Firm Disqualification Motions—Screening and Immediate Appeals as of Right: Armstrong v. McAlpin

Ziporah Janowski
FIRM DISQUALIFICATION
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IMMEDIATE APPEALS AS OF RIGHT:
ARMSTRONG v. McALPIN

The Code of Professional Responsibility (the Code) requires an attorney to avoid all conflicts of interest, real or apparent. Should a conflict arise, therefore, the attorney, as well as his firm, is directed to disqualify himself in order to avoid the mere appearance of impropriety. This rule has precipitated harsh results especially where a former government attorney, currently in private practice, encounters a matter over which he had substantial responsibility as a public employee. By seemingly necessitating the

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1 Although not binding upon the courts, the Code of Professional Responsibility has been recognized by state and federal courts as a statement of the proper rules and guidelines for the ethical conduct of the bar. NCK Organization Ltd. v. Bregman, 542 F.2d 128, 129 n.2 (2d Cir. 1976); Hull v. Celanese Corp., 513 F.2d 568, 571 n.12 (2d Cir. 1975); see Preliminary Statement, ABA Code of Professional Responsibility (1976).

2 ABA Code of Professional Responsibility, Canon 5; EC 5-1. Canon 5 provides that “a lawyer should exercise independent professional judgment on behalf of a client.”

3 See ABA Code of Professional Responsibility, Canon 9. Canon 9 directs that “a lawyer should avoid even the appearance of professional impropriety.”

4 DR 5-105(D) was amended in 1974 to state: “If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate or any other lawyer affiliated with him or his firm, may accept or continue such employment.” ABA Code of Professional Responsibility, DR 5-105(D). As amended, this rule requires disqualification of the firm if the lawyer has been disqualified under any Disciplinary Rule. See generally Note, Business As Usual: The Former Government Attorney and ABA Disciplinary Rule 5-105(D), 28 Hastings L.J. 1537, 1539 (1977).

5 DR 9-101(B). The ethical considerations which accompany DR 9-101 appear to provide conflicting guidelines for an attorney. While it is important for a lawyer to avoid acting in a manner which may appear unethical, he must never subordinate his duty to his clients or the public simply because he may be subjected to criticism for his actions. ABA Code of Professional Responsibility, EC 9-2. At the same time, however, an attorney must “strive to avoid not only professional impropriety but also the appearance of impropriety.” ABA Code of Professional Responsibility, EC 9-6.

6 See DR 9-101(B); EC 9-3. DR 9-101(B), which in large part mirrors EC 9-3, provides: “A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.” ABA Code of Professional Responsibility, DR 9-101(B). The government attorney includes all lawyers who worked for government agencies, members of the judiciary, prosecutors, and elected officials. While the Code provides different ethical considerations for each type of government attorney, see Comment, Conflicts of Interest and the Former Government Attorney, 65 Geo. L.J. 1025, 1025 n.3 (1977), the distinctions do not affect the issues discussed in this comment.
disqualification of the former government attorney and his firm, this rule has threatened to arrest the revolving door between public and private employment and to quarantine government employees who seek to enter private practice. Recently, however, in *Armstrong v. McAlpin*, the Second Circuit held that a mere appearance of impropriety is insufficient to disqualify a firm when engaged in a matter which a firm member had substantial responsibility over while a public employee. Rather, the applicable standard was stated to be whether continued representation by the firm threatens to taint the trial. Additionally, the court overruled its decision in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.* and held that orders denying disqualification motions are not immediately appealable as of right.

