of complying with ethical considerations will fall more heavily upon their shoulders").

⁴³ BOSTON BAR ASSOCIATION COMM. ON ETHICS: OPINION No. 76-2 (1976).

⁴⁴ See *Armstrong v. McAlpin*, 625 F.2d 433, 445 (2d Cir. 1980) (en banc), *vacated*, 101 S.Ct. 911 (1981). See also *Kramer, The Appearance of Impropriety Under Canon 9:*

rule disqualifying an entire firm for the conflicting interest of one partner be re-examined in light of the growing practice of building "Chinese Walls" around "conflicted" partners to insulate and exclude them from contact with a firm matter with which they have had prior and conflicting association.⁴⁵

Efforts have been made in each of these three directions. At least one court⁴⁶ and several bar associations⁴⁷ have suggested special conflict of interest rules for legal aid societies, thereby allowing these organizations to represent, with a variety of safeguards,⁴⁸ both husband and wife in divorce litigations. This approach violates the principle that standards for legal aid attorneys should be no different from standards for the rest of the profession,⁴⁹ but it does so in an effort to make legal counsel more readily available to the indigent. Without relaxation of this principle, and absent the use of private counsel by legal aid societies,⁵⁰ an indigent person losing the "race to the courthouse" might be denied any representation.

A Study of the Federal Judicial Process Applied to Lawyers, 65 MINN. L. REV. 243 (1980).

⁴⁵ See Note, *The Chinese Wall Defense in Law Firm Disqualification*, 128 U. PA. L. REV. 677 (1980) (applauds viability of "Chinese Wall defense" in large complex law firms).

⁴⁶ *Flores v. Flores*, 598 P.2d 893 (Alaska 1979). In *Flores*, the Alaska Supreme Court found a state constitutional right to counsel in divorce proceedings involving child custody decisions. The court found that if Chinese Walls are created around attorneys "[i]t is not . . . an inevitable conclusion that . . . [the Alaska Legal Services Corporation] could not under any circumstances, furnish counsel to take both sides of a case." *Id.* at 896. Because such a wall had not been erected the court forbade dual representation in *Flores*, but urged prospective reassessment of the rule against concurrent representation. *Id. Contra*, *Borden v. Borden*, 277 A.2d 89 (D.C. 1971) (following traditional view regarding conflicts of interest and legal aid society).

⁴⁷ See, e.g., ALLEGHENY COUNTY BAR ASSOCIATION: MEMORANDUM OPINION (1973) (canons of ethics do not prevent Neighborhood Legal Services Ass'n attorneys from representing both child and parents in deprived child proceedings); BOSTON BAR ASSOCIATION COMM. ON ETHICS: OPINION No. 76-2 (1976) (attorneys from separate offices of the Greater Boston Legal Services may represent opposing sides in legal matters).

⁴⁸ See, e.g., *Flores v. Flores*, 598 P.2d 893, 896-97 (Alaska 1979) (safeguards should include regulations concerning record keeping, access to files, physical separation of offices and supervision of attorneys).

⁴⁹ ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL ETHICS OPINIONS No. 1233 (1972) ("professional standards regarding representation of differing interests apply to legal aid offices the same as to other lawyers"); NEW YORK STATE BAR ASSOCIATION COMM. ON PROFESSIONAL ETHICS, OPINIONS No. 102 (1969) ("Principles applicable to . . . a law partnership apply to Legal Aid Societies."). See *Borden v. Borden*, 277 A.2d 89, 92 (D.C. 1971).

⁵⁰ See, e.g., *Flores v. Flores*, 598 P.2d 893 (Alaska 1979) discussed in note 46, *supra*.

The rule allowing disqualification of an attorney because of the mere "appearance of impropriety" also has been subjected to increased scrutiny. At a practical level, courts have often found this type of disqualification necessary in order to avoid the thorny and sometimes embarrassing thicket of consequences flowing from the finding of an actual conflict.⁵¹ Other courts have used this rule as an "escape valve" through which they may disqualify counsel who have aroused "public suspicion or obloquy"⁵² when no actual impropriety has been identified or proven. In contrast to these, a third group of courts, and commentators alike, have argued that the appearance of impropriety alone, "is simply too dangerous and vague a standard to serve as a foundation for guiding professional conduct."⁵³ The recent proposal to revise the Code of Professional Responsibility, conforms with this latter view.⁵⁴ While one may criticize the vagaries of its use, the appearance of impropriety rule supports the belief that courts should be concerned with the public's confidence in the integrity of our legal system. This concern should not be lightly ignored.

