APPEALABILITY OF DENIALS OF MOTIONS TO DISQUALIFY COUNSEL

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

Defendants[1] moved to disqualify[2] and enjoin[3] plaintiff's attorneys

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1. Chrysler Motors Corp. and Chrysler Realty Corp. (jointly referred to hereinafter as Chrysler).

2. "Disqualification" refers to a court order directing an attorney to withdraw from a case. Motions to disqualify are generally made by a party to a suit who is a former client of an attorney presently representing an adverse interest. This conflicting relationship raises the possibility that, in prosecuting or defending the present action, the attorney has disclosed or used confidential information obtained from the former client, especially if matters in the present suit are substantially related to the subject matter of the former employment. Such disclosure or use would violate Canon 4 of the American Bar Association's *Code of Professional Responsibility* (1969): "A lawyer should preserve the confidences and secrets of a client." Although the *Code* does not have the force of a statute, "it is recognized by bench and bar as setting forth proper standards of professional conduct." Estates Theatres, Inc. v. Columbia Pictures Indus., Inc., 345 F. Supp. 93, 95 n.1 (S.D.N.Y. 1972). Using a confidence or secret of a client without his consent for the attorney's own advantage or the advantage of a third person will also warrant disciplinary action, *see* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(3), but a disqualification proceeding is not in the nature of a disciplinary proceeding. A disqualification simply means that the attorney may not participate in, or give advice concerning, the further conduct of the suit. *See generally* Annot., 31 A.L.R.3d 715 (1970); Annot., 52 A.L.R.2d 1243 (1957). For a discussion of what constitutes representation of conflicting interests subjecting the attorney to disciplinary action, see Annot., 17 A.L.R.3d 835 (1968).

Although a motion to disqualify one party's counsel is normally made by an adverse party, the court may order disqualification on its own initiative. W.E. Bassett Co. v. H.C. Cook Co., 201 F. Supp. 821 (D. Conn.), *aff'd per curiam*, 302 F.2d 268 (2d Cir. 1962); Porter v. Huber, 68 F. Supp. 132 (W.D. Wash. 1946).

This Comment is limited in scope to the procedural aspects of federal appeals of orders denying disqualification. For discussions of the standards used in determining the merits of motions to disqualify, see Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); Brasseaux v. Girouard, 214 So. 2d 401 (La. Ct. App. 1968); Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957); 68 HARV. L. REV. 1084 (1955); 11 N.Y.L.F. 148 (1965); 64 YALE L.J. 917 (1955).

3. Motions to disqualify are often phrased as injunctions against further participation and assistance in the suit. Historically, the English procedure to disqualify an attorney was a bill in equity to enjoin the attorney's participation. *See, e.g.*, Little v. Kingswood Collieries Co., 20 Ch. D. 733 (1882); Cholmondeley v. Clinton, 34 Eng. Rep. 515 (Ch. 1815). This procedure has sometimes been used in state actions. *See, e.g.*, Murphy v. Riggs, 238 Mich. 151, 213 N.W. 110 (1927).

If the motion to disqualify is in the form of an injunction, some state courts consider its denial to be a denial of an injunction and therefore immediately appealable under

from further participation in the action.[4] The federal district court denied the motion and refused to include in its order a statement that would have permitted an immediate discretionary appeal of the interlocutory order to the court of appeals.[5] Defendants then filed notice

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state law. *See, e.g.*, Meehan v. Hopps, 45 Cal. 2d 213, 288 P.2d 267 (1955), *discussed in* 15 HASTINGS L.J. 105 (1963). Federal courts, however, refuse to consider such motions as applications for "injunctions" in determining their appealability. *See, e.g.*, Fleischer v. Phillips, 264 F.2d 515, 516 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959).

4. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., Civil No. 73-853 (E.D.N.Y., filed June 12, 1973), is the pending suit. Dale Schreiber, one of the attorneys, was formerly employed by a large law firm and worked on certain litigation matters for Chrysler. Schreiber left the firm and joined with Alexander Hammond to form a new firm, which was engaged by plaintiff, a Chrysler dealership, to prosecute a claim against Chrysler. Chrysler's attempt to disqualify Hammond & Schreiber was based on Schreiber's previous employment and the relevant confidential information concerning Chrysler practices and procedures that Schreiber had allegedly obtained or had access to while so employed.

5. For District Judge Weinstein's opinion denying the motion to disqualify, see Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581 (E.D.N.Y. 1973).

If a party can persuade a district judge to include in his order a statement pursuant to 28 U.S.C. § 1292(b) (1970), and the court of appeals agrees to accept the appeal, the party can obtain immediate review of an interlocutory order. 28 U.S.C. § 1292(b) (1970) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . .

Added by the Interlocutory Appeals Act of 1958, Pub. L. No. 85-919, 72 Stat. 1770, this section provides the district and circuit courts with a limited means of permitting appeal of otherwise unappealable interlocutory orders. An order may be amended by the district judge to include the necessary statement upon a party's motion pursuant to FED. R. APP. P. 5(a).

In the principal case, after the district judge refused to include a § 1292(b) statement, Chrysler moved in the court of appeals for permission to appeal pursuant to § 1292(b) and FED. R. APP. P. 5. This motion was a hopeless gesture, however, because if a district judge refuses to include the statutory statement, there can be no appeal under § 1292(b). United States v. 687.30 Acres of Land, 451 F.2d 667 (8th Cir. 1971); 9 J. MOORE, FEDERAL PRACTICE ¶ 110.22[3] (2d ed. 1973) [hereinafter cited as MOORE]; *see* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 613-14 (1975). The courts of appeals also refuse to issue writs of mandamus directing district judges to certify issues for appeal under § 1292(b). *See, e.g.*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1344 (2d Cir. 1972):

> Congress plainly intended that an appeal under § 1292(b) should lie only when

of direct appeal from the order.[6] The Court of Appeals for the Second Circuit denied plaintiff's motion to dismiss the appeal, and *held*: A federal district court's denial of a motion to disqualify counsel is directly appealable.[7]

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the district court and the court of appeals agreed on its propriety. It would wholly frustrate this scheme if the court of appeals could coerce decision by the district judge.

6. Defendants claimed rights of appeal under 28 U.S.C. §§ 1291, 1292(a) (1970). In response to the notice of direct appeal, plaintiff moved to dismiss the appeal. A motion to dismiss an appeal on the ground that the order is not appealable raises the issue of the appellate jurisdiction of the court of appeals; but even if the question of appealability is not raised by the parties, a court will consider the question in order to determine if it has jurisdiction. *E.g.*, Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp., 293 U.S. 449 (1935).

Unsure whether a right of appeal lay from denial of a motion to disqualify, defendants also petitioned the court under 28 U.S.C. § 1651(a) (1970) for a writ of mandamus directing the district judge to vacate his original order, disqualify plaintiff's counsel, and dismiss the complaint without prejudice. Some courts, refusing to find a denial of a motion to disqualify counsel to be final and appealable, have accepted petitions for writs of mandamus in order to consider the disqualification question on the merits. *See, e.g.*, Cord v. Smith, 338 F.2d 516 (9th Cir. 1964) *discussed in* note 18 *infra*.

Defendants did not request that the district judge dismiss the complaint with prejudice since the purpose of a disqualification proceeding is not to punish the attorney's present client, or even the attorney, but rather to protect the confidential disclosures made to the attorney by the former client. Colonial Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., 262 F.2d 856 (2d Cir. 1959). When disqualification is ordered, the actions a court may take to protect the interests of the former client are discretionary and vary according to the stage of the proceedings and the conduct of the attorney. In Doe v. A Corp., 330 F. Supp. 1352 (S.D.N.Y. 1971), *aff'd per curiam sub nom.* Hall v. A Corp., 453 F.2d 1375 (2d Cir. 1972), the district court dismissed the complaint without prejudice and also directed that the file of the case be sealed by the clerk. Often, however, the attorney is merely enjoined from further participation "except to the limited extent reasonably necessary to the transfer of [his] duties to new counsel." E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 401 (S.D. Tex. 1969). The suit itself continues except for a change of counsel. Colonial Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., *supra*. If several attorneys from different firms are representing the same party, the disqualified attorney may simply be directed to "disappear" from the lawsuit while the other attorneys continue the case. W.E. Bassett Co. v. H.C. Cook Co., 201 F. Supp. 821, 825 (D. Conn.), *aff'd per curiam*, 302 F.2d 268 (2d Cir. 1962).

7. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974). The court of appeals had joined the petition for a writ of mandamus and the motion to dismiss the appeal, *see* note 6 *supra*, and considered them en banc. After holding the order directly appealable, the court found it unnecessary to consider the merits of the petition for a writ and dismissed the petition as moot. 496 F.2d at 806. Throughout its opinion, the court expressly refused to consider the merits of the motion to disqualify and limited itself to the appealability question. In a subsequent decision on the merits, a panel of the court affirmed the district court's denial of disqualification. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 418 F.2d 751 (2d Cir. 1975).

In the Judiciary Act of 1789, Congress provided that appeals in all federal civil cases would lie only from "final decrees and judgments."[8] While mandamus, as an extraordinary writ, was available to allow immediate review of an interlocutory order,[9] federal courts used that remedy only sparingly and thereby maintained a general final judgment requirement for appeals. Although the courts refused to interpret "final" in a highly technical sense during the nineteenth century, they nevertheless kept relaxation of the finality requirement within narrow

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8. Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 84. The requirement of a final judgment derives from English common law, which required a final judgment in the lower court before a party could obtain a writ of error, the procedure used by the King's Bench to review the decisions of lower courts. *See* McLish v. Roff, 141 U.S. 661 (1891). Apparently the reason for requiring a final judgment was simply that the record of a case could not be in two courts at one time. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 541-44 (1932). In contrast, English equity practice allowed appeals even from interlocutory decrees. *See* Forgay v. Conrad, 47 U.S. (6 How.) 201, 205 (1848); Crick, *supra* at 545-48.

The early American states generally followed the English common law precedent for appeals from actions at law, and many enacted statutes incorporating the final judgment requirement into equity as well. Enactment of these statutes was due partly to a general merger of law and equity, and partly to the relative unimportance of most questions brought up on interlocutory appeals. *See* Crick, *supra* at 549-50.

The justifications for the federal requirement of a final judgment or decree before appeal developed as the appellate courts became more congested and courts began to fear an onslaught of interlocutory appeals. Crick, *supra* at 550-51. Justice Story, in Canter v. American Ins. Co., 28 U.S. (3 Pet.) 307 (1830), was one of the first to justify the requirement, stating:

> It is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon *final* decrees only, that causes should not come up here in fragments, upon successive appeals. It would occasion very great delays, and oppressive expenses.

Id. at 318 (emphasis original). Intermediate appeals raise the problem of possible harassment as well as expense and delay. Cobbledick v. United States, 309 U.S. 323, 325 (1940). Conservation of judicial resources, possible settlement of the main action, and the possibility that subsequent rulings by the trial court will make appeal unnecessary are all justifications for allowing appeal only from final judgments. *See* Parkinson v. April Indus., Inc., Civil Nos. 74-2058, -2214 (2d Cir., June 30, 1975); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 352 (1961); Note, *The Finality and Appealability of Interlocutory Orders*, 7 SUFFOLK L. REV. 1037, 1040 (1973); Note, *Discretionary Appeals of District Court Interlocutory Orders*, 69 YALE L.J. 333, 334 (1959).

9. Judiciary Act of 1789, ch. 20, §§ 13, 14, 1 Stat. 80 (now 28 U.S.C. § 1651(a) (1970)). In order not to undermine the system of appellate review, the scope of review available in a mandamus proceeding traditionally has been limited to correcting the abdication or usurpation of authority, or clear abuse of power, by the lower court. 9 MOORE ¶ 110.02, at 51; *see* Paar v. United States, 351 U.S. 513, 520-21 (1956).

bounds.[10] To ameliorate the harshness of the general rule, Congress passed several exceptions, the most important of which were the 1891 provision for immediate review of orders granting or continuing injunctions[11] and the 1958 provision for discretionary review of interlocutory orders that meet certain criteria.[12]

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10. Exemplifying the nontechnical interpretation was Forgay v. Conrad, 47 U.S. (6 How.) 201, 203 (1848), in which Chief Justice Taney stated:

> Undoubtedly, [the decree] is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words "final decrees" in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature.

This statement reflected the early Supreme Court view that a decree was not interlocutory simply because ministerial duties remained to be performed. *See* The Palmyra, 23 U.S. (10 Wheat.) 502, 504 (1825); Ray v. Law, 7 U.S. (3 Cranch) 179, 180 (1805). Generally, however, the courts required a final judgment, stressing the long-established policy against piecemeal appeals. *See, e.g.,* McLish v. Roff, 141 U.S. 661, 665-66 (1891).

11. Act of March 3, 1891, ch. 517, § 7, 26 Stat. 828, *as amended*, 28 U.S.C. § 1292 (a)(1) (1970). The Court in Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955) suggested that the "need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence" was the probable reason for the modification of the finality requirement. 348 U.S. 176, 181 (1955) (footnote omitted) This statute has been expanded to include orders modifying, refusing, or dissolving injunctions as well. *See* 28 U.S.C. § 1292(a)(1) (1970). Other provisions relating to appeals from certain interlocutory orders in receivership, admiralty, and patent infringement actions are also contained in § 1292(a). *See* 9 MOORE ¶ 110.16. Notably, most of these exceptions are for interlocutory orders that formerly would have been made in chancery. *See* Note, *Appealability in the Federal Courts, supra* note 8, at 367.

Since words of restraint or direction can be used in almost any order, courts have generally read § 1292(a)(1) as applying only to those injunctions granting part or all of the substantive relief sought by a complaint, and not to those restraining the conduct of the parties or their counsel in a way unrelated to the substantive issues. International Prods. Corp. v. Koons, 325 F.2d 403, 406 (2d Cir. 1963), *quoted with approval in* Weight Watchers v. Weight Watchers Int'l, Inc., 455 F.2d 770, 774-75 (2d Cir. 1972). *See generally* 9 MOORE ¶ 110.20.

12. Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b) (1970); *see* note 5 *supra*. The Judicial Conference of the United States had recommended enactment of this statute, relying in part on the report of a committee of the Judicial Conference of the Tenth Circuit. This report stated:

> [T]he enlargement of the right of appeal should be limited to extraordinary cases in which extended and expensive proceedings probably can be avoided by immediate final decision of controlling questions encountered early in the action. The shortening of the period between commencement of an action and its ultimate termination, together with avoidance of unnecessary work and expense, are the imperative considerations which impel the committee's recommendation for change in the existing law.

H.R. REP. No. 1667, 85th Cong., 2d Sess. 5 (1958), *reprinting* REPORT OF COMM. OF JUDICIAL CONFERENCE OF THE TENTH CIRCUIT (1953); *see* E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 403 (S.D. Tex. 1969). *See generally* 9 MOORE ¶ 110.22[1].

In addition to these statutory exceptions, federal case law also qualified the requirement of a final judgment. Perhaps the most significant of these qualifications was the "collateral order" rule, based primarily on *Cohen v. Beneficial Industrial Loan Corp.*,[13] in which the Supreme

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The appeal is strictly a discretionary one for interlocutory orders—discretionary for the appellant, the district judge, and the court of appeals. The discretion of the district judge is limited by the statute to a determination of whether the order involves a "controlling question of law as to which there is substantial ground for difference of opinion" and whether immediate appeal from the order may "materially advance the ultimate termination of the litigation." *See generally* 9 MOORE ¶ 110.22[2]; Note, *Section 1292 (b): Eight Years of Undefined Discretion*, 54 GEO. L.J. 940 (1966); Note, *supra* note 5, at 617-28. At first, courts interpreted § 1292(b) to apply only to exceptional cases where immediate appeal might "avoid protracted and expensive litigation." Milbert v. Bison Labs., Inc., 260 F.2d 431, 433 (3d Cir. 1958). An exceptional case is not required by the language of the section, however, and support for this view is dwindling. *See* Note, *supra* note 5, at 625-27. *See generally* 9 MOORE ¶ 110.22[3].

Courts vary in their use of § 1292(b), from sparing to frequent. *Compare* Control Data Corp. v. IBM Corp., 421 F.2d 323, 325 (8th Cir. 1970), *and* United Barge Co. v. Logan Charter Serv., Inc., 237 F. Supp. 624, 631 (D. Minn. 1964), *with* Frist v. Gallant, 240 F. Supp. 827, 830 (W.D.S.C. 1965). In the Fifth Circuit, by "suggesting" that matters be resubmitted to the district court for redetermination and possible § 1292(b) certification, the court of appeals is making the section a vehicle for the exercise of its supervisory guidance. Note, *Section 1292(b): Eight Years of Undefined Descretion supra* at 959-60; *see, e.g.*, Hadjipateras v. Pacifica, S.A., 290 F.2d 697, 702 (5th Cir. 1961).

Another procedural qualification of the final judgment requirement is FED. R. CIV. P. 54(b), which allows a district judge to enter a final judgment as to only one claim where there is more than one claim, or as to only one party where there are multiple parties, if the judge expressly determines that "there is no just reason for delay . . . ." *See generally* 6 MOORE ¶ 54.04[3]; Note, *Appealability in the Federal Courts, supra* note 8, at 357-63.

13. 337 U.S. 541 (1949). The suit was a shareholder derivative action in which the corporation, as defendant, moved to require plaintiff to give security for expenses of the suit, a right provided a defendant corporation by New Jersey law. The district court denied the motion, finding the state statute inapplicable, and the court of appeals, ruling on this interlocutory order, reversed. Beneficial Indus. Loan Corp. v. Smith, 170 F.2d 44 (3d Cir. 1948), *rev'g* 7 F.R.D. 352 (D.N.J. 1947). Justice Jackson, writing for the Supreme Court, stated:

> When that time [final judgment] comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. . . .
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> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. . . .
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> We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.

Court described a small class of interlocutory orders that were appealable as final judgments. This class consisted of orders meeting the following prerequisites: (1) the order was a final determination of a claim of right "separable from, and collateral to," the rights asserted

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337 U.S. at 546-47. This passage has been quoted in many cases and in innumerable briefs of counsel to support the appealability of a wide range of interlocutory orders claimed to be final determinations of important collateral rights.

The Supreme Court has applied *Cohen* to find various orders appealable. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (order allocating costs of class action notice); Stack v. Boyle, 342 U.S. 1 (1951) (order refusing to reduce bail); Roberts v. United States Dist. Court, 339 U.S. 844 (1950) (order denying prisoner's motion to proceed in forma pauperis); Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684, 688-89 (1950) (order vacating attachment on foreign-owned vessel); *cf.* Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963).

Circuit courts have frequently applied the *Cohen* rule to hold various district court orders appealable. *See, e.g.*, Garber v. Randell, 477 F.2d 711, 715 (2d Cir. 1973) (order consolidating suits and directing filing of consolidated complaint); Spanos v. Penn Cent. Transp. Co., 470 F.2d 806 (3d Cir. 1972) (order refusing to appoint counsel in civil suit); Dickstein v. duPont, 443 F.2d 783 (1st Cir. 1971) (order staying action pending arbitration); Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971) (order disapproving class settlement). Relying on *Cohen*, the Second Circuit has developed the "death knell" doctrine, which permits appeal of an order dismissing a class action if, without review, the order would put an end to the litigation. Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 120-21 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967), *quoting* Chabot v. National Sec. & Research Corp., 290 F.2d 657, 659 (2d Cir. 1961). *But cf.* Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972). *See generally* Comment, *Appealability of a Class Action Dismissal*, 39 U. CHI. L. REV. 403 (1972).

Many cases have rejected application of the *Cohen* rule to particular orders. *See, e.g.*, Aaacon Auto Transp., Inc. v. Ninfo, 490 F.2d 83 (2d Cir. 1974) (order concerning venue under § 1404(a) and order staying arbitration); IBM Corp. v. United States, 493 F.2d 112 (2d Cir. 1973) (order finding party in civil contempt); Stans v. Gagliardi, 485 F.2d 1290 (2d Cir. 1973) (order setting trial date); Financial Servs., Inc. v. Ferrandina, 474 F.2d 743 (2d Cir. 1973) (order refusing to vacate attachment); United States v. Fried, 386 F.2d 691 (2d Cir. 1967) (order refusing to quash information subpoena, despite possible consequences to witness' mental health). *See generally* 9 MOORE ¶ 110.13.

Recent cases have expressed increasing reluctance to give the collateral order rule an expansive reading, stressing the growing appellate dockets and the undermining of the final judgment requirement that would result. *See* Baker v. United States Steel Corp., 492 F.2d 1074, 1077-78 (2d Cir. 1974); Weight Watchers v. Weight Watchers Int'l, Inc., 455 F.2d 770 (2d Cir. 1972); West v. Zurhorst, 425 F.2d 919 (2d Cir. 1970); Borden Co. v. Sylk, 410 F.2d 843 (3d Cir. 1969).

Professor Moore has suggested that the *Cohen* rule should be revoked altogether if the practice of supervisory mandamus for the review of new, important, and unsettled questions becomes generally accepted. Moore argues that the rule emerged at a time when the final judgment rule was inflexible (before § 1292(b) was added) and that mandamus, which is always discretionary, is preferable to appeal as of right. 9 MOORE ¶ 110.10, at 135-36. Nevertheless, the recent Supreme Court decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), effectively refuted any suggestion that the *Cohen*

in the main action; (2) it was "too important to be denied review"; and (3) appeal after final judgment would be too late to review the order effectively because the rights conferred would already "have been lost, probably irreparably."[14] Relying on this collateral order rule, the Fifth[15] and the Third[16] Circuits have held denials[17] of motions to dis-

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rule was about to be revoked or replaced. The *Eisen* Court relied heavily on *Cohen* to find an order appealable and did not attempt to limit *Cohen* in any way.

Another test that has emerged to determine when a decision is final and appealable is a kind of balancing test, first appearing in Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950). There the Court referred to the competing considerations of inconvenience and "costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Id.* at 511 (footnote omitted). This is sometimes called the "practical" or "pragmatic" approach. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962). This approach is often used in conjunction with the *Cohen* rule to find an order appealable. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). For an extension of this approach to an admittedly "marginal" case involving a ruling "fundamental to the further conduct of the case," see Gillespie v. United States Steel Corp., 379 U.S. 148, 153-54 (1964). *See generally* 9 MOORE ¶ 110.12; Note, *The Finality and Appealability of Interlocutory Orders, supra* note 8, at 1046-47.

14. 337 U.S. at 546-47, *quoted in* note 13 *supra*. The prerequisites, as stated, are those commonly recognized by Second Circuit cases. *See, e.g.*, IBM Corp. v. United States, 471 F.2d 507, 513-14 (2d Cir. 1972), *rev'd on rehearing en banc*, 480 F.2d 293 (2d Cir. 1973), *cert. denied*, 416 U.S. 980 (1974) (reversed on ground that these prerequisites of *Cohen* were not satisfied); *cf.* 9 MOORE ¶ 110.10, at 133.

15. Tomlinson v. Florida Iron & Metal, Inc., 291 F.2d 333 (5th Cir. 1961) involved representation by a former government attorney that the court of appeals found violated the Act of June 1, 1872, ch. 256, § 5, 17 Stat. 202 (now 18 U.S.C. § 207 (1970)). The court reached the merits after determining, in reliance on *Cohen*, that the district court's order denying disqualification was appealable. The disqualification issue was " 'entirely disconnected with the principal contention . . . in the pending suit,' " and the order constituted a " 'final decision on that ancillary matter.' " *Id.* at 334, *quoting* Tomlinson v. Paller, 220 F.2d 308, 311 (5th Cir. 1955). The harm resulting from a possible error in the order would frustrate the public policy expressed by the statute; any appeal taken after the trial in which the attorney had participated would neither avoid nor mitigate the harm. 291 F.2d at 334.

In Uniweld Prods., Inc. v. Union Carbide Corp., 385 F.2d 992 (5th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968), the court summarily held appealable, on the basis of Tomlinson v. Florida Iron & Metal, Inc., *supra*, an order denying a motion to disqualify, although only ethical considerations of conflict of interest were involved. *See also* United States v. Trafficante, 328 F.2d 117 (5th Cir. 1964).

16. In an unreported decision, Greene v. Singer Co., Civil No. 1835 (3d Cir., Nov. 2, 1971), the court held that an order denying disqualification was appealable under the collateral order rule enunciated in *Cohen*. The court emphasized that requiring the appellant to await final judgment to appeal the order would deny appellant "the reality of appellate processes," and the law could provide no practical remedy if confidential information were disclosed or used by the attorney. "Conversely . . . the possibility of irreparable injury would be substantially lessened" if there was an immediate appeal. *Id.* at 3. The court limited its holding, noting that not every ruling about a conflict of inter-

qualify opposing trial counsel final and appealable. In contrast, the Ninth Circuit has held these orders not directly appealable.[18]

Faced with this conflict among the circuits,[19] including precedent in its own circuit that denials of motions to disqualify were not directly appealable,[20] the Court of Appeals for the Second Circuit reexamined

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est by an attorney could "activate the *Cohen* rule"; the rights asserted here were too important and too independent to require postponement of appellate consideration.

17. Orders *granting* motions to disqualify counsel have long been assumed to be immediately appealable. *See, e.g.*, Brown v. Miller, 286 F. 994 (D.C. Cir. 1923) (attorney himself appealing order, leaving plaintiff's suit pending). Generally jurisdiction is assumed without comment. *See, e.g.*, American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971); W.E. Bassett Co. v. H.C. Cook Co., 302 F.2d 268 (2d Cir. 1962). Where considered, jurisdiction for appeal has been upheld with little comment. *See* Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1383 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); Fleischer v. Phillips, 264 F.2d 515, 516 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959), *cited with approval in* Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 570 n.5 (2d Cir. 1973). *But cf.* United States v. Hankish, 462 F.2d 316 (4th Cir. 1972).

18. Cord v. Smith, 338 F.2d 516 (9th Cir. 1964). Without specifically referring to the collateral order rule or the final judgment requirement, the court noted its agreement with earlier Second Circuit cases, *see* cases cited note 20 *infra*, holding orders denying disqualification motions unappealable. Although the appellant in *Cord* had not obtained a § 1292(b) statement from the district judge, the court noted the possibility of such action as one reason for rejecting appellant's argument that the order was appealable as a denial of an injunction under § 1292(a). 338 F.2d at 521; *see* notes 3, 11, 12 *supra*. Nevertheless, the court found that this was an appropriate time to treat the matter as a petition for a writ:

> Continued participation as an attorney, by one who is disqualified by conflict of interest from so doing, will bring about the very evil which the rule against his participation is designed to prevent, and a subsequent reversal based upon such participation cannot undo the damage that will have been done as a result of such participation. We therefore proceed to the merits.

338 F.2d at 521-22. Following *Cord v. Smith*, the court in Chugach Elec. Ass'n v. United States Dist. Court, 370 F.2d 441 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967), used a writ of mandamus method to review an order denying disqualification of counsel.

19. The United States Court of Appeals for the District of Columbia Circuit has noted this conflict concerning appealability of denials of motions to disqualify when disqualification was sought on ethical considerations alone. Yablonski v. United Mine Workers, 454 F.2d 1036 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972). In *Yablonski*, however, the court found that the conflicting obligations of union counsel were a "significant impingement on a specific legislative policy," expressed in the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531 (1970). 454 F.2d at 1038 n.9. Therefore, the court assumed jurisdiction over an appeal from a disqualification order. *Id.* at 1038 & n.9, *citing* Tomlinson v. Florida Iron & Metal, Inc., 291 F.2d 333 (5th Cir. 1961); *see* note 15 *supra*.

20. Marco v. Dulles, 268 F.2d 192 (2d Cir. 1959); Fleischer v. Phillips, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959).

en banc the appealability question in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*[21] In a unanimous opinion, Judge Moore discussed extensively the development of appealability of disqualification orders in the Second Circuit. He found that appealability, based on *Cohen v. Beneficial Industrial Loan Corp.*, was definitely established in the circuit from the time of that decision in 1949 until 1959.[22] During this time, the court, without discussing appealability, accepted appeals from three orders granting disqualification and one order denying disqualification;[23] in one case, *Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc.*,[24] the court explicitly held that a denial was appealable. In 1959, however, in *Fleischer v. Phillips*,[25] the court re-

21. 496 F.2d 800 (2d Cir. 1974).

22. *Id.* at 803. It should be noted, however, that all of the cases taking appeals from orders granting or denying disqualification during this time interval were concentrated in the years from 1954 to 1956. *Cohen* itself did not involve a disqualification order, but rather a denial of security. *See* note 13 *supra.*

23. Fisher Studio, Inc. v. Loew's Inc., 232 F.2d 199 (2d Cir.), *cert. denied*, 352 U.S. 836 (1956) (appeal from order disqualifying attorney); Laskey Bros., Inc. v. Warner Bros. Pictures, Inc. (Austin Theatre, Inc. v. Warner Bros. Pictures, Inc.), 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956), *noted in* 3 U.C.L.A.L. REV. 105 (1955); Consolidated Theatres, Inc. v. Warner Bros. Circuit Mgmt. Corp., 216 F.2d 920 (2d Cir. 1954) (appeal from order disqualifying attorney), *noted in* 68 HARV. L. REV. 1085 (1955), 6 SYRACUSE L. REV. 360 (1955), *and* 64 YALE L.J. 917 (1955). *Laskey* and *Austin* were consolidated for appeal because they involved the same law firm, but *Laskey* was an appeal from a disqualification order while *Austin* was from a denial of disqualification. Both orders were affirmed on the merits with no discussion of appealability, Judge Clark writing the majority opinion. In dictum in *Fisher*, Judge Clark referred to the collateral nature of the disqualification order.

24. 239 F.2d 555 (2d Cir. 1956), *cert. denied*, 355 U.S. 824 (1957). Writing for the majority, Judge Swan found the order appealable. No distinction as to appealability existed between orders granting and orders denying disqualification; both were within the small class of appealable orders described in *Cohen. Id.* at 556; *see* notes 13 & 14 *supra* and accompanying text. Chief Judge Clark dissented, however, finding a denial of disqualification "quite interlocutory" and therefore not appealable. 239 F.2d at 557. According to Judge Clark, a denial lacked finality since a district judge could still disqualify the attorney at any time if more convincing evidence were presented; therefore *Cohen* was inapplicable. *Id.* at 557-58. Judge Clark also noted that if there was any basis for the disqualification claim, the confidential information would probably have been disclosed and used already so that there was no immediate need to stop the attorney from further disclosure. *Id.* at 558 n.3.

25. 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959). Chief Judge Clark first stated that the request to enjoin a firm from representing defendants was equivalent to a request to disqualify so that the denial did not render the order appealable under § 1292(a)(1) as a denial of an injunction. *Id.* at 516; *see* note 11 *supra.* Judge Clark distinguished between orders granting and orders denying disqualification, not only as to their finality, *see* note 24 *supra*, but also as to their results:

jected the earlier approach of *Harmar* and held that denials of disqualification were not appealable; Judge Moore wrote a vigorous dissent. Faced with an appeal from a similar order later that year, another Second Circuit panel felt "constrained" by *Fleischer* to dismiss the appeal.[26]

After examining the more recent cases from other circuits indicating a trend toward allowing immediate review of orders denying disqualification, the court concluded that *Cohen* required "a return to the wisdom of *Harmar*" and therefore overruled *Fleischer*.[27] The court justi-

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> An order granting disqualification seriously disrupts the progress of the litigation and decisively sullies the reputation of the affected attorney; but one refusing such relief merely allows the action to proceed and has no permanent effect of any kind.

264 F.2d at 517. District Judge Gibson, concurring in Judge Clark's opinion, added that review of denials of disqualification would set back the cause of "just, speedy and inexpensive justice." *Id.* at 518, *quoting* FED. R. CIV. P. 1.

Relying on the enactment of § 1292(b) in 1958, Chief Judge Clark did not feel bound by the contrary decision in *Harmar*. He noted that the Judicial Conference of the United States, while preparing its § 1292(b) proposal, had revealed that a majority of federal judges disfavored the trial supervision implicit in the general use of interlocutory appeals. *Id.* at 517. *See also* Note, *supra* note 5, at 610-12. Therefore, Judge Clark felt that the provision in § 1292(b) of limited areas for review manifested the "desirability of maintaining the settled federal principle against piecemeal appeals . . . ." 264 F.2d at 517.

Judge Moore, dissenting, believed the order was appealable. If there was any violation of ethics that might "taint the entire proceeding this possibility should be tested at the threshold." *Id.* Finding that the issue of disqualification was wholly collateral, that the merits of that issue would not be merged in a final judgment of the underlying case, and that there was a final disposition of a right "not an ingredient of the cause of action," Judge Moore thought the order was within the class of appealable orders described in *Cohen*. *Id.* at 518-19. Dismissal of the appeal would cause difficulties in determining the admissibility of evidence, confusion due to the diversity of issues in a possible future appeal, and a waste of time if the trial judgment were later reversed solely because the attorneys should have been disqualified. *Id.*

26. Marco v. Dulles, 268 F.2d 192, 193 (2d Cir. 1959). Judge Swan, who had also written the majority opinion in *Harmar*, stated that *Fleischer* demonstrated that an order denying disqualification was interlocutory and not appealable without compliance with § 1292(b). *Id.* at 193. Judge Moore dissented.

More recently, *Fleischer* was held to require dismissal of an appeal from a denial of defendant's motion to enjoin a nonlawyer claimant from acting *pro se* in a stockholder's derivative suit. Willheim v. Murchison, 312 F.2d 399 (2d Cir. 1963), *dismissing appeal from* 206 F. Supp. 733 (S.D.N.Y. 1962). This was the first Second Circuit case involving a denial of "counsel" disqualification on a basis other than conflict of interest due to former employment. The court's failure to attempt to distinguish this case from *Fleischer* showed apparent unwillingness to limit the *Fleischer* holding. *See also In re* Grand Jury Investigation, 318 F.2d 533, 537-38 (2d Cir. 1963).

27. 496 F.2d at 805-06. Before considering the precedents, *see* notes 15-19 & 24-26

fied overruling *Fleischer* by noting the inadequate basis for distinguishing between orders granting disqualification (the appealability of which had long been assumed in the Second Circuit) and orders denying disqualification.[28] Both orders met all three prerequisites for appealability given in *Cohen*.[29] In addition, the court noted that allowing immediate appeal of denials of disqualification would produce two desirable results: elimination of uncertainty about whether review could be obtained through the writ method[30] or under section 1292(b) without a statutory statement by the district judge;[31] and resolution of the question of disqualification at the outset "lest a costly and protracted trial be tainted on the merits by an issue collateral thereto."[32] Because the order met the prerequisites of *Cohen*, and since the court perceived only beneficial results in permitting appeal, the court followed the "mandate" of *Cohen* and held that any order denying disqualification of counsel was directly appealable.

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supra, the court had quoted extensively from *Cohen*, the case that the court said could "be taken as the cornerstone." 496 F.2d at 802. Because the court overruled *Fleischer*, it also had to overrule *Marco v. Dulles*, which had followed *Fleischer*. *See* note 26 *supra* and accompanying text.

28. 496 F.2d at 805. Compare Chief Judge Clark's contrary view, discussed in note 25 *supra*, that an adequate ground existed for distinguishing between the two kinds of orders. For cases holding that orders granting disqualification are appealable, see note 17 *supra*.

The Second Circuit recently faced a similar problem in deciding whether orders granting class action status should be appealable if the denial of such status would be. *See* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1007 n.1 (2d Cir. 1973). There is, however, no rule that if one action taken on an order is appealable, the opposite action is also appealable. *Compare* Swift & Co. Packers v. Compania Columbiana Del Caribe, 339 U.S. 684, 688-89 (1950) (order vacating attachment is appealable), *with* West v. Zurhorst, 425 F.2d 919 (2d Cir. 1970) (order refusing to vacate attachment not appealable). *See also* Shattuck v. Hoegl, Civil No. 74-1767 (2d Cir., July 16, 1975) (Moore, J. concurring).

In an apparent effort to make the overruling of *Fleischer* rest at least partially on the passage of time and changed circumstances, the court also noted the change in the court makeup and the change in the structure of large metropolitan law firms since 1959. 496 F.2d at 803.

29. *See* note 14 *supra* and accompanying text.

30. *See* notes 6 & 18 *supra*.

31. *See* note 5 *supra*.

32. 496 F.2d at 803. The concern over a "costly and protracted trial" is reminiscent of the exceptional case doctrine under § 1292(b), which the Second Circuit has used frequently for the "big" cases. *See* 9 MOORE ¶ 110.22[3]; note 12 *supra*. Plaintiff's attorneys, however, considered the underlying case to be a "small case" which would take only a day or two to dispose of. Supp. Mem. for Appellee at 21, Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (1974).

Although exhaustive in its canvass of appeals involving denials of disqualification, the court reached its result with deceptive ease. The court's treatment of precedent creates an illusion that all of the circuits permit immediate review of such orders. While it is true that the Ninth Circuit has used the writ approach to effect much the same result as an appeal[33] and that the Fifth Circuit seems to have accepted appealability without reservation,[34] the Third Circuit has manifested a disposition not to allow appeals from every order involving disqualification,[35] and the District of Columbia[36] and Fourth[37] Circuits have not actually committed themselves to a position. Further, the court implied that *Fleischer* was a mere aberration, Judge Clark having led the court away from the true path of *Cohen*. In fact, there was no prior established policy of allowing appeal of orders denying disqualification.[38]

More disturbing than the court's misleading treatment of precedent is its failure to explain under what circumstances the *Cohen* rule will be applied in the future. Rather than stating *why* the order was deemed final or collateral[39] or *why* it involved an important question,[40]

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33. *See* note 18 *supra*.

34. *See* note 15 *supra*.

35. *See* note 16 *supra*; *cf.* Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972) (refusing to extend Greene v. Singer Co., Civil No. 1835 (3d Cir., Nov. 2, 1971), into other areas).

36. *See* note 19 *supra*.

37. The Fourth Circuit case cited by the court, United States v. Hankish, 462 F.2d 316 (4th Cir. 1972), is certainly not precedent for the appealability of denials of disqualification, since the case itself involved an order granting disqualification in a criminal trial. Nor is it precedent for the appealability of a grant of disqualification, since the court equivocated on the appealability of such an order. *See id.* at 318-19.

38. *See* note 22 *supra*. Only *Harmar* had so held. Since § 1292(b) was enacted after *Harmar* and before *Fleischer*, Judge Clark might reasonably have assumed that the availability of § 1292(b) made it unnecessary to consider denials final and appealable. *See* note 25 *supra*. Interestingly, § 1292(b) was based on a statute that Judge Clark himself had proposed in an effort to restrict the scope of appeals suggested by earlier proposals. *See* H.R. REP. No. 1667, 85th Cong., 2d Sess. 5 (1958).

After the *Fleischer* decision, courts felt that the Second Circuit had taken a definite position refusing immediate appeal of orders denying disqualification. If there was any established policy at all regarding appealability, it was that appealability would be denied. *See, e.g.*, Cord v. Smith, 338 F.2d 516, 521 (9th Cir. 1964); Marco v. Dulles, 268 F.2d 192, 193 (2d Cir. 1959). Professor Moore found the Second Circuit's approach denying the applicability of the *Cohen* rule clearly preferable to allowing appeal under *Cohen*. 9 MOORE ¶ 110.13[10].

39. Judge Clark's principal basis for distinguishing between grants and denials of motions to disqualify had been the lack of finality of a denial since a judge could reconsider the order whenever presented with new evidence which might justify disqualification. *See* notes 24 & 25 *supra*. *But cf.* Kohn v. Royall, Koegel & Wells, 496 F.2d 1094,

the court simply stated its conclusions with quotations from *Cohen*. Similarly, the court relied on the favorable results of allowing immediate review, but neglected to explain why this policy consideration

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1097 (2d Cir. 1974) (although sometimes held final and appealable, neither grant nor denial of class standing was "final" order); MacAlister v. Guterma, 263 F.2d 65, 70 (2d Cir. 1958) (denial of consolidation held final and appealable, although court of appeals affirmed denial order without prejudice to any further application to district court for consolidation order). In Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172 (1974), the Supreme Court found that an order which imposed on defendant 90% of the notice costs for plaintiff's class action was final because the order conclusively rejected defendant's contention that it could not lawfully be required to bear this expense. The Court found *Cohen* controlling, noting that the order in *Cohen* was not "tentative, informal or incomplete"; rather, the *Cohen* order had conclusively settled the corporation's claim for security and "concerned a collateral matter that could not be reviewed effectively on appeal from the final judgment." *Id.* at 172.

Similarly, an order denying disqualification is not normally tentative or incomplete, even though it is not irrevocable. The district judge generally has a voluminous record of affidavits or hearing testimony from which to make his determination of disqualification; it is unlikely that he will change his mind and later order disqualification upon the presentation of new evidence unless the attorney subsequently acts in a manner clearly requiring his disqualification. Often the record is one prepared by a special master to whom the district court has referred the matter for findings of fact. *See, e.g.*, Consolidated Theatres, Inc. v. Warner Bros. Circuit Mgmt. Corp., 216 F.2d 920 (2d Cir. 1954). When adopted by the trial court, these findings and the subsequent order are certainly not tentative or informal. Any finality they lack is compensated by the irreparable nature of any injury caused by disclosure of lawyer-client confidences; in other words, the matter is one which could not be effectively reviewed after final judgment. A successful appeal then would be only a "hollow victory" since the breach of confidence would already have occurred and little could be done to repair that breach. *See* Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684, 689 (1950); Peterson v. Nadler, 452 F.2d 754 (8th Cir. 1971); Glaser v. North Am. Uranium & Oil Corp., 222 F.2d 552, 554 (2d Cir. 1955). Although a lack of drastic consequences from an order may persuade a court that the order is not appealable, *see, e.g.*, Weight Watchers v. Weight Watchers Int'l, Inc., 455 F.2d 770, 773 (2d Cir. 1972), serious consequences alone are insufficient to make an order final and appealable, *see* Stans v. Gagliardi, 485 F.2d 1290, 1292 (2d Cir. 1973).

For a discussion of the various definitions of "collateral", see Note, *Appealability in the Federal Courts, supra* note 8, at 365. Not even Judge Clark ever denied that disqualification orders are collateral to the main action, the controversy in such orders being primarily between the former client and attorney. This tangentiality to the main action was further illustrated in *Silver Chrysler* by Hammond and Schreiber's statement to the district court that they were litigating the disqualification issues at their own expense. Supp. Mem. for Appellants at 5, Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974).

40. *Cohen* refers to a determination of a claim of right "too important to be denied review . . . ." 337 U.S. at 546. Professor Moore thinks that "important" should be interpreted as requiring a serious and unsettled question of general importance beyond the immediate concern of the particular litigants. *See* 9 MOORE ¶ 110.10, at 133. *Cohen* and subsequent cases, however, appear more concerned with the importance of the

was sufficient to cause the court to depart from a general policy against reading *Cohen* expansively and allowing piecemeal appeals.[41] For ex-

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claimed right to the *litigant* than with its general import ·e. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 101, at 452, 456 d ed. 1970). *But cf.* Katz v. Realty Equities Corp., Civil Nos. 74-2053, -2054 (2d Cir. une 30, 1975). In noting the kinds of orders which have been treated as "final" unde he *Cohen* rule, Professor Wright quoted a test from a case that he believed stated the v of the Supreme Court: " '[A]n order, otherwise nonappealable, determining substantial rights of the parties which will be irreparably lost if review is delayed until final judgment may be appealed immediately under section 1291.' " C. WRIGHT, *supra*, § 101, at 456, *quoting* United States v. Wood, 295 F.2d 772, 778 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962).

In West v. Zurhorst, 425 F.2d 919 (2d Cir. 1970), the court held an order refusing to vacate an attachment not appealable. Although the court agreed that the grievance created by an improper attachment was "important," it was "not important enough to make the decision 'final' " under *Cohen*. *Id.* at 921. The Second Circuit has indicated, however, that "whether a decision will settle a point once and for all . . . or will open the way for a flood of appeals concerning the propriety of a district court's ruling" is a factor in deciding whether the *Cohen* doctrine should be applied. Weight Watchers v. Weight Watchers Int'l, Inc., 455 F.2d 770, 773 (2d Cir. 1972); *accord*, IBM Corp. v. United States, 480 F.2d 293, 298 (2d Cir. 1973), *cert. denied*, 416 U.S. 980 (1974).

41. In West v. Zurhorst, 425 F.2d 919, 921 (2d Cir. 1970), the court stated:

> The increase in the burden on the courts of appeals in the last decade . . . hardly suggest [*sic*] the desirability of an expansive reading of *Cohen*, even if controlling decisions left us freer in that respect than we think.

In Weight Watchers v. Weight Watchers Int'l, Inc., 455 F.2d 770, 773 (2d Cir. 1972), the court said: "We have often indicated that *Cohen* must be kept within narrow bounds, lest this exception swallow the salutary 'final judgment' rule." In Baker v. United States Steel Corp., 492 F.2d 1074, 1077 (2d Cir. 1974), the court again emphasized its strong policy against interlocutory appeals.

The court in *Silver Chrysler* briefly considered *Weight Watchers*, *Baker*, and other cases finding orders not appealable, but distinguished them all because they did not involve disqualification and lacked one or another of the *Cohen* prerequisites. 496 F.2d at 805. Obviously, however, the appellee was citing these cases for the general policy stated in them of discouraging interlocutory appeals, and the court did not address this rationale.

In *Baker*, the district court had ordered disclosure of grand jury transcripts from an earlier indictment filed against the defendants involving the same charges asserted in the pending civil suit. The court of appeals noted the harm that could result if the order were erroneous since, once disclosed, the transcripts could not be restored to secrecy. This disclosure would affect not only the defendants, but also the public interest in the confidentiality of grand jury proceedings. Nevertheless, the court found itself powerless to accept appeal of this interlocutory order, although it did suggest that the district court reconsider its order in light of the court of appeals' opinion. 492 F.2d at 1078-79.

In IBM Corp. v. United States, 480 F.2d 293 (2d Cir. 1973), *cert. denied*, 416 U.S. 980 (1974), the court of appeals, sitting en banc, found unappealable a discovery order requiring the disclosure of documents IBM claimed were within the attorney-client privilege. An alternative ground for finding the order unappealable was that *Cohen* was inapplicable, partly because it was a discovery order that was at issue and partly because any error that had been committed "did not rise to the magnitude appropriate for . . .

ample, the court emphasized the uncertainty involved in attempting to appeal a denial of disqualification.[42] This consideration, however, is not persuasive since it applies to appeals of any order presently regarded as unappealable. Although the court's concern with avoiding the possibility of a trial tainted on the merits by an order erroneously refusing to disqualify a party's counsel is valid, it should not be dispositive. The possibility of prejudicial error is not a sufficient basis for immediate appeal.[43]

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a *Cohen* appeal . . . ." *Id.* at 298-99. Judge Moore, dissenting with Judge Timbers, emphasized the historical importance of the attorney-client privilege and the inability to remedy after final judgment any harm that would have resulted from forced disclosure. *Id.* at 299-303. If Judge Moore thought the injury there was irreparable, his conclusion in *Silver Chrysler* that the injury from a denial of disqualification was irreparable was certainly foreseeable. Yet, in *Silver Chrysler*, Judge Moore gave no reason why the other Second Circuit judges felt that disqualification proceedings were distinguishable from the discovery order in *IBM*.

This failure to distinguish disqualification proceedings may make *Silver Chrysler* a difficult case for litigants to rely on. The opinion does not evince a strong federal policy against allowing interlocutory appeals, and one would presume the court would thereafter apply *Cohen* liberally to achieve "practical" results and avoid the uncertainties and paperwork involved in resort to § 1292(b) and § 1651, at least when the question, "if unresolved, might well taint a trial . . . ." 496 F.2d at 806. The litigant wishing to appeal, however, will have difficulty pointing to any standard the court actually used except the tests of *Cohen* itself. In effect, the court merely stated its conclusion that denials of disqualification satisfied the *Cohen* prerequisites. Even the standards in quoted statements from other courts were never expressly endorsed. Although this case may in fact indicate a new trend toward reading *Cohen* broadly, the opinion is so written that the court can distinguish the case whenever it desires by simply pointing to the statement that cases involving other kinds of orders were not authority for the unappealability of denials of disqualification, *id.* at 805, and by concluding that disqualification proceedings are peculiar. In a recent case involving an order denying disqualification, the court cited *Silver Chrysler* as authority for its jurisdiction to review the order and stated that "such an interlocutory order falls within the narrow confines of permissible appeals under the collateral order doctrine." General Motors Corp. v. City of New York, 501 F.2d 639, 644 (2d Cir. 1974).

42. 496 F.2d at 801, 806.

43. *See, e.g.*, Baker v. United States Steel Corp., 492 F.2d 1074, 1078-79 (2d Cir. 1974). The relative frequency of reversals of orders denying disqualification is, however, a consideration in determining appealability. *See* Donlon Indus., Inc. v. Forte, 402 F.2d 935, 937 (2d Cir. 1968). Orders denying disqualification were reversed in the following cases: General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974) (jurisdiction to review based on *Silver Chrysler*); Yablonski v. United Mine Workers, 454 F.2d 1036 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); Chugach Elec. Ass'n v. United States Dist. Court, 370 F.2d 441 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967); Cord v. Smith, 338 F.2d 516 (9th Cir. 1964); Tomlinson v. Florida Iron & Metal, Inc., 291 F.2d 333 (5th Cir. 1961); Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., 239 F.2d 555 (2d Cir. 1956), *cert. denied*, 355 U.S. 824 (1957);

The most compelling reason for the court's result lies in the finding that the third requirement of *Cohen* was met, that is, that review after final judgment cannot provide adequate relief if an attorney who should have been disqualified for conflict of interest is allowed to participate in the case. By the time final judgment is rendered, any harm that the rule prohibiting participation seeks to prevent will already have occurred.[44] Although some harm to the former client may occur before the motion to disqualify counsel is filed, the further injury caused by

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General Contract Purchase Corp. v. Armour, 125 F.2d 147 (5th Cir. 1942); United States v. Bishop, 90 F.2d 65 (6th Cir. 1937). *Armour* and *Bishop* were presented on appeal from final judgment. In both, the denial of disqualification was considered prejudicial error, although in each case there was another basis for reversal. A new trial may or may not be required, depending on the other grounds for reversal. The court in *Bishop* did require a new trial.

Generally, it seems that when a litigant waits to appeal until after a final judgment, the appellate court summarily passes over the disqualification issue. This suggests that an appellate court may be more willing to reverse the lower court and disqualify an attorney who may possess relevant confidential information when the suit is in its incipience than on appeal after a trial, when the court possesses the whole record and can judge whether the former client was in fact prejudiced. *Compare* Chugach Elec. Ass'n v. United States Dist. Court, *supra, and* Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., *supra, with* Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556, 567-68 (2d Cir. 1970), Lucom v. Atlantic Nat'l Bank, 354 F.2d 51, 56 (5th Cir. 1965), *and* Pioche Mines Consol., Inc. v. Dolman, 333 F.2d 256, 265 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965). In Herbst v. ITT Corp., 495 F.2d 1308, 1313 (2d Cir. 1974), the court candidly admitted to this discrepancy in its willingness to reverse orders authorizing class actions, depending on the time when appeal was taken. The *Herbst* court, while acknowledging the large numbers of class actions pending in the Second Circuit, believed that immediate review of class action authorizations, before large amounts of time and money were expended in managing the class actions, would be desirable and would be a valid exercise of its "supervisory powers over the administration of justice in the district courts." *Id.* at 1313; *cf.* General Motors Corp. v. City of New York, *supra* at 659 (concurring opinion). *But see id.* at 644 n.12 (majority opinion). Undoubtedly, it is equally important for the court to exercise its supervision of district courts with respect to disqualification of lawyers, especially in view of the rate of reversals of orders denying disqualification and the importance the court attaches to high standards for lawyer representation. *See generally* Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973) (considerations involved in determining disqualification).

44. *See* notes 15, 39, 41 *supra.* Chrysler's position was not that any ethical breach had yet occurred, but that a potential breach could be prevented from occurring by disqualification of Hammond & Schreiber. Supp. Mem. for Appellants at 10-12, Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974). Hammond & Schreiber in turn countered that the question of disqualification was a factual determination for the trial judge, Supp. Mem. for Appellee at 16-17, Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., *supra*, and that Judge Weinstein, after a thorough hearing, had found disqualification unwarranted, *id.* at 21-22. *See generally* 9 MOORE ¶ 110.13[10], at 190.

delay of appeal is not limited to the moving party or even to the party employing the challenged counsel.[45] The failure to adjudicate the attorney's qualification immediately and finally also inhibits public confidence in the attorney-client relationship. Allowing the appearance of impropriety to pervade the proceeding, even if no impropriety in fact exists, undermines the public's faith in the elements of the American judicial process—the judge and the lawyer.[46] If public confidence is as important as courts ruling on the merits of disqualification motions have declared it to be,[47] then the final resolution of these issues de-

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45. Both parties will, of course, incur excessive delay and expense if a new trial is eventually required. In addition, the suspicion and distrust between the parties will be heightened because of the lack of finality of the disqualification ruling. Further a judge will have greater difficulty in ruling on the admissibility of evidence. Fleischer v. Phillips, 264 F.2d 515, 519 (2d Cir.) (dissenting opinion), *cert. denied*, 359 U.S. 1002 (1959). In Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973), the court referred to the problems of a lawyer who, charged with a conflict of interests, remains as counsel in the suit:

> [O]ut of an excess of good faith, a lawyer might bend too far in the opposite direction, refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety.

46. In Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 570-71 (2d Cir. 1973), the court stated:

> Without strict enforcement of such high ethical standards, a client would hardly be inclined to discuss his problems freely and in depth with his lawyer, for he would justifiably fear that information he reveals to his lawyer on one day may be used against him on the next. A lawyer's good faith, although essential, is, nevertheless, an inadequate safeguard when standing alone. Even the most rigorous self-discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in the earlier representation and transforming it into a telling advantage in the subsequent litigation. . . . The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case.

The court must "exercise its leadership to insure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process." *Id.* at 575. Compare Canon 9 of the American Bar Association's *Code of Professional Responsibility* (1969): "A lawyer should avoid even the appearance of professional impropriety."

47. For expressions of the importance of public confidence, see General Motors Corp. v. City of New York, 501 F.2d 639, 644 (2d Cir. 1974); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 570-71, 575 (2d Cir. 1973); Rosen v. Sugarman, 357 F.2d 794, 796-97 (2d Cir. 1966); W.E. Bassett Co. v. H.C. Cook Co., 302 F.2d 268 (2d Cir.), *aff'g per curiam* 201 F. Supp. 821 (D. Conn. 1962); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 395 (S.D. Tex. 1969). The *Rosen* court found that early review of a judge's refusal to disqualify himself was both in the interest of preserving public confidence in the courts and in the interest of proper administration of justice. The court found review by writ of mandamus preferable, however, to a direct appeal for the disqualification of a judge.

mands immediate attention by the appellate courts. It is this concern with the public interest that differentiates orders denying disqualification from other orders which, though equally important to the parties, are not directly appealable.

This consideration of public confidence seems to be the only valid reason for the *Silver Chrysler* court's decision to allow appeal of all denials, especially since the court had at least two alternatives that would have enabled it to control the number of appeals and still take into account its stated reasons for allowing appeal. For example, if the potential harm to an individual litigant were the decisive factor, the court could have expressly limited the right of appeal from denials to cases involving serious ethical questions.[48] If resolution of important questions of law at the outset of a trial were the primary consideration, the court could have combined certification under section 1292(b) with the mandamus approach.[49] That is, if a district judge refused to

48. The court has required a case-by-case analysis in certain other situations in which the *Cohen* rule has been applied. *See, e.g.*, Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974) (orders denying or granting class action status); Garber v. Randell, 477 F.2d 711, 716 (2d Cir. 1973) (consolidation and severance orders appealable if they deny party's due process right to prosecute his own claims or defenses without having them merged into claims of others). *Compare In re* Biaggi, 478 F.2d 489, 491 (2d Cir. 1973) (order directing release of grand jury minutes is "obviously appealable"), *with* Baker v. United States Steel Corp., 492 F.2d 1074, 1078 (2d Cir. 1974) (similar order found unappealable; *Biaggi* distinguished on ground that no other relief was sought there and review of order after final judgment would have been impossible). *But see id.* at 1080-81 (Lumbard, J., dissenting). Decisions like *Baker* show the court's reluctance to introduce a case-by-case approach into the area of discovery orders out of fear that the courts would be swamped with interlocutory appeals. Although Judge Moore, in *Silver Chrysler*, frankly admitted that "[c]harges of conflict of interest and motions to disqualify will probably increase rather than abate," 496 F.2d at 803, appeals of denials of disqualification would amount to only a small fraction of the number of appeals that discovery orders could generate.

49. Professor Moore has endorsed the combination of these approaches. 9 MOORE ¶ 110.11, at 135-36; *id.* ¶ 110.13[10], at 190. For a discussion of § 1292(b), see notes 5 & 12 *supra*. Several courts of appeals have suggested the use of § 1292(b) for orders denying disqualification. *E.g.*, Cord v. Smith, 338 F.2d 516, 521 (9th Cir. 1964); Marco v. Dulles, 268 F.2d 192, 193 (2d Cir. 1959). The district court in E.F. Hutton & Co. v. Brown, 305 F. Supp. 371 (S.D. Tex. 1969), certified an appeal from its order disqualifying plaintiff's counsel and, in a supplemental memorandum, examined the certification question at length. The court found that, when counsel was disqualified, delaying appeal until after final judgment would render the order moot, but plaintiff would have incurred the delay of finding new counsel and the expense of giving the new attorney the time necessary to digest the files already amassed by the disqualified counsel. In this sense an appeal "[would] not significantly retard, and may materially advance the prosecution of this litigation." *Id.* at 403. Although Judge Noel stated he was

certify the order for immediate appeal,[50] an appellate court could review the order on a petition for mandamus if the order showed a possible abuse of power by the trial judge, or the question raised was a novel and substantial one, or the trial court had applied a new or different standard requiring immediate review.[51] The certification-or-

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firmly convinced that there should be a disqualification in that case, he found there was ground for difference of opinion, especially since commentators disagreed on several of the questions involved. The parties themselves, as well as attorneys and prospective litigants generally, were entitled to have a definitive ruling on the problem of professional ethics presented by the case. In summation, Judge Noel stated:

> Interlocutory appeals are luxuries which litigants and the judicial system can seldom afford, but the Court feels that in this case, a denial of an interlocutory appeal would prove even more costly.

Id.

At least one district court has certified an order denying disqualification of counsel, but the Court of Appeals for the Tenth Circuit, after first granting the petition for appeal under § 1292(b), dismissed the appeal as improvidently granted. Waters v. Western Co. of N. America, 436 F.2d 1072 (10th Cir. 1971). The opinion contains strong language that the control of attorneys in trial litigation is a matter within the discretion of the trial judge, and that the exercise of this discretion will not normally be disturbed on appeal. Nevertheless, the court's initial granting of the petition to appeal indicates that it would be willing to entertain appeals of orders involving serious conflicts of interest. Here, after petition for appeal was granted, the court found that there was no proper trial record of the issue and that co-counsel for plaintiff disagreed on whether appeal under § 1292(b) should be taken. The court did not discuss whether the order might be directly appealable under § 1291, although its silence on this question, as well as its dismissal of appeal under § 1292(b), might indicate that the court believed the order was not directly appealable. For an excellent discussion of § 1292, its legislative history, and its purposes, and when it should be used for appeal, see Katz v. Carte Blanche Corp., 496 F.2d 747, 753-56, 764-65 (3d Cir. 1974).

50. Note that Judge Weinstein refused to amend his order to include a § 1292(b) statement. *See* note 5 *supra* and accompanying text. According to Judge Noel, the question to be considered "is not whether an appeal can be permitted, but whether it should be." E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 402 (S.D. Tex. 1969). It is not for a district court to decide when appeal is permitted under § 1291 or § 1292(a), since those are questions for a court of appeals, but rather to make findings under FED. R. CIV. P. 54(b) or § 1292(b) as to the need for prompt appeal.

If certification under § 1292(b) was proper in a case where disqualification was granted, as Judge Noel thought in *Hutton*, such certification seems even more appropriate when disqualification is denied, because the injury that may result from erroneously allowing an attorney to remain as counsel is greater than the possibility of delay and expense incident to disqualification. *See* notes 44-46 *supra*.

51. Correcting an abuse of power by a lower court is the traditional basis for issuing a writ of mandamus. *See* note 9 *supra*. Advisory mandamus, a term describing the use of mandamus to review new and important questions, is based on Schlagenhauf v. Holder, 379 U.S. 104 (1964). Although the ability of courts to review such issues is questionable when the traditional allegations of usurpation of power are absent, some courts have cited *Schlagenhauf* and have claimed such power. *See, e.g., In re* Ellsberg, 446 F.2d 954 (1st Cir. 1971); United States v. United States Dist. Court, 444 F.2d 651,

mandamus approach might be preferable if a court desired to review the order and yet protect the professed sanctity of the final judgment rule.[52] Allowing direct appeal, however, has the advantage of per-

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656 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972). *See generally* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973). Review by mandamus of a trial court's departure from a traditional standard is within an apellate court's supervisory power. This supervisory mandamus, while relatively undefined in scope, is based on LaBuy v. Howes Leather Co., 352 U.S. 249 (1957). *See generally* 9 MOORE ¶ 110.26.

In a long and eloquent opinion, filled with policy arguments against unnecessary restrictions on young attorneys temporarily associating themselves with large law firms, Judge Weinstein departed from the traditional standards employed in determining disqualification. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581 (E.D.N.Y. 1973). He painted an elaborate picture of large law firms monopolizing the best legal talents for their lcients. If, in addition, the Canons imply restrictive covenants needlessly interfering with the freedom of both litigants and young attorneys, he felt that serious antitrust questions could arise. *Id.* at 589-91. The facts, as found by Judge Weinstein, may not have required disqualification under the traditional "substantially related" test, first enunciated in T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268 (S.D.N.Y. 1953). Yet, having enunciated a new standard affecting innumerable present and past lawyers in large New York law firms and their clients, Judge Weinstein should have certified the order for immediate appeal. Since Judge Weinstein did not certify the order for appeal under § 1292(b), however, this case would have been an appropriate one for the use of supervisory mandamus, even if the court of appeals found it unnecessary to reverse the decision. Although the considerations that might persuade a district judge to certify an appeal under § 1292(b) need not be as substantial as those requiring the extraordinary remedy of mandamus, the order in this case would seem to satisfy the requirements for review by either method.

52. Since review under the mandamus approach does not require a finding that there was a final judgment, the definition of "final" is not changed; nor is there a direct attack on the federal policy against piecemeal appeals, since provisions for review by writ are as time-honored as the final judgment requirement, with regard to the federal system. *See* note 9 *supra* and accompanying text; *cf.* 38 TEXAS L. REV. 792, 793-94 (1960) (indicating Texas would entertain writ of mandamus but not direct appeal of order denying disqualification). Some states have used the writ of certiorari approach to grant review of some orders refusing to disqualify opposing counsel. *See, e.g.*, Brasseaux v. Girouard, 214 So. 2d 401 (La. Ct. App. 1968); Kurbitz v. Kurbitz, 77 Wash. 2d 943, 468 P.2d 673 (1970). Some states allow direct appeals. *See, e.g.*, Schmidt v. Pine Lawn Memorial Park, Inc., 86 S.D. 501, 198 N.W.2d 496 (1972). California allows such direct appeals via the injunction method. *See* note 3 *supra*. New York law provides for appeal as of right from any order deciding a motion that affects a substantial right or involves some part of the merits. N.Y. CIV. PRAC. §§ 5701(a)(2)(iv), (v) (McKinney 1963).

The mandamus approach has the advantage of allowing the court of appeals to limit the number of cases it reviews, since the writs are discretionary and a court can reject a petition for a writ without hearing. 9 MOORE ¶ 110.10, at 136. The use of mandamus to review a judge's refusual to disqualify himself when a party files an affidavit of bias or prejudice under 28 U.S.C. § 144 (1970) exemplifies how such a system of review would probably operate for disqualifications of counsel. Professor Moore notes that "al-

mitting the appellate court to adjudicate the merits of the question without lingering over jurisdictional issues.

Despite these alternatives, the Second Circuit has taken a definite position allowing direct appeal of all orders either granting or denying disqualification. Its unanimous en banc decision may influence those circuits not already permitting such appeals to reconsider their positions.[53] Finally, the court's willingness to consider practical problems caused by unappealability—such as uncertainty, prejudicial error, and irreparable injury—may induce more litigants to attempt appeals of presently unappealable interlocutory orders.[54]

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though the courts of appeal insist that review by mandamus may be had only in exceptional cases, it appears to be granted rather commonly in this area . . . ." 9 MOORE ¶ 110.13[10], at 187-88. For discussions of the history of disqualification of judges and analyses of various proposed changes see Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROB. 43 (1970); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736 (1973).

53. The Ninth Circuit may decide to grant direct appeals rather than use the mandamus approach. Its decision in Cord v. Smith, 338 F.2d 516 (9th Cir. 1964), did not expressly consider the collateral order doctrine, and there was considerable reliance in that opinion on the now overruled *Fleischer* case. *See* note 18 *supra*. The Third Circuit was obviously convinced of the desirability of allowing immediate appeal, and it may now be less inclined to restrict the availability of such appeal. *See* notes 16 & 35 *supra*. The Fourth and District of Columbia Circuits, *see* notes 19 & 37 *supra*, as well as those circuits which have not yet faced the issue at all, may be similarly influenced to allow direct appeals.

54. In United States v. Beckerman, Civil No. 74-2478 (2d Cir., May 13, 1975), the Second Circuit held that a denial of a motion to dismiss a criminal indictment on the ground of double jeopardy was directly appealable. The court noted that this "logical extension of the concept of appealability expressed in *Cohen*" was "in keeping with *Silver Chrysler* . . . ." *Id.* at 3510.