As an attorney with the Securities and Exchange Commission (SEC), Theodore Altman had supervised the investigation and prosecution of a suit against Clovis McAlpin and others, which alleged that the defendants had pilfered a number of investment firms. Following completion of the SEC action, the court-appointed receiver of the investment companies dismissed the counsel retained to assist in efforts to recover the embezzled money and hired the firm of Gordon, Hurwitz, Butowsky, Baker, Weitzen and Shalov (Gordon) as a replacement. Shortly thereafter, however,

Many attorneys work for a government agency following graduation from law school and then associate with a private firm which specializes in government litigation. In fact, it is common for the same attorney to go through a “revolving door” several times, alternately working in the government and in private practice. See Moskowitz, *Can D.C. Lawyers Cut The Ties That Bind?*, JURIS DOCTOR, Sept. 1976, at 34.


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

625 F.2d at 433 (2d Cir. 1980)(en banc), petition for cert. filed, 49 U.S.L.W. 3334 (U.S. Nov. 4, 1980).

625 F.2d at 445.

*Id.* at 433.

496 F.2d 800 (2d Cir. 1974)(en banc).

625 F.2d at 440.

*Id.* at 435.

*Id.* at 436. The court-appointed receiver, Armstrong, had originally retained another firm which had worked on the case for a year and a half, devoting approximately 2,600 hours
the receiver discovered that Altman had resigned from the SEC and had become associated with the Gordon firm. While Altman clearly could not participate in the suit commenced by the receiver, it was agreed that the firm need not be disqualified, as long as Altman was screened from participation. The defendants' motion to disqualify the Gordon firm due to Altman's prior participation in the matter was denied by the district court on the ground that continued representation by Gordon would not be prejudicial to the defendants. On appeal, the Second Circuit reversed. Upon reconsideration, a divided Second Circuit, sitting en banc, vacated its earlier decision and affirmed the district court. Writing for the majority, Judge Feinberg first addressed the

to the matter. Id. at 435. When one of its institutional clients became a potential defendant in the action, however, the initial firm had to be replaced because of a potential conflict of interest. Id. Due to limited funds and the complexity of the litigation, Armstrong experienced difficulty in obtaining new counsel. Eventually, the Gordon firm was retained. Id. at 436.

Altman had been employed by the SEC for nine years before resigning. He left the Commission after the termination of the action against McAlpin which he had supervised. Id.

As Assistant Director of the Division of Enforcement at the SEC, Altman supervised about twenty-five attorneys and had substantial responsibility over many cases. Although not involved in the McAlpin investigation on a day-to-day basis, he was informed of its progress. Id. Thus, Altman was disqualified under DR 9-101(B). Id. See generally Comment, supra note 6, at 1039-44.

After the receiver learned that Altman had joined the Gordon firm, both the Gordon firm and the firm originally retained, see note 15 supra, researched the effect of Altman's prior participation in the SEC suit. Although the two firms concluded that Gordon need not be disqualified if Altman was screened, they consulted the trial judge who then authorized the retention of the Gordon firm. 625 F.2d at 436. The matter also was brought to the attention of the SEC, which stated that it did not object as long as Altman was screened from participation in the matter. Id.

"Screening" is a procedure through which the disqualified, former government attorney is isolated by his firm from participation in any matter related to the disqualification issue. The attorney is not permitted to discuss the matter with his colleagues, is denied access to all relevant files and documents, and does not receive any remuneration derived from the case. See ABA Formal Opinion 342, 62 A.B.A.J. 517, 521 (1976).

606 F.2d at 34. While the Second Circuit panel declined to adopt a general rule for firm disqualification where a firm member was disqualified under DR 9-101(B), it did point out two significant factors: whether the matter presented a risk that the former government attorney would be influenced by the possibility of future employment, and whether the disqualified attorney had a personal involvement in the matter while in government employ. Id. at 32-33. The court held that since these two factors were present in the instant case, screening was ineffective to prevent firm disqualification. Id. at 33-34.

23 625 F.2d at 435.

Chief Judge Kaufman and Judges Mansfield, Oakes, and Timbers joined in Judge
question of the appealability of disqualification motions.\footnote{24} The court expressed concern over the consequences of its decision in \textit{Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.}, which held orders denying disqualification motions to be immediately appealable.\footnote{25} Noting that the availability of an immediate appeal spawned an increase in the use of such motions for solely strategic purposes, such as delay,\footnote{27} Judge Feinberg reevaluated \textit{Silver Chrysler}'s finding that denials of disqualification motions fell within the exception to the final judgment rule\footnote{28} enunciated by the court.