Another ethical standard under attack is the rule stating that one partner in a law firm is responsible for the liabilities of all other partners.⁵⁵ This taint theory is perhaps the most difficult ethical principle to adhere to for large firm attorneys. The

⁵¹ See, e.g., *Sapienza v. New York News, Inc.*, 481 F.Supp. 676, 680 (S.D.N.Y. 1979) (The mere appearance that counsel is representing conflicting interests is sufficient to support disqualification).

⁵² *Woods v. Covington County Bank*, 537 F.2d 804, 813 n. 12 (5th Cir. 1976).

⁵³ See *Kramer*, *supra* note 44, at 244. *Accord*, ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS No. 342 (1975) (The rule stating that one should avoid the appearance of impropriety is too nebulous to be helpful); *Moritz v. Medical Protective Co.*, 428 F.Supp. 865, 874 (W.D. Wisc. 1977) (The importance of a party's right to retain counsel of its own choosing outweighs the appearance of impropriety rule and indicates that the rule should not be indiscriminately applied).

⁵⁴ See ABA MODEL RULES, *supra* note 5, rule 1.7, Comment.

⁵⁵ Under this standard an English solicitor is absolutely responsible for seeing that his partner adheres to proper accounting procedures. SOLICITORS' PROFESSIONAL CONDUCT, *supra* note 37, at 26, 144. "The liability . . . for unbecoming conduct of a professional nature, other than for breaches of the Solicitors' Accounts Rules . . . depend[s] upon whether or not the partner was knowingly involved or by reason of his conduct, neglect or default contributed to the subject matter of the complaint." *Id.* at 26. For an American case adhering to this rule, see *Sanchez v. Murphy*, 385 F.Supp. 1362, 1364 (D. Nev. 1974) (Partnership law and the fact that fees for services are shared, justify holding one partner in a law firm liable for the conduct of others in the firm).

rule reflects historical attitudes toward law partnerships⁵⁶ and has been used to disqualify not only all partners in the conflicted attorney's firm, but even members of the tainted attorney's family.⁵⁷

Recent efforts by law firms to develop "Chinese Walls" for quarantining tainted partners reflect the extent to which practicing attorneys are seeking a relaxation of present constraints. Extensive efforts toward the development of a quarantine theory of conflict have been made in the commercial sphere and have been applauded by government and law firms alike.⁵⁸ Some courts presently appear to favor this theory,⁵⁹ but the final disposition of the issue is uncertain.

The rationale behind the conclusive taint principle is two-fold. First is the assumption that persons in propinquity will, more than likely, share confidences.⁶⁰ Second is the fear that to allow a tainted partner's firm to handle the case will create an

⁵⁶ Some of the uncertainty which large American firms have had about using the favorable tax consequences of the professional corporation stem from this view of the partnership as an entity whose liabilities are held equally by all parties. See Brill, *Ways and Means: To P.C. or not to P.C.?*, 3 AM. LAW. 10 (Feb. 1981).

⁵⁷ In Canada, for example, the rule is that:

Conflicting interests include but are not limited to the financial interest of the lawyer or an associate of the lawyer and the duties and loyalties of the lawyer to any other client, including the obligation to communicate information. . . . Associates of the lawyer within the meaning of the rule include his spouse, son or daughter, any relative of the lawyer (or of his spouse) who lives under the same roof, any partner or associate of the lawyer in the practice of law.

CANADIAN BAR ASSOCIATION CODE OF PROFESSIONAL CONDUCT, 16 (1974).

