PROFESSIONAL RESPONSIBILITY—ATTORNEY DISQUALIFICATION—WESTINGHOUSE ELECTRIC REGENERATES AN OLD IDEA—Westinghouse Electric Corp. v.Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978)

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Nowhere is Shakespeare's observation that 'there is nothing either good or bad but thinking makes it so, more apt than in the realm of ethical considerations.'

I. INTRODUCTION

The success of an attorney-client relationship often depends upon the maintenance of confidentiality and loyalty between the parties. To ensure that confidentiality and loyalty are maintained, professional codes of responsibility as enforced by the courts require attorneys to be disqualified from cases in which the confidences and secrets of a client may not be preserved, or from cases in which there may be a conflict of interest. One way in which the courts have enforced this rule is by holding that a client's confidences and secrets are imputed to all members of a firm. Under the imputation doctrine, once a client retains a lawyer in a firm, all lawyers in that firm are disqualified from representing another client whose interests would conflict with those of the participating attorney's client.

Although this rule has its virtues, it can be cumbersome and inequitable to large, multicility firms which represent many different


clients. The opportunities for disqualification due to a conflict of interest are likely to be greater in a large firm where many lawyers represent a number of different clients. The rule can be particularly harsh considering that attorneys in some large law firms have little or no contact with one another and, therefore, are not in the position to disclose their clients' confidences and secrets.

A recent series of decisions does not accept the principle of automatic imputation of knowledge to all members of the firm. These cases determine whether the attorney should be disqualified by evaluating his actual exposure to the confidences and secrets of a client, rather than the mere possibility of his exposure to such confidences and secrets.3 This pragmatic approach makes access to large firms more readily available to the individual client because fewer firms will be automatically disqualified. These decisions should benefit the large, multicity firms.

Notwithstanding these minority view decisions, the majority view of imputing knowledge to all members of a firm was recently reaffirmed in Westinghouse Electric Corp. v. Kerr-McGee Corp 4 The court in Westinghouse addressed the ethical considerations involved in disqualifying Kirkland & Ellis5 (Kirkland), a large, multicity firm. The firm's Chicago office had been retained by Westinghouse. Unknown to that office, the interests of Westinghouse were adverse to those of another client who had previously retained the firm's Washington branch. Subsequently, the client of the Washington branch sought to disqualify the Chicago office from representing Westinghouse. Although the two offices had not exchanged the confidences and secrets of either respective client, the court relied on the traditional, mechanistic, imputation approach. The court automatically imputed the confidences and secrets of one client to all members of the firm and disqualified any member of the firm from representing the other client. The court reasoned that the secrets and confidences of the first client might be revealed in the representation of the new client.

The decision in Westinghouse reaffirmed the established precedent in the Seventh Circuit.\textsuperscript{6} It rejected the minority view espoused in recent cases which required a thorough analysis of the facts in each case. This note will examine the Westinghouse decision\textsuperscript{7} in light of the underlying objectives of the ABA Code of Professional Responsibility and the cases that have interpreted the Code's application in the area of disqualification. It seeks to resolve the tension between a strict imputation approach and the development of multicity firms by establishing procedural guidelines for firms. These procedures will maintain confidentiality and loyalty between the parties while providing clients with increased individual access to the legal counsel of their choice.

II. FACTS

Kirkland, a large multicity firm with offices in Washington, D.C. and Chicago, Illinois, was retained by the American Petroleum Institute (API).\textsuperscript{8} Gulf Oil Corp. (Gulf), Kerr-McGee Corp. (Kerr-McGee), and Getty Oil Corp. (Getty) are substantial dues paying members of API. Kirkland's Washington office was preparing arguments for API for upcoming divestiture hearings\textsuperscript{9} that would oppose the adoption of legislation intended to break up the oil companies. The legal services rendered to API required Kirkland to research factual and legal questions in this complex area of corporate interrelations.\textsuperscript{10} To facilitate the representation, a

\textsuperscript{6} Schloetter v. Railoc of Ind., Inc., 546 F.2d 706, 710 (7th Cir. 1976).
\textsuperscript{7} The portions of the district court and circuit decisions concerning the motion by Noranda Mines Ltd. to disqualify Kirkland are not within the scope of this article.
\textsuperscript{8} API is national petroleum trade association which performs wide variety of cooperative efforts for the petroleum industry.
\textsuperscript{9} In October, 1975 legislative proposals were presented in Congress to break up the oil companies, both vertically (by separating their control over production, transportation, refining, and marketing entities), and horizontally (by prohibiting cross-ownership of alternative energy sources in addition to oil and gas). 580 F.2d at 1313. Kirkland was retained by committee formed to lobby against these proposals.
\textsuperscript{10} A letter dated May 4, 1976 stated that the Kirkland firm work for API should include the preparation of possible testimony, analyzing the probable legal consequences and antitrust considerations of the proposed legislation and should make an objective survey and study of the probable effects of the pending legislation, specifically including probable effects on the oil companies that would have to divest assets. \textit{Id.} The letter specified that Kirkland was to act as an independent expert counsel and hold any company information learned through these interviews in strict confidence, not to be disclosed to any other company, or even to API, except in aggregated or such other form as will preclude identifying the source company with its data. Westinghouse Elec. Corp. v. Rio Algom Ltd., 448 F Supp. 1284,
partner at Kirkland’s Washington office interviewed representatives of eight oil companies and confidentially surveyed fifty-nine members of API.\(^{11}\)