\footnote{24} The court had requested the parties to brief the issue of whether the denial of disqualification should be appealable. 625 F.2d at 437.

\footnote{25} 496 F.2d 800 (2d Cir. 1974)(en banc).

\footnote{26} Id. at 805.

\footnote{27} 625 F.2d at 437. Both the Second Circuit and various commentators had noted the use of the disqualification motion as a delaying tactic since the \textit{Silver Chrysler} decision. See, e.g., 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); Lefrak v. Arabian Am. Oil Co., 527 F.2d 1136, 1139-41 (2d Cir. 1975); Comment, \textit{The Appealability of Orders Denying Motions For Disqualification of Counsel in the Federal Courts}, 45 U. Cm. L. Rev. 450, 450-51 (1978); Note, \textit{The Second Circuit and Attorney Disqualification—Silver Chrysler Steers In A New Direction}, 44 FORDHAM L. REV. 130, 137-38, n. 53 (1975).

In his dissent, Judge Mulligan took issue with the majority's belief that there had been a proliferation of tactical appeals since \textit{Silver Chrysler}. 625 F.2d at 447 (Mulligan, J., concurring in part, dissenting in part). Judge Mulligan noted that there had been only eleven such appeals—six of which resulted in an affirmance of the denial—which hardly could be "characterize[d] . . . as a serious problem of calendar congestion." Id. The majority responded to Judge Mulligan's assertions by pointing out that Judge Mulligan himself had stated previously that "[s]ince this court has reversed our prior rule and held that denials of motions to disqualify counsel are directly appealable to this court . . . such motions and appeals have proliferated." Id. at 437, n.9 (quoting W.T. Grant Co. v. Haines, 531 F.2d 671, 678 (2d Cir. 1976)). The majority further stated that the eleven published opinions were not an accurate reflection of the increased number of appeals, since a significant number of appeals were either disposed of prior to a hearing or affirmed without opinion. Id. at 437-38.

\footnote{28} 625 F.2d at 437. As a general rule, the jurisdiction of the federal courts of appeals is limited by the "final order" rule embodied in 28 U.S.C. § 1291 (1976). Section 1291 provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts . . ." By rendering interlocutory orders nonappealable as of right, the rule seeks to avoid piecemeal review and preserve judicial resources. Note, \textit{Appealability in the Federal Courts}, 75 HARV. L. REV. 351, 351-52 (1961). It has been recognized, however, that certain orders, if erroneous, may have an especially serious and detrimental effect upon the litigation. Crick, \textit{The Final Judgment As a Basis For Appeal}, 41 YALE L.J. 539, 553 (1932). Consequently, a number of statutory and judicially created exceptions permit the immediate appeal of certain interlocutory orders, see, e.g., Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); 28 U.S.C. §§ 1292, 1651(a) (1976). See notes 29 & 33-34 and accompanying text infra.
Supreme Court in Cohen v. Beneficial Industrial Loan Corp.\textsuperscript{29} Under Cohen, an order is appealable if it is collateral to the merits, too important to be denied immediate review, and if the denial of an appeal would pose a threat of irreparable harm to the movant.\textsuperscript{30} The Armstrong court held that although the denial of a disqualification motion is indeed collateral, the latter two Cohen requirements were not satisfied, and thus Silver Chrysler must be overruled.\textsuperscript{31}

Judge Feinberg reasoned that while an erroneous denial of a disqualification motion may compel a party to bear the cost and inconvenience of a tainted trial,\textsuperscript{32} the possibility of irreparable harm is mitigated by the party’s ability to obtain either a new trial or an immediate appeal through certification\textsuperscript{33} or mandamus.\textsuperscript{34} Additionally, the Armstrong court construed the “too important to be denied review” requirement of Cohen to mean that an order must

