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Armstrong v. McAlpin: Screening Former Government Attorneys

John J. Rapisardi

Notes and Comments

Armstrong v. McAlpin: Screening Former Government Attorneys

I. Introduction

The Model Code of Professional Responsibility[1] forbids a former government attorney from accepting private employment[2] in the same matter[3] for which he had substantial respon-

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1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979). This note will refer to the current Model Code of Professional Responsibility [hereinafter referred to as the Model Code or the Code], and to the proposed alternative draft of the Model Rules of Professional Conduct [hereinafter referred to as Model Rules] which will be presented to the House Delegates of the American Bar Association [hereinafter the ABA] for approval in 1982. The proposed Model Rules have been drafted in two different formats, one of which will be chosen by the delegates. The first retains the format of the current Code which includes the canons, disciplinary rules, and ethical considerations, while the second draft adopts the Restatement format of the American Law Institute, and abolishes the use of disciplinary rules and ethical considerations. Reference in this note to the proposed Model Rules will be to the first format.

The canons are statements of axiomatic standards of professional conduct expected of lawyers. They embody general concepts from which ethical considerations and disciplinary rules are derived. The ethical considerations [hereinafter referred to as EC] are aspirational in character, and represent the objectives which every member of the profession should strive. Disciplinary Rules [hereinafter referred to as DR] are mandatory, stating the minimum level of conduct below which lawyers cannot fall without being subject to disciplinary action. *See Preamble and Preliminary Statement* to MODEL CODE OF PROFESSIONAL RESPONSIBILITY.

2. "As used in DR 9-101(B) 'private employment' refers to employment as a private practitioner." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 [hereinafter cited as Opinion 342], *reprinted in* 62 A.B.A.J. 517, 519 (1976).

3. The term "same matter" is defined as

> a discrete and isolatable transaction or a set of transactions between identifiable parties. . . . The same lawsuit or litigation is the same matter. . . . By contrast, work as a government employee in drafting, enforcing, or interpreting government or agency procedures, regulations, or laws or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulations, procedures, or points of law; the "same matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties.

Opinion 342, *supra* note 2, at 519.

sibility[4] while working for the government.[5] Violation of this rule requires the former government attorney's disqualification from the case at issue.[6] The Code also provides that if an attorney is disqualified under any of its rules, then all associates or members of his firm should be disqualified.[7] A literal reading of these two rules, as applied to government attorneys, would be especially harsh since a government attorney is substantially involved in a wide range of matters,[8] and the prospect of a law firm being disqualified in an extensive number of cases, because of the presence of a former government attorney on its staff, would cause law firms to be extremely hesitant to hire such attorneys.[9] Thus, the entailing label of government service would inhibit the movement of many attorneys from the private to the

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4. "Substantial responsibility" envisages a much closer and more direct relationship than that of mere perfunctory approval or disapproval of the matter in question. It contemplates a responsibility requiring the official to become personally involved to an important, material degree in the investigative or deliberative processes regarding the transactions or facts in question. Thus, being the chief official in some vast office or organization does not *ipso facto* give that government official or employee the "substantial responsibility" contemplated by the rule in regard to all the minutiae of facts lodged within that office. Yet it is not necessary that the public employee or official shall have personally and in a substantial manner investigated or passed upon the particular matter, for it is sufficient that he had such a heavy responsibility for the matter that it is unlikely he did not become personally and substantially involved in the investigative or deliberative processes regarding that matter.

Opinion 342, *supra* note 2, at 520.

Relevant considerations under DR 9-101(B) in determining whether the government attorney had substantial responsibility for a matter are: Structure of the government agency; the size of the particular division; the length of the chain of command; number of positions between the attorney in question and person primarily responsible. *See* Comment, *The Former Government Attorney and the Code of Professional Responsibility: Insulation or Disqualification?*, 26 CATHOLIC U.L. REV. 402, 406 (1977).

5. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(B).

6. Although the Code of Professional Responsibility establishes proper guidelines for the professional conduct of attorneys, a violation does not automatically result in disqualification of counsel. The sanction of disqualification rests in the discretion of the trial court and its determination will only be overturned upon a showing of abuse of such discretion.

Central Milk Producers Coop. v. Sentry Food Stores, Inc., 573 F.2d 988, 991 (8th Cir. 1978). *See* W.T. Grant Co. v. Haines, 531 F.2d 671, 676 (2d Cir. 1976); Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 270 (2d Cir. 1975).

7. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D).

8. *See infra* note 44.

9. *See* Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977).

public sector.[10]

In cases where an attorney is claimed to have received confidences from representing a client in a particular case,[11] and he subsequently joins a firm that seeks to represent a party adverse to his former client in a substantially related case, the attorney will be screened or isolated from the case to prevent disqualification[12] of the firm.[13] A screening procedure, or "Chinese Wall," typically excludes the attorney from participating in the case at issue, and from sharing in any fee charged by the firm for that case.[14]

In *Armstrong v. McAlpin*[15] the issue arose whether that

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10. "The situation of the former government attorney or the attorney contemplating government service is conducive to the overcautious approach. The restrictions placed upon his future career are so unclear and may be so sterilizing that unless he is completely unwary he will hesitate before accepting government employment." Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657, 657 (1957).

Government attorneys include the judiciary, elected officials, prosecutors, and lawyers working for executive branch agencies. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-8 and 7-13.

11. *See infra* notes 24-27 and accompanying text. *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon Four.

12. Disqualification rules were fashioned at common law to assure the public that an attorney would never disclose or utilize information obtained from the client without the client's permission. The purpose of this assurance was to encourage a client to speak freely to his attorney. *See In re* Boone, 83 F. 944 (C.C.N.D. Cal. 1897).