While the Washington office was representing the member oil companies of API, Kirkland’s Chicago branch was preparing a case against the oil companies. The Chicago branch brought an antitrust action in behalf of Westinghouse Electric Corp.\(^{12}\) against twelve foreign and seventeen domestic corporations engaged in various aspects of the uranium industry.\(^{13}\) The suit against the oil companies alleged that starting in 1972 a cartel agreement was arranged to rig bids, fix prices and contract terms.\(^{14}\) They had apparently agreed to “divide and allocate the world uranium market among the uranium producers, [which would] require Westinghouse and other uranium resellers to pay discriminatorily high prices.”\(^{15}\) According to the complaint, an agreement had been reached between the foreign producers and the producers of uranium in the United States. The agreement was designed to raise and stabilize world prices, “to withdraw uranium from the market, to boycott Westinghouse, to lobby foreign officials to refuse to sell uranium to Westinghouse, and to exchange market information.”\(^{16}\) Westinghouse sought a declaration that this conduct violated Section 1 of the Sherman Act and Section 73 of the Wilson Tariff Act.\(^{17}\) The complaint also requested treble damages and injunctive relief.\(^{18}\)

1291-92 (N.D. Ill.), aff’d in part, rev’d and remanded in part, sub nom. 580 F.2d 1311 (7th Cir. 1978), cert. dened, 439 U.S. 955 (1979).

11. Accompanying the survey questionnaire was a cover letter written by API’s General Counsel. The letter stated in part:

Kirkland, Ellis & Rowe is acting as an independent special counsel for API, and will hold any company information in strict confidence, not to be disclosed to any other company, or even API, except in aggregated or such other form as will preclude identifying the source company with its data.


12. The Chicago office had represented Westinghouse for many years. Id. at 1289.

13. On September 8, 1975, Westinghouse, major manufacturer of nuclear reactors, notified utility companies that 17 of its long term uranium supply contracts had become commercially impracticable under § 2-615 of the Uniform Commercial Code. In response, the affected utilities filed suit against Westinghouse. The development of Westinghouse defense led to the antitrust action. Id. at 1288.

14. Id.

15. Id.

16. Id.

17. Id.

18. Id.
ATTORNEY DISQUALIFICATION

A comparison of the API report and the complaint filed for Westinghouse indicates a basic conflict in the representations made by the firm's two offices. The final report 19 to API was released on October 15, 1976. The report's analysis, based on a thorough review of the information supplied by the oil companies, stated that the current diversification of the oil companies did not threaten overall energy competition. It concluded that the proposed legislation was not required. On the same day Kirkland's Chicago office filed Westinghouse's complaint, charging the oil companies with conspiracy to destroy competition in the uranium market and to artificially increase prices. The oil companies charged that Kirkland had taken opposing positions on the same issue. Kirkland's failure to rebut this charge was interpreted by the court as Kirkland's acknowledgement of its contradictory positions. 20

The oil companies sought Kirkland's disqualification from representing Westinghouse because the firm's Washington office had represented API. They claimed that information shared by the oil companies with the firm, and their reliance on the promise of strict confidentiality established an attorney-client relationship. They claimed that allowing the dual representation of the substantially related and conflicting interests violated Canons 4, 5, and 9 of the ABA Code of Professional Responsibility 21

Kirkland strongly denied that there was any basis for disqualifying the Chicago office as counsel for Westinghouse. Kirkland argued that Kerr-McGee, Getty and Gulf failed to establish the crucial element of a disqualification motion, that an attorney-client relationship existed between the parties. Although Kirkland agreed that it had a professional relationship with Westinghouse and API, the firm maintained that this professional relationship did not extend to the individual members of API. Kirkland produced evidence substantiating its position that it had not acted as attorney for the oil companies. 22

Kirkland further contended that the research performed for the API report did not produce any signifi-

19. The complete report, representing all aspects of the diversification question, covered 230 pages of text and 82 pages of exhibits. Uranium, the subject matter of the Westinghouse suit, is the primary subject of approximately 25 pages of text and 11 pages of exhibits. 580 F.2d at 1314.


21. See text accompanying notes 49-58 infra.

22. Kirkland emphasized requests for data in the uranium contracts litigation in the name of Westinghouse, contemporaneous written communications, and course of dealing with the oil companies.
cant confidential information that had been or was to be used against the oil companies in the Westinghouse suit.

Kirkland also argued that the firm's Washington attorneys kept their work confidential from the firm's Chicago attorneys, and vice versa. The Westinghouse antitrust suit was disclosed only to those directly involved in the matter. Securities law dictated that public disclosure of possible antitrust lawsuits be prevented. None of the Washington attorneys working on the API report knew of the separate Westinghouse antitrust complaint until it was filed in court. Similarly, the Chicago attorneys were isolated from the work being done by the Washington office and had little, if any, awareness of the API project. Kirkland's third argument was that the actual hardship and inconvenience Westinghouse would experience by disqualification far outweighed the actual or apparent prejudice to the oil companies.

The oil companies' first attempt at disqualification was rejected. In *Westinghouse Electric Corp. v. Rio Algom Ltd.*, the district court upheld Kirkland's representation. The lower court found that no attorney-client relationship existed between Kirkland and the oil companies. That conclusion mooted the claims under Canons 4

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23. There was one partial overlap between the Chicago and Washington attorneys in connection with the API antidivestiture representation. One of Kirkland's lead attorneys working on the Westinghouse antitrust complaint prepared a legal memorandum for API. The memorandum examined arguments broadening the scope of existing antitrust laws proscribing interlocking directorates. After an analysis of the facts, the district court concluded that "[t]he memorandum addresses the antitrust issues from predominantly theoretical perspective, and does not contain one word on uranium." *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 448 F Supp. 1284, 1296 (N.D. Ill.), aff'd in part, rev'd and remanded in part, sub nom. 580 F.2d 1311 (7th Cir. 1978), cert. denied, 439 U.S. 955 (1979). With this analysis, the overlap did not have any impact on the district court's determination.

24. *Id.*

25. *Id.*

26. One factor that weighed heavily in the district court's determination of the case was the magnitude and complexity of the representation. The litigation had to that point required the efforts of from eight to 14 attorneys for Westinghouse and had generated some $2.5 million in legal fees. *Id.* at 1289. Further evidence of the complexity of the litigation is apparent from Judge Marshall's decision to delay the trial date by one year, to September 1981. A spokesman for Westinghouse stated that the judge was afraid people just weren't going to be ready in time. *Wall Street Journal*, Aug. 31, 1979, at 10, col. 4. Most recent figures indicate that seven million pages of documents had been submitted during the discovery proceedings. *Id.* Both sides are expected to take more than three hundred depositions. *Id.*


28. *Id.* at 1303. The court reasoned that where there is no express or implied agreement between the attorney and the layman, the attorney-client relationship
and 5\textsuperscript{29} of the ABA Code of Professional Responsibility which are applicable only in an attorney-client relationship.\textsuperscript{30} The court did, however, hold that the ethical considerations embodied in Canon 9 were applicable to an attorney even if no professional relationship existed.\textsuperscript{31} Although the court recognized the serious ethical questions that Kirkland’s actions posed, it held that those actions were insufficient to warrant the extreme step of disqualification, particularly in a case of this complexity.\textsuperscript{32} The court also ruled that public policy weighed against disqualifying the firm. The court stated that forcing Kirkland to give up the case to another firm would inevitably delay the progress of the litigation and might compromise the just resolution of the vital public issue being litigated.\textsuperscript{33}

The circuit court reversed the district court’s decision. The court’s consideration of the threshold question of the attorney-client relationship rejected the agency analysis relied on by the lower court.\textsuperscript{34} The court reasoned that where there is a fiduciary duty between a layman and an attorney the attorney is bound by the ABA Code of Professional Responsibility in that relationship. To promote the goals and principles of the Code, the court applied the judicially created mechanism, imputation approach. The court imputed the material information gained from the research for API by the Washington office to the Chicago branch. With that knowledge imputed, there was a possibility of breaching the client’s confidences and secrets, and Kirkland was disqualified. The court rejected the argument that the actual separation of the two offices or the intentional separation of the two staffs was sufficient to avoid negative ethical inferences generated from consideration of the Code. The decision refused to recognize any distinction between actual or apparent exposure to the confidences and secrets of a client.

could be established only through examination of the relationship in light of agency law. After undertaking an exhaustive analysis of the relationship between Kirkland and the oil companies, the court concluded that an attorney-client relationship did not exist between the parties. \textit{Id.}

29. \textit{See} text accompanying notes 49-58 supra.
30. 448 F. Supp. at 1300 (citing Fred Weber, Inc. Shell Oil Co., 566 F.2d 602, 608 (8th Cir. 1977); \textit{In re Yarn Processing Patent Validity Litigation}, 530 F.2d 83, 90 (5th Cir. 1976); American Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1129 (5th Cir. 1971)).
31. 448 F. Supp. at 1304.
32. \textit{Id.}
33. \textit{Id.} at 1306.
34. \textit{See} note 23 supra.
III. THE CODIFICATION OF ETHICS IN THE UNITED STATES

To determine when the mechanistic imputation of knowledge to all members of a firm is appropriate, it is necessary to understand the historical development and the rationale behind the codified ethics applicable to the legal profession in the United States. The American Bar Association's (ABA) concern for maintaining minimum professional standards among attorneys resulted in the adoption of the Canons of Professional Ethics in 1908 (the former Canons). The Bar recognized that such provisions could help to maintain respect for the legal profession and its place in American jurisprudence. The former Canons were intended to aid law students and practicing lawyers in remaining loyal to the ethical precepts of the legal profession.

One major concern reflected in the former Canons was the attorney's obligation of confidentiality. This obligation is intended to facilitate the attorney's ability to represent his client effectively. The pledge of confidentiality encourages the client to share with his lawyer all pertinent factual information which is essential to effective representation. Confidentiality may also encourage laymen to seek legal assistance.

The principle of confidentiality was evident in three of the

35. H. DRINKER, LEGAL ETHICS 25 (1953).
36. Canons 1 through 32 were adopted by the ABA at its 31st Annual Meeting on August 27, 1908. Canons 33 through 45 were adopted at the 51st Annual Meeting on July 26, 1928. Canon 46 was adopted on August 31, 1933. Canon 47 was adopted September 30, 1937. In the period from 1928 until the adoption of the new Code in 1970, various canons were subjected to amendment and revision. See notes 46-58 and accompanying text infra.
37. The members of the bar foresaw that the consequent weakening of an effective professional public opinion clearly called for more definite statement by the bar of the accepted rules of professional conduct. See note 35 supra at 25.
38. The concept has been part of Anglo-American jurisprudence since the reign of Elizabeth I, making it the oldest of the evidentiary privileges. For an historical treatment of the evidentiary privileged, see 8 J. WIGMORE, EVIDENCE, § 2290, at 542 (McNaughton rev. 1961).
39. The lawyer-client privilege (against disclosure of confidences) is one of the oldest and most ironclad in the law. It is also one of the most sensible rules of ethics. The lawyer is often the possessor of guilty secrets. The client has done something wrong; he bares his soul to the attorney (or the attorney drags the facts out). If the lawyer were duty bound to reveal statements his client has communicated to him in private, the lawyer would be incapable of zealous representation.

J. LIEBERMAN, CRISIS AT THE BAR 140 (1978); ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 4-1 [hereinafter cited as EC]. See also note 35 supra at 131-37
former Canons. Former Canon 6\textsuperscript{40} stated that the attorney's obligation of confidentiality barred him from subsequently accepting employment from other clients if it would adversely affect confidences reposed in the attorney by a prior client. Former Canon 11\textsuperscript{41} stated that the attorney should avoid taking advantage of client confidences for personal benefit. Former Canon 37\textsuperscript{42} instructed the attorney about preserving the confidences of clients. It stated that the duty continued after the termination of the lawyer's employment by his client and extended to an attorney's employees. Em-

\hspace{1cm} 40. Adverse Influences and Conflicting Interests:
It is the duty of lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after full disclosure of the facts. Within the meaning of this canon, lawyer represents conflicting interests when, in 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 or 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.