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\textsuperscript{29} 337 U.S. 541, 545-47 (1949). In Cohen, the Supreme Court was faced with the issue of the appealability of an order denying a defendant’s motion to require the plaintiff to post security for the defendants’ costs in a stockholders’ derivative action. Id. at 543. In holding the order appealable, the Court noted that the denial did not have the characteristics of orders traditionally held nonappealable under section 1291. Here the denial order was not tentative or incomplete and would not be merged into the final judgment. Moreover, review after final judgment would be an empty rite. Id. at 546.

\textsuperscript{30} 337 U.S. at 545-47. See also Gillespie v. United States Steel Corp., 379 U.S. 148, 154 (1964).

\textsuperscript{31} 625 F.2d at 440.

\textsuperscript{32} Id. at 438. The court noted that the harm resulting from an erroneous disqualification is not significantly different from the harm that may result when other erroneous interlocutory orders are held to be nonappealable. Id. See, e.g., Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int’l, Inc., 455 F.2d 770, 773 (2d Cir. 1972); American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 281-82 (2d Cir. 1967); Rosen v. Sugarman, 357 F.2d 794, 796 (2d Cir. 1966).

\textsuperscript{33} Certification is obtained pursuant to the Interlocutory Appeals Act of 1958:

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


\textsuperscript{34} 625 F.2d at 438; see note 70 infra.
raise a legal issue. Since most disqualification orders rest upon factual questions, this component was not satisfied. Accordingly, the court overruled Silver Chrysler and held that orders denying disqualification motions were no longer appealable as of right.

Turning to the merits, the court acknowledged the district court's finding that Altman was disqualified since he had substantial responsibility over the matter while a government employee. The court then addressed whether the firm should be disqualified because one of its members had been disqualified. Noting that both the district court and the Second Circuit panel had found no "taint of trial" because of the Gordon firm's continued representation of the receiver, the court refused to require disqualification on the ground that there was an appearance of impropriety. Judge Feinberg asserted that "the possible 'appearance of impropriety is

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35 625 F.2d at 439; see note 96 infra. The public importance requirement, apparent in the Cohen Court's statement that not "every order fixing security is subject to appeal," 337 U.S. at 547, has not, however, been applied consistently by the Court in subsequent cases. Indeed, certain orders have been held appealable under Cohen notwithstanding that they involved primarily factual rather than legal issues. See, e.g., Abney v. United States, 431 U.S. 651 (1977) (order rejecting defense of double jeopardy); Stack v. Boyle, 342 U.S. 1 (1951) (order denying request for bail reduction); Roberts v. United States District Court, 339 U.S. 844 (1950) (order denying motion to proceed in forma pauperis). But see Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-69 (1978). The Armstrong court distinguished these rulings by stating that although these cases involved primarily factual issues, they also presented a threat of irreparable harm through devastation of important constitutional rights. 625 F.2d at 339. It has been suggested that although the Supreme Court has not emphasized the public importance aspect, every case heard by that Court must have had a high degree of importance, otherwise certiorari would not have been granted. Comment, supra note 27, at 456 n.28.

36 625 F.2d at 339.

37 Id. In overruling Silver Chrysler, the Armstrong court rejected the rule of limited appealability, advocated by Judge Mulligan in his dissent, id. at 440 n.13. Judge Mulligan would authorize immediate appeals of disqualification denials which "involv[e] the integrity of the trial." Id. at 449 (Mulligan, J., dissenting in part). The majority contended that such a procedure would require as much appellate attention as a full hearing on the merits and would, therefore, be as much a delaying tool as an appeal as of right. Id. at 440 n.13. The majority also rejected Judge Mulligan's assertion that the presence of a threat of taint could be determined by a superficial examination of the disciplinary rule involved. Id.