⁵⁸ For example, twenty-six former senior government officials filed an amicus brief in the *Armstrong* en banc rehearing and urged that the Chinese Wall principle be upheld. Brief of Certain Lawyers as Amici Curiae on Rehearing En Banc, *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated*, 101 S.Ct. 911 (1981). In addition, the Commodity Futures Trading Commission, Department of Justice, Federal Maritime Commission, Interstate Commerce Commission, and the Securities and Exchange Commission all expressed their support for this position. 625 F.2d at 443 n. 18.

⁵⁹ See, e.g., *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated*, 101 S.Ct. 911 (1981); *Sierra Vista Hospital, Inc., v. United States*, 639 F.2d 749 (Ct. Cl. 1981); *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977) (per curiam).

⁶⁰ Understanding this natural human tendency, the English Law Society Council noted in response to a query regarding the propriety of office sharing between independent firms, "that they did not see how such group practices could overcome the difficulties caused by clients' privilege." SOLICITORS' PROFESSIONAL CONDUCT, *supra* note 37, at 27. In response to a similar query regarding the sharing of office services, the Council noted "that difficulties of ensuring preservation of clients' confidences and of clients' privilege might make a common typing service for other than purely routine matters impracticable and undesirable." *Id.*

appearance of impropriety in the eyes of the layman and thereby engender decreased public confidence in the legal profession.⁶¹

An alternative to the present taint theory and rule of total disqualification is to limit disqualification to those cases where actual confidences have been transmitted and a possibility exists that these confidences will be abused.⁶² Under this standard an attorney might represent a client with interests adverse to those of a former client so long as the former client's confidences are not revealed.

This alternative view, of necessity, raises the question of the extent to which former clients must be adversely affected before an attorney may be disqualified. In *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*,⁶³ the court held that the defendants, former associates of a law firm having a "peripheral relationship" to prior litigation, refuted the presumption of taint by showing that there was no actual injury to the complaining former client.⁶⁴ An early English case, *Rakusen v. Ellis, Munday & Clarke*,⁶⁵ held similarly, finding that proof of prior retainer, alone, was not sufficient to support disqualification.⁶⁶ Instead, the court stated, the complaining party must show that "real mischief and real prejudice will in all human probability result if the solicitor is allowed to act."⁶⁷ In *Rakusen*, the attorney ac-

⁶¹ Thus, the English rule which asserts a conclusive taint for solicitors who change firms states:

Where a solicitor or a member of his staff who has acted on behalf of a client in respect of any matter, irrespective of its nature, thereafter joins a different firm where he has the opportunity of acting for a party with adverse interests from those of his former client, he and the firm which he joins should cease to act in that matter if he has acquired in his former capacity any information which would not properly have become available to him in his new capacity. Although in theory there might be no objection to the solicitor acting in his new capacity where the client with full knowledge of all the implications gives consent to his so doing, nevertheless the need to ensure that justice must be seen to be done must render rare the case in which it would be safe for the solicitor or the firm which he has joined to continue to act.

SOLICITORS' PROFESSIONAL CONDUCT, *supra* note 37, at 49.

⁶² See CORDERY'S LAW RELATING TO SOLICITORS 89 (6th ed. 1968).

⁶³ 370 F. Supp. 581 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975).

⁶⁴ *Id.* at 588.

⁶⁵ [1912] 1 Ch. 831 (C.A.).

⁶⁶ *Id.* at 835.

⁶⁷ *Id.* A similar position is taken by other Commonwealth courts. See *Farmers Mut. Protection v. United States Smelting*, 28 D.L.R.2d 618 (Sask. 1961); *Ramlall Aqarwallah*

cused of taint was out of the country during the period his firm was litigating the case in question. Thus, the court found that any transmission of confidences to him was impossible.⁶⁸

Recent "Chinese Wall" approaches to the conflict of interest issue can be viewed as attempts to resurrect the *Rakusen* paradigm—to create situations in which transmission of confidences is impossible. The success of this approach lies in the eye of the beholder. Construction of the wall usually begins after a conflicting matter comes to the firm. Thus, unlike *Rakusen*, the potential for intentional or unintentional transmission of confidences does exist. At best, the wall, because it depends in large part on the good faith of all participants, the absence of unconscious disclosures, and pure luck, can prevent only communications subsequent to the discovery of the conflict. Furthermore, the wall appears to represent a denigration of the attorney's ex-post facto duty of loyalty to his former client. It is unlikely that former clients will feel confident in the knowledge that their interests are being protected via walls constructed by their adversaries' law firms, just as it is unlikely that the public will believe that attorney-regulated walls are not conveniently porous. The difficulty in implementing "Chinese Walls" can be seen in the decision in *Cheng v. GAF Corp.*⁶⁹ where, despite a law firm's sincere efforts to quarantine its tainted attorney, the firm was disqualified because of its relatively small size and the consequent increased likelihood of inadvertent disclosures.⁷⁰

To date, case law discussions of conflicts of interest have failed to illuminate a central issue underlying the problem—whether or not client consent is sufficient to vitiate a conflict. Courts have focused their attention solely on methods to ensure that confidential communications will not be leaked to the detriment of former clients.⁷¹ While the protection of client interests is clearly a central concern, other interests may be rele-

v. *Moonia Bibee*, 6 Indian L.R. 79 (Calcutta 1880).

⁶⁸ [1912] 1 Ch. at 836.

⁶⁹ 631 F.2d 1052 (2d Cir. 1980), *vacated and appeal dismissed*, 101 S.Ct. 1338 (1981).

⁷⁰ *Id.* at 1059.

⁷¹ See, e.g., *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980), *vacated and appeal dismissed*, 101 S.Ct. 1338 (1981); *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated*, 101 S.Ct. 911 (1981); *Sierra Vista Hospital, Inc., v. United States*, 639 F.2d 749 (Ct.Cl. 1981); *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977) (per curiam).

vant. As one comparative analysis of Germany's legal profession has noted: For an attorney to represent adverse interests would violate "the trust of the client as well as the principle that the lawyer, as an officer of the court, should stand by the course of action chosen. . . . A consequence of this emphasis is that consent of the clients involved does not justify the [attorneys] working for both sides."⁷²

The German legal profession's refusal to allow client consent to waive conflict problems illustrates that the issue in conflict of interest problems is not merely the protection of client interests. Courts are also concerned with preventing the integrity of the legal system from being infringed by attorneys who undercut principles of adversariness in order to serve a multitude of clients.⁷³ Thus, an early American court maintained that:

[A] client cannot consent that an attorney should be released from obligations which the law imposes on him. A client may waive a privilege which the relation of attorney and client confers upon him, but he cannot enter into an agreement whereby he consents that the attorney be released from all the duties, burdens, obligations, and privileges pertaining to the relation of attorney and client. . . . The fact that a client may be willing to enter into such a contract does not justify the court in upholding it, nor can the client's consent or connivance shelter an attorney from unprofessional conduct. Courts owe a duty to themselves, to the public, and to the profession which the temerity or improvidence of clients cannot supercede.⁷⁴

The courts, therefore, and not the clients, control the professional conduct of attorneys, and the concerns of each differ. Thus, even where a client consents to a conflict situation (an event which rarely occurs in former client contexts unless government agencies are involved),⁷⁵ a court nevertheless may pro-

⁷² D. RUESCHEMEYER, *LAWYERS AND THEIR SOCIETY* 126 (1973). Indeed, the representation of conflicting interests is criminal as well as unethical. *Id.* at 125. See also Hogrefe, *Referat Zur Nergestaltung des Paragraphen*, 1954 *ST. GB.* 356, reprinted in W. KALSBACH, *STANDESRECHT DES RECHTSANWALTS* 350-64 (1956).

For a similar American view, see *Chateau De Ville Prods., Inc., v. Tams-Witmark Music Library, Inc.*, 474 F. Supp. 223, 227 (S.D.N.Y. 1979) (it is doubtful that client consent will cure a conflict of interest problem).

⁷³ For a historical articulation of this view, see Anonymous, 7 *Mod.* 47 (1702).

⁷⁴ *In re Boone*, 83 F. 944, 957 (C.C. N.D. Cal. 1897).

⁷⁵ A number of government agencies have developed disqualification rules which allow an agency to waive its objection to a conflict under certain circumstances. See, e.g., 17 C.F.R. 200.735-8(8)(1980) (The Securities and Exchange Commission will grant waivers if the firm has adopted screening measures which isolate disqualified individuals

hibit an attorney from representing interests adverse to those of the consenting client in order to vindicate principles of professional loyalty to clients past and present. As an early draft of the Kutak Commission Report makes clear, "[a] client's consent does not legitimate a lawyer's abuse of professional office."⁷⁶

Courts may vindicate these principles of professional loyalty despite an attorney's argument that exigent realities make adherence to professional norms difficult.⁷⁷ Empirical evidence refutes the notion that "the licensed practitioner is someone who has been reconstituted by his learning experience and is now set apart from other men."⁷⁸ While the small practitioner complains that the constraints of professional norms are too costly to follow,⁷⁹ the large firm often ignores them or bends their spirit.⁸⁰ The changing structure of the profession may well require a revision of the customary rules of etiquette contained in the Code of Professional Responsibility.⁸¹ It should not require a shift in

from participating in the subject matter or sharing in the fees derived from litigating this matter). In contrast, one commentator has argued that attorneys under certain circumstances have an ethical duty to move to disqualify an adversary and may not waive this duty. Comment, *The Ethics of Moving to Disqualify Opposing Counsel for Conflict of Interest*, 1979 DUKE L. J. 1310, 1317-20, 1331-33.

⁷⁶ ABA MODEL RULES DISCUSSION DRAFT, *supra* note 1, rule 1.8, Comment.

⁷⁷ One commentator, noting the practical arguments sometimes advanced in support of a departure from professional norms observed that "[b]etween the official requirements of the Canons of Professional Ethics and the practical demands of individual practitioners there is often sharp conflict." J. CARLIN, *LAWYERS ON THEIR OWN* 155 (1962). See also *id.* at 209. It should be noted that the author does not specifically discuss conflict of interest issues.

⁷⁸ E. GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 46 (1959).

⁷⁹ Professor Carlin, in studying the acceptance of ethical norms by varying sized firms, found significant response differences concerning a number of ethical issues, but none concerning the conflict of interest question. J. CARLIN, *LAWYERS' ETHICS* 50, Table 30 (1966). He also found that conflict problems develop more often in small practices. *Id.* at 58, Table 38. In general, Carlin's study revealed that the smaller the law firm, the more likely it is to violate ethical norms. *Id.* at 55. Professor Carlin identifies the reason for this as being the fact that the lawyer's location in the system of bar stratification determines both the nature of his clientele and the extent to which he is insulated from situational inducements to violate ethical norms. *Id.* at 122, 129. See also *Cheng v. GAF Corp.*, 631 F.2d 1052, 1059 (2d Cir. 1980), *vacated and appeal dismissed*, 101 S.Ct. 1333 (1981) (conceding that effective screening is more difficult in a small law firm).

⁸⁰ Note, *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest*, 73 YALE L. J. 1058, 1070-71, (1964) (research based on an extensive questionnaire sent by author to a sample of large corporate firms).

⁸¹ Law firms have opposed the presumption of taint in a variety of contexts. Thus, after the California Supreme Court in *Comden v. Superior Ct.*, 576 P. 2d 971, 145 Cal. Rptr. 9 (Cal. 1978) disqualified Loeb & Loeb, a seventy-five member law firm, from rep-

those rules of professional conduct designed to assert professional norms and to protect client interests.

The treatment by American courts of conflict of interest problems provides an interesting laboratory for exploring interactions between economic and social pressures and professional legal standards of conduct. Arguments in favor of "screening" former government officials are predicated largely on the fears that law firms will decline to hire young civil servants unless traditional restraints are relaxed.⁸² But the extent to which strict adherence to these restraints actually inhibits an attorney's career⁸³ has neither been proven nor studied.⁸⁴ Similarly, arguments concerning the inexorable growth of law firms, the economic necessity for multi-office firms, and their subsequent effect on ethical norms, have not been examined. The perspective of the Second Circuit on disqualification issues does not necessa-

representing the plaintiffs in a litigation matter because of the possibility that one of the partners might be called as a witness, the California State Bar Association proposed an amendment to the state code of ethics exempting law firms from the rule that prohibits an attorney from being both lawyer and witness in the same case. CALIFORNIA STATE BAR ASSOCIATION PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT (Dec. 1978), Rule 2-111 (A)(4). See also Brown & Brown, *Disqualification of the Testifying Advocate—A Firm Rule?*, 57 N.C. L. REV. 597, 622 n. 104 (1979); Enker, *The Rationale of the Rule That Forbids a Lawyer To Be Advocate and Witness in the Same Case*, 1977 AM. B. FOUNDATION RESEARCH J. 455.

⁸² See *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated*, 101 S.Ct. 911 (1981). In *Armstrong* the Second Circuit rested its decision to allow screening on the public policy concern that strict application of the conflicts rule would "hamper the government's efforts to hire qualified attorneys." *Id.* at 443. See also *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977) (per curiam).

⁸³ See *Silver Chrysler Plymouth, Inc., v. Chrysler Motors Corp.* 370 F. Supp. 581, 589 (E.D.N.Y. 1973) ("the rigid rule of total disqualification" will force young attorneys to "become over-committed to their initial employer"), *aff'd* 518 F.2d 751, 757 (2d Cir. 1975) (It is important to avoid unnecessarily constricting the careers of lawyers who started their practice at large firms.).

⁸⁴ See *Armstrong v. McAlpin*, 625 F.2d 433, 454 (2d Cir. 1980) (en banc) (Newman, J., concurring in part and dissenting in part) (calling for "concrete evidence of adverse consequences" before allowing the conflicts rules to be changed), *vacated*, 101 S.Ct. 911 (1981).

The United States Attorney for the District of New Jersey has for several years maintained a policy prohibiting a former assistant now in private practice from handling any case that was pending in the office during the assistant's employment, even if the assistant had no knowledge, responsibility or connection with the case. In *United States v. Miller*, 624 F.2d 1198 (3d Cir. 1980), "[t]he First Assistant U. S. Attorney testified that the policy had neither hindered the office's ability to recruit assistants nor excessively restricted the practice of former assistants." *Id.* at 1203.

rily reflect the views of the rest of the country.⁸⁵ Without more intensive inquiry, we should not perceive the "Chinese Wall" as an easy solution to the ethical problems raised by conflicts of interest.

⁸⁵ The Eighth Circuit takes a far stricter view on the status of appearances. Compare *State v. Dean Foods Prods. Co.*, 605 F.2d 380 (8th Cir. 1979); *Fred Weber, Inc., v. Shell Oil Co.*, 566 F.2d 602 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978); *with Armstrong v. McAlpin*, 625 F.2d 433, 446 (2d Cir. 1979) (en banc), *vacated*, 101 S. Ct. 911 (1981); and *Board of Educ. v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979). Both the Third and the Fifth Circuits have evolved *per se* disqualification rules concerning close relationships between plaintiff class representatives and class counsel in fee-generating class actions. See *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102 (5th Cir. 1978); *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3d Cir. 1976). See also *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 94-95 (7th Cir. 1977).

The Ninth Circuit explicitly chose to "express no opinion upon the 'Chinese Wall' theory". *Trone v. Smith*, 621 F.2d 994, 999 n. 5 (9th Cir. 1980). The Seventh Circuit has rejected the wall in theory but it has not articulated a rule *per se*. *Westinghouse Elec. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir.), *cert denied*, 439 U.S. 955 (1978). *Accord*, *MPL, Inc., v. Cook*, 498 F. Supp. 148, 151 (N.D. Ill. 1980) (where law firm is in possession of client confidences and secrets derived from an earlier representation, no wall may be erected).

The Sixth Circuit, to date, has not ruled on the "Chinese Wall" theory. A district court within the circuit, however, rejected the theory based on the Seventh Circuit's reasoning in *Westinghouse Contracting & Material Co., v. Steel Co. of Canada*, No. 78-70403 (E.D. Mich. Apr. 15, 1981).