ABA CANONS OF PROFESSIONAL ETHICS, No. 6.
41. Dealing with Trust Property.
The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.

Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.

Id. No. 11.
42. Confidences of Client.
It is the duty of lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of client to commit crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

Id. No. 37.
ployment which might involve the disclosure or use of the confidences either for the private advantage of the lawyer or his employees, or to the disadvantage of the client without the client's permission, must be declined. Employment should be discontinued when an attorney discovers that he may not be able to perform his duty fully to his former or his new client.

The second general area of ethical considerations in the former Canons which is relevant to disqualification is the concern for conflicts of interest in the lawyer's dealings with past or present clients. The duty owed to the client is based on the strong fiduciary nature of the relationship. The attorney acting primarily for the benefit of his client, becomes a source of confidences and secrets. The fiduciary duty places a special burden upon the attorney in his dealings with other clients to protect those confidences and secrets. This duty arises whenever the interests of the first client are, or could be, endangered.43 The concern for the conflicts of interest problem is reflected in former Canons 644 and 37 45

The ABA Canons of Professional Ethics did not specifically define what constituted an ethical violation. While the Canons were intended to inspire lawyers to follow certain ethical guidelines, they were not mandatory and did not set forth sanctions. As part of the continued effort to update the Canons and increase their value and applicability a Special Committee on Evaluation of Ethical Standards was established by the ABA. The committee produced the new ABA Code of Professional Responsibility which became effective on January 1, 1970.46 The goal of the present Code is to retain the sound principles of the former Canons and to form the foundation for clear instruction to the beginning practitioner. The

43. See note 35 supra at 89-189.
44. See note 40 supra and accompanying text.
45. See note 42 supra and accompanying text.
46. Unlike the former Canons, the new Code is divided into nine general canons, each of which contains Ethical Considerations and Disciplinary Rules. The Canons are statements in general terms of the standards of professional conduct. Preliminary Statement to ABA CODE OF PROFESSIONAL RESPONSIBILITY. The Ethical Considerations suggest goals which members of the profession should strive to attain. Id. The essential difference in the new Code is the Disciplinary Rules which are mandatory in character. Id. They state the "minimal level of conduct" beyond which professional behavior will not be tolerated without the initiation of disciplinary action. Id.

The Code in its present form is designed to be adopted by the appropriate agencies. Id. State bar associations that have adopted the Code are free to make changes in their version. Interested attorneys should check the form of the Code applicable to their jurisdiction.
new Code is intended as a guide for conduct and as the basis for disciplinary action.47

Canon 4 states: A Lawyer Should Preserve the Confidences and Secrets of a Client."48 This Canon, with its Ethical Considerations (EC) and Disciplinary Rules (DR), makes no changes in the settled principles of ethics previously developed in this area, although they do add specificity Canon 4 recodifies the traditional ideas encompassed by former Canons 6, 11, and 37 49 These ideas were further strengthened through numerous ABA formal opinions and informal opinions issued since 1926.50

Canon 5 states: A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."51 It is largely concerned with the effect of dual representation upon the quality of the professional service rendered to a client.52 The Canon is based on the ancient maxim that one man cannot serve two masters.53 A comparison with the former Canons indicates little substantive change in the reasoning behind disqualification for prior representation or representation of clients with conflicting interests.55 Disciplinary Rule 5-101(A) best restates the central concept behind the conflict of interest area, reasserting the single-minded fidelity with which the lawyer must devote himself to the interests of his client.56 The Canon also takes the position that when an attorney is prevented from accepting employment under a Disciplinary Rule, the members of his firm are also prohibited from accepting that employment.57 The rationale, derived from examination of the overriding Disciplinary Rule, is to avoid a situation in which the

47. See R. Wise, Legal Ethics 3-9 (2d ed. 1970).
49. See notes 40-42 supra and accompanying text.
50. See note 47 supra at 65.
51. ABA Code of Professional Responsibility, Canon 5.
52. See ABA Code of Professional Responsibility, Disciplinary Rule 5-105, Ethical Considerations 5-14 & 5-15.
53. "No man can serve two masters; for he will hate the one, and love the other; or else he will hold to one, and despise the other. He cannot serve God and mammon. Matthew 6:24. See also ABA Comm. on Professional Ethics, Opinion No. 33 (1931); Id. No. 71 (1932); Id. No. 83 (1932).
54. ABA Canons of Professional Ethics, Nos. 6, 11, & 37.
55. See notes 40-42 supra and accompanying text.
56. "Except with the consent of his client after full disclosure, lawyer shall not accept employment if the exercise of his professional judgement on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests. ABA Code of Professional Responsibility, Disciplinary Rule 5-101(A).
57 Id. at 5-101 (D).
interests of one client may impair the independent professional judgment of the attorney representing another client. The concern of the courts with attorneys involved in conflict of interest situations is reflected in the increasing number of cases in which disciplinary action has been taken, including disqualification, censure, disbarment, and refusal to enforce fee agreements.⁵⁸

Canons 4 and 5 represent recodifications of Ethical Considerations found in the former code. Canon 9's command to avoid even the appearance of impropriety adds a concept contained nowhere in the former Canons. The Ethical Considerations and Disciplinary Rules following the Canon provide some examples of possible violations. Practitioners should recognize, however that Canon 9 is applicable to all aspects of a professional relationship. Under a literal interpretation of the language to "Avoid Even the Appearance of Professional Impropriety"⁵⁹ Canon 9 would trigger disciplinary action for a broader scope of activities than those covered by Canons 4 and 5.

