CASE COMMENTS

DUAL REPRESENTATION IN UNRELATED MATTERS PERMITTED WITH CLIENT CONSENT WHEN FIRM CAN PROTECT CLIENTS' BEST INTERESTS

Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339 (9th Cir. 1981)

In *Unified Sewerage Agency v. Jelco Inc.*,[1] the Court of Appeals for the Ninth Circuit rejected a per se rule against adverse multiple client representation and clarified the appropriate preconditions to such representation under the Code of Professional Responsibility (Code).[2]

Jelco, a Utah corporation and the prime contractor on a construction project in Oregon, approached Kobin & Meyer, a Portland law firm, for representation in a suit against Ace Electric (Ace), its electrical subcontractor.[3] Kobin & Meyer had represented Teeples & Thatcher, Jelco's concrete subcontractor, as general counsel for over ten years.[4] Attorney Meyer informed Jelco that the firm represented Teeples in a potential dispute with Jelco and that the prime contractor should obtain other counsel for its litigation with the electrical subcontractor.[5] Meyer repeatedly told Jelco of Kobin & Meyer's intention to represent Teeples in all matters and asked Jelco to reconsider whether it would be in Jelco's best interest to obtain other counsel.[6] Each time Jelco expressed a desire to retain Meyer's representation in the Ace litigation regardless of developments in the Teeples-Jelco dispute.[7] Meanwhile,

1. 646 F.2d 1339 (9th Cir. 1981).

2. The District Court for the District of Oregon adopted the disciplinary rules of the State Bar of Oregon. *See* 646 F.2d at 1342 n.1. *See also* LR 3(d), OR. R. CT. 318 (West 1980). The state bar adopted the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter cited as CODE]. *See infra* note 11.

3. Jelco provided materials from a different equipment supplier than stipulated in the Ace-Jelco subcontract. Ace alleged that this changed the provisions of the subcontract and sought additional remuneration from Jelco. 646 F.2d at 1342.

4. Kobin & Meyer also had experience representing other construction companies during that time. *Id.*

5. Teeples had expressed discontent with the order and progress of cement work on the project. *Id.* at 1343.

6. Jelco reevaluated Kobin & Meyer's representation after a potential settlement with Teeples was unsuccessful. After Jelco lost the liability issue in the Ace litigation and Teeples had filed suit against them, Jelco again decided Meyer should continue representing them on the damages issue in the Ace litigation. *Id.*

7. *Id.*

Kobin & Meyer filed suit for Teeples against Jelco.[8] Months later, Jelco dismissed Kobin & Meyer from the Ace litigation and filed a motion to disqualify the firm from representing Teeples in its action against Jelco.[9] The district court denied Jelco's disqualification motion[10] based on alleged violations of Canons 4, 5, and 9 of the Code.[11]

8. Unified Sewerage Agency contracted with Jelco for Jelco's services as general contractor on the project. Jelco, in turn, subcontracted with Teeples. Unified Sewerage Agency brought this action on behalf of Teeples. *Id.* at 1342.

9. *Id.* at 1343. The disqualification motion forced the *Unified* court to address the issue of the attorney's alleged conflict of interest. By mandating judicial review, disqualification motions may provide the parties with some protection regardless of whether the court grants the motion. *See, e.g.,* Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975) (disqualification is the proper remedy to ensure absolute fidelity and guard against abuse of confidential information); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 376 (S.D. Tex. 1969) (mem.) (motion to disqualify is proper procedure to bring conflict of interest to court's attention).

The purpose of disqualification is to protect the client, not to punish the attorney. *See, e.g.,* City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 206 (N.D. Ohio) (ensures attorney cannot prejudice client with confidential information), *aff'd mem.,* 573 F.2d 1310 (6th Cir. 1977), *cert. denied,* 435 U.S. 996 (1978). *See also* W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976) (purpose not to punish errant attorney, but to protect other parties). *See generally* Comment, *Disqualification of Counsel: Adverse Interests and Revolving Doors,* 81 COLUM L. REV. 199, 201 (1981) (confidential information obtained from client may not be used to client's detriment).

The courts balance several competing policy considerations in making the disqualification decision. They must try to preserve a person's right to choose counsel, protect the former client's interest in preventing unauthorized use of confidential information previously disclosed to the attorney, avoid disqualifying the attorney when the purpose of the motion is purely tactical, and preserve the integrity of the profession. *See, e.g.,* IBM Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978) (extremely important to maintain public confidence in persons involved in administration of justice); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 564-65 (2d Cir. 1973) (balance right to choose counsel and maintenance of high standards of ethical professional responsibility); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 196 (N.D. Ohio), (right to choose counsel secondary to maintenance of high standards of attorney conduct and scrupulous administration of justice), *aff'd mem.,* 573 F.2d 1310 (6th Cir. 1977), *cert. denied,* 435 U.S. 996 (1978).

10. 646 F.2d at 1343-44. The district court's power to disqualify is incident to its power to police the conduct of attorneys appearing before it. *See* Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980); Schloetter v. Railoc, Inc., 546 F.2d 706, 710 (7th Cir. 1976); Gas-a-tron v. Union Oil Co., 534 F.2d 1322, 1324 (9th Cir.) (per curiam), *cert. denied,* 429 U.S. 861 (1976); Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 270-71 (2d Cir. 1975). *But cf.* Community Broadcasting, Inc. v. FCC, 546 F.2d 1022, 1027 (D.C. Cir. 1976) (appellate courts should not act as overseers of ethics); W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976) (court's business is to dispose of litigation and not to oversee ethics, unless trial actually tainted by improper conduct).

11. CODE, *supra* note 2. Canon 4 states: "A Lawyer Should Preserve the Confidences and Secrets of a Client." Canon 5 provides: "A Lawyer Should Exercise Independent Professional Judgement on Behalf of a Client." Canon 9 states: "A Lawyer Should Avoid Even the Appearance of Impropriety."

The Code of Professional Responsibility, adopted by the ABA on August 12, 1969, and effective on January 1, 1970, replaced the Canons of Professional Ethics (1908). Canons 4 and 5 are modi-

On review of Jelco's petition for a writ of mandamus[12] the Ninth Cir-

fications of former Canons 6 and 37. *See* R. WISE, LEGAL ETHICS 65 (2d ed. 1970); Note, *The Second Circuit and Attorney Disqualification*—Silver Chrysler *Steers in New Direction,* 44 FORDHAM L. REV. 130, 130 n.2 (1975). Canon 9 has no counterpart in the former Canons. *See* Comment, *Ethical Considerations When an Attorney Opposes a Former Client: The Need for a Realistic Application of Canon Nine,* 52 CHI.-KENT L. REV. 525, 530-31 (1975).

The Code of Professional Responsibility consists of Canons, which express the general standards of professional conduct expected of lawyers; Ethical Considerations, which are aspirational, ethical objectives for which attorneys should strive; and Disciplinary Rules, which are mandatory and subject attorneys to disciplinary action for conduct contrary to their directives. *See* CODE, *supra* note 2, Preliminary Statement. On March 11, 1975, the Oregon Supreme Court adopted Canons 4, 5, and 9, and the accompanying Ethical Considerations and Disciplinary Rules which are identical to the Code of Professional Responsibility provisions cited above. The United States District Court for the District of Oregon applies the Oregon Code of Professional Responsibility through Local Rule 3(d): "The members of the Bar of this Court shall be governed by and shall observe the Code of Professional Responsibility of the Oregon State Bar . . . ." OR. R. CT. 318 (West 1980). *See also* FEDERAL LOCAL RULES FOR CIVIL AND ADMIRALTY PROCEEDINGS (1981); COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, ABA CODE OF PROFESSIONAL RESPONSIBILITY BY STATE (1977).

12. Jelco actually appealed the denial of its motion to disqualify. The circuit courts are divided on appropriate procedure for appellate review of orders denying motions to disqualify. At the beginning of 1981, five circuits held that litigants had a right to appeal the interlocutory order rather than wait until final judgment to appeal. In Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (collateral order exception to the Final Judgment Rule, 28 U.S.C. § 1291 (1976)), the Supreme Court implicitly established a three-part test to determine the availability of appeals by right. A litigant can automatically bring an interlocutory appeal if he shows that the order denying the motion to disqualify conclusively determines the question in dispute, resolves an important question separate from the main action, and is effectively unreviewable on appeal from a final judgment. If a litigant meets this test, the order is final and appealable under § 1291 even though it does not end the litigation.

In Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981), *aff'g in part and vacating in part In re* Multipiece Rim Products Liability Litigation, 612 F.2d 377 (8th Cir.) (en banc), a unanimous court held that the denial of a motion to disqualify counsel does not meet the third criterion. The Court ruled that delaying appeal from the denial of the motion until final judgment would not prejudice the movant. The Court held that orders denying attorney disqualification motions were not appealable. *Id.* at 376-77.

A second means to obtain judicial review of an order denying disqualification is to obtain both certification from the district court and permission from the circuit court. 28 U.S.C § 1292(b) (1976). *See, e.g., In re* Multipiece Rim Products Liability Litigation, 612 F.2d 377, 378 (8th Cir.) (en banc) (movant failed to obtain permission of the circuit court), *aff'd in part and vacated in part sub nom.* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981); Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 606 (8th Cir. 1977) (movant must use certification process), *cert. denied,* 436 U.S. 905 (1978); Cord v. Smith, 338 F.2d 516, 521 (9th Cir. 1964) (dicta) (appeal by certification proper), *clarified by,* 370 F.2d 418 (9th Cir. 1966).

Mandamus is also used to appeal disqualification denials. *See, e.g.,* Trone v. Smith, 621 F.2d 994, 996 n.1 (9th Cir. 1980) (mandamus alowed); Melamed v. ITT Continental Baking Co., 592 F.2d 290, 296 (6th Cir. 1979) (dicta that petition for a writ of mandamus granted only in the exceptional case); Community Broadcasting, Inc. v. FCC, 546 F.2d 1022, 1028 (D.C. Cir. 1976)

cuit affirmed[13] and *held*: The Code permits dual representation of clients who knowingly consent when the matters are unrelated and it is obvious that the firm can adequately represent the best interests of each client.[14]

Canon 4[15] of the Code applies when an attorney represents an interest adverse to that of a former client.[16] Courts apply the substantial relationship test, first promulgated in *T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.*,[17] when ruling on disqualification motions. The test mandates disqualification if the attorney's present representation is substantially related to the subject matter of the prior representation of

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(mandamus allows court flexibility; prevents injustice while maintaining the final judgment rule). *See also* 28 U.S.C. § 1651 (1976) (All Writs Act).

The *Unified* court considered Jelco's appeal from the ordinarily nonappealable disqualification denial to be a petition for a writ of mandamus. In determining whether to grant extraordinary relief, the Ninth Circuit used a five-part test set forth in Bauman v. United States Dist. Court, 557 F.2d 650, 654-55 (9th Cir. 1977). 646 F.2d at 1344. The propriety of granting mandamus for interlocutory review of orders denying disqualification of counsel is questionable, however, in light of two recent Supreme Court decisions. *See* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373-74 (1981) (immediate review not necessary because a new trial will correct injustice); Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980) (per curiam) (when matter is discretionary, litigant's right to mandamus is not necessary because review of the propriety of the order for a new trial by direct appeal after final judgment provides full redress). The *Unified* court distinguished *Unified* from *Firestone* by stating that the irreparable harm that would result from delay in review of *Unified* was too great to force the parties to wait until final judgment to appeal denial of the motion. 646 F.2d at 1344 n.2. The *Firestone* court rejected the same contention. 449 U.S. at 378 (quoting Armstrong v. McAlpin, 625 F.2d 433, 438 (2d Cir. 1980)).

The *Unified* court also granted mandamus because the case was one of first impression in the ninth circuit and it wanted to establish a clear standard for the profession and the public to follow. 646 F.2d at 1344.

13. 646 F.2d at 1352. The district court's ruling will be affirmed unless it is clearly erroneous, *see* Brennan's Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 171 (5th Cir. 1979); Woods v. Covington County Bank, 537 F.2d 804, 810 (5th Cir. 1976), or an abuse of discretion, *see* Government of India v. Cook Indus., Inc., 569 F.2d 737, 740 (2d Cir. 1978); Gas-a-tron v. Union Oil Co., 534 F.2d 1322, 1325 (9th Cir.) (per curiam), *cert. denied,* 429 U.S. 861 (1976); Kroungold v. Triester, 521 F.2d 763, 765 n.2 (3d Cir. 1975); Greene v. Singer Co., 461 F.2d 242, 243 (3d Cir.) (per curiam), *cert. denied,* 409 U.S. 848 (1972).

14. 646 F.2d at 1344 n.3, 1348-49 (1981).

15. *See supra* note 11. *See also* CODE, *supra* note 2, EC 4-1 to -6, DR 4-101.

16. Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 252 (5th Cir. 1977) (per curiam); Akerly v. Red Barn System, Inc., 551 F.2d 539, 544 (3d Cir. 1977); Gas-a-tron v. Union Oil Co., 534 F.2d 1322, 1325 (9th Cir.) (per curiam), *cert. denied,* 429 U.S. 861 (1976); Redd v. Shell Oil Co., 518 F.2d 311, 315 (10th Cir. 1975); American Roller Co. v. Budinger, 513 F.2d 982, 984 (3d Cir. 1975).

17. 113 F. Supp. 265, 268 (S.D.N.Y. 1953). Courts apply the substantial relationship test under Canon 4 of the 1970 Code of Professional Responsibility even though the test preceded the Code by 17 years. *See, e.g., supra* note 16 and *infra* notes 18-24.

his former client.[18] Courts applying the substantial relationship test assume that the attorney obtained confidential information as a by-product of the previous relationship[19] that would damage the former client's interests if used against him.[20] Disqualification encourages the free flow of information that is necessary for the attorney to represent a client adequately[21] by ensuring that confidences or secrets[22] cannot

18. *See, e.g.,* Brennan's Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168 (5th Cir. 1979) (trademark infringement cases); Schloetter v. Railoc, Inc., 546 F.2d 706 (7th Cir. 1976) (patent infringement cases); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382 (3d Cir. 1972) (plaintiff's attorney previously employed by defendant's sister corporation), *cert. denied,* 411 U.S. 986 (1973); Fund of Funds, Ltd. v. Arthur Andersen & Co., 435 F. Supp. 84 (S.D.N.Y.) (mem.) (defendant's former regional counsel representing plaintiff), *aff'd,* 567 F.2d 225 (2d Cir. 1977).

19. *See, e.g.,* NCK Org., Ltd. v. Bregman, 542 F.2d 128, 134 (2d Cir. 1976) (presume attorney received confidential information; possible use of confidences necessitates disqualification); Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975) (disqualification proper to prevent possibility of inadvertent use of confidential information); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973) (strict prophylactic rule to protect client); United States v. Trafficante, 328 F.2d 117, 120 (5th Cir. 1964) (confidential information presumed to have passed).

20. *See* 113 F. Supp. 265.

> No client should ever be concerned with the possible use against him in future litigation of what he may have revealed to his attorney. Matters disclosed by clients under the protective seal of the attorney-client relationship and intended in their defense should not be used as weapons of offense.

Id. at 269. *See also* Trone v. Smith, 621 F.2d 994, 998-99 (9th Cir. 1980) (use of confidences disclosed in prior attorney-client relationship prevented by disqualification because possible breach of confidence would harm client); Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 252 (5th Cir. 1977) (no inquiry whether attorney intends to, or is likely to, use damaging disclosures against his former client); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 570-71 (2d Cir. 1973) (unfair for attorney to use confidential information against former client).

21. Ethical Consideration 4-1 states that:

> A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system . . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

CODE, *supra* note 2, EC 4-1. *See also* Emle Indus. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973) (high ethical standards permit client to discuss problems in detail without fear of a breach of confidence); MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 175-77 (E. Cleary 2d ed.) 1972) (attorney must be fully informed about client's case to function effectively, and preventing the attorney from using the information against the client encourages full disclosure). Ethical Consideration 4-4 states that: "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge . . . ." CODE, *supra* note 2, EC 4-4. Thus the client, the holder of the attorney-client privilege, can silence the attorney from ever repeating statements made confidentially within the scope of the relationship.

In addition to the evidentiary attorney-client privilege, the attorney has an ethical duty to main-

later prejudice the client.[23] Disqualification is also necessary to uphold the ethical standards of the profession.[24]

Under the original substantial relationship test,[25] once an attorney-client relationship is proven by the former client,[26] there is an irrebuttable presumption that confidential information has been passed.[27] This presumption mandates automatic disqualification of counsel from adverse representation.[28] Courts have developed, however, exceptions

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tain his client's information, secrets, and confidences. *See, e.g.,* Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 171-72 (5th Cir. 1979). *See also* cases cited *infra* note 23.

The attorney has an ethical duty to keep all information regarding a client confidential regardless of where the attorney obtained the information. Thus, information has a broader meaning than "confidences and secrets." The ethical duty provides greater protection for a client than the attorney-client privilege. *See* CODE, *supra* note 2, EC 4-4.

22. *See* Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973). The Code provides in part:

> (A) "Confidence" refers to information protected by the attorney-client privilege . . . , and "secret" refers to other information gained in the professional relationship . . . the disclosure of which would . . . be likely to be detrimental to the client.
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> (C) A lawyer may reveal:
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> (1) Confidences or secrets with the consent of the client . . . , but only after a full disclosure to them.

CODE, *supra* note 2, DR 4-101 (Preservation of Confidences and Secrets of a Client).

23. *See* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 224 (7th Cir. 1978) (confidences disclosed in one matter harmful to client in second matter); Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 269 (D. Del. 1980) (preservation of confidence overrides search for truth). *See also supra* note 20.

24. *See, e.g.,* Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 753 (2d Cir. 1975) (maintain the highest ethical standards of professional responsibility); Hull v. Celanese Corp., 513 F.2d 568, 569 (2d Cir. 1975) (maintain scrupulous administration of justice); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 196 (N.D. Ohio 1976) (maintain integrity of bar), *aff'd mem.,* 573 F.2d 1310 (6th Cir. 1977), *cert. denied,* 435 U.S. 996 (1978); Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 267 (D. Del. 1980) (retain public trust in integrity of bar). *See generally* H. DRINKER, LEGAL ETHICS 105 (1953); R. WISE, *supra* note 11, at 258.

25. The court declined to pierce the protective cloak surrounding the attorney-client relationship to verify whether the client conveyed confidences to counsel. 113 F. Supp. at 268-69.

26. Proof that an attorney-client relationship existed is a prerequisite to disqualification under Canons 4, 5 or 9. *See* Trone v. Smith, 621 F.2d 994, 1002 (9th Cir. 1980) (relationship may be informal); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978) (relationship may exist regardless of lack of compensation); American Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1129 (5th Cir. 1971) (relationship necessary for disqualification); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 207 (N.D. Ohio 1976) (bond counsel merely a scrivener not an advocate, therefore, no attorney-client relationship), *aff'd mem.,* 573 F.2d 1310 (6th Cir. 1977), *cert. denied,* 435 U.S. 996 (1978).

27. *See, e.g.,* Westinghouse Elec. Corp. v. Gulf Oil Corp., 558 F.2d 221, 224 (7th Cir. 1978); Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 608 (8th Cir. 1977); Schloetter v. Railoc, Inc., 546 F.2d 706, 710 (7th Cir. 1976).

28. *See* Brennan's Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 171 (5th Cir. 1979) (findings of prior representation and substantive relationship mandate disqualification); Government

to the per se rule of *T. C. Theatre Corp.*[29] in response to the increasing number of disqualification motions filed solely for tactical purposes such as delay.[30] Some courts narrow the substantive grounds for disqualification to instances in which both representations involve the same issue or subject matter.[31] Others apply a rebuttable presumption that the prior client communicated confidential information to the attorney.[32] Courts that allow rebuttal must analyze the facts to deter-

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of India v. Cook Indus., Inc., 569 F.2d 737, 740 (2d Cir. 1978) (disqualification follows from proof of attorney-client relationship); Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 252 (5th Cir. 1977) (per curiam) (dicta that attorney is disqualified once former client shows representations are substantially related); Estates Theatres, Inc. v. Columbia Pictures Indus., Inc., 345 F. Supp. 93, 98-99 (S.D.N.Y. 1972) (per se disqualification).

29. 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953). *See supra* notes 25-28 and accompanying text.

30. The Second Circuit in Armstrong v. McAlpin, 625 F.2d 433, 437-38 (2d Cir. 1980) (en banc), *vacated,* 439 U.S. 1106 (1981) stated that while the court could not precisely determine the number of disqualification motions filed, it had a "clear impression that they have substantially grown in number." *Id.* at 437. The court reviewed eleven disqualification cases between 1975 and 1980. Three appeals were also terminated before review in 1978 alone. *Id.* at 437-38 n.9. The trial on the merits in *Armstrong* was delayed from June 1978 until January 1981 while the parties contested the disqualification motion. *Id.* at 438. *See also* Gould v. Lumonics Research Ltd., 495 F. Supp. 294, 297 (N.D. Ill. 1980) (motion to disqualify is a litigation strategy); North Am. Foreign Trading Corp. v. Zale Corp., 83 F.R.D. 293, 295-97 (S.D.N.Y. 1979) (motion frivolous, penalty assessed against movant). *See generally* Allegaert v. Perot, 565 F.2d 246, 251 (2d Cir. 1977); W.T. Grant Co. v. Haines, 531 F.2d 671, 677-78 (2d Cir. 1976); International Elec. Corp. v. Flanzer, 527 F.2d 1288, 1289 (2d Cir. 1975); LeFrak v. Arabian Am. Oil Co., 527 F.2d 1136, 1138-39 (2d Cir. 1975); J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J., concurring). The Supreme Court's decision in Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) should reduce the tactical appeal of disqualification motions. The Court held that certification and petition for writ of mandamus were the only means to obtain interlocutory review of orders denying disqualification motions. There is no longer an automatic right to interlocutory appeal. The effects of dilatory motions are thereby reduced, in most cases, to the time in which the district court decides the motion. *See supra* note 12.

31. *See, e.g.,* Government of India v. Cook Indus., Inc., 569 F.2d 737, 739-40 (2d Cir. 1978) (substantial relationship test met only if issues are identical or overlap substantially); Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975) (subject matters almost identical; substantially related); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 572 (2d Cir. 1973) (identical issues).

32. *See, e.g.,* Gas-a-tron v. Union Oil Co., 534 F.2d 1322, 1325 (9th Cir.) (per curiam) (attorney had access to confidential files but court inquiry determined that he did not actually obtain confidential information), *cert. denied,* 429 U.S. 861 (1976); Rossworm v. Pittsburg Corning Corp., 468 F. Supp. 168, 171-72 (N.D.N.Y. 1979) (court did not make presumption); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 209 (N.D. Ohio 1976) (presumption rebutted by evidence that no disclosure of confidential information occurred), *aff'd mem.,* 573 F.2d 1310 (6th Cir. 1977), *cert. denied,* 435 U.S. 996 (1978).

The rebuttable presumption is more consistent with practical realities of modern legal practice than is the irrebuttable presumption. Today large law firms represent multinational corporations. Attorneys, especially young associates, often work for more than one firm during their careers. As such, an attorney may work for firms representing competitors within an industry. It is unrealistic

mine whether disqualification is appropriate.[33] Attorneys who prove nonexposure to confidential information are then immunized from disqualification.[34]

The Code allows an attorney to use information obtained from a former client if the attorney receives the client's consent after full disclosure.[35] The Fifth Circuit stated in *In re Yarn Processing Patent Validity Litigation*[36] that a former client could consent to adverse representation by his former attorney.[37] In *Westinghouse Electric Corp. v. Gulf Oil Corp.*,[38] however, the Seventh Circuit held that a client's consent could

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to impute knowledge of all the confidential information in a firm's files to each attorney in the firm. Such imputation would infringe on an attorney's mobility and career prospects as well as a client's right to choose counsel. The rebuttable presumption standard maintains public respect in the judicial system by initially presuming that an attorney acquired confidential information. The presumption then realistically allows an attorney to demonstrate that he was insulated from confidential information. *See* City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 209-11 (N.D. Ohio 1976), *aff'd mem.*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 587-88 (E.D.N.Y. 1973), *aff'd*, 581 F.2d 751 (2d Cir. 1975). *See also* Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657, 666-67 (1957); Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to That of Former Client*, 55 B.U.L. REV. 61, 65 (1975); Note, *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest*, 73 YALE L.J. 1058, 1071 (1964). *See generally* Note, *supra* note 11.

33. Akerly v. Red Barn System, Inc., 551 F.2d 539, 543-44 (3d Cir. 1977) (carefully scrutinize all facts and circumstances to determine whether conduct warrants disqualification); United States v. Standard Oil Co., 136 F. Supp. 345, 367 (S.D.N.Y. 1955) (conclusion in ethics case can be reached only after a painstaking factual analysis); Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 269 (D. Del. 1980) (careful factual analysis).

34. *See, e.g.*, Akerly v. Red Barn System, Inc., 551 F.2d 539, 544 (3d Cir. 1977) (relation between attorneys not active where no confidential information had passed); Gas-a-tron v. Union Oil Co., 534 F.2d 1322, 1325 (9th Cir.) (per curiam) (attorney proved that he did not receive any confidential information in prior representation), *cert. denied*, 429 U.S. 861 (1976); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 756-57 (2d Cir. 1975) (differentiate for disqualification purposes lawyers who became heavily involved in facts of case and those who entered briefly on the periphery for a limited purpose solely relating to legal issues). *See also supra* note 31.

35. Disciplinary Rule 4-101(C) states: "A lawyer may reveal (1) confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them." CODE, *supra* note 2, DR 4-101(C). *See also infra* notes 38-41 and accompanying text.

36. 530 F.2d 83 (5th Cir. 1976).

37. *Id.* at 89. The Second Circuit, in Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 926 (2d Cir. 1954), noted that a client is most likely to consent to adverse use of prior disclosure when he knows it will not harm him in the new case. *See also* E. F. Hutton & Co. v. Brown, 305 F. Supp. 371, 400 (S.D. Tex. 1969) (mem.) (second representation proper if informed consent received from client; court ruled that no such consent had been obtained.)

38. 588 F.2d 221 (7th Cir. 1978).

not justify the use of confidential information against the client.[39] The court relied on Ethical Consideration 4-5,[40] and ruled that an attorney could use confidential information for personal use, but not against a former client in a lawsuit.[41] Courts interpret the failure of a former client to object to adverse use of confidential information as an implied consent to such use.[42] This result assumes, however, that the client would object if the attorney obtained potentially damaging information in the former representation.[43]

Canon 5 of the Code applies when an attorney represents interests adverse to those of a client represented contemporaneously in another matter.[44] Canon 5 imposes a stricter standard for disqualification than

39. *Id.* at 228-29. The court stated that it was inconceivable that a former client would want prior disclosures to harm his present case.

40. Ethical Consideration 4-5 states: "A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes." CODE, *supra* note 2, EC 4-5.

41. *See also* Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 273 (D. Del. 1980).

42. *See, e.g.,* Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 926 (2d Cir. 1954) (dictum) (lack of a challenge constitutes implied consent); North Am. Foreign Trading Corp. v. Zale Corp., 83 F.R.D. 293, 297 (S.D.N.Y. 1979) (movant should have known that all parties acquiesced in the plaintiff's attorney's dual role).

43. *See, e.g.,* Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 926 (2d Cir. 1954) (lack of challenge indicated former client's belief that attorney's use of prior disclosures could not damage ex-client's present case); Rossworm v. Pittsburgh Corning Corp., 468 F. Supp. 168, 174-75 (N.D.N.Y. 1979) (former client's failure to object to adverse representation constituted consent). *See also* IBM Corp. v. Levin, 579 F.2d 271, 280 (3d Cir. 1978); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 206-07 (N.D. Ohio 1976) *aff'd mem.,* 573 F.2d 1310 (6th Cir. 1977), *cert. denied,* 435 U.S. 996 (1978); Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 271-72 (D. Del. 1980); *supra* note 9. *Cf.* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 228 (7th Cir. 1978) (public policy dictates that client cannot consent to adverse use of confidential information).

Courts determine whether to apply Canon 4 or Canon 5 as of the date that the complaint is filed in the later, adverse representation. This prevents an attorney from filing a complaint against a client he presently represents, withdrawing from representation of that client, and then claiming that the more lenient former client standard of Canon 4 applies. Courts apply Canon 5 in such circumstances. Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976); Fund of Funds, Ltd. v. Arthur Andersen & Co., 435 F. Supp. 84, 95 (S.D.N.Y.) (mem.), *aff'd,* 567 F.2d 225 (2d Cir. 1977); Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 269-71 (D. Del. 1980).

44. Under Canon 4, representation adverse to a former client is impermissible only when there is a possibility that an attorney will use information confided to him in a prior relationship to defeat his ex-client in the present litigation. *See supra* notes 25-28. Under Canon 5, any representation adverse to a present client requires disqualification. Canon 5 dictates that an attorney serve each client with undiluted loyalty. This is impossible when an attorney represents a second party who brings suit against a preexisting client. Melamed v. ITT Continental Baking Co., 592

Canon 4 by providing that any representation adverse to the interests of an existing client is prima facie improper.[45] Canon 5 requires that an attorney represent each client with undivided loyalty[46] and fidelity.[47] The attorney has a fiduciary duty[48] to advocate and champion his client's cause[49] zealously,[50] without attempting to serve adverse interests.[51]

F.2d 290, 292 (6th Cir. 1979) (balance shifts significantly towards disqualification if representation against an existing client rather than a former client); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386-87 (2d Cir. 1976) (attorney must show that he does not have actual or apparent conflicting loyalties when bringing suit against a preexisting client). Fewer reported cases arise under Canon 5 than Canon 4 because of the difference in clarity between the two standards. In most instances it is obvious that an attorney should not litigate against an existing client. Under Canon 4, whether two representations are substantially related or whether confidential information has passed are debatable questions. Attorneys are therefore more likely to represent parties opposing former clients rather than existing clients. *See supra* note 11.

45. *See, e.g.,* IBM Corp. v. Levin, 579 F.2d 271, 280 (3d Cir. 1978); Grievance Comm. v. Rottner, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964).

46. *See, e.g.,* Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976); Haffer v. Farkas, 498 F.2d 587, 589 (2d Cir. 1974); Spector v. Mermelstein, 361 F. Supp. 30, 38 (S.D.N.Y. 1972), *modified on other grounds,* 485 F.2d 474 (2d Cir. 1973).

47. *See, e.g., In re* Farr, 264 Ind. 153, 165, 340 N.E.2d 777, 784-85 (1976); *In re* Kamp, 40 N.J. 588, 594, 194 A.2d 236, 240 (1963).

In Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976), an attorney was a partner in two law firms; one located in Buffalo, the other in New York City. The Buffalo firm represented the defendant, Cinerama, against charges of conspiracy to monopolize theatre licensing and film distribution in the Rochester area. At the same time, the New York City firm attempted to represent plaintiff, Cinema 5, in the Southern District Court for New York. The allegations included conspiracy to take over the plaintiff's corporation by stock acquisitions in order to monopolize and restrain competition in the theatre industry. The Second Circuit affirmed the order disqualifying the New York City firm from representation of Cinema 5. The court stated it was irrelevant whether the two cases were substantially related. The inquiry focused on whether there was a possibility or an appearance that the dual representation would adversely affect the attorney's loyalty or judgment. In the absence of full disclosure and consent, the court noted that it would be a rare case that an attorney could properly represent conflicting interests that could affect his professional obligations to each client. Because the attorney spent half of his time defending and half of his time suing Cinerama, the court held that the disqualification order was not an abuse of discretion. *Id.* at 1385-87.

48. Grievance Comm. v. Rottner, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964).

49. *In re* Farr, 264 Ind. 153, 169-70, 340 N.E.2d 777, 787 (1976). *See also* Trone v. Smith, 621 F.2d 994, 998-99 (9th Cir. 1980); Cinerama 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976); Estates Theatres, Inc. v. Columbia Pictures Indus., Inc. 345 F. Supp. 93, 99 (S.D.N.Y. 1972).

50. *See* Sapienza v. New York News, Inc., 481 F. Supp. 676, 679 (S.D.N.Y. 1979); *In re* Hershberger, 288 Or. 559, 567, 606 P.2d 623, 626 (1980) (per curiam); *In re* Mumford, 285 Or. 559, 561-62, 591 P.2d 1377, 1377-78 (1979) (en banc) (per curiam); *In re* Banks, 283 Or. 459, 475, 584 P.2d 284, 292 (1978) (en banc) (per curiam).

51. *See supra* note 10. Ethical Consideration 5-15 states:

If a lawyer is requested to undertake or to continue representation of multiple clients

An attorney has a duty to exercise independent professional judgment on behalf of each client.[52] An obligation to assert a claim on behalf of one client against another whom he has a duty to defend compromises the attorney's independent judgment.[53] An attorney may represent dual conflicting interests only by fulfilling the two-part test of Disciplinary Rule 5-105(C).[54] Under Rule 5-105(C) an attorney may represent multiple clients if he first obtains consent from each client after full disclosure of the potential adverse effects of dual representation. It must also be obvious to the attorney that he can adequately represent each client's interests.[55]

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having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. . . . If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with . . . resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially.

CODE, *supra* note 2, EC 5-15.

52. *See, e.g.*, IBM Corp. v. Levin, 579 F.2d 271, 280 (3d Cir. 1978) (independent professional judgment impaired by adverse representation of existing client); Moritz v. Medical Protective Co., 428 F. Supp. 865, 876 (W.D. Wis. 1977) (attorney's judgment adversely affected by client's suit against him).

53. Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976) (improper for attorney to defend client in one action and simultaneously sue same client in a separate litigation). *See supra* notes 44 & 47. *See also* CANONS OF PROFESSIONAL ETHICS, Canon 6 (1908). Former Canon 6 stated:

> It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.
>
> The obligation to represent the client with undivided fidelity and not to divulge his secrets and confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

Id., *repealed by* CODE, *supra* note 2. *See* H. DRINKER, *supra* note 24, at 311.

54. Disciplinary Rule 5-105 provides in part:

> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, . . . except to the extent permitted under DR5-105(C).
>
> (C) [A] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

CODE, *supra* note 2, DR5-105.

55. Failure to comply with either part of DR5-105(C)'s test results in disqualification. A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 37 (1976); ABA Committee on Professional Ethics, Informal Op. No. 1282 (1973), 1235 (1972); ABA Committee on Professional Ethics, Formal Op. No. 331 (1972).

Canon 6 of the 1908 Canons of Professional Ethics did not contain an obviously adequate representation requirement.[56] Rather, it merely required mutual consent after full disclosure.[57] Consequently, case law under DR 5-105(C) of the 1970 Code relies primarily on the consent after full disclosure test with sparse mention of the obviously adequate representation requirement.[58] The Oregon Supreme Court, however, in *In re Porter*[59] stated that a literal interpretation of DR 5-105(C) would make representation of conflicting interests nearly impossible. The court proposed a per se rule that would prevent dual representation of conflicting interests in all cases. The court postulated that once an adverse effect on the exercise of an attorney's independent judgment is shown, it would not be obvious that he could adequately represent each client's best interests.[60]

Unlike the factors constituting obvious adequate representation, the requirements of full disclosure are well developed by case law. A lawyer must inform each client of his relationship with the other client, the scope of that representation, and all possible consequences of dual representation.[61] He must explain the nature of the conflict in sufficient detail for the client to understand that it may be to his advantage to retain independent counsel.[62]

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56. Disciplinary Rule 5-105(C) is a stricter standard for disqualification than former Canon 6. Canon 6 dealt with direct conflicts of interest between an attorney's clients. Disciplinary Rule 5-105(C) applies not only to direct conflicts of interest, but also to cases in which an attorney's representation of one client will adversely affect his loyalty and judgment in representation of another client. *Compare* former Canon 6, *supra* note 53, *with* Disciplinary Rule 5-105(C), *supra* note 54.

57. *See supra* note 53.

58. Occasionally courts have stated that it is not "obvious" that an attorney can adequately represent two clients, but no case has established the requirements of obviously adequate representation. *See* Sapienza v. New York News, 481 F. Supp. 676, 680 (S.D.N.Y. 1979) (not obvious that attorney can adequately represent both parties in antitrust case); Rice v. Baron, 456 F. Supp. 1361, 1376 (S.D.N.Y. 1978) (not obvious that attorney can adequately represent two counterclaimant defendants).

59. 283 Or. 517, 584 P.2d 744 (1978) (en banc) (per curiam).

60. *Id.* at 528 n.5, 584 P.2d at 749 n.5.

61. *See, e.g.,* E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 396-97 (S.D. Tex. 1969) (mem.) (amount of disclosure required varies with facts and circumstances; attorney must disclose information sufficient for client to make informed choice); *In re* Kamp, 40 N.J. 588, 595, 194 A.2d 236, 240-41 (1963) (attorney should inform clients of possible future conflicts and reveal which client he intends to represent should a conflict develop). *See also* CODE, *supra* note 2, EC 5-16, EC 5-19; H. DRINKER, *supra* note 24, at 105, 120-21.

62. *See, e.g., In re* Boivin, 271 Or. 419, 424, 533 P.2d 171, 174 (1975) (en banc) (per curiam) (attorneys must convey reasons why independent counsel's undiluted loyalty serves client's best

Once an attorney shows that he has made full disclosure to each client, the inquiry shifts to the issue of consent.[63] Conduct that would otherwise result in disqualification is permissible if each client consents after full disclosure of the nature and consequences of the dual representation.[64] Public policy or undue prejudice to one party may, however, mandate disqualification despite each client's consent.[65] Furthermore, courts apply a per se rule that any representation against an existing client is improper without the client's consent.[66] To prevent future conflicts of interest,[67] courts grant disqualification motions

interests). *See also* CODE, *supra* note 2, EC 5-19; L. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW 232, 235 (1971); R. WISE, *supra* note 11.

63. A client cannot knowingly waive his right to independent counsel without full disclosure. *See* E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 397 (S.D. Tex. 1969) (mem.); *In re* Kamp, 40 N.J. 588, 595, 194 A.2d 236, 240 (1963); *In re* Boivin, 271 Or. 419, 424, 533 P.2d 171, 174 (1975) (en banc) (per curiam). Full disclosure to only one client is insufficient and will prompt disqualification. *See* E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 400-01 (S.D. Tex. 1969) (mem.) (attorney who did not disclose or obtain former client's consent to adverse representation ordered to withdraw from case); *In re* Kali, 116 Ariz. 285, 286-88, 569 P.2d 227, 228-29 (1977) (en banc) (improper for attorney to arrange loan between clients without fully informing each); *In re* Farr, 264 Ind. 153, 162-69, 340 N.E.2d 777, 779-87 (1976) (ethical violation where law firm represents plaintiff for personal injury and also represents defendant's liability insurer, unless firm fully discloses each representation to each client); *In re* Kamp, 40 N.J. 588, 595, 194 A.2d 236, 240 (1963) (attorney who represents buyer and seller, without informing buyer, violates Code).

64. *See, e.g.*, Melamed v. ITT Continental Baking Co., 592 F.2d 290, 293 (6th Cir. 1979) (representing competitors); Kagel v. First Commonwealth Co., 534 F.2d 194, 195 (9th Cir. 1976) (per curiam) (court allowed representation of potential conflicting interests in bankruptcy action because there was full disclosure and implied consent); Gould v. Lumonics Research, Ltd., 495 F. Supp. 294, 297 (N.D. Ill. 1980) (proper for patent assignee to represent consenting patent holder in infringement suit).

65. *See, e.g., In re* A & B, 44 N.J. 331, 333, 209 A.2d 101, 103 (1965) (per curiam) (improper to represent land developer and municipality even with consent); Kelly v. Greason, 23 N.Y.2d 368, 378-79, 244 N.E.2d 456, 462, 296 N.Y.S.2d 937, 946 (dictum that if attorney represented insurer and insured, court would disqualify attorney even if consent obtained); Jedwabny v. Philadelphia Transp. Co., 390 Pa. 231, 236-37, 135 A.2d 252, 254 (1957) (conflict so adverse that attorney can not represent both sides), *cert. denied*, 355 U.S. 966 (1958). *See generally* H. DRINKER, *supra* note 24, at 106 & 120 n.16; R. WISE, *supra* note 11, at 256; ABA Committee on Professional Ethics, Informal Op. No. 1157 (1970); ABA Committee on Professional Ethics, Formal Op., No. 132 (1935). Despite judicial decisions disallowing consent, the ABA has repeatedly refused to delete the consent clause. H. DRINKER, *supra* note 24, at 120 n.16 (1953). *See* CODE, *supra* note 2, DR 4-101(C)(1) & 5-105(C).

66. *See infra* note 69.

67. Rice v. Baron, 456 F. Supp. 1361, 1374 (S.D.N.Y. 1978). In *Rice*, the firm that represented the plaintiffs attempted to represent two corporations who were joined as counterclaim defendants. The court prevented the firm from undertaking representation of the counterclaim defendants. There was a potential conflict of interest because the counterclaim defendants might crossclaim or file an independent lawsuit against the plaintiffs. In order to advise the counterclaim defendants adequately concerning their legal rights, the firm would have had to suggest

under the per se rule even if the attorney did not obtain any damaging confidential information and the subject matters of the two representations are unrelated.[68] When no vital public interest is at stake and a client has given his consent after full disclosure, however, attorneys can represent clients with adverse interests.[69]

The purpose of Canon 9 is to maintain public confidence in the legal system.[70] Attorneys must avoid not only actual wrongdoing, but also

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action detrimental to the interests of their other clients, the plaintiffs. Disqualification prevented the conflict from arising. The firm's loyalty to the plaintiffs thus remained undiluted and they remained free to exercise their professional judgment without competing pressures. *Id.* at 1373-76. *See also In re* Hansen, 586 P.2d 413, 415 (Utah 1978) (Disciplinary Rule 5-105(A) designed to prevent even potential conflicts between an attorney's clients). *See supra* note 51.

68. *See, e.g.,* IBM Corp. v. Levin, 579 F.2d 271, 281 (3d Cir. 1978) (labor and antitrust representations totally unrelated); Grievance Comm. v. Rottner, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964) (cannot sue client even when no relationship between the two cases); *In re* Kushinsky, 53 N.J. 1, 3-4, 247 A.2d 665, 666 (1968) (per curiam) (irrelevant that subject matters totally unrelated, disqualify); *In re* Hedrick, 258 Or. 70, 74-75, 481 P.2d 71, 73 (1971) (en banc) (per curiam) (disqualification even though no confidential information passed concerning subject matter of present adverse representation); *In re* Hansen, 586 P.2d 413, 414-15 (Utah 1978) (improper to represent client in a criminal action while simultaneously suing that client, on behalf of another client, in a civil action).

69. *See, e.g.,* Melamed v. ITT Continental Baking Co., 592 F.2d 290, 293 (6th Cir. 1979) (no disqualification because movant knowingly consented to representation of its competitors by opponent's law firm); Whiting Corp. v. White Mach. Corp., 567 F.2d 713, 716 (7th Cir. 1977) (per curiam) (no wrongdoing because firm fully advised each client and neither objected to dual representation); Gould v. Lumonics Research, Ltd., 495 F. Supp. 294, 297 (N.D. Ill. 1980) (enthusiastic consent of all the affected clients bars disqualification); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 202 (N.D. Ohio) (movant's consent to firm's dual role constitutes waiver and movant is estopped from revoking consent to move for disqualification order), *aff'd mem.,* 573 F.2d 1310 (6th Cir. 1977), *cert. denied,* 435 U.S. 996 (1978); Fulton v. Woodford, 26 Ariz. App. 17, 20, 545 P.2d 979, 982 (1976) (dual representation of insurance company and insured proper because consent given).

In *City of Cleveland v. Cleveland Elec. Illuminating Co.* the court discussed waiver and estoppel as justifications for adverse representation after full disclosure and consent. 440 F. Supp. at 212-13. Although waiver and estoppel are distinct concepts, the legal effect of each was identical in *City of Cleveland.* Estoppel is applied when one person detrimentally relies on another's conduct. The law prevents repudiation of that conduct because of the unfairness to those who acted reasonably in reliance thereon. Waiver is the intentional, voluntary abandonment of a known legal right. *See* Matsuo Yoshida v. Liberty Mut. Ins. Co., 240 F.2d 824, 829 (9th Cir. 1957).

70. Trone v. Smith, 621 F.2d 994, 1002 (9th Cir. 1980) (preserve highest ethical standards in profession); Woods v. Covington County Bank, 537 F.2d 804, 810 (5th Cir. 1976) (ensure ethical conduct by attorneys to ensure retention of public trust in judicial system); General Motors Corp. v. City of New York, 501 F.2d 639, 649 (2d Cir. 1974) (public trust in administration of justice reason for Canon 9's appearance of evil doctrine); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1386 (3d Cir. 1972) (court and bar must supervise attorneys to maintain public confidence), *cert. denied,* 411 U.S. 986 (1973).

the appearance of impropriety.[71] Disqualifications based solely on Canon 9 are uncommon[72] but can serve as an alternative basis for disqualification.[73] A literal interpretation of Canon 9 would lead to a per se prohibition of all representation against a client, notwithstanding the Code sections authorizing consent to adverse representation. Thus, many courts have cautioned against using Canon 9 to repeal Disciplinary Rule 5-105(C).[74]

Canons 4, 5, and 9 mandate disqualification in close cases in order to maintain public respect for the judicial system.[75] An attorney's good faith is no defense to the disqualification motion.[76] For minor ethical

71. IBM Corp. v. Levin, 579 F.2d 271, 293 (3d Cir. 1978) (maintain public confidence in judicial system by disqualification when attorney's conduct appears improper); Gas-a-tron v. Union Oil Co., 534 F.2d 1322, 1324-25 (9th Cir.) (dictum that disqualification for appearance of impropriety maintains public confidence in legal profession), *cert. denied,* 429 U.S. 861 (1976); Kramer v. Scientific Control Corp., 534 F.2d 1085, 1088-89 (3d Cir. 1976) (improper for class action representative to appoint his firm as class attorney); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976) (disqualification because attorney represented conflicting interests by suing a client he represented in a separate action); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1385-86 (3d Cir. 1972) (improper acts and failure to avoid appearance of improper acts justifies attorney's disqualification).

72. Kramer v. Scientific Control Corp., 534 F.2d 1085, 1090-92 (3d Cir. 1976) (attorney class representative prevented from appointing his firm as class counsel).

73. Canon 9 is often combined with an allegation of a violation of Canon 4. *See, e.g.,* Brennan's Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168 (5th Cir. 1979); Schloetter v. Railoc, Inc., 546 F.2d 706 (7th Cir. 1976); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382 (3d Cir. 1972), *cert. denied,* 411 U.S. 986 (1973).

74. *See, e.g.,* Woods v. Covington County Bank, 537 F.2d 804, 812-13 (5th Cir. 1976) (court refused literal interpretation of Canon 9 that would require disqualification for mere appearance of impropriety); International Elec. Corp. v. Flanzer, 527 F.2d 1288, 1295 (2d Cir. 1975) (court cautioned against using Canon 9 to disqualify in all cases simply because another canon, ethical consideration, or disciplinary rule does not proscribe the challenged conduct); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 205-06 (N.D. Ohio 1976) (Canon 9 should not be broadly applied in the disqualification setting), *aff'd mem.,* 573 F.2d 1310 (6th Cir. 1977), *cert. denied,* 435 U.S. 996 (1978). *See also* CODE, *supra* note 2, DR 4-101(C)(1). *See also supra* note 51.

75. *See, e.g.,* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 225 (7th Cir. 1978) (doubt about existence of conflict of interest requires disqualification); IBM Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978) (doubt resolved in favor of disqualification); Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975) (resolve any doubt by disqualification of counsel); Chugach Elec. Ass'n. v. United States Dist. Court, 370 F.2d 441, 444 (9th Cir. 1966) (where abuse of confidential information or conflict of interest is alleged, public interest requires disqualification in case of doubt), *cert. denied,* 389 U.S. 820 (1967).

76. *See, e.g.,* Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1385 (3d Cir. 1972), *cert. denied,* 411 U.S. 986 (1973); Chugach Elec. Ass'n. v. United States Dist. Court, 370 F.2d 441, 442 (9th Cir. 1966), *cert. denied,* 389 U.S. 820 (1967); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 397-98 (S.D. Tex. 1969) (mem.); *In re* Porter, 283 Or. 517, 529, 584 P.2d 774, 750 (1978) (en banc) (per curiam).

violations, some courts advocate disciplinary action against the attorney rather than disqualification which may also harm the client.[77]

In *Unified Sewerage Agency v. Jelco Inc.*,[78] the Ninth Circuit applied Canon 5, the "present client" standard of undivided loyalty, correcting the district court's use of Canon 4's substantial relationship test.[79] The court ruled that when an attorney takes a position adverse to that of a present client, an adverse effect is presumed and necessitates disqualification under Disciplinary Rule 5-105(B).[80] The court required attorney compliance with the two-part consent test of full disclosure and obvious adequate representation to prevent disqualification.[81] The court held that attorney Meyer clearly fulfilled the consent requirement. Jelco had full knowledge of the longstanding relationship between Teeples & Thatcher and Kobin & Meyer when it retained the firm. As a result of this informed waiver,[82] and each party's good faith reliance on that waiver, the court estopped Jelco from revoking its

77. W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976) (violation of ethics does not automatically result in disqualification); Fund of Funds, Ltd. v. Arthur Andersen & Co., 435 F. Supp. 84, 99 (S.D.N.Y.) (dictum) (mem.) (do not always dismiss suit because of attorney misconduct), *aff'd*, 567 F.2d 225 (2d Cir. 1977).

The main action is delayed while the disqualification motion is on appeal. If disqualification results, the court will lose the time and energy it has expended on the matter or case. The party that suffers disqualification must incur the additional expense of retaining another attorney if it wishes to litigate the case. *See generally* O'Dea, *The Lawyer-Client Relationship Reconsidered: Methods for Avoiding Conflicts of Interest, Malpractice Liability, and Disqualification*, 48 GEO. WASH. L. REV. 692, 693 (1980); *Developments in the Law, Conflicts of Interest*, 94 HARV. L. REV. 1244, 1471 (1981).

78. 646 F.2d 1339 (9th Cir. 1981).

79. The district court determined that Jelco was a former client of Meyer's because Meyer did not represent Jelco at the time of trial and therefore applied Canon 4 to deny the motion to disqualify. The Ninth Circuit reached the same result applying Canon 5. The proper ethical standard to apply is determined as of the date Meyers filed the Teeples complaint. The present client standard was the proper test because Meyer simultaneously represented Teeples and Jelco when he filed suit for Teeples against Jelco. 646 F.2d at 1344-45, 1345 n.4. *See supra* notes 43-45 and accompanying text.

80. 646 F.2d at 1345. The court agreed with the Third Circuit's decision in IBM Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978), that an adverse effect of dual representation need not be specifically proven. *See* Disciplinary Rule 5-105(B) *supra* at note 54. *See also supra* note 63 and accompanying text.

81. 646 F.2d at 1346. *See supra* notes 53-62.

82. *See supra* note 4 and accompanying text. The district court's finding that Jelco, after full disclosure, waived any objection to Meyer's dual representation complied with Federal Rule of Civil Procedure 52(a). Rule 52(a) requires the district court, when sitting without a jury, to state the findings of fact and conclusions of law that are the basis for its decisions. FED. R. CIV. P. 52(a).

consent.[83]

The Ninth Circuit found the second part of DR-105(C), the obvious adequate representation requirement, more difficult to apply.[84] The *Unified* court rejected *Porter*'s per se rule of disqualification[85] and held that the mere possibility of inadequate representation does not abolish the client's right to consent to dual representation of adverse interests in every instance.[86] The court in *Unified* emphasized that DR 5-105(C)[87] of the 1970 Code incorporated the consent provision of Canon 6 of the 1908 Canons of Professional Ethics.[88] Moreover, the Committee on Professional Ethics has rebuffed proposals to delete the consent clause.[89] The court observed that in some cases adverse representation would be inherently inadequate because of the nature of the conflicting interests.[90] Thus, Canon 5 only allows dual representation in exceptional situations that meet the requirements of DR 5-105(C).[91] The *Unified* court held that the Code preserves an individual's right to choose counsel and does not create a "paternalistic" per se rule forbidding dual representation of adverse interests.[92] The judiciary's role, therefore, is to maintain an individual's right to choose counsel freely and to disqualify attorneys when dual representation violates policy considerations.[93]

The *Unified* decision provided a workable definition for the requirements of obvious adequate representation. The court reasoned that "obvious" is an objective standard[94] and suggested several factors to determine when representation of adverse interests is adequate. These

83. 646 F.2d at 1346 n.6. *See* City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 203-05, (N.D. Ohio 1976) (movant estopped from retroactively withdrawing consent), *aff'd mem.*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied,* 435 U.S. 996 (1978); *supra* note 64 and accompanying text.

84. 646 F.2d at 1346-51.

85. 283 Or. 517, 528 n.5, 584 P.2d 744, 749 n.5 (1978) (en banc) (per curiam) (a showing of adverse effect would preclude an attorney from ever obviously representing adverse clients adequately). *See supra* notes 59-60 and accompanying text.

86. 646 F.2d at 1347. *See supra* notes 61-62 & 69 and accompanying text.

87. *See supra* note 54.

88. 646 F.2d 1347-49. *See supra* notes 53-54 and accompanying text.

89. 646 F.2d at 1349, 1349 n.13. *See* H. DRINKER, *supra* note 24, at 120 n.16. *See supra* notes 61-65 and accompanying text.

90. 646 F.2d at 1350. *See supra* note 65 and accompanying text.

91. 646 F.2d at 1352. *See supra* note 54.

92. 646 F.2d at 1350.

93. *Id. See supra* notes 9 & 70.

94. 646 F.2d at 1348 n.12. *See supra* notes 55-56 and accompanying text.

factors include: (1) the nature of the litigation, (2) the kind of information the attorney may have had access to, (3) whether the client knows that multiple representation may be to his disadvantage and can protect his interests, and (4) the disputed questions.[95]

Applying these factors, the *Unified* court first found the nature of the two cases in question to be quite different. The Ace litigation involved a narrow issue of contract interpretation on undisputed facts. *Unified*, however, involved factual allegations that each party delayed and interfered with the order of concrete work on the same project.[96]

Turning to the second factor, the court decided that attorney Meyer obtained general insights and information from his representation of Jelco. These helpful insights included Jelco's institutional attitudes about negotiation, settlement, and business methods.[97] Meyer, however, did not have access to specific information that would help Teeples prevail over Jelco.[98] Furthermore, Jelco's general counsel fully advised the prime contractor of the risks of dual representation before Jelco retained Kobin & Meyer.[99]

After stating the general rule that an attorney should decline representation when doubt exists concerning the propriety of dual representation,[100] the court in *Unified* criticized the practice of bringing suit against an existing client.[101] The court observed that in certain circumstances counsel could continue to represent the client, yet expose himself to disciplinary action for violations of the Code's sanctions.[102] The court also recognized its duty to safeguard the public's expectation of integrity in the judicial process.[103] Here, a finding of a lack of public respect for attorneys was thought too speculative to override Teeples' right to retain its chosen attorney because Jelco had full knowledge and assumed all potential risks of dual representation.[104] The court held that Meyer adequately represented each client. Meyer thus fulfilled the

95. 646 F.2d at 1350. *See supra* note 54.

96. 646 F.2d at 1351. *See supra* notes 3 & 5.

97. The court stated that this information is "always helpful in later suits against that client." 646 F.2d at 1351.

98. *Id. See supra* notes 19-43 and accompanying text.

99. 646 F.2d at 1351. *See supra* note 6 and accompanying text.

100. 646 F.2d at 1349, 1349 n.4. *See* Ethical Consideration 5-15 *supra* note 51. *See supra* note 69.

101. 646 F.2d at 1349. *See supra* note 47.

102. 646 F.2d at 1350 n.15. *See supra* note 77 and accompanying text.

103. 646 F.2d at 1349. *See supra* notes 9, 24, 65 & 70-71.

104. 646 F.2d at 1349-50. *See supra* notes 3, 5 & 9 and accompanying text.

second part of Disciplinary Rule 5-105(C)'s test.[105] Judge Goodwin dismissed the Canon 9 allegation, ruling that Canon 9 was not intended to repeal impliedly the exceptional dual representations permitted by Disciplinary Rule 5-105(C).[106]

The *Unified* court properly concluded that the Code does not create a per se rule prohibiting dual representation of adverse interests in all cases.[107] The specific provisions of DR 5-105(C) permit clients to consent to dual representation in exceptional cases.[108] It is illogical to contend that the broad language of Canon 9 eliminates the specific exception because dual representation of adverse interests is always inadequate. DR 5-105(C) is based on the premise that dual representation is permissible if the two-part test is met.[109]

Unified aids the legal profession by enunciating guidelines for determining whether dual representation is obviously adequate pursuant to the DR 5-105(C) exception.[110] The court's reasoning, however, is overbroad in two respects. *Unified* implicitly holds that Jelco knowingly waived its right to object to attorney Meyer's use of general information potentially damaging to Jelco and that Meyer did not obtain specific, confidential information from Jelco.[111] Confidential information, however, cannot be used against a client, even if the client consents to such use.[112] Furthermore, an opponent's settlement and negotiation policy clearly provides an advantage for an attorney in litigation strategy.[113] By classifying Jelco's negotiation and settlement policy as gen-

105. 646 F.2d at 1352. *See supra* notes 53-62 and accompanying text.

106. 646 F.2d at 1352. *See supra* notes 54 & 74.

107. 646 F.2d at 1344 n.3.

108. *See supra* note 54.

109. 646 F.2d at 1334 n.3. *See supra* notes 10, 53-56 & 74. A second argument supports the contention that Canon 9 does not overrule DR5-105(C). This argument asserts that Canons express the general standards of professional conduct expected of attorneys. Noncompliance with a Disciplinary Rule, but not a Canon, however, results in disciplinary action against the attorney. Therefore, the Disciplinary Rule is more authoritative than a Canon and is not overruled thereby. *See* CODE, *supra* note 2, Preliminary Statement. *See supra* notes 53-56 & 65.

110. 646 F.2d at 1350. *See supra* text accompanying note 95. The obviously adequate representation inquiry is similar to Canon 4's substantial relationship standard. *Id.* at 1350-51. The court will inquire into some of the same factual considerations in deciding the obviously adequate representation and substantial relationship tests. *See supra* notes 31-34 & 94-95 and accompanying text.

111. 646 F.2d at 1351.

112. *See* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 228 (7th Cir. 1978); Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 273 (D. Del. 1980). *See supra* note 38-41 and accompanying text.

113. *See supra* note 97 and accompanying text.

eral rather than specific or confidential, however, the court in *Unified* refused to find that advantage so unfair as to warrant disqualification.[114]

The judiciary should not broaden the scope of general information to the detriment of the trust and confidence placed in the attorney-client relationship.[115] In order for an attorney to function effectively the client must feel free to relate all relevant information to counsel. A client will not do so if he fears that sensitive general information, like his settlement policy, could possibly be used against him in the future.[116]

The *Unified* decision deviates from prior case law in one other significant respect. The court placed great emphasis on an individual's right to choose counsel[117] and mentioned only in passing the judiciary's duty to maintain public confidence and respect for the legal system.[118] This emphasis is misplaced. Although a client's right to choose counsel is relevant in considering disqualification, the maintenance of public confidence in the judicial system is paramount.[119] Courts should therefore not extend *Unified*'s questionable balancing of these policy considerations. Furthermore, the broad reasoning in *Unified* implicitly condones and encourages representation of interests adverse to those of an ex-

114. 646 F.2d at 1351.

115. *See supra* notes 21-24 and *infra* note 116 and accompanying text.

116. Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 252 (5th Cir. 1977) (per curiam) (ensure open communication between attorney and client by precluding possibility of misuse of confidential information); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1384 (3d Cir. 1972) (client should not fear confidences will be betrayed; client encouraged to reveal all pertinent information to attorney), *cert. denied,* 411 U.S. 986 (1973); United States v. Standard Oil Co., 136 F. Supp. 345, 355 (S.D.N.Y. 1955) (free flow of information vital to our system of justice); *In re* Hedrick, 258 Or. 70, 74, 481 P.2d 71, 73 (1971) (en banc) (per curiam) (ethical prohibition against disclosure fosters trust and confidence in attorney-client relationship).

117. 646 F.2d at 1350. The court stated that clients who are advised by counsel can properly assume risks inherent in dual representation. *Id.*

118. *Id.* at 1349. *See supra* notes 9 & 24.

119. *See supra* notes 9, 24 & 70-71. The maintenance of judicial integrity is one justification for the exclusionary rule under the fourth amendment's search and seizure doctrine. A policy that justifies suppressing reliable and relevant evidence from a criminal trial is more important than a person's right to choose one particular attorney. *See, e.g.,* Mapp v. Ohio, 367 U.S. 643, 659 (1961) (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)); Savina Home Indus., Inc. v. Secretary of Labor, 594 F.2d 1358, 1363 (10th Cir. 1979). Justice Brandeis stated in dissent in Olmstead v. United States, 227 U.S. 438, 485 (1928): "If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy." Attorneys, as officers of the court, must also conduct themselves so that the public maintains confidence in the judicial system as a fair and effective forum to resolve disputes. To do otherwise breeds "contempt for the law" and encourages dispute resolution outside the judicial system.

isting client.[120]

The *Unified* decision is significant for its refusal to adopt a per se prohibition of dual representation of adverse interests and for its specification of the factors identifying obviously adequate dual representation. Unlike *Unified*, future courts should classify all information detrimental to a former client as confidential, even if it is general in nature. The judiciary also should not repeat *Unified*'s elevation of an individual's right to choose counsel over the need to maintain public respect for the legal system.

C.D.H.

120. 646 F.2d at 1349. The court observed that disciplinary action against an attorney, without disqualification, might be sufficient to maintain public respect in judicial integrity. Disciplinary action, unlike disqualification, does not harm a client. The court did not address the question whether disciplinary action would be appropriate here. In retrospect, Kobin & Meyer should have complied with Ethical Consideration 5-15 and declined to represent Jelco, especially if the nature of the potential dispute was such that litigation was inevitable. *See* 646 F.2d 1349, 1349 n.2, 1350 n.15. *See also supra* notes 21, 51 & 77.