38 Judge Feinberg stated that while ordinarily a finding that the court lacks jurisdiction will preclude it from ruling on the merits, he explained that such a ruling was necessary in order to provide guidance to lower courts in the proper standard for firm disqualification. Furthermore, since the en banc court had already entertained all the facts of the case, it would be inefficient and wasteful to require another court to duplicate this effort. 625 F.2d at 442.

39 625 F.2d at 442; see note 5 supra.

40 625 F.2d at 442-43; see note 6 supra.

41 625 F.2d at 445.
simply too slender a reed on which to rest a disqualification order . . . particularly . . . the appearance of impropriety is not very clear.' 

Focusing instead on the integrity of the trial process, the court noted that the Gordon firm was not attempting to represent conflicting interests. Moreover, no advantage could be gained through the use of privileged information because the receiver had obtained the SEC's files and Altman had been effectively screened from participation in the case. Having found no taint of trial, the court denied the disqualification motion stating that any ethical considerations were best left to the disciplinary committees of the bar.

Judge Mulligan, dissenting from the court's overruling of Silver Chrysler, argued that the denial of a disqualification motion should remain appealable since the Cohen requirements were satisfied. The "irreparable harm" requirement was met because the use of privileged information would taint not only the original trial but any retrial granted upon appeal. Additionally, certification and mandamus were insufficient to protect against this harm. As to the public importance requirement, Judge Mulligan argued that recent Supreme Court authority illustrated that the issue to be decided need not be a legal one.

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42 Id. (quoting Board of Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979)). Judge Feinberg expressed concern that a disqualification order at such a late stage in the litigation would effectively impede the receiver's chances of recovering on his cause of action. Id.

43 625 F.2d at 444. The court's approach represented an adoption of the rationale expressed in Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979).

44 625 F.2d at 445.

45 Id. Although the Armstrong court declined to expressly rule on the ethical propriety of screening techniques, id. at 444, its affirmance of the district court implies some approval of these techniques. In the procedures employed in this case, Altman was denied access to records, did not share in any fees, and his colleagues were ordered not to discuss the case in his presence. 461 F. Supp. at 624-25.

46 625 F.2d at 446. See also Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979). The Nyquist court contended that a court need not deal with all ethical violations in the case in which they arise since the state and federal bars have ample disciplinary powers. Id.; see Lefrak v. Arabian Am. Oil Co., 527 F.2d 1136, 1141 (2d Cir. 1975); Fed. R. App. P. 46(c); 2d Cir. R. § 46(h); cf. United States v. Kitchin, 592 F.2d 900, 903 (5th Cir. 1979) (per curiam), cert. denied, 444 U.S. 843 (1980) (courts do not have unlimited discretion to disqualify because of violations of ethical standards).

47 625 F.2d at 451 (Mulligan, J., concurring in part, dissenting in part).

48 Id. at 449 (Mulligan, J., concurring in part, dissenting in part).

49 Id. at 450 (Mulligan, J., concurring in part, dissenting in part).

50 Id. at 451 (Mulligan, J., concurring in part, dissenting in part). Judge Mulligan argued that the majority's reasoning could not consistently hold grants of disqualification orders to be appealable. In particular, he could not comprehend how disqualification grants
Judge Newman, dissenting in part, charged the majority with avoiding the key issue of whether, under Disciplinary Rule (DR) 5-105(D), a law firm may continue representation even though one of its members has been disqualified pursuant to DR 9-101(B). He argued that the Gordon firm should have been disqualified on the basis of an appearance of impropriety to ensure that the underlying purposes of DR 9-101(B) were fulfilled. Alternatively, Judge Newman contended that if taint of trial was the proper standard, such a taint did exist in this case despite the use of screening. Judge Newman concluded, therefore, that the motion to disqualify should have been granted regardless of whether the standard applied was taint of trial or appearance of impropriety.

Appealability of Disqualification Motions

It is submitted that the Armstrong decision precