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David Ivers

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ATTORNEY AND CLIENT—CONFLICT OF INTEREST—PROHIBITION AGAINST APPEARANCE OF IMPROPRIETY RETAINED UNDER MODEL RULES OF PROFESSIONAL CONDUCT. *First American Carriers, Inc. v. Kroger Co.*, 302 Ark. 86, 787 S.W.2d 669 (1990).

On June 8, 1988, in Lonoke County, Arkansas, an eleven-vehicle accident occurred on a stretch of Interstate 40 that was covered by dense smoke from the burning of nearby wheat fields.¹ Ryder Truck Rental (Ryder) owned one of the vehicles that was leased to First American Carriers (First American).² David Newman, a First American employee, was driving the Ryder truck.³ Kroger Company (Kroger) owned three of the vehicles, which were insured by CNA Insurance Company (CNA).⁴

The following day, Ryder retained Roger Glasgow, a partner⁵ in the Wright, Lindsey & Jennings law firm (the Wright Firm),⁶ to represent Ryder, First American, and Newman.⁷ Glasgow immediately began investigating the cause of collision.⁸ The same day that Ryder retained Glasgow, a CNA claims representative contacted Edwin L. Lowther, Jr., another partner⁹ in the Wright Firm.¹⁰ He told Lowther that the accident involved vehicles owned by CNA's insured, Kroger, and asked Lowther for legal research on open-field burning in Arkansas.¹¹ Lowther copied relevant Arkansas statutes and sent them to

1. *First American Carriers, Inc. v. Kroger Co.*, 302 Ark. 86, 87, 787 S.W.2d 669, 669 (1990). The chain-reaction wreck involved seven tractor-trailer trucks, three cars, and a pickup truck. After the wreck occurred, the gas tank of the pickup truck exploded and three tractor-trailers caught fire and burned. Four people died as a result of the accident. *Arkansas Gazette*, June 10, 1988, at A1, col. 6. Two of those killed were Kroger employees. Another victim was in the pickup and the fourth was driving a car. *Arkansas Gazette*, Dec. 15, 1989, at B2, col. 1.

2. *First American Carriers, Inc.*, 302 Ark. at 87, 787 S.W.2d at 669.

3. *Id.*

4. *Id.*

5. 1 MARTINDALE-HUBBELL LAW DIRECTORY, 701B (122d ed. 1990).

6. Wright, Lindsey & Jennings has 30 partners, 3 of counsel members, and 19 associates. Its areas of practice include: General civil practice, admiralty, antitrust, banking, bankruptcy, corporate, environmental, insurance, labor, litigation, municipal bonds, probate, public utilities, real estate, securities, taxation, and trusts. *Id.* at 700-02B.

7. *First American Carriers, Inc.*, 302 Ark. at 87, 787 S.W.2d at 670.

8. *Id.*

9. 1 MARTINDALE-HUBBELL LAW DIRECTORY, 701B (122d ed. 1990).

10. *First American Carriers, Inc.*, 302 Ark. at 87, 787 S.W.2d at 670.

11. *Id.*

CNA.¹²

On June 13, 1988, Lowther advised a CNA representative on whether the advance of funeral expenses would be prejudicial to CNA in subsequent litigation.¹³ Later that day, Glasgow and Lowther discovered the conflict.¹⁴ Lowther notified CNA immediately and declined further representation.¹⁵ In a July 7, 1988 letter Lowther formally advised CNA of the conflict.¹⁶ The letter stated that because Glasgow was already substantially involved on Ryder's behalf, the Wright Firm had "no choice but to withdraw as CNA-retained counsel for Kroger Stores."¹⁷ There had been no direct contact between any Kroger representative and the Wright Firm, and there was no evidence that the Wright Firm had obtained any confidential information from CNA or Kroger.¹⁸

On the same day the conflict was discovered, the estate of one of the drivers killed in the accident filed a lawsuit in Lonoke County Circuit Court listing First American, Newman, and Kroger among the named defendants.¹⁹ CNA hired other counsel for Kroger, while Kroger moved to disqualify the Wright Firm from representing First American and Newman, claiming a conflict of interest.²⁰ The trial court granted the motion.²¹ First American and Newman appealed.²² The Arkansas Supreme Court affirmed on April 16, 1990.²³

The court found that the Wright Firm's representation of First American and Newman was adverse to the interests of CNA/Kroger, a former client,²⁴ and upheld the lower court's disqualification of the

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 87-88, 787 S.W.2d at 670. The Wright Firm enclosed a bill for \$82.50. *Id.* at 88, 787 S.W.2d at 670.

18. *Id.* at 88, 787 S.W.2d at 670.

19. *Pinson v. Kroger Co.*, Civ. 88-245 (Lonoke County Cir. Ct. June 13, 1988). The case, which has 13 defendants; was pending as of October 1990. *Id.* The estates of 2 people killed in the wreck filed separate lawsuits in Pulaski County Circuit Court in Little Rock, naming 12 defendants. *Arkansas Gazette*, Feb. 15, 1989, at A6, col. 1. A jury found John Cheeseman Trucking and Sunbelt (Mallinckrodt) Trucking Company, along with their respective drivers, guilty of negligence. *Arkansas Gazette*, Dec. 15, 1989, at B2, col. 1.

20. *First American Carriers, Inc.*, 302 Ark. at 88, 787 S.W.2d at 670.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 89, 787 S.W.2d at 671. It was a 6-1 decision. Three special justices, Harrell,

Wright Firm under Rule 1.9 of the Model Rules of Professional Conduct.²⁵ The court stated that even though language that “‘a lawyer should avoid even the appearance of impropriety’” was in the old Model Code of Professional Responsibility and was not included in the Model Rules,²⁶ “the principle applies because its meaning pervades the Rules and embodies their spirit.”²⁷ *First American Carriers, Inc. v. Kroger Co.*, 302 Ark. 86, 787 S.W.2d 669 (1990).²⁸

Conflicts of interest have concerned lawyers and other professionals for centuries.²⁹ For the first several decades after the United States declared its independence, society expected lawyers to check their ethical conduct through self-regulation.³⁰ However, the country's expansion and the increase in the number of lawyers brought calls for formal guidelines.³¹ The formal codes and rules in effect today owe their birth to David Hoffman,³² a Baltimore, Maryland, lawyer whose “Fifty Resolutions in Regard to Professional Department” was published in 1834, and to Judge George Sharswood,³³ whose series of lectures on ethics was published in 1854.³⁴ Out of these grew the first code of ethics, adopted by the Alabama State Bar Association in 1887.³⁵

In 1908 the American Bar Association (ABA) adopted thirty-two

Crow, and Bristow, sat in for three associate justices (Hays, Glaze, and Price) who did not participate. *Id.* at 87, 93, 787 S.W.2d at 669, 673.

25. *Id.* at 92-93, 787 S.W.2d at 673. Arkansas adopted the Model Rules in 1985. For text of Rule 1.9 see *infra* note 70.

26. *Id.* at 90, 787 S.W.2d at 671.

27. *Id.* at 92, 787 S.W.2d at 672.

28. The Arkansas Supreme Court granted a clarification in the case regarding the number of pages parties may file in a petition for rehearing. 302 Ark. 332, 788 S.W.2d 742 (1990).

29. Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 808 (1977).