IV DISQUALIFICATION UNDER CODIFIED ETHICAL CONSIDERATION

To establish workable guidelines for the disqualification of counsel and to achieve the goals of the Ethical Considerations, the courts have developed a bifurcated approach. The party making the motion for disqualification must first establish that an attorney-client relationship has existed or does exist. The moving party must then prove that there is a substantial relationship between the subject matter of the two representations. The substantial relationship element requires the moving party to show that the subject matter of the initial relationship is sufficiently related⁶⁰ to the representation upon which disqualification is sought.⁶¹ It is only when there

⁵⁹ ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9.
⁶⁰ I hold that the former client need show no more than that the matters embraced within the pending suit are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation.
⁶² Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978);
In re Yarn Processing Patent Validity Litigation, 530 F.2d 83 (5th Cir. 1976); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975); Redd Shell Oil Co., 518 F.2d 311 (10th Cir. 1975); Emle Indus., Inc. v. Patentex, Inc.,
is a representation involving related material that the possibility of a breach of the client’s secrets and confidences may occur.

This two-part test for determining the disqualification of an attorney was designed to meet several considerations. The attorney-client relationship element has been developed because the rule of confidentiality should not necessarily cover all communication between the attorney and client. This is a logical corollary to the underlying purpose of encouraging the client to discuss his legal problems openly with his attorney. The protection of confidentiality is granted only to the client. The requirement that the two representations be substantially related is intended to protect the client’s communications with the attorney without unduly restricting the attorney’s right to practice law freely. The screening of cases through these two tests is designed to avoid placing the attorney in the dilemma of having to make a good faith judgment, subject to judicial review as to whether or not to accept a new client.

The basic test for disqualifying an attorney is that there be an attorney-client relationship and that the subject matter of the representations be substantially related. This test has been modified
and further developed. Under the modified approach, the court had to ascertain whether the complainant showed that the attorney had physical access to substantially related material. If the attorney did have access, even though the information was not actually communicated, an inference of communication would be made. The attorney could offer no proof to rebut the inference if the proof would disclose any of the confidences sought to be preserved. This modified approach was developed prior to the adoption of the ABA Code of Professional Responsibility and Canon 9's command to
Avoid Even the Appearance of Professional Impropriety.65

The rules pertaining to the disqualification of an individual attorney were designed to uphold the applicable Ethical Considerations. In Consolidated Theatres v. Warner Brothers Circuit Management Corp.,67 the court was faced, however, with an ethical question to which the Canons of Professional Ethics had not yet been applied. A motion was made to disqualify an attorney and his firm on the grounds that the attorney's previous employment exposed him to the confidences and secrets of a client who was an adverse party in the present suit.68 The judge concluded that there had been an attorney-client relationship and that the subject matter of the two representations was substantially related. The attorney was, therefore, disqualified under the guidelines of former Canon 6. The court also decided that the firm was properly disqualified,69 but it did not explain the extension of Canon 6 to all members of the firm.

The imputation doctrine was applied one year later in Laskey Brothers of West Virginia v. Warner Brothers Pictures70 which involved a situation similar to that in Consolidated Theatres. The court upheld the disqualification of the entire firm, stating that all members of a partnership are barred from participation in a case

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66. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9.
67. 216 F.2d 920 (2d Cir. 1954).
68. While Consolidated Theatres represents the first interpretation of Canon 6 on the disqualification question, it was not the first case to disqualify firm because of past representation of one of the partners. See In re Cowdery, 69 Cal. 32, 63, 10 P. 47 65 (1886) (dictum); Christian v. Waialua Agricultural Co., 30 Haw. 533 (1928). See also Note, Disqualification of Attorneys for Representing Interests Adverse to Former Clients, 64 YALE L.J. 917, 920 (1955).
69. 216 F.2d at 928.
70. 224 F.2d 824 (2d Cir. 1955), cert. denied, 350 U.S. 932 (1956).
when one partner has been disqualified.\textsuperscript{71} The court said that its conclusion was an extension of the literal wording of former Canons 6\textsuperscript{72} and 37\textsuperscript{73} The extension of the theory of disqualification was based on the premise that the partner possessing confidential information could enable other members of the firm to learn confidences and secrets of the client, even if the other partners had not actually been exposed to the confidential information or had participated in the representation. The doctrine developed in \textit{Consolidated Theatres} and \textit{Laskey Brothers} in response to small, two-member partnerships, has continued to evolve. It is now applied to all members of a firm in a majority\textsuperscript{74} of jurisdictions.\textsuperscript{75}

The substantial relationship test and the imputation doctrine were devised by the courts to promote the policies and ethics embodied in the Canons of Professional Ethics. After the new Code became effective in 1970, courts facing the lawyer disqualifi-
cation question had to consider a new concept in legal ethics. Canon 9 mandated that the attorney "Should Avoid Even the Appearance of Professional Impropriety." 76

One of the first cases to recognize the distinctions incorporated in the new Code was Richardson v. Hamilton International Corp. 77 The court appeared to be applying the substantial relationship test, but the court based its conclusion on the fact that there was only "some relationship between the former representation and the current litigation." 78 The trial judge held that although it was a close question, disqualification was required to avoid the appearance of evil." 79 The court recognized that it was faced with reaching a result that was controlled by two contradictory rules. First, the substantial relationship test required that the subject matter of the two representations be closely related. Secondly, there was the "appearance of evil" test, which would function whenever it appeared that there might be a conflict between the parties. 80 On final analysis, however, the court in Richardson applied the substantial relationship test. The court held that disqualification would be triggered by a lower standard than was formerly required. When there is an appearance of evil, the court sides with the client and disqualifies the lawyer. The trend of decisions immediately following this decision increased recognition of the impact of Canon 9 and indicated that the courts were serious about enforcing a strict interpretation of the Canon, regardless of the consequences. 81

As a result of the harsh consequences derived from a strict interpretation of Canon 9, some courts recognized the need for a more pragmatic approach to the treatment of imputation. This new trend was established by the court in Silver Chrysler Plymouth,

76. ABA Code of Professional Responsibility, Canon 9.
77. 333 F Supp. 1049 (E.D. Pa. 1971), aff'd, 469 F.2d 1382 (3d Cir. 1972), cert. denied, 411 U.S. 986 (1973) (motion to disqualify attorney, who had previously performed legal work for corporation, from bringing class action and shareholder derivative suit against that corporation).
78. Id. at 1054.
79. Id.
80. The trial took place before the adoption of the new Code, and ostensibly was based on old Canons 6 and 37. Id. The appeal was decided under the new Code, however. Id. It has been concluded that the language and stress on appearances indicates that the court recognized the mandate of the new Canon 9. See Note, supra note 65, at 531 n.37
Inc. v. Chrysler Motors Corp. After examining the functioning of a large law firm, the court concluded that it would be absurd to assume that all of the confidences and secrets of all the firm's clients are reposed in all associates. The court stated: "[A] rational interpretation of the Code of Professional Responsibility does not call for disqualification on the basis of such an unrealistic perception of the practice of law in large firms." The court distinguished its determination in Silver Chrysler from other recent disqualification cases. After surveying a number of cases requiring disqualification, the court concluded that the result was patently clear in those particular cases because of the circumstances involved. In Silver Chrysler however the court refused the mechanistic imputation that would have necessitated disqualification of the entire firm.

Courts have differed in their interpretation of the imputation question, particularly in relation to cases concerning the government attorney in private practice. This diverse treatment prompted the ABA Committee on Ethics and Professional Responsibility to discuss the issue. The committee ultimately rejected a mechanistic application of imputation. The issue presented to the committee involved a former government attorney who subsequently practiced in the private sector Disciplinary Rule 9-101(B) states that a

82. 518 F.2d 751 (2d Cir. 1975) (motion to disqualify attorney and law firm by reason of attorney having once been associated with an eighty man firm which represented the adverse party in the present suit; the attorney's level of involvement with the firm was insufficient to expose him to confidences that could be used in the current representation).
83. Id. at 754.
84. Id. Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975) (attorney who had worked in defense of the same case sought to join forces with the plaintiffs); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974) (attorney previously serving with the Department of Justice in Washington, sought to represent City of New York in an antitrust suit for which he had had substantial responsibility while in Washington); Emle Indus., Inc. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973) (attorney first represented Burlington Industries, Inc. as client and then represented client suing Burlington subsidiary); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382 (3d Cir. 1972), cert. denied, 411 U.S. 986 (1973) (attorney vested with substantial responsibility for defense of Hamilton in SEC suit not free to represent persons suing Hamilton on related matter); Churgach Elec. Ass'n v. United States Dist. Court, 370 F.2d 441 (9th Cir. 1966) (attorney who had been general counsel for Churgach for several years could not appear as counsel in an antitrust action against Churgach); Motor Mart, Inc. v. Saab Motors, Inc., 359 F. Supp. 156 (S.D.N.Y. 1973) (attorney for plaintiff had, in the course of his former service as Saab counsel, represented Saab in similar suits).
85. ABA COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL OPINION, No. 342 (1975). See also Note, Appearance of Impropriety As the Sole Ground For Disqualification, 31 U. MIAMI L. REV 1516 (1977).
lawyer may not accept such employment if it concerns a matter in which he had substantial responsibility as a public employee. While the opinion analyzes DR9-101(B), it contains an interpretation of Canon 9 that is applicable to the disqualification of an entire firm. The committee noted that the "appearance of professional impropriety" is not a standard, test, or element embodied in the disciplinary rule. The placement of DR9-101(B) under Canon 9 represents a policy decision that the "appearance of professional impropriety" and attempts to avoid that appearance, are only part of the underlying theories for the rule. The opinion stated that the appearance of evil is probably not even the most important reason for the existence of the rule. \(^{86}\) Under the committee's approach, it is necessary to look past the appearance of impropriety and analyze the rationale for the rule. The committee reasoned that the interpretation of the rule should be made consistent, as far as possible, with the underlying policy considerations. \(^{87}\) Therefore, the interpretation of any rule requires the evaluation of the policy considerations that underlie the creation of the rule.

The principles of the committee's decision were applied by the court in \textit{Kesselhaut v. United States} \(^{88}\) In \textit{Kesselhaut}, an action was brought to recover counsel fees which the plaintiffs alleged were owed because of their representation of the Federal Housing Authority (FHA) in certain property matters. The government sought to disqualify plaintiff's counsel because an individual associated with counsel for the plaintiff had been general counsel for FHA. The Court of Claims reversed the lower court decision which called for the counsel to withdraw and rejected the mechanistic imputation of confidential information. The court was satisfied with the screening procedures that had been instituted, and would not


\(^{87}\) ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL OPINION, No. 342, at 5 (1975).

\(^{88}\) 555 F.2d 791 (Ct. Cl. 1977).
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disqualify the firm as long as the screening procedures were maintained.89

The mechanistic imputation approach was again rejected in City of Cleveland v. Cleveland Electric Illuminating Co.90 In that case, the court recognized that the mechanistic imputation of confidences might severely restrict the private attorney’s future career and the operation of the firm, as well as interfere with the individual’s right to legal counsel of his choice.91 The court also adopted the doctrine of vertical responsibility which allows that absent direct proof to the contrary confidential information relating to matters within the exclusive control of another department or section of a firm, would not be imputed to the attorney.92 A review of the other decisions and rationale applied in this area led the court to conclude that the Silver Chrysler treatment was the more intellectually sound method of evaluating the disqualification where confidential information is concerned.

V ANALYSIS OF THE WESTINGHOUSE CASE

The Seventh Circuit rejected the modern trend evident in Silver Chrysler Kesselhaut and City of Cleveland, and reversed the lower court’s decision in Westinghouse. By reversing the lower court,93 the circuit court settled two issues that are crucial to the disqualification question. The first involves the attorney-client relationship. The relationship has been treated by some courts under the principles of agency law.94 Another approach requires only a

89. Mr. Prothro [the attorney] is to continue to have no connection with the case, all other attorneys are not to discuss it with him and are to prevent any case documents from reaching him, the files are to be kept in locked file cabinet, the keys controlled by Messrs. Altman and Krug and issued to other attorneys, clerks, and secretaries, only on need to know basis.


91. Id. at 211.

92. Id.

93. By statute, the court of appeals has jurisdiction to review final decisions. 28 U.S.C. § 1291 (1976). Orders either granting or denying motions to disqualify counsel are generally held to be final collateral orders. Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949); Schloetter v. Railoc of Ind. Inc., 546 F.2d 706 (7th Cir. 1976); (citing International Elec. Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975)); Fullmer Harper, 517 F.2d 20 (10th Cir. 1975); Kroungold Triester, 521 F.2d 763 (3d Cir. 1975); Draganescu First Nat’l Bank of Hollywood, 502 F.2d 550 (5th Cir. 1974).

94. See, e.g., Brinkley v. Farmers Elevator Mut. Ins. Co., 485 F.2d 1223, 1286 (10th Cir. 1973); Hensley v. United States, 281 F.2d 605, 607 (D.C. Cir. 1960); Rothman v Wilson, 121 F.2d 1000, 1006 (9th Cir. 1941); Balmer Gagnon, 19 Ariz. App. 55, 504 P.2d 1278 (1973); Farnham State Bar, 17 Cal. App. 3d 605, 131 Cal.
finding by the court of a fiduciary relationship between the parties to bind the attorney under the codified Ethical Considerations of the legal profession. The court in Westinghouse overcame the threshold problem of establishing an attorney-client relationship by rejecting the agency theory The court relied on the more general standard of the existence of a fiduciary duty between the attorney and client. Through the utilization of this standard, the court was free to determine whether there had been violations of Canons 4 and 5. The lower court had held that this issue was inapplicable.

The court then examined the separation of the Chicago and Washington offices. A complete separation of the two offices, rigorously enforced, would negate the actual sharing of pertinent information. The court’s analysis of this “Chinese wall” between the two offices included an in-depth discussion of the breach of that wall which had occurred. After a discussion of that incident in which information between the two offices may have been shared, the court stated: “Despite this breach of the wall, we do not recognize the wall theory as modifying the presumption that actual knowledge of one or more lawyers in a firm is imputed to each member of that firm.” Although the breach discussion appears to add weight to the final decision, the court relied on the mechanistic imputation doctrine to disqualify the firm without an analysis of an actual, substantive breach of the wall. Although the two offices were separated and client information was kept confidential, the court felt that there remained a real possibility of improper conduct by the two offices which would be injurious to the confidences and secrets of the client. One of the concurring judges did believe, however, that had Kirkland established real insulation between all of the lawyers working on the two projects, and their respective relevant information, the automatic imputation of knowledge would have been

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95. The circuit court stated that it was an abuse of discretion for the district court to apply narrow formal agency approach to determine the criteria for formation of an attorney-client relationship. 580 F.2d at 1318.

96. “Chinese wall” was the court’ terminology for the separation practiced between the two offices. Id. at 1321.

97 See note 23 supra.

98. 580 F.2d at 1321.
eliminated and the lower court decision may have been affirmed.\(^99\)

The court rejected Kirkland's argument that the oil companies were aware of Kirkland's representation of Westinghouse. The court distinguished "knowledge of the Westinghouse representation from awareness that such representation would lead to Kirkland's mitigation of a lawsuit against the oil companies. The opinion states that it could not be presumed that the oil companies were aware that the attorneys in the Washington office knew nothing about the Westinghouse case being handled in Kirkland's Chicago office. In addition, the court stated that Kirkland had a duty to keep the oil companies advised of actual or potential conflicts of interest.\(^100\)

As to the application of Canons 4, 5, and 9 to Kirkland's dual representation, the court did not specify how they functioned in the development of the final decision. The court reasoned that because the oil companies reasonably relied on the representation that the firm was acting in the undivided interest of each company the Canons applied.\(^101\) The court also stated that the size of the firm had no bearing on the application of the Canons,\(^102\) and that Westinghouse had the option of dismissing Gulf, Kerr-McGee, and Getty or discharging Kirkland from the case.\(^103\)

The court's mechanistic imputation of confidences and secrets to all members of a firm is logical only in light of the doctrine's early historical development, or a reading of Canon 9 as a strict rule to be followed regardless of the individual circumstances or the actual risk of impropriety. The two cases most responsible for the establishment of the imputation doctrine, Consolidated Theatres and Laskey Brothers, both involved the imputation of information between two partners of a two-member firm.\(^104\) Mechanistic

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\(^99\) \textit{Id.} n.28 (Fairchild, J.).
\(^101\) 580 F.2d at 1321.
\(^102\) \textit{Id.}
\(^103\) \textit{Id.} at 1322.
\(^104\) The value of \textit{Consolidated Theatres} as precedent may also be challenged. Although both partners in the firm were disqualified because of the knowledge of one partner, the other partner continued to represent the plaintiff in that case, the very party the firm had been disqualified from representing. A review of the court of appeal's decision indicates that the particular point was not mentioned. The rationale for the omission may be found in Judge Goddard's unreported opinion in the district court, "[d]efendants conceded before the Master that any question as to the ethical
imputation appears to be an appropriate rule for the small firm. The district court concluded that the rigid segregation between the two groups of attorneys, the geographical separation of their offices, and the absence of any hint of actual disclosure, rendered the possibility of improper professional conduct fairly remote. These circumstances do not coincide with the considerations prevalent when the rule was created for the small, two-partner firm, making the automatic imputation rule inappropriate.

The application of the imputation doctrine to the large, multicuity firm must be distinguished from the application of the doctrine to the small, two-member firm. The ethical questions raised by this distinction must be examined in light of Canon 9. There are a number of cases taking a realistic approach to the application of that Canon in the area of disqualification. The reasoning set forth in Formal Opinion 342 encourages the pragmatic approach. The appearance of evil must be examined in light of the underlying policies for the rule. The imputation rule was designed to serve several functions. First, the rule protects the confidences and secrets of a client from exposure through other members of the firm. Secondly the rule prevents an attorney or firm from being influenced by a prior client or a current client in the exercise of his professional judgment. The third reason, developed under the philosophy stated by Canon 9, is to Avoid Even the Appearance of Impropriety in the actions of the attorney.

The goals of the imputation principle can be met without the harsh result of disqualification. The presumption of imputation should occur when the moving party proves that he has been, or is, involved in a professional relationship with the attorney or firm, or that he is owed a fiduciary duty and that the subject matter of the two representations is sufficiently related so that information from the prior representation could be pertinent to the present litigation. The creation of a presumption in the moving party's favor should be rebuttable by the party charged with the disqualification by clear and convincing evidence.

duties of Mr. Gold, separate and apart from any partnership with Mr. Nickerson, is not involved in this proceeding, and to that view the attorneys for Gold and Nickerson have subscribed. Laskey Bros. of W Va. v. Warner Bros. Pictures, 130 F Supp. 514, 519 n.4 (S.D.N.Y. 1955).
105. 448 F Supp. at 1305.
106. See notes 85-87 supra and accompanying text.
107. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9.
VI. Proposals

One of the major reasons for the mechanistic imputation of a client's confidences and secrets is to avoid even the appearance of evil. The chief problem with that standard, as pointed out by the ABA Committee on Ethics and Professional Responsibility is that it is really no standard at all. What constitutes impropriety will vary in the eyes of almost every observer. The solutions to this problem must be sufficient to assure the reasonable observer that the policies behind the rule are being safeguarded.

To avoid disqualification, the attorney should first contact the former client whose case poses a conflict with the attorney's present case, and request that the former client waive the attorney-client confidentiality. The attorney must be aware, however, that the court will look beyond the agreement to ascertain whether there is any latent impropriety not readily perceptible to the layman. If the client is willing to waive disqualification, the conflict could be avoided at an early point in the representation.

Alternatively, a method of determining whether the use of information possessed by the attorney might be adverse to the former client would be to have an in camera session with the judge and attorney. Such a hearing would prevent the possibility of exposing the information to the public. The decision could be rendered early in the representation to avoid unnecessary delay. Such a hearing would be, however, of questionable value in a long, complicated case, because the hearing also would require an investment of a substantial amount of time by the judge out of the courtroom. The already overburdened judges should not be subjected to these potentially lengthy and involved hearings. The hearing would be most practical in the short, uncomplicated case.

Another approach that has received a considerable amount of attention is screening. Screening involves taking precautions that


110. Wise, supra note 47, at 258.


112. See Note, Disqualification—"Screening to Rebut the Automatic Law
would preclude an attorney from being accused of violating his client's confidentiality. Screening has application in several areas. The first of these is the screening of the individual lawyer from those working on a related case. This procedure has been used in cases involving former government attorneys. The screening procedures also should prevent that attorney from receiving a share of the legal fees generated by the representation. Screening should include physical separation from evidence, other work on the case, and social involvement in discussions pertaining to the case.

Vertical separation, an approach previously discussed, is a test which scrutinizes the actual functioning of a large firm and creates a presumption that information pertaining to a particular case is imputed only to the members of the section working on the case. In conjunction with this approach, large firms might find it advantageous to inform a client that while he will have available to him the full resources of the firm, information about the case or representation will be limited only to those working directly on it. In the instant case, notification to API and the oil companies about the Westinghouse representation, with full disclosure of the screening procedures, would have forced a decision as to whether counsel would be retained, early in the representation, and thus saved considerable delay.

A final consideration would require the attorney to examine the role he has played in the representation. Members of the firm may be required to submit affidavits to the court evaluating their noninvolvement or exposure to the case in question. Through this method, the client may be assured that the attorney has made his declaration fully aware of the possible penalties for misstatement.

VII. CONCLUSION

The mechanistic imputation of a client's confidences and secrets is a judicially created device designed to provide a better and more confidential service to clients by their attorneys. Such a rule is logical when dealing with the small law firm. This principle is not, however necessary to protect the client's interests in every


113. 555 F.2d at 793.
114. See text accompanying note 92 supra.
case. It must be expanded or modified if it is to be appropriate for large multicity firms.

A motion to disqualify counsel may prolong the period prior to judicial decision on the merits of the case.\(^{115}\) This added delay could exacerbate the problems caused by the heavy case load that most courts already confront. Consideration also must be given to the hardship and expense that the innocent client will incur if he is forced to retain a new lawyer.

Automatic disqualification of an entire firm interferes with an individual's access to the counsel of his choice. The client must have the right to secure the best representation available. The law must also accommodate the young attorney and the government attorney whose careers would be substantially limited if they were charged with all of the confidences and secrets reposed in their past employers and all of the information imputed to all members of their present firm. The rule must account for the growth of the large, departmentalized firms where imputation is an impractical and unrealistic rule. In light of available alternatives to assure confidentiality the needs of the public and the American Bar Association's reputation can best be served by a rule designed to consider all relevant factors and to grant disqualification only when there is an actual possibility of disservice to the client.

*Joseph John Kempf Jr*

\(^{115}\) A number of courts have also recognized the use of disqualification in some cases as purely strategic tool. See, e.g., Aetna Cas. & Sur. Co. v. United States, 570 F.2d 1197, 1201 n.7 (4th Cir.), cert. denied, 439 U.S. 821 (1978); Allegaert v. Perot, 565 F.2d 246, 251 (2d Cir. 1977); Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022, 1027 (D.C. Cir. 1976); Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976); W.T. Grant Co. v. Haines, 531 F.2d 671 (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, 1141 (2d Cir. 1975); Redd v. Shell Oil Co., 518 F.2d 311, 315-16 (10th Cir. 1975).