13. *See infra* text accompanying notes 24-27.

14. "[S]creens" or "Chinese Walls" [are] procedures [that] aim to isolate the disqualification to the lawyer or lawyers infected with the privileged information that is the source of the ethical problem, and thereby to allow other attorneys in the firm to carry on the questioned representation free of any taint of misuse of confidences. Typical walling procedures include prohibiting the tainted attorney(s) from having any connection with the case or receiving any share of the fees attributable to it, banning relevant discussions with or the transfer of relevant documents to or from the tainted attorney(s), restricting access to files, educating all members of the firm as to the importance of the wall, and separating, both organizationally and physically, groups of attorneys working on conflicting matters.

Note, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 678 (1980).

Screening will ultimately depend upon the personal integrity of the attorneys involved, which could be judged by a court through live testimony or affidavits. Opponents of such procedures argue that the public is inherently skeptical of attorneys and that such skepticism should preclude any use of screening. *See* Alexander, *Screening Former Government Attorneys to Prevent Disqualifying Their Law Firms*, N.Y.S.B.J. 552, 556 n.45 (Dec. 1981).

15. Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (Feinberg, J.) (en banc), *vacated on juris. grounds*, 449 U.S. 1106 (1981). A procedural issue in this case was

same type of screening could be used to avoid disqualification of the former government attorney's law firm in a matter the firm was currently litigating, and for which he had substantial responsibility while with the government. The Second Circuit in *Armstrong* held that unless the presence of the "screened off" former government attorney at the firm threatened the integrity of the underlying trial, any appearance of impropriety arising solely from his mere presence would be "too slender a reed on which to rest a disqualification order" against an entire law firm.[16] If the rationale of this decision is followed by other courts, any reluctance that firms may have had to hire a former government attorney will be dispelled, and any disruption of the flow of attorneys between the public and private sector will be avoided.

Part II of this note explores the historical development of firm disqualification and the use of Chinese Walls. Part III discusses the district court, three judge panel, and en banc decisions. Part IV clarifies the en banc court's formulation and reasoning. This note concludes by agreeing with the en banc decision that firm disqualification was not appropriate in this instance, and with the court's approval of the use of screening to avoid the vicarious disqualification of the former government attorney's firm.

II. Background: Historical Development

A. *The Screening of Private Attorneys*

Canon Five[17] of the Model Code requires an attorney to

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whether denial of a disqualification motion was immediately appealable under Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). The court, in overruling Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975), held that a denial of a disqualification motion was not appealable until after final judgment. Armstrong v. McAlpin, 625 F.2d at 441. The Supreme Court vacated this decision apparently because once the Second Circuit had decided the motion was not appealable it should not have reached the merits of the case. *See* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). Armstrong v. McAlpin, 449 U.S. at 1106. Although this decision lacks precedential value, it is still important because of the Second Circuit's demonstrated willingness to approve of screening devices involving a former government attorney. The district court's decision, Armstrong v. McAlpin, 461 F. Supp. 622 (S.D.N.Y. 1978), which initially approved of the screening, can be cited to for precedential support.

16. Armstrong v. McAlpin, 625 F.2d at 445.

17. Canon Five provides that: "A lawyer should exercise independent professional

maintain and exercise professional independent judgment on behalf of his client.[18] In following the maxim that a servant cannot serve two masters[19] the Code precludes the simultaneous representation by an attorney of two clients with conflicting interests in the same matter.[20] Situations may arise where an attorney and the firm he is working for are representing clients with conflicting interests. The courts have found screening to be inadequate to prevent the disqualification of an entire law firm if one of its attorneys is found to be representing a party with a conflicting interest.[21] The reasoning behind this principle is that "[w]hen two groups of attorneys within a single law firm are engaged in conflicting representations at one and the same time, there is a greater danger of disclosure of confidences than would exist if one of the representations took place in the past."[22]

Canon Four[23] of the Model Code requires an attorney to preserve the confidences and secrets of his client.[24] If an attorney participates in a case adverse to the interests of a former client, that client may allege that the attorney breached or may breach the confidences of their former relationship. To disqualify the attorney the former client must establish that there ex-

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judgment on behalf of a client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon Five.

18. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A).

19. Matthew 6:24.

20. *See* Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 608 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14.

21. *See, e.g.*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); Funds of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977).

22. Note, *supra* note 14, at 691.

23. Canon Four provides that: "A lawyer should preserve the confidences and secrets of a client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon Four.

24. "[T]he ethical duty [of Canon Four] is broader than the evidentiary privilege: 'This ethical precept unlike the evidentiary privilege exists without regard to the nature or sources of information or the fact that others share the knowledge.' " Avnet, Inc. v. OEC Corp., 498 F. Supp. 818, 821 (N.D. Ga. 1980) (quoting Brennan's, Inc. v. Brennan's Restaurant, Inc., 590 F.2d 168, 172 (5th Cir. 1979)). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) provides that:

> "Confidence" refers to information protected by the attorney-client privilege under the applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

ists a substantial relationship between the former and subsequent case.[25] Once this is proven, the attorney is irrebuttably presumed[26] to have received confidences from his former client as to the case in question, and therefore, is automatically disqualified.[27]

The issue that had to be resolved under Canon Four was whether the disqualified attorney should be irrebuttably presumed to have shared the confidences of his former client with other members of his law firm,[28] and thus warrant disqualification of the entire firm.[29] The Second Circuit, in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*,[30] held that imputation of information from a disqualified attorney to other members of his firm was rebuttable through the use of a screening proce-

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25. *See* Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954); United States v. Standard Oil Co., 136 F. Supp. 345 (S.D.N.Y. 1955); T.C. Theatres Corp. v. Warner Bros. Pictures Inc., 113 F. Supp. 265 (S.D.N.Y. 1953); H. DRINKER, LEGAL ETHICS 135 (1953).

26. *See* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978).

> "To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require disclosure of the very matters intended to be protected by the rule."

Id. at 224 n.3 (quoting T.C. Theatres Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. at 269).

27. *See* Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954) (Where an attorney had spent 80% of his time on motion picture antitrust suits, participated in three lawsuits which involved the defendants, and although there was no direct evidence that he had obtained confidences useful to him in the present suit, he was still disqualified).

28. *See* Laskey Bros. of W. Va. v. Warner Bros. Pictures, Inc., 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956). (This case involved the situation where two members of a law partnership were barred from participating in a case from which one partner was disqualified). *Id.* at 825-26.

29. The Second Circuit, in *Laskey* found that the second attorney was not disqualified from handling a case which came to him after dissolution of the firm in absence of proof that he had acquired confidential information. *Id.* at 826. Thus, *Laskey* set forth the idea that the presumption of disclosed confidences could be rebutted.

30. 518 F.2d 751 (2d Cir. 1975). In this case, an associate for Kelly Drye Warren Clark & Ellis resigned and established his own law firm. He had handled matters for Chrysler Corporation while working at the firm. Subsequently, in his own partnership, he was hired by Silver Chrysler Corporation in a dealer suit against Chrysler Motors Corp. *Id.* at 752.

dure.[31] In *Novo Terapeutisk Laboratorium v. Baxter Travenol Laboratories, Inc.*,[32] the Seventh Circuit held that the presumption of shared confidences was rebuttable. The court found that an affidavit submitted by the attorneys of a firm stating that they did not receive information from a staff attorney, who was substantially involved in the contested matter, and who had since left their firm,[33] effectively rebutted the presumption of shared confidences.[34] Although *Silver Chrysler* and *Novo* approved of a screening device as a procedure to prevent vicarious disqualification, the question still remained whether such a procedure could be used to screen a former government attorney, thereby preventing disqualification of his associates or firm.

B. *The Screening of Former Government Attorneys*

Canon Nine cautions attorneys to avoid appearances of impropriety,[35] and usually applies in conjunction with some other ethical violation.[36] That is, if there is a breach of confidence[37] or loyalty,[38] an appearance of impropriety[39] may also be found. Canon Nine may also be deemed to have been violated through a

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31. *Id.* at 757.

32. 607 F.2d 186 (7th Cir.), *rev'd on reh'g*, 607 F.2d 194 (7th Cir. 1979). In *Novo*, Granger Cook was a member of the Chicago law firm of Hume, Clements, Brinks, Willian, Olds & Cook, Ltd. (the Hume firm). During that time Baxter Laboratories was a client of the firm, with Mr. Cook in charge of the account. When Cook left the Hume firm he took the Baxter account with him and represented Baxter as defendant in a patent infringement suit brought by Novo. The Hume firm appeared as counsel for plaintiff Novo. Defendant Baxter opposed the appearance and filed a motion to disqualify the Hume firm as counsel for Novo. The court, on rehearing en banc, denied the motion. *Id.* at 194, 197.

33. *Id.* at 197.

34. *Id.*

35. Canon Nine provides that: "A lawyer should avoid even the appearance of professional impropriety." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon Nine.

36. *See* Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976) (Canons Five and Nine); NCK Organization, Ltd. v. Bregman, 542 F.2d 128 (2nd Cir. 1976) (Canons Four and Nine); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) (en banc), *aff'd on reh'g*, 518 F.2d 751 (2d Cir. 1975) (Canons Four and Nine); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974) (DR 9-101(B) and Canon Nine); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973). (Canons Four and Nine).

37. *See supra* note 23.

38. *See supra* note 17.

39. *See supra* note 35.

breach of DR 9-101(B). Disciplinary Rule 9-101(B) provides that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."[40] The basis for this rule is that a government attorney who enters private practice, and then becomes involved in that same matter for which he had substantial responsibility while with the government, may create the appearance that he is: Obtaining an unfair advantage over opposing counsel because of his knowledge of confidential agency policies relating to negotiation techniques, enforcement practices or litigation strategies; being placed in a favored position with former colleagues in the government agency the attorney left; or abusing the power of his office to obtain a position with a private law firm by acting favorably in his official capacity toward that firm.[41] Thus, even if a former government attorney is not guilty of any ethical misconduct, DR 9-101(B) and Canon Nine allow for his disqualification solely on appearances of impropriety.

Disciplinary Rule 5-105(D), as amended in 1974, provides that "[i]f a lawyer is required to decline employment or 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."[42] A complication arises upon application of this rule in conjunction with DR 9-101(B). If an attorney is disqualified under DR 9-101(B) solely because of his substantial responsibility for the same matter while with the government, any member of his law firm must also be disqualified under DR 5-105(D).[43] Under such a literal reading, the screening of the former government attorney that is

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40. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(B).

Compare DR 9-101(B) *with* 18 U.S.C. § 207(a) (Supp. III 1979). Section 207(a) permanently prohibits a former U.S. government attorney from participating after termination of his employment as an agent or attorney for anyone other than the United States in connection with any judicial or other proceeding in which the "United States is a party or has a direct and substantial interest and, in which he participated personally and substantially as an officer or employee. . . ." *Id.* "Some authorities have interpreted 'substantial responsibility' to mean 'personal involvement to an important degree' . . . a standard more clearly stated by the phrase 'personal and substantial.' " *Model Rules of Professional Conduct* DR 9-101 notes at 305 (Alternative Draft 1981) (citing Opinion 342, *supra* note 2, at 520). *See supra* note 4.

41. *See* Comment, *supra* note 4, at 405-06.

42. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D).

43. *See* Comment, *supra* note 4, at 409.

used to prevent the vicarious disqualification of his law firm is inoperative since firm disqualification is mandatory under this interpretation. Given the possibility of firm disqualification in a wide range of cases,[44] private firms would be reluctant to hire former government attorneys. Government agencies, therefore, claimed that a literal reading of DR 5-105(D) together with DR 9-101(B) would brand young government attorneys seeking private positions as legal "Typhoid Marys,"[45] and reduce the government's ability to attract high quality legal talent.[46]

To alleviate the harsh effects of a literal reading of DR 5-105(D) and DR 9-101(B) the ABA committee issued Opinion 342.[47] This opinion allowed for the screening of a former government attorney, and disregarded the literal reading of DR 5-105(D) and DR 9-101(B). Opinion 342 appeared to balance the need for protecting the integrity of the legal profession with the concern of unnecessarily burdening former government attorneys. The ABA committee found that the purpose of the extension of disqualification to all affiliated lawyers was to prevent the circumvention by a lawyer of the disciplinary rules.[48] An inflexible application of DR 5-105(D) resulting in automatic firm disqualification because a staff attorney was disqualified due to past governmental service was viewed as unworkable in light of a number of enunciated policy considerations.[49] A total preclusion of screening was seen as serving "no worthwhile public interest if it becomes a mere tool enabling a litigant to improve his prospects by depriving his opponent of competent counsel."[50] The committee reiterated the argument that the "ability of government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraints

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44. No present young lawyer, after serving a one-year term as a Supreme Court, court of appeals, or district court law clerk, could join any law firm that had even a rooting interest for a client in any case that had been before the court. Neither could many young lawyers now serving at the I.R.S., the S.E.C., or the Antitrust Division join a firm . . . in which they had participated.

Cutler, *Legal Ethics Forum*, 63 A.B.A.J. 725, 727 (1977).

45. Kesselhaut v. United States, 555 F.2d 791, 793 (Ct. Cl. 1977).

46. *Id.* at 793-94.

47. Opinion 342, *supra* note 2, at 517.

48. *Id.* at 520.

49. *Id.*

50. *Id.* at 518.

upon future practice. . . ."[51]

Opinion 342 proposed that the government agency, for whom the attorney had worked, review the screening procedure adopted by the firm, and "determine whether the procedure effectively isolated the individual lawyer from participating in the particular matter, and sharing in the fees attributable to it."[52] By screening the attorney from the case, with the approval of his former agency, and still allowing for the possible disqualification of his entire law firm, the committee hoped to discourage any incentive to use a public office as a bargaining chip for private employment.[53] Although Opinion 342 did not provide for judicial review of a screening procedure already approved or rejected by a government agency, in light of the well established common law rule that it is within the court's province to supervise the conduct of those attorneys litigating before it,[54] this author believes that the drafters of the opinion would have explicitly precluded judicial review had they intended to do so.

Those who argue for a literal reading of DR 5-105(D) and DR 9-101(B) reject the approach of Opinion 342.[55] Claiming that no workable standard has been devised that determines when such a screening procedure is effective, they argue that policing violations are virtually impossible once a waiver of firm disqualification is granted by a governmental agency.[56] Additionally, they point out that agency lawyers who pass upon the effectiveness of the screening procedure adopted by a law firm on behalf of a former colleague would have a personal incentive in approving the screening procedure because they will "be making similar

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51. *Id.*

52. *Id.* at 521.

53. *Id.*

54. *See supra* note 6. *See also* In re Asbestos Cases, 514 F. Supp. 914 (E.D. Va. 1981)

> [D]espite a Government waiver, it remains the clear and independent duty of the Court to scrutinize the screening procedures and to disqualify the firm if the Court finds that, despite the attempted screening, continued representation constitutes a threat to the integrity of the trial. . . . [I]f, after evaluating the sufficiency of a proposed screen a court still harbors doubts as to the sufficiency of . . . [the] screen the court should resolve the issue in favor of disqualification.

Id. at 922. *See also infra* text accompanying notes 63, 70.

55. *See, e.g.*, Freedman, *Legal Ethics Forum* 63 A.B.A.J. 724, 725 (1977); Inquiry 19, District Lawyer 39 (Fall 1972) (as discussed in Comment, *supra* note 4, at 402, 415-16).

56. *See, e.g.*, Freedman, *Legal Ethics Forum* 63 A.B.A.J. 724-25 (1977).

requests for waivers when they leave governmental service."[57] Further, they assert that when a former government attorney has had personal and substantial involvement in a matter while with the government, DR 5-105(D) and DR 9-101(B) should be read to preclude the use of a screening device,[58] and thereby result in the vicarious disqualification of his law firm.[59]

Two recent decisions, however, have followed Opinion 342. In *Kesselhaut v. United States*[60] the court of claims coined the term "Typhoid Marys"[61] in describing the effect on young government attorneys if DR 5-105(D) was rigidly applied in conjunction with DR 9-101(B). The court referred to Opinion 342 in stating

> that an inexorable disqualification of an entire firm for the disqualification of a single member or associate, is entirely too harsh and should be mitigated by the appropriate screening . . . when truly unethical conduct has not taken place and the matter is merely one of superficial appearance of evil, which a knowledge of the facts will dissipate.[62]

In this case, the government refused to approve the proposed screening procedure. The court found that the government's withholding of its consent of the screening procedure was unjustified and *not* binding on the court.[63]

In *Central Milk Producers Coop. v. Sentry Stores, Inc.*,[64]

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57. *Id.*

58. *Id.*

59. In the following cases a law firm was vicariously disqualified: Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706 (7th Cir. 1976); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974).

60. 555 F.2d 791 (Ct. Cl. 1977). In *Kesselhaut*, Mr. Prothro was general counsel for the Federal Housing Administration before joining Krooth and Altman. The Kesselhaut firm had represented the FHA in a tax abatement case, and a fee controversy developed. The Kesselhaut firm thereafter retained Krooth and Altman as counsel in an action against the FHA. Although Prothro was disqualified, the FHA claimed that the entire firm of Krooth and Altman should be disqualified. The court held that disqualification of the entire firm was not necessary given the effectiveness of the adopted screening procedures. *Id.* at 794. The court of claims reiterated its approval of screening former government attorneys in Sierra Vista Hospital, Inc. v. United States, 639 F.2d 749 (Ct. Cl. 1981).

61. 555 F.2d at 793.

62. *Id.*

63. *Id.*

64. 573 F.2d 988 (8th Cir. 1978).

the Eighth Circuit affirmed the trial court's refusal to disqualify a law firm because two members of the law firm had previously worked for the government in a closely related case. Without specifically citing Opinion 342, the court of appeals approved the use of screening devices as a way of avoiding automatic disqualification of an entire law firm.[65]

1. *The Proposed Model Rule*

The recently proposed Model Rules of Professional Responsibility[66] follow the trend started by Opinion 342 in allowing the screening of a former government attorney to avoid the vicarious disqualification of his associates.[67] The proposed disciplinary rule provides that a lawyer may 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."[68] Additionally,

> no lawyer in a firm with which that lawyer is associated may undertake or continue representation in the matter *unless:* the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee . . . and written notice is promptly given to the appropriate government agency to enable the agency to ascertain compliance with the provisions of [the] disciplinary rule.[69]

The authors of the proposed Model Rules point out that consent of the affected government agency is not necessary since

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65. *Id.* at 993.

66. *See supra* note 1.

67. The ABA Commission on Evaluation of Professional Standards in the Model Rules of Professional Conduct abolishes the use of "appearance of impropriety" as a standard to be applied when dealing with issues of vicarious disqualification.

> If [appearance of impropriety] were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question begging. It, therefore, has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy . . . or by the very general concept of appearance of impropriety.

MODEL RULES OF PROFESSIONAL CONDUCT DR 5-111 comment at 163 (Alternative Draft 1981).

68. MODEL RULES OF PROFESSIONAL CONDUCT DR 9-101(A) (Alternative Draft 1981).

69. *Id.* DR 9-101(D) (emphasis added).

a mandatory requirement would provide agencies with unregulated discretionary power.[70] Thus, the authors make clear in their commentary what Opinion 342 did not clarify. That is, although government review and approval of a screening procedure is suggested, it is not necessarily the final authority in ruling upon the effectiveness of such devices.

C. *The* Nyquist *Rule*

The basis of *Armstrong* was set forth in *Board of Education v. Nyquist*.[71] The *Nyquist* decision dealt only with the issue of disqualification of a private attorney during trial due to a possible appearance of impropriety.[72] The *Nyquist* court found that attorney disqualification should occur primarily when an attorney acts in conflict with an interest of a current client thereby violating Canons Five and Nine, and where the attorney threatens to violate Canons Four and Nine by placing himself in a position to use privileged information concerning the other side through his prior representation.[73] Outside these two circumstances, the Second Circuit stated that considerable reluctance should be shown by courts in disqualifying attorneys.[74] The basic considerations of the court's reluctance to disqualify an attorney were the immediate adverse affect on the client by separating him from counsel of his own choice, and the possible use of disqualification motions to delay the trial.[75] The court concluded that unless a violation of Canon Four or Five was established in conjunction with Canon Nine, an attorney should not be disqualified solely because of an appearance of impropriety unless the "attorney's conduct tends 'to taint the underlying

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70. *Id.* DR 9-101(D) notes at 307.

71. 590 F.2d 1241 (2d Cir. 1979). In *Nyquist* the disqualification motion was aimed at an attorney who was not associated with government service. *Id.* at 1243, 1244. The case involved the appointment of an attorney by a teacher's union to represent the male members in an action contesting seniority listing based on sex. *Id.* The female members of the union claimed that this limited appointment created an appearance of impropriety. *Id.* at 1244. The female members argued that such an appearance of impropriety could only be avoided if counsel were supplied by the union to represent them, or in the alternative, if the counsel representing the male teachers were disqualified. *Id.*

72. *Id.*

73. *Id.* at 1246.

74. *Id.*

75. *Id.*

trial.' "[76]

III. *Armstrong v. McAlpin*

A. *Facts*

Theodore Altman, who was the Assistant Director of the Division of Enforcement for the Securities and Exchange Commission,[77] left the SEC in 1975 to become an associate at the firm of Gordon Hurwitz Butowsky Baker Weitzer and Shalov.[78] Prior to leaving the SEC, Altman had supervised an action against Clovis McAlpin, the highest executive officer of a group of related investment companies known as the Capital Growth Companies.[79] Following a default judgment in this action the district court appointed a receiver to oversee the financial interests of the investors of Capital Growth.[80] The receiver employed the Gordon firm after his original counsel had resigned.[81] Subsequently, the receiver filed an action against McAlpin to recover twenty-four million dollars he allegedly stole from Capital Growth.[82] The Gordon firm concluded that Altman should be disqualified because of his supervision of the SEC investigation, and therefore screened Altman from the suit. The SEC and district court approved the arrangement.[83]

The defendant filed a motion to disqualify the Gordon firm because of Altman's prior involvement in the case.[84] The district court denied the disqualification motion since it could not find any actual misdoing or significant appearance of impropriety.[85]

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76. *Id.* (quoting W.T. Grant Co. v. Haines, 531 F.2d 671, 678 (2d Cir. 1976)).

77. Hereinafter the SEC.

78. [Hereinafter the Gordon firm]. Altman joined the Gordon firm in October 1975. Armstrong v. McAlpin, 625 F.2d at 436.

79. Armstrong v. McAlpin, 625 F.2d at 435.

80. Armstrong, as receiver, had the responsibility of attempting to recover all monies and property which were due Capital Growth shareholders. *Id.*

81. Barrett Smith Shapiro & Simon was originally appointed counsel, but disqualified itself in 1976. *Id.* at 436.

82. *Id.* at 434.

83. *Id.* at 436.

84. *Id.* at 436, 437. Appellee's brief indicates that the Gordon firm was not the original choice, but was hired only after several other firms had turned down their offer. Appellee's Brief on Rehearing En Banc at 7, Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980).

85. Armstrong v. McAlpin, 461 F. Supp. 622 (S.D.N.Y. 1978) (Werker, J.).

The Second Circuit, in a panel decision, reversed the district court, and ruled that regardless of the Chinese Wall used to screen Altman from the instant case, the entire Gordon firm still should be disqualified.[86] The issue on appeal to the Second Circuit, en banc, was whether the entire Gordon firm should be disqualified, even though Altman had been disqualified and screened[87] from the Capital Growth case.[88]

B. *The District Court*

The defendant, McAlpin, moved to dismiss the Gordon firm claiming that, as the Assistant Director at the SEC, Altman directly and personally conducted and supervised the related investigation and enforcement proceeding against McAlpin, which was the basis of the instant action.[89] The defendant claimed that the Gordon firm had access to all of Altman's SEC records, and that they were not made available to the defendant.[90] The defendant insisted that no screening procedure had ever been adopted by the Gordon firm that effectively separated Altman from the instant case,[91] and argued that even if such a screening procedure had been adopted it would have been barred by DR 5-105(D) and DR 9-101(B).[92]

Judge Werker dismissed the defendant's motion to disqualify the Gordon firm.[93] In rejecting a literal reading of DR 5-105(D) and DR 9-101(B) the judge stated that "the proper screening of Altman rather than disqualification of the Gordon

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86. Armstrong v. McAlpin, 606 F.2d 28 (2d Cir. 1979) (Newman, J.).

87. The initial screening and disqualification of Altman was approved by the SEC in accordance with federal regulations, *see* Armstrong v. McAlpin, 625 F.2d at 436, specifically, 17 C.F.R. § 200.735-8(b)(2) (1981).

> Waivers [of firm disqualification] ordinarily will be granted [by the SEC] where the firm makes a satisfactory representation that it has adopted screening measures which will effectively isolate the individual lawyer disqualified under paragraph (a)(1) from participating in the particular matter or matters and from sharing in any fees attributable to it.

Id.

88. Armstrong v. McAlpin, 625 F.2d at 434.

89. Appellant's Brief on Rehearing En Banc at 4, Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980).

90. *Id.* at 7.

91. *Id.* at 19.

92. *Id.* at 13.

93. Armstrong v. McAlpin, 461 F. Supp. 622 (S.D.N.Y. 1978).

firm [was] the solution to the . . . dispute."[94] The court noted that the retention of the Gordon firm did not prejudice the defendant.[95] The court found that the SEC provided the receiver with the documents in question prior to his retention of the Gordon firm, and noted that the receiver was prepared to provide any and all of this information to the defendant. Additionally, the court found that: There was no indication Altman had an intent to prosecute a later action involving Capital Growth; Altman and his two partners attested under penalty of perjury that he had never discussed the action with other members of the firm; and there was no proof he shared in the firm's income derived from prosecution of the action.[96] The court concluded that Altman had not participated in any ethical misconduct.[97] In light of these findings the court found that the screening of Altman from the suit was an effective procedure in dispelling any appearances of impropriety that may have arisen from his prior governmental involvement in the SEC enforcement proceedings against McAlpin, and the Gordon firm's subsequent representation of the receiver, with Altman on its staff.[98]

C. *The Three Judge Panel Decision*

The Second Circuit's panel opinion[99] reversed the district court's decision and granted the motion to disqualify the Gordon firm. Judge Newman, who wrote the decision, declared that "[a] government attorney with direct, personal involvement in a matter involving enforcement of laws that are the basis for private causes of action must understand, and it must appear to the public, that there will be no possibility of financial reward if he succumbs to the temptation to shape the government action in the hope of enhancing private employment."[100] If the attorney's role while with the government was personal and substantial, the court reasoned that an Opinion 342 screening procedure would not destroy the incentive of a government attorney to

94. *Id.* at 626.
95. *Id.*
96. *Id.*
97. *Id.* at 625.
98. *Id.* at 626.
99. Armstrong v. McAlpin, 606 F.2d 28 (2d Cir. 1979) (panel opinion) (Newman, J.).
100. *Id.* at 34.

handle his work so as to affect his future employment.[101] In support of this claim, Judge Newman pointed out that a screening procedure could be easily circumvented by upwardly adjusting the former government attorney's salary in order to allow him to profit monetarily from the case he was supposedly screened from.[102]

The court concluded that although neither Altman nor the Gordon firm had committed any impropriety, "[i]n view of the type of matter Altman handled for the SEC and his direct personal involvement with it, disqualification of his firm [was] required."[103] Thus, the disqualification of the Gordon firm was viewed as "a prophylactic measure to guard against misuse of authority by government lawyers."[104]

D. *The Decision En Banc*

1. *Majority*

The court of appeals, rehearing the case en banc, reversed the three judge panel decision.[105] Judge Feinberg reiterated the district court's factual findings,[106] and concluded that because the district court justifiably found no actual misdoing on the part of Altman or the Gordon firm, disqualification could be based only on the appearance of impropriety stemming from Altman's association with the firm.[107]

In dealing with the question of whether the Gordon firm should be disqualified solely because of possible appearances of impropriety arising from Altman's presence on the firm's staff, even though he was already screened, the court relied upon the principle it enunciated in *Nyquist*.[108] Although *Nyquist* was factually unrelated to this case, the Second Circuit applied the concept that disqualification could not be based solely on Canon Nine unless there existed a substantial appearance of impropri-

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101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc) (Feinberg, J.), *vacated on juris. grounds*, 449 U.S. 1106 (1981).
106. *Id.* at 442-43.
107. *Id.* at 445.
108. 590 F.2d 1241 (2d Cir. 1979).

ety that threatened to taint the integrity of the underlying trial.[109]

The court stated that it would not become involved in the full fray of arguments concerning a literal reading of DR 9-101(B) and DR 5-105(D).[110] The court still, however, went on to agree with the rationale of Opinion 342,[111] and found that a decision rejecting the efficacy of screening procedures within this context could hamper the government's efforts to hire qualified attorneys and transform such attorneys into legal "Typhoid Marys" because of government service.[112]

While recognizing that reasonable minds can and do differ over the ethical propriety of screening devices, the court found that to disallow the screening of Altman as ineffective per se, and thus warrant disqualification of the Gordon firm, would create serious adverse consequences.[113] That is, to separate the receiver from his counsel would seriously delay and impede, and perhaps altogether thwart his attempt to obtain redress for defendant's alleged frauds.[114] The court concluded that under "these circumstances, the possible 'appearance of impropriety is simply too slender a reed on which to rest a disqualification order . . . particularly . . . where the appearance of impropriety is not very clear.' "[115] Although he acknowledged, without elaboration, that there could be unusual situations where there is a sufficient appearance of impropriety that warrants firm disqualification, Judge Feinberg concluded that this was not such a case.[116]

2. *Dissent*

In repeating the basic theme of the panel decision, Judge Newman stated that the "purposes of DR 9-101(B) cannot be fully achieved unless there is no possibility that the government attorney could be (or *seem to be*) influenced by the prospect of

109. Armstrong v. McAlpin, 625 F.2d at 445.
110. *Id.* at 444.
111. *Id.* at 443.
112. *Id.*
113. *Id.* at 445.
114. *Id.* at 446.
115. *Id.* at 445 (quoting Board of Educ. v. Nyquist at 1247).
116. *Id.* at 446.

later private employment."[117] His sole concern was the public perception of lawyers, rather than the efficiency and integrity of the underlying trial. "It may well be that no matter how this litigation develops, Altman will in fact not disclose to his partners anything he learned while exercising substantial government responsibilities for related matters. But the public will not believe it."[118] Judge Newman concluded that appearance of impropriety and public misconception could be avoided only if DR 5-105(D) and DR 9-101(B) were applied as written, and that the court should have required disqualification of the entire law firm regardless of the use of screening procedures.[119]

IV. Analysis

A. *Approval of Screening a Former Government Attorney*

The Second Circuit's approval of the screening of Theodore Altman to avoid disqualification of the Gordon firm is significant because it gave recognition to the approach of Opinion 342.[120] The court rejected the argument that DR 5-105(D) and DR 9-101(B) should be applied literally when faced with the question of whether or not a law firm of the former government attorney should be vicariously disqualified from a case because the former government attorney was substantially responsible for the same matter while working for the government.[121] The court, in effect, announced its opposition to any view that screening devices were ineffective per se solely because a former government attorney was involved.

1. *The Emphasis on* Nyquist

At first glance, the heavy emphasis on *Nyquist* by the court of appeals, en banc, might seem perplexing. *Nyquist* was a case that did not involve screening, and only dealt with the issue of whether *one private* attorney should be disqualified.[122] The

117. Armstrong v. McAlpin, 625 F.2d 433, 453 (2d Cir. 1980) (Newman, J., dissenting) (emphasis added).

118. *Id.* at 453.

119. *Id.* at 454.

120. *See supra* text accompanying notes 47-54.

121. *See supra* text accompanying notes 42-43.

122. *See supra* note 71.

court's approach can be best understood by its efforts to deal with the argument that the mere presence of Theodore Altman on the staff of the Gordon firm created a sufficient appearance of impropriety to warrant the firm's disqualification. The court, in applying the *Nyquist* rule, was seeking to negate the argument that the threat of public skepticism would always render ineffective the screening of former government attorneys. In restricting the applicability of "appearance of impropriety" the court made clear that there would have to be established the presence of an existing threat to the integrity of the underlying trial in order to find the screening of a former government attorney to be ineffective. Thus, the *Nyquist* rule was applied to the facts of this case to restrict and limit the speculative use of "public skepticism" and "appearance of impropriety" to render ineffective the screening of former government attorneys.

2. *Lack of Specificity*

Criticism can be made of the court's failure to explain what would constitute a substantial appearance of impropriety, and at what point the integrity of the underlying trial could be deemed threatened. This omission can be justifiably explained by the fact that the court may have been seeking to avoid a rigid rule that set forth, as a matter of law, when such screening procedures would be effective or ineffective. Instead, the court sought to allow the lower courts to decide, on a case by case basis, the effectiveness of the disputed screening procedure since they would be more familiar with the facts of the case in question.

3. *An Example*

A hypothetical example would be helpful in clarifying the guidelines established by the Second oCircuit in *Armstrong*. Assume that in *Armstrong* the district court accepted the allegation made by the defendant: That the Gordon firm received certain documents solely through Altman's access to them while he was supervising the enforcement proceeding against the defendant, and that the defendant had been denied access to those documents by the SEC and the Gordon firm. The district court, under the court of appeals' new standard, would have to decide whether in its discretion such a situation creates a substantial

appearance of impropriety, and a threat to the integrity of the underlying trial. In reviewing the facts, the district court may conclude that since the documents were of such importance, and it was not possible for McAlpin to obtain these documents, there would exist such an unfair advantage to the Gordon firm over the defendant's attorneys that it would give rise to a substantial appearance of impropriety, and create a threat to the integrity of the underlying trial.[123] As such, the court could in its discretion declare the screening of Altman to be ineffective in remedying the existing unfairness, and order the disqualification of the entire Gordon firm from the instant case.

4. *Problems with the Dissenting Opinion*

The error in Judge Newman's dissenting opinion is that it focuses solely on the concern that the public will not trust the effectiveness of a Chinese Wall when used to screen a former government attorney. The claims that it *might* seem improper for a former government attorney's firm to be litigating a matter that he was previously involved in while with the government, that the attorney and firm *could* easily circumvent the screening procedure by slipping confidential information to other members of his firm, or that the attorney *could* continue to benefit monetarily from his firm's litigation of the case, are too broad and predeterminative. It ignores the concept that each case is factually unique, and that screening can remedy unfairness due to the former government attorney's presence on the staff of the firm. Clearly, any screening procedure will not be perfect, since it depends upon the honesty and integrity of the attorney and firm involved, and the movement of a public official to a private firm will inevitably produce some skeptical comment. Still, it would seem quite harsh to disqualify an entire law firm solely because of the mere presence of the former government attorney on its staff without any other proof that there exists a serious unfairness due to the former government attorney's prior governmental involvement in the same matter.

Although public trust in government officials is an important factor in maintaining confidence in and credibility of such

123. *See supra* text accompanying notes 109-116.

officials, the public also has an interest in the expediency and fairness of the judicial process. To allow disqualification of a former government attorney's law firm solely because the attorney was substantially responsible for the case as a government employee[124] ignores the policy considerations that have been set forth in Opinion 342,[125] by a substantial number of authorative commentators,[126] and in the proposed Model Rules.[127]

The dissent overlooks the fact that a trial court will have the opportunity to review any adopted screening procedure. If there appears to have been any favoritism exhibited by the government agency initially approving the procedure, or any circumvention of the adopted screening procedure on the part of the firm and former government attorney, the court may declare it void and act accordingly in its discretion. As seen in the example above,[128] the court may find that the presence of the former government attorney on the staff of the private firm gives the firm such a distinct and unfair advantage over the counsel of the moving party that vicarious disqualification is the only remedy to alleviate the unfairness.[129] Declaring screening ineffective per se, without specific allegations which establish a substantial appearance of impropriety, will serve only to disrupt the trial process, to deprive a client of his choice of counsel, and to discourage entry by attorneys into governmental agencies.

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124. *See supra* text accompanying note 40.

125. *See supra* text accompanying notes 47-54.

126. *See, e.g.*, Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957); Van Graafeiland, *Lawyer's Conflict of Interest—A Judge's View Part II*, N.Y.L.J., July 20, 1977, at 1, col. 2; Comment, *Conflicts of Interest and the Former Government Attorney*, 65 GEO. L. J. 1025 (1977); Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy*, 73 NW. U.L. REV. 996 (1979).

127. *See* MODEL RULES OF PROFESSIONAL CONDUCT DR 9-101 comment at 301.

128. *See supra* the hypothetical example at Part IV A(3) of the text.

129. *See* supra note 54. *See also* Sierra Vista, Inc. v. United States, 639 F.2d 749 (Ct. Cl. 1981). (The court of claims found that the trial judge had properly denied the government's motion to disqualify the firm where only one of the lawyers involved had any substantial connection with the case while with the government. The court found that the screening of the attorney who had substantial involvement in the case would be effective). *Id.* at 753. Cheng v. GAF Corp., 631 F.2d 1052 (2d Cir. 1980). (The court was *not* satisfied that screening in this particular case was effective to prevent disclosure to the firm of information the lawyer had obtained during his prior service with a non-governmental public interest organization).

5. *The Effectiveness of the Screening Procedure in* Armstrong

The Second Circuit was correct in affirming the district court's finding that Altman's presence at the Gordon firm did not require the firm's disqualification. The receiver had access to the SEC files prior to the Gordon firm's retention. Altman could not foresee the receiver's counsel resigning and the receiver's choice of the Gordon firm as a replacement.[130] Additionally, the screening of Altman from any participation in the instant case further rebutted any possible inferences of impropriety arising from his presence at the firm, and *no* evidence was introduced that indicated that there was any attempt to circumvent such procedures.[131]

V. Conclusion

Armstrong v. McAlpin will allow trial courts to evaluate on a case by case basis the screening of former government attorneys.[132] The *Armstrong* decision rejects the argument that such procedures are ineffective per se solely because the public's attitude will be very skeptical if a former government attorney was substantially responsible for the same matter from which he was screened at his firm.

The prior case of *Board of Education v. Nyquist* set forth the concept that disqualification of an attorney based solely on an appearance of impropriety should not occur unless the integrity of the underlying trial was threatened. The *Armstrong* court found that the *Nyquist* rationale should be applied to uphold the use of procedures in screening a former government attorney from a particular case in order to avoid disqualification of his entire firm. Thus, unless the facts of the case indicate that the former government attorney's presence on the staff of his firm taints the underlying trial, the trial court should approve his screening.

John J. Rapisardi

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130. *See* Armstrong v. McAlpin, 461 F. Supp. at 626.
131. *Id.*
132. *See supra* note 15.