30. Armstrong, *Codes of Professional Responsibility*, in PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS 2 (1978). This is still the case in England, where the relatively small bar and deeply established tradition have enabled the nation to operate without a formal code. *Id.*

31. *Id.* “[T]he diversity of lawyers' practices and the variety of their activities grew, with the result that the line between ethical and unethical conduct became increasingly vague. More and more lawyers engaged in activities of questionable propriety, largely because they had no standard against which to measure their behavior.” *Id.*

32. David Hoffman was born in 1784 and died in 1854. H. DRINKER, LEGAL ETHICS 23 (1953). Hoffman wrote the resolutions “for the assistance of the young practitioner.” *Id.* at app. E n.1. The resolutions are reprinted in H. DRINKER, LEGAL ETHICS app. E (1953).

33. George Sharswood was a prominent lawyer and judge. In 1850 he became head of the University of Pennsylvania's new law department. His lectures to students formed the basis of an Essay on Professional Ethics. Papke, *The Legal Profession and Its Ethical Responsibilities: A History*, in ETHICS AND THE LEGAL PROFESSION 37 (1986).

34. Robinson, *The Arkansas Code of Professional Responsibility*, 33 ARK. L. REV. 605, 606 (1980).

35. *Id.*

Canons of Professional Ethics.³⁶ Most states followed suit, although sometimes making changes.³⁷ In 1939 the Arkansas Supreme Court adopted the Canons, promulgating them as Rules Regulating Conduct of Attorneys at Law.³⁸ Eventually, however, perceived flaws in the Canons brought calls for reform.³⁹ In 1964 the ABA created a Special Committee on Evaluation of Ethical Standards, chaired by Edward L. Wright, then-senior partner of the Wright Firm.⁴⁰ By 1969 the committee had written a completely new code, which was adopted by the ABA House of Delegates to become effective January 1, 1970, as the Model Code of Professional Responsibility.⁴¹ By an Arkansas Supreme Court order dated February 23, 1970,⁴² Arkansas became the first state to adopt the Code.⁴³ The remaining states followed, usually with minor variations.⁴⁴

The Code has three basic components.⁴⁵ The Canons⁴⁶ are statements of axiomatic norms, embodying general concepts from which the Ethical Considerations and Disciplinary Rules are derived.⁴⁷ The Ethi-

36. "The Canons of Professional Ethics set forth general guidelines for lawyers' behavior and presented a standard against which each member of the profession could measure his conduct." Armstrong, *supra* note 30, at 3.

37. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 3 (1970).

38. Brill, *The Arkansas Supreme Court Committee on Professional Conduct 1969-79: A Call for Reform*, 33 ARK. L. REV. 571, 572 (1980). The court's action was under the authority of amendment 28 to the Arkansas Constitution, which was added in 1938 and provides: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys of law." *Id.* at 572 & n.4.

39. Wright, *supra* note 37, at 3-5. In 1954 a committee of the American Bar Foundation recommended complete revision of the Canons because of four main problems: 1) they did not reflect changes that had occurred in the profession; 2) their principles did not adequately address concrete situations; 3) the standards needed more consistency; and 4) the Canons needed to be rearranged according to subject matter. Armstrong, *supra* note 30, at 4.

40. Wright, *supra* note 37, at 1, 4.

41. Armstrong, *supra* note 30, at 4.

42. *In re Arkansas Bar Ass'n: Petition for the Adoption of New Supreme Court Rules on Professional Conduct*, 285 Ark. 488, 491, 687 S.W.2d 118, 119 (1985). ("This Court adopted the Code by Per Curiam Order dated February 23, 1970.") The 1970 order adopting the Model Code could not be found in the official reporters. See Robinson, *supra* note 34, at 606 n.12.

43. Brill, *supra* note 38, at 572.

44. Armstrong, *supra* note 30, at 4. The federal courts generally adopt local state rules concerning professional conduct. Comment, *Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest*, 62 WASH. L. REV. 863, 864 (1987).

45. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980). The dates given in this case-note for the Model Code of Professional Responsibility and the Model Rules of Professional Conduct vary, depending on whether the original or an amended version is being cited.

46. These are not to be confused with the old Canons of Professional Ethics.

47. MODEL CODE OF PROFESSIONAL RESPONSIBILITY 1 Preliminary Statement (1980).

cal Considerations are aspirational goals and are meant to provide guidance in specific situations.⁴⁸ The Disciplinary Rules are mandatory and establish the minimum level below which no lawyer may fall without being subject to disciplinary action.⁴⁹

By the mid-1970s the Code was already coming under criticism.⁵⁰ Critics charged that: 1) some provisions were unconstitutional; 2) there was an unworkable distinction between mandatory requirements and aspirational goals; 3) the Code was oriented toward the small-town lawyer practicing alone; and 4) developing areas, such as conflicts of interest, were not adequately covered.⁵¹ In response, the ABA created a committee to suggest possible options.⁵² After years of work, the committee proposed and the ABA adopted the Model Rules of Professional Conduct on August 2, 1983.⁵³ The Model Rules are black letter rules with comments and take a functional, instead of an aspirational, approach.⁵⁴ The Arkansas Supreme Court adopted the Rules on December 16, 1985.⁵⁵ Thirty-two states have adopted the Rules so far.⁵⁶

Despite the many years spent wrangling over codes of ethics, lawyers still lack clear and consistent guidelines when it comes to conflicts of interest involving former clients.⁵⁷ However, it is clear that simultaneous representation of adverse interests in the same case is prohibited.⁵⁸ The duty of the lawyer to give undivided loyalty to each client precludes it.⁵⁹ Simultaneous adverse representation was the reason for

48. *Id.*

49. *Id.*

50. H. BRILL, ARKANSAS PROFESSIONAL AND JUDICIAL ETHICS 1 (1986).

51. *Id.*

52. *Id.*

53. *Id.*

54. I G. HAZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT at xxxv, xxxviii.1 (Supp. 1988).

55. *In re* Arkansas Bar Ass'n: Petition for the Adoption of the Model Rules of Professional Conduct, 287 Ark. 495, 702 S.W.2d 326 (1985). They became effective January 1, 1986. *Id.*

56. LAWYER'S MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) §§ 01:3-01:4 (July 18, 1990). The states are: Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming, along with the District of Columbia.

57. Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227, 229 (1987).

58. Survey, *Developments in the Law - Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1306 (1981).

59. Goldberg, *supra* note 57, at 231-32. The "prohibition against simultaneous representation of opponents reflects a concept entrenched firmly in our societal morality." *Id.* at 232 (citing

the Wright Firm's haste in discontinuing its representation of one of the parties—CNA/Kroger—in *First American Carriers, Inc.*⁶⁰ Once the relationship was terminated the problem became one involving a former client (CNA/Kroger),⁶¹ prompting CNA/Kroger to accuse the Wright Firm of successive representation of adverse interests.⁶²

Successive representation of adverse interests was prohibited in the old Canons of Professional Ethics,⁶³ but was of little concern to courts and commentators until recent years.⁶⁴ In fact, the 1969 Code of Professional Responsibility contains no specific provision addressing the issue of former clients.⁶⁵ As a result, courts interpreting the Code have based decisions on Canon 4 (A Lawyer Should Preserve the Confidences and Secrets of a Client), Canon 5 (A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client), or Canon 9 (A Lawyer Should Avoid Even the Appearance of Professional Impropriety), or a combination thereof.⁶⁶ Courts have justified the prohibition against successive representation of adverse interests on the basis

the Bible: "Thou shalt have no other gods before me." *Exodus* 20:3 (King James); "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." *Matthew* 6:24 (King James.).

60. See 302 Ark. 86, 87, 787 S.W.2d 669, 670 (1990).

61. See G. HAZARD & W. HODES, *supra* note 54, at 176.2 (Supp. 1988). "It should be observed that many cases of simultaneous representation can become Rule 1.9 'former client' situations. This can occur, for example, when a lawyer terminates his representation of one concurrent client but continues representation of the other." *Id.* "Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9 [Conflict of Interest: Former Client]." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment "Loyalty to a Client" (1989).

62. See *First American Carriers, Inc.*, 302 Ark. at 88, 787 S.W.2d at 670.

63. Goldberg, *supra* note 57, at 234 (citing CANONS OF PROFESSIONAL ETHICS Canon 6 (1908)).

64. *Id.* at 227-28. Disqualification for successive adverse representation "was once a rare court action." *Id.* at 227. The landmark case of *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953), received scarcely any attention in professional journals. *Id.* at 227.

65. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969); Morgan, *Conflicts of Interests and the Former Client in the Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RES. J. 993, 995 (1980).

66. See, e.g. *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982); *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980); *Board of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *Arkansas v. Dean Foods Products Co.*, 605 F.2d 380, 387 (8th Cir. 1979); *State v. Martinez*, 100 N.M. 532, 535, 673 P.2d 509, 512 (N.M. Ct. App. 1983). See also Greene, *Everybody's Doing It - But Who Should Be? Standing to Make a Disqualification Motion Based on an Attorney's Representation of a Client with Interests Adverse to Those of a Former Client*, 6 U. PUGET SOUND L. REV. 205, 213 (1983); Goldberg, *supra* note 57, at 241-43; Comment, *supra* note 44, at 864-65.

of: The duty to preserve client confidences; the obligation of undivided loyalty to clients; and the need to guard against erosion of public trust in lawyers (i.e., avoiding the appearance of impropriety).⁶⁷ However, in recent years, an explosion of motions to disqualify attorneys for alleged conflicts of interest has caused concern among courts and commentators.⁶⁸ The ABA warns that such motions "should be viewed with caution" since they can be used as a "technique of harassment."⁶⁹ When the ABA adopted the Model Rules in 1983, it incorporated in Rule 1.9 the rulings of the majority of courts regarding the former client problem, and dropped the language of Canon 9 concerning an appearance of impropriety.⁷⁰

The seminal case in the development of common law regarding former clients is *T.C. Theatre Corp. v. Warner Brothers Pictures*,⁷¹ which involved an alleged conspiracy to restrain trade in the motion picture exhibition industry.⁷² The defendant, a movie distributor, moved to disqualify counsel for the plaintiff, a theater operator, because the lawyer had previously represented the defendant in an anti-trust action brought by the federal government and arising from the same alleged conspiracy.⁷³ The test Judge Weinfeld used to disqualify

67. *In re* Corn Derivatives Antitrust Litig., 748 F.2d 157, 162 (3d Cir. 1984); *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953). *See also* Greene, *supra* note 66, at 208.

68. Greene, *supra* note 66, at 206; Goldberg, *supra* note 57, at 228.

69. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1989) (Conflict Charged by an Opposing Party). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Scope para. 6 (1989) ("Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.").

70. Goldberg, *supra* note 57, at 230; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (Conflict of Interest: Former Client) (1983), which reads as follows:

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

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

The Arkansas Supreme Court has since adopted amendments to the Model Rules on at least two occasions. *In re* Amendment of the Model Rules of Professional Conduct, 294 Ark. 661, 741 S.W.2d 250 (1987); *In re* Amendment to the Model Rules of Professional Conduct, 302 Ark. appendix (1990). In the latter, the court adopted ABA amendments that include changes in Rules 1.9 and 1.10. The changes mainly eliminate overlap and confusion between the two rules while retaining the basic meaning of the previous versions. *See Id.* at Rule 1.9, Rule 1.10 (1990).

71. 113 F. Supp. 265 (S.D.N.Y. 1953).

72. *Id.* at 267.

73. *Id.*

the attorney is still the general test accepted by most jurisdictions.⁷⁴ Under this test, the former client must show two things: first, that an attorney-client relationship was established in a former, adverse representation; and second, that the current case is the same case or a "substantially related" matter.⁷⁵ Once the former client has shown these elements, "[t]he court will assume that during the course of the former representation confidences were disclosed to the attorney," and the lawyer will be disqualified automatically.⁷⁶

As simple as it sounds, this two-part "substantially related" test has generated considerable confusion and inconsistency among the courts.⁷⁷ Even the initial question of whether an attorney-client relationship was established creates disagreement. Some courts employ a subjective approach in evaluating the existence of an attorney-client relationship.⁷⁸ This basically means that a relationship was established if the client believed that one was.⁷⁹ A few courts will apply an objective test, which provides that both parties must have consented, either expressly or impliedly, to the relationship.⁸⁰

74. *E.g.*, *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1266 (7th Cir. 1983); *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980); *Arkansas v. Dean Foods Prods. Co.*, 605 F.2d 380, 383 (8th Cir. 1979); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.* 518 F.2d 751, 754 (2d Cir. 1975); *United States Football League v. National Football League*, 605 F. Supp. 1448, 1451 (S.D.N.Y. 1985); *Carlson v. Langdon*, 751 Wyo. 344, 348, 751 P.2d 344, 348 (1988); *Sellers v. Superior Court*, 154 Ariz. 281, 287, 742 P.2d 292, 298 (Ariz. Ct. App. 1987). *See also* Survey, *supra* note 58, at 1317 n. 168 (and cases cited therein).

75. *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953) ("[T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client.").

76. *T.C. Theatre Corp.*, 113 F. Supp. at 268.

77. Comment, *Ethical Considerations When an Attorney Opposes a Former Client: The Need for a Realistic Application of Canon Nine*, 52 CHI.-KENT L. REV. 525, 525 (1975); Aronson, *supra* note 29, at 808.

78. Survey, *supra* note 58, at 1321.

79. *E.g.*, *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 & n.14 (7th Cir. 1978) (citing R. WISE, LEGAL ETHICS 284 (1970)) ("The deciding factor is what the prospective client thought when he made the disclosure, not what the lawyer thought."), *cert. denied*, 439 U.S. 955 (1978); *Alexander v. Superior Court*, 141 Ariz. 157, 162, 685 P.2d 1309, 1314 (1984) ("An attorney-client relationship is said to exist when the party divulging confidences and secrets to an attorney believes that he is approaching the attorney in a professional capacity with the intent to secure legal advice.") (quoting *Trinity Ambulance Serv., Inc. v. G & L Ambulance Serv., Inc.*, 578 F. Supp. 1280, 1282 (D. Conn. 1984)). *See also*, C. McCORMICK, McCORMICK ON EVIDENCE § 88 (3d ed. 1984).

80. *Committee on Professional Ethics & Grievances v. Johnson*, 447 F.2d 169, 174 (3d Cir. 1971) (The relationship arises only when both parties consent, either expressly or impliedly.); *Premium Prods. Sales Corp. v. Chipwich, Inc.*, 539 F. Supp. 427, 433-34 (S.D.N.Y. 1982) (court

Courts also disagree over the second part of the test—what constitutes a “substantially related” matter. Most simply look for a relationship between subject matters or factual contexts.⁸¹ A minority of courts apply a stricter definition.⁸² For instance, in the influential opinion⁸³ by the Second Circuit Court of Appeals in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*,⁸⁴ the court required the connection to be “patently clear.”⁸⁵ The Second Circuit explained in a later case that “patently clear” means that the issues must be “identical” or “essentially the same.”⁸⁶

Further disagreement has revolved around Judge Weinfeld’s conclusion in *T.C. Theatre Corp.* that if the “substantially related” test is met, the attorney must be disqualified automatically.⁸⁷ A majority of courts agree with Weinfeld that the presumption is irrebuttable.⁸⁸ To allow the lawyer to attempt to prove that no confidential matters were discussed “would require the disclosure of the very matters intended to be protected by the rule.”⁸⁹ Other courts have allowed attorneys to try to rebut the presumption that confidences were received.⁹⁰ For exam-

looked at client’s “subjective understanding as manifested by the objective circumstances”). For a discussion of both subjective and objective approaches, see Survey, *supra* note 58, at 1321-23.

81. See, e.g., *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980).

82. Survey, *supra* note 58, at 1325.

83. ABA ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 409 (1979).

84. 518 F.2d 751 (2d Cir. 1975).

85. *Id.* at 754.

86. *Government of India v. Cook Indus.*, 569 F.2d 737, 740 (2d Cir. 1978). For a discussion of courts’ interpretation of “substantial relationship,” see Survey, *supra* note 58, at 1325.

87. See *supra* note 76 and accompanying text.

88. Brodeur, *Building Chinese Walls: Current Implementation and a Proposal for Reforming Law Firm Disqualification*, 7 REV. OF LITIGATION 167, 171 & n.5 (and cases cited therein).

89. *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 269 (S.D.N.Y. 1953). See also *Arkansas v. Dean Foods Prods. Co.*, 605 F.2d 380, 384 (8th Cir. 1979); *Fred Weber, Inc. v. Shell Oil Co.*, 566 F. 2d 602, 608 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978).

90. E.g., *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 (7th Cir. 1982); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 756-57 (2d Cir. 1975). Compare *Government of India v. Cook Indus.*, 569 F.2d 737, 740 (2d Cir. 1978) (“[A] court should not require proof that an attorney actually had access to or received privileged information while representing the client in a prior case.”), with Judge Mansfield’s concurrence in that case, *Id.* at 741 (“I believe that the district court should have the discretionary authority to permit the attorney to dispel a false impression. . . .”). In order to satisfy Judge Weinfeld’s concern that allowing rebuttal requires disclosure of the confidences the rule is designed to protect, some courts allow evidence concerning the existence or nonexistence of confidences to be given *in camera*. E.g., *United States Football League v. National Football League*, 605 F. Supp. 1448, 1462 (S.D.N.Y. 1985) (“Once the parties agree to permit such [*in camera*] proof, the purpose the irrebuttable rule is supposed to serve is gone. . . .”); *Fred Weber, Inc. v. Shell Oil Co.*, 432 F. Supp. 694

ple, in *Silver Chrysler Plymouth, Inc.*⁹¹ the court created what has become known as the "peripheral representation" exception:⁹² the attorney should be allowed to rebut the presumption when he was involved only "briefly on the periphery for a limited and specific purpose relating solely to legal questions."⁹³ According to the court, in such circumstances, "the attorney's role cannot be considered 'representation' within the meaning of *T.C. Theatre Corp.* . . ."⁹⁴

Two years after the decision in *T.C. Theatre Corp.*,⁹⁵ the Second Circuit in *Laskey Brothers, Inc. v. Warner Brothers Pictures*,⁹⁶ took the substantial-relationship test a step farther.⁹⁷ Accepting the presumption that the client shared confidences with the original attorney, the court in *Laskey Brothers, Inc.* reasoned that easy access to information among partners in a law firm justified disqualifying the lawyer's entire firm as well.⁹⁸ This concept of imputed disqualification has been generally accepted,⁹⁹ and is included in the Model Code¹⁰⁰ and the

(E.D. Mo. 1977) (After a study of the record, including *in camera* submissions, the court concluded that no confidential information was transmitted to the firm in question.), *aff'd*, 566 F.2d 602, 608 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978).

91. 518 F.2d 751 (2d Cir. 1975).

92. Brodeur, *supra* note 88, at 172.

93. *Silver Chrysler Plymouth, Inc.*, 518 F.2d at 756.

94. *Id.* at 757. In *Silver Chrysler Plymouth, Inc.*, Schreiber, an attorney, was representing an automobile dealer against a manufacturer. The manufacturer sought disqualification of Schreiber and his firm because Schreiber formerly worked for an eighty-person firm that represented the manufacturer. The court upheld the district judge's refusal to grant disqualification because Schreiber had successfully rebutted the presumption that confidences had been disclosed to him. There was ample evidence that some of the matters on which Schreiber worked were not "substantially related." As for the other matters, "Schreiber's involvement was, at most, limited to brief, informal discussions on a procedural matter or research on a specific point of law." *Id.* at 756.

95. 113 F. Supp 265 (S.D.N.Y. 1953).

96. 224 F.2d 824 (2d Cir. 1955). In *Laskey Bros., Inc.* the plaintiff's lawyer, Malkan, sued Warner Brothers and others in civil antitrust cases involving the motion picture industry. Malkan's partner, Isacson, had represented Warner Brothers while at another firm. The court disqualified Malkan because Isacson could not have represented the plaintiffs, and "all members of a partnership are barred from participating in a case from which one partner is disqualified." *Id.* at 825-26.

97. *Id.* at 826-27. See also Goldberg, *supra* note 57, at 236 & n.40. "The court had no strong case precedent for either barring a disqualified lawyer's partner or for an irrebuttable shared confidences presumption." *Id.* at 236-37 (footnotes omitted).

98. *Laskey Bros., Inc.*, 224 F.2d 824, 827 (2d Cir. 1955) ("[T]he fact of access to confidential information through the person of the partner with such specialized knowledge is sufficient to bar the other partners, whether or not they actually profit from such access."). The rule has since come to include associates as well as partners. See *infra* notes 100 & 101.

99. *E.g.*, *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1266-67 (7th Cir. 1983); *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 608 (8th Cir. 1977). See also Kramer, *The*

Model Rules.¹⁰¹ The rationale is that imputed disqualification is an extension of the need to protect client confidences and maintain loyalty to the client.¹⁰² It would be too difficult for former clients to prove confidences were shared within a law firm, so the sharing is presumed.¹⁰³ Some courts find that Canon 9's warning against an appearance of impropriety requires disqualification even if the evidence shows that no confidences were shared with other lawyers in the firm.¹⁰⁴

Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers, 65 MINN. L. REV. 243, 250 (1981).

100. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (D) (1980) provides:

"If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

101. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (Imputed Disqualification: General Rule) (1983) provides:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

102. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment (1989) (explaining that: "[s]uch situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated); Note, *Motions to Disqualify Counsel Representing an Interest Adverse to a Former Client*, 57 TEX. L. REV. 727, 734-35 (1979) (noting that vicarious (imputed) disqualification is intended to protect client confidences).

103. See Note, *supra* 102, at 734-35.

104. *E.g.*, *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1269 (7th Cir. 1983) (law firm switching sides created an appearance of impropriety that the court held could not be dispelled by presenting evidence that no improper communication took place between lawyers in the firm.) (See also, *Arkansas v. Dean Foods Prods. Co.*, 605 F.2d 380, 387 (8th Cir. 1979). A lawyer (Griffin) representing the state in a suit against Dean formerly worked for a firm that represented Dean. Even though the trial judge found that Griffin received no confidential information, the court said he must be disqualified under Canons 4 and 9. Finally, the court found that Canon 4 did not require that Griffin's staff be disqualified, but that Canon 9 did. *Id.* at 382, 386-87.

However, some courts take a different view of imputed disqualification when a lawyer has moved to a new firm and that firm is representing a client with interests adverse to a client of the attorney's former firm.¹⁰⁶ These courts have held that such situations are far enough removed to allow rebuttal: The new firm is permitted to show that the attorney did not receive confidential information about the client at his old firm.¹⁰⁶

Subsequent to the decisions in *T.C. Theatre Corp.* and *Laskey Brothers, Inc.*, further expansion of the substantial-relationship test occurred with the creation of the Model Code and its warning in Canon 9 against an appearance of impropriety.¹⁰⁷ The Canon has been troublesome for the courts, resulting in its inconsistent application.¹⁰⁸ The Ethical Considerations under Canon 9 include some specific examples of what would constitute violations, but the former client problem is not among them.¹⁰⁹ Canon 9, however, is not limited to those specific examples. It can encompass any type of conduct.¹¹⁰ The justification for Canon 9 is that a lawyer's conduct, even if actually ethical, "may appear to the lay person as unethical" and thus "erode public confidence" in the bar.¹¹¹

An example of the far-reaching effect of Canon 9 on the substan-

105. Goldberg, *supra* note 57, at 250.

106. Arkansas is in this group. See *Burnette v. Morgan*, 303 Ark. 150, 155, 794 S.W.2d 145, 148 (1990). But see *Analytica, Inc.*, 708 F.2d at 1274 (Allowing rebuttal when a lawyer has joined new firm but not when the firm itself has changed sides "is 'poppycock,' a distinction without a difference.") (Coffey, J., dissenting). For other cases supporting rebuttal when the lawyer moves to a new firm, see *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 (7th Cir. 1982); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.* 518 F.2d 751, 754 (2d Cir. 1975); *United States Football League v. National Football League*, 605 F. Supp. 1448, 1466 (S.D.N.Y. 1985); *United States v. Standard Oil Co.*, 136 F. Supp. 345, 364 (S.D.N.Y. 1955). Accord, MODEL RULES OF PROFESSIONAL CONDUCT (1983) Rule 1.10(b). In some cases courts will allow the lawyer's new firm to show that it used "Chinese walls" to insulate the new attorney and prevent communication on the matter. *Brodeur*, *supra* note 88, at 177, 179 & n.40 (and cases cited therein).

107. Note, *supra* note 102, at 732. Though the Model Code brought it to the surface, the concept is found in some earlier cases as avoiding the "appearance of evil." *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976). See also *In re Maltby*, 68 Ariz. 153, 155, 202 P.2d 902, 903 (1949).

108. Comment, *supra* note 77, at 526; *Kramer*, *supra* note 99, at 244; *Greene*, *supra* note 66, at 212.

109. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 EC 9-1 - 9-6 (1980).

110. ABA Committee on Ethics and Professional Responsibility, Formal Op. 337 (1979).

111. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-2 (1980). See also *Arkansas v. Dean Foods Prods. Co.*, 605 F.2d 380, 386 (8th Cir. 1979); *Woods*, 537 F.2d at 813.

tial-relationship test is *Arkansas v. Dean Foods Products Co.*¹¹² The defendant, Dean, moved to have the state's counsel disqualified in a price-fixing case.¹¹³ The attorney had been involved in peripheral work for Dean at a private firm before going to work for the state.¹¹⁴ The court held that even though the district court found that the attorney had not received confidential information, such a limited role was unusual for an attorney in a small firm, and his disqualification had to be upheld in order to avoid the appearance of impropriety.¹¹⁵ The court stated that when applying Canon 9, "considerations of actual impropriety are irrelevant."¹¹⁶ This strict application of Canon 9 constitutes the "literalist" approach.¹¹⁷ Under this view, courts have a justification for not allowing the attorney to rebut the presumption that confidences were received.¹¹⁸ Because Canon 9's "appearance of impropriety" standard requires disqualification regardless of whether the former client actually confided in the lawyer, rebuttal would be useless.¹¹⁹

Despite the potential for broad application of Canon 9, many courts are reluctant to use it to disqualify counsel unless there is a factual basis or at least a reasonable probability that confidences were shared.¹²⁰ In other words, the attorney's conduct must also meet requirements for disqualification under other sections of the Model Code.¹²¹ This "realist" view¹²² takes the position that a rebuttable presumption of shared confidences makes more sense.¹²³ Most commenta-

112. 605 F.2d 380 (8th Cir. 1979).

113. *Id.* at 382.

114. *Id.*

115. *Id.* at 382, 386.

116. *Id.* at 386.

117. Survey, *supra* note 58, at 1327.

118. *Id.* at 1329-30.

119. *E.g.*, *Arkansas v. Dean Foods Prods. Co.*, 605 F.2d 380, 386 (8th Cir. 1979); *Emlé Indus. v. Patantex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973).

120. Survey, *supra* note 58, at 1326. *See, e.g.*, *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 723 (7th Cir. 1982); *Church of Scientology v. McLean*, 615 F.2d 691, 693 (5th Cir. 1980); *Board of Educ. v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979); *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976); *International Elecs. Corp. v. Flanzer*, 527 F.2d 1288, 1295 (2d Cir. 1975); *Premium Prods. Sales Corp. v. Chipwich, Inc.*, 539 F. Supp. 427, 435 (S.D.N.Y. 1982); *Alexander v. Superior Court*, 141 Ariz. 157, 165, 685 P.2d 1309, 1317 (1984).

121. *See supra* note 120; *International Elecs. Corp. v. Flanzer*, 527 F.2d 1288, 1295 (2d Cir. 1975) (Canon 9 "should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules."); Survey, *supra* note 58, at 1326; *Greene, supra* note 66 at 211-15.

122. Survey, *supra* note 58, at 1327-28.

123. *Id.* at 1330. The "literalist" and "realist" views of Canon 9 have corresponding effects on the concept of imputed disqualification. *Compare Silver Chrysler Plymouth, Inc. v. Chrysler*

tors criticize Canon 9 as too broad or unnecessary.¹²⁴ Even the ABA issued a formal opinion de-emphasizing Canon 9.¹²⁵ The ABA eventually dropped the language of Canon 9 when it adopted the Model Rules.¹²⁶ The comment to Rule 1.9 says the "appearance of impropriety" standard is "question-begging" and too vague to be useful.¹²⁷ Among the thirty-two states¹²⁸ that have adopted the Model Rules, only three — Arkansas, New Jersey, and Arizona — have ruled that a prohibition against an appearance of impropriety remains in the Model Rules.¹²⁹ Of these three, only Arkansas has kept the prohibition without putting substantial restrictions on its use.¹³⁰

In *First American Carriers, Inc.*, the Arkansas Supreme Court applied the "substantially related" test, finding first that there was an attorney-client relationship.¹³¹ Applying the second prong of the test, the court looked to see whether the parties were adversarial and whether they were involved in the same or a substantially related case.¹³² The court found this part of the test satisfied because "[t]his is

Motors Corp., 518 F.2d 751, 757 (2d Cir. 1975) with *Dean Foods Prods. Co.*, 605 F.2d at 386. In addition, the initial question of whether an attorney-client relationship was established can become irrelevant under Canon 9 since the Canon is concerned with appearances and not with whether a relationship was actually established. See *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 448 F. Supp. 1284, 1303-04 (N.D. Ill. 1978), *aff'd in part, rev'd in part*, *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978). *Cf. Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 609 (8th Cir. 1977) ("[T]he broad injunction of Canon 9 against the 'appearance of impropriety' relates to the entire spectrum of lawyer conduct."), *cert. denied*, 436 U.S. 905 (1978).

124. Goldberg, *supra* note 57, at 270. *E.g.*, Kramer, *supra* note 99, *passim*; Comment, *supra* note 77, *passim*; Greene, *supra* note 66, at 217.

125. ABA Committee on Ethics and Professional Responsibility, Formal Op. 342 at n.17 (1975).

126. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7 - 1.10 (1983).

127. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 comment (1989).

128. See *supra* note 56.

129. Based on a Westlaw search as of October 1990. See *First American Carriers, Inc.*, 302 Ark. 86, 787 S.W.2d 669 (1990); *Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. 201, 536 A.2d 243 (1988); *Gomez v. Superior Court*, 149 Ariz. 223, 717 P.2d 902 (1986). New Jersey has amended the Model Rules to include appearance of impropriety, but "the 'appearance' of impropriety must be something more than a fanciful possibility. It must have a reasonable basis." *Dewey*, 109 N.J. at 214, 216, 536 A.2d at 249, 250-51 (quoting *Higgins v. Advisory Comm. on Professional Ethics*, 73 N.J. 123, 129, 373 A.2d 372, 375 (1977)). In Arizona Canon 9 "survives as a part of conflict of interest and an appearance of impropriety should be enough to cause an attorney to closely scrutinize his conduct," *Gomez*, 149 Ariz. at 225, 717 P.2d at 904, but it is confined to cases that survive a four-part balancing test. *Id.* at 226, 717 P.2d at 905.

130. *First American Carriers, Inc.*, 302 Ark. 86, 787 S.W.2d 669 (1990).

131. *Id.* at 89-90, 787 S.W.2d at 671. The court dismissed the Wright Firm's argument that the insurer (CNA) and not Kroger was the real former client. *Id.*

132. *Id.* at 91, 787 S.W.2d at 672.

the same matter, and the interests of the appellants [First American and Newman] and Kroger are adversarial" concerning the issue of relative fault.¹³³ Reiterating its opinion in *Gipson v. Brown*,¹³⁴ the court stated that the presumption of confidential disclosure is irrebuttable and requires disqualification.¹³⁵ Without discussion, the court found that Rule 1.10 requires that the entire firm be disqualified.¹³⁶

Finally, the court found that there was an appearance of impropriety requiring disqualification.¹³⁷ It devoted much of the opinion to explaining why this was so, even though Arkansas follows the Model Rules and not the Model Code.¹³⁸ The court reasoned that the "appearance of impropriety" standard is still valid under the Model Rules because of the statement in the Preamble that the Rules do not contain all the "moral and ethical considerations" that should inform a lawyer.¹³⁹ As the court put it, "[w]hile Canon 9 is not expressly adopted by the Model Rules, the principle applies because its meaning pervades the Rules and embodies their spirit."¹⁴⁰

Although the court noted that the appearance of impropriety may exist when there is no factual basis,¹⁴¹ it found that a factual basis did exist in *First American Carriers, Inc.* because the Wright Firm had an actual conflict of interest.¹⁴² This occurred, the court said, because it would have been "inappropriate" for the Wright Firm to represent both clients,¹⁴³ yet it "accepted both clients, even though innocently, and even though there was no confidential information obtained from CNA or Kroger."¹⁴⁴

The court relied upon two main cases for support. In *Gipson v. Brown*¹⁴⁵ the attorney represented church members filing suit against

133. *Id.* at 92-93, 787 S.W.2d at 673.

134. 288 Ark. 422, 431, 706 S.W.2d 369, 374 (1986).

135. *First American Carriers, Inc.*, 302 Ark. at 91, 787 S.W.2d at 672.

136. *Id.* at 93, 787 S.W.2d at 673. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (Imputed Disqualification: General Rule) (1989).

137. *First American Carriers, Inc.*, 302 Ark. at 92, 787 S.W.2d at 672.

138. *Id.* at 90-92, 787 S.W.2d at 671-73.

139. *Id.* at 92, 787 S.W.2d at 672 (citing MODEL RULES OF PROFESSIONAL CONDUCT § 2 (1989)) (technically Scope, though court calls it Preamble).

140. 302 Ark. at 92, 787 S.W.2d at 672.

141. *Id.* at 91-92, 787 S.W.2d at 672.

142. *Id.* at 92, 787 S.W.2d at 672.

143. *Id.* See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (Conflict of Interest: General Rule) (1989).

144. 302 Ark. at 92, 787 S.W.2d at 672.

145. 288 Ark. 422, 706 S.W.2d 369 (1986).

church elders in order to obtain certain financial and business information.¹⁴⁶ The attorney previously had assisted the elders in incorporating the church.¹⁴⁷ The court decided the case under the Model Code.¹⁴⁸ Using the "substantially related" test and applying an irrebuttable presumption of confidential disclosure,¹⁴⁹ the court found a violation of Canons 4 and 5, as well as 9.¹⁵⁰ In *First American Carriers, Inc.* the court noted this, stating, "[t]he attorney in *Gipson v. Brown* was not disqualified solely because of the appearance of impropriety"¹⁵¹

In the other case upon which the court relied, *Martindale v. Richmond*,¹⁵² the attorney represented a plaintiff in a child support suit against her former husband.¹⁵³ Five years earlier the attorney had filed divorce papers for the husband, but the suit had been dismissed two months later at the husband's request.¹⁵⁴ Evidence showed that the attorney had not remembered representing the husband until the husband's attorney presented evidence on the day of the support hearing, at which time the attorney refused to withdraw.¹⁵⁵ The court said that even though there was "no evidence that appellant actually intended to damage" the former husband's defense, "the appearance exists that such an abuse could occur" and the attorney must be disqualified.¹⁵⁶

In his dissent in *First American Carriers, Inc.*, Special Justice Bristow took the court to task for "exalting form over substance"¹⁵⁷ when the contacts between CNA and the Wright Firm were "minimal in nature"¹⁵⁸ and no confidences were disclosed.¹⁵⁹ He concentrated on the facts, noting that only one full work day elapsed between the time that CNA's representative contacted the Wright Firm and the time that the Wright Firm told CNA that it must decline representation.¹⁶⁰

146. 288 Ark. 422, 425, 429, 706 S.W.2d 369, 371, 373 (1986).

147. *Id.* at 430, 706 S.W.2d at 374.

148. *Id.* at 430-31, 706 S.W.2d at 374.

149. *Id.* at 431, 706 S.W.2d at 374.

150. *Id.* at 430-31, 706 S.W.2d at 374-75. See *supra* note 66 and accompanying text.

151. 302 Ark. at 91, 787 S.W.2d at 672.

152. 301 Ark. 167, 782 S.W.2d 582 (1990).

153. *Id.* at 782 S.W.2d at 583.

154. *Id.* at 168, 782 S.W.2d at 583. They were later divorced, but the attorney in question did not represent either party. *Id.*

155. *Id.* at 169, 782 S.W.2d at 583.

156. *Id.* at 170, 782 S.W.2d at 584.

157. 302 Ark. at 95, 787 S.W.2d at 674 (1990) (Bristow, J., dissenting).

158. *Id.* at 94, 787 S.W.2d at 673-74.

159. *Id.* at 95, 787 S.W.2d at 674.

160. *Id.* at 93, 787 S.W.2d at 673.

He charged that the majority's concern for maintaining confidence in the legal profession¹⁶¹ was misplaced. "From the standpoint of the public at large it is difficult to fathom how this decision can be perceived as anything other than one of those endless rules which lawyers constantly argue over."¹⁶²

Like the majority, Bristow looked to the Preamble for support, noting that it calls the Rules "rules of reason" and warns that "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons."¹⁶³ He also used a balancing analysis,¹⁶⁴ noting that by disqualifying the Wright Firm, the court deprived Ryder, First American, and Newman of the services of a law firm that had been intimately involved from the start, while CNA/Kroger would not be harmed whether the motion was granted or not.¹⁶⁵ Bristow argued that because the "appearance of impropriety" language does not appear in the Model Rules,¹⁶⁶ "it should not be used to explain the end result of reasoning rather than to explain the exact policies and intricacies of such reasoning."¹⁶⁷ He criticized the majority for using the "appearance of impropriety" standard to disqualify an attorney "when the facts do not justify its invocation."¹⁶⁸ Finally, Bristow warned that the the majority was creating trouble for the future based on the logical extensions of its reasoning.¹⁶⁹

On the surface, the court's opinion in *First American Carriers, Inc.* appears praiseworthy. Few would argue that lawyers should be unmindful of public perception.¹⁷⁰ However, the opinion presents troubling questions. First, it creates uncertainty. The ABA kept the Model Code's "appearance of impropriety" standard out of the Model Rules because it had proved "too vague a phrase to be useful."¹⁷¹ The confu-

161. *Id.* at 90, 787 S.W.2d at 671.

162. *Id.* at 95, 787 S.W.2d at 674.

163. *Id.* at 94, 787 S.W.2d at 673 (quoting MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983)).

164. The need for such an approach is discussed in Comment, *supra* note 44, at 872-73.

165. 302 Ark. at 95, 787 S.W.2d at 674 (1990) (Bristow, J., dissenting).

166. *Id.* at 96, 787 S.W.2d at 674; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 comment (1983).

167. 302 Ark. 86, 96, 787 S.W.2d 669, 674 (1990) (Bristow, J., dissenting).

168. *Id.*

169. *Id.* at 96, 787 S.W.2d at 674-75.

170. See Comment, *supra* note 77, at 540 and *passim* ("[Avoiding even the appearance of impropriety] is a moral obligation assumed because of the sensitive and integral role a lawyer plays when a client confides in him.").

171. ABA Standing Committee on Ethics and Professional Responsibility, Formal Op. 342

sion among courts under the Model Code has left attorneys without clear guideposts.¹⁷² Canon 9 has been described as "all-inclusive, perfectionist, and unmerciful,"¹⁷³ as well as "dangerous."¹⁷⁴ Also, Arkansas is going against the trend by retaining Canon 9's dictate as a part of the Model Rules.¹⁷⁵ Even among the few states that have kept the "appearance of impropriety" standard after adopting the Model Rules,¹⁷⁶ only Arkansas has failed to place any real limits on it.¹⁷⁷

Second, in embracing the Canon 9 language, the Arkansas court did not make clear whether there must be a factual basis for finding a

n.17 (1975).

172. Kramer, *supra* note 99, at 244.

173. Westinghouse Elec. Corp. v. Rio Algom Ltd., 448 F. Supp. 1284, 1304 (N.D. Ill. 1978), *aff'd in part, rev'd in part*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978).

174. Kramer, *supra* note 99, at 265.

175. See *supra* note 129. See also *In re* Petition for Review of Op. No. 569 of the Advisory Comm. on Professional Ethics, 103 N.J. 325, 329 n.4, 511 A.2d 119, 121 n.4 (1986) (court noted that "New Jersey remains one of the few states to adhere to the 'appearance of impropriety' rule").

176. See *supra* note 129.

177. *First American Carriers, Inc.*, 302 Ark. 86, 787 S.W.2d 669 (1990). In another conflict of interest case decided since *First American Carriers, Inc.*, the Arkansas Supreme Court acknowledged that disqualification is a "drastic measure to be imposed only where clearly required by the circumstances." *Burnette v. Morgan*, 303 Ark. 150, 155, 794 S.W.2d 145, 148 (1990). However, in the same opinion the court stated that the "appearance of impropriety" standard is "yet alive." *Id.* at 156, 794 S.W.2d at 148. In the imputed disqualification case involving a suit over damage to Morgan's orchards, the defendant, Burnette, sought to disqualify the Easley & Hicky law firm from representing Morgan. Burnette alleged a conflict of interest because Preston Hicky, a partner in Easley & Hicky, had previously worked as a partner in the Butler, Hicky and Routon, Ltd. law firm (Butler-Hicky), counsel for Burnette. *Id.* at 152-53, 794 S.W.2d at 146. The court noted that Preston Hicky testified that "quite possibly he had discussed the facts" of the case while working at Butler-Hicky. Preston Hicky's new firm had requested Butler-Hicky allow him to work on the case at Easley & Hicky and was denied (though Preston Hicky was already working on the case at the time). *Id.* at 153, 794 S.W.2d at 146-47. The court cited Model Rules 1.9 and 1.10 and said that when the attorney has moved to a new firm, Rule 1.10 prohibits adverse representation "only when the attorney involved *actually has knowledge acquired* during the former association. Thus, a rebuttable presumption is created." *Id.* at 154-55, 794 S.W.2d at 147-48. The court failed to point to any knowledge that Preston Hicky had actually acquired, but still found that he "was so deeply implicated in both sides of this case" that his new firm should have been disqualified. *Id.* at 156, 794 S.W.2d at 148-49. The court stated, "[W]e are not departing from our recent holding in *First American Carriers, Inc. v. Kroger Co.* . . . [W]e there recognized and here reassert that the principle [of "appearance of impropriety"] is yet alive and, though not controlling, is a rock in the foundation upon which is built the rules guiding lawyers in their moral and ethical conduct." *Id.* As in *First American Carriers, Inc.*, the dissent took the court to task for relying on appearances. Justice Hays agreed with the majority's statement that an attorney must have actually acquired knowledge in the former representation, "but the majority points to nothing from the proof which meets that test, other than appearances." *Id.* at 160, 794 S.W.2d at 150-51. (Hays, J., dissenting).

violation. Part of this confusion stems from the two main Arkansas cases the court relied upon for support. In *Gipson v. Brown*¹⁷⁸ the court found a factual basis for the appearance of impropriety, noting that there was a violation of Canons 4 and 5, as well as 9.¹⁷⁹ But in *Martindale v. Richmond*,¹⁸⁰ an appearance alone was found sufficient.¹⁸¹ *Martindale v. Richmond* was decided under the Model Rules,¹⁸² but the ruling gave no indication that the court recognized that the Model Rules no longer contained the Canon 9 language regarding an appearance of impropriety.¹⁸³ This is odd because apparently the court cited *Martindale v. Richmond* to bolster its opinion that Canon 9 is still valid.¹⁸⁴ However, by citing the case, the court left it unclear as to whether an appearance alone — as existed in *Martindale v. Richmond* — is enough to disqualify an attorney, or whether there must be a factual basis — as existed in *Gipson v. Brown* and, according to the court, in *First American Carriers, Inc.* The court may require a factual basis in the future based on its comments in *First American Carriers, Inc.* about there being a factual basis in that case,¹⁸⁵ but the reliance on *Martindale v. Richmond* leaves this unclear.

Third, the court's statement that there was a factual basis for the appearance of impropriety in *First American Carriers, Inc.*¹⁸⁶ is perplexing. When courts speak of the need to find a factual basis for a violation of Canon 9, they are ordinarily referring to the receipt of confidential information.¹⁸⁷ The court acknowledged that no confidential information was obtained,¹⁸⁸ but found a factual basis because the Wright Firm had initially, albeit innocently, accepted both parties as clients.¹⁸⁹

178. 288 Ark. 422, 706 S.W.2d 369 (1986).

179. *Id.* at 430-31, 706 S.W.2d at 374-75.

180. 301 Ark. 167, 782 S.W.2d 582 (1990).

181. *Id.* at 170, 782 S.W.2d at 584.

182. *Id.* at 170, 782 S.W.2d at 583.

183. *Id.* In fact, even in *First American Carriers, Inc.* the appellants argued, "Canon 9 of the Model Rules of Professional Responsibility has not been violated." 302 Ark. at 90, 787 S.W.2d at 671. The court noted the error. *Id.*

184. *See First American Carriers, Inc.*, 302 Ark. at 92, 787 S.W.2d at 673.

185. *Id.* at 91-92, 787 S.W.2d at 672.

186. *Id.* at 92, 787 S.W.2d at 672.

187. *E.g.*, *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 723 (7th Cir. 1982); *Church of Scientology v. McLean*, 615 F.2d 691, 693 (5th Cir. 1980); *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 173 (5th Cir. 1979).

188. *First American Carriers, Inc.*, 302 Ark. at 92, 787 S.W.2d at 672.

189. *Id.*

Since the Wright Firm had withdrawn from representing CNA/Kroger as soon as it discovered the conflict,¹⁹⁰ it would have been easy for the court to find that no "representation" occurred "within the meaning of *T.C. Theatre Corp.*"¹⁹¹ and, thus, that the situation was a "peripheral representation" exception.¹⁹² Instead, the court found the facts to be irrelevant¹⁹³ and used the "appearance of impropriety" as its justification for disqualification.¹⁹⁴ By finding that Canon 9 embodies the spirit of the Model Rules,¹⁹⁵ the court directly contradicted the ABA's own statement on the matter.¹⁹⁶ As a result, the court may be perpetuating the problem identified by the ABA, in which the appearance of impropriety "can be taken to include any new client-lawyer relationship that might make a former client feel anxious."¹⁹⁷

Fourth, the court's combination of the "appearance of impropriety" prohibition with the irrebuttable presumption of shared confidences creates harsh results in cases such as *First American Carriers, Inc.* The court could have made the presumption rebuttable because the circumstances of the case made it clear that no confidential information was received¹⁹⁸ and, therefore, no confidences could be disclosed during consideration of the motion for disqualification. Allowing rebuttal of the presumption¹⁹⁹ and requiring a reasonable basis for finding an appearance of impropriety²⁰⁰ would have brought a result opposite

190. *Id.* at 87, 787 S.W.2d at 670.

191. *See supra* note 94 and accompanying text.

192. *See supra* notes 92-93 and accompanying text.

193. For arguments that consideration of the facts is necessary, *see e.g.*, *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976) ("[T]here must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur."); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir. 1975) ("To apply the remedy [of disqualification] when there is no realistic chance that confidences were disclosed would go far beyond the purpose" of protecting the confidences of former clients.); *Emle Indus. v. Patentex, Inc.*, 478 F.2d 562, 565 (2d Cir. 1973) ("[E]thical problems cannot be resolved in a vacuum."); *Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. 201, 216, 536 A.2d 243, 251 (1988) ("[T]he 'appearance' of impropriety must be something more than a fanciful possibility. It must have a reasonable basis.").

194. *First American Carriers, Inc.*, 302 Ark. at 90, 787 S.W.2d at 671.

195. *Id.* at 92, 787 S.W.2d at 672.

196. *See supra* notes 125, 127 and accompanying text.

197. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 comment (1989).

198. 302 Ark. at 88, 787 S.W.2d at 670.

199. *See supra* note 90 and accompanying text. The presumption that confidences were disclosed to the attorney "is obviously inappropriate when the relationship is such that no secret or confidential information could have passed from attorney to client." *Premium Prods. Sales Corp. v. Chipwich, Inc.*, 539 F. Supp. 427, 434 (S.D.N.Y. 1982).

200. *See supra* note 120 and accompanying text.

of that reached in *First American Carriers, Inc.* Similarly, declaring that the presumption had failed and shifting the burden of proof to CNA/Kroger²⁰¹ also would have meant no disqualification was warranted.

Finally, as Special Justice Bristow implied, it is highly likely that CNA/Kroger was simply using the motion to disqualify as a procedural weapon in this case.²⁰² Neither party would have suffered if the motion had been denied, but only Ryder suffered when it was granted. The court did not address the fact that disqualification motions have mushroomed in this area of the law.²⁰³

The consequences of disqualification can be serious: the client is deprived of his or her choice of counsel, the client must bring new counsel "up to speed," the disqualified firm suffers a loss of reputation as well as a financial loss, and, when combined with disqualification of the lawyer's firm, it hampers the mobility of lawyers and burdens large firms disproportionately.²⁰⁴ Ironically, disqualification may damage public perception of lawyers by creating suspicion and perpetuating the view of the legal system as slow and burdened with technicalities.²⁰⁵ By handing lawyers the key to easier disqualification through the "appearance of impropriety," the Arkansas Supreme Court may be damaging the very public confidence it seeks to protect.

David Ivers

201. For a discussion of shifting the burden of proof, see Survey, *supra* note 58, at 1330, 1332.

202. 302 Ark. at 95, 787 S.W.2d at 674 (Bristow, J., dissenting).

203. See Greene, *supra* note 66, at 206; Goldberg, *supra* note 57, at 228.

204. Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982); Survey, *supra* note 58, at 1320; G. HAZARD & W. HODES, *supra* note 54, at 177; Comment, *supra* note 44, at 872; Note, *supra* note 102, at 741.

205. *First American Carriers, Inc.*, 302 Ark. at 95, 787 S.W.2d at 674 (Bristow, J., dissenting); Survey, *supra* note 58, at 1328; Comment, *supra* note 44, at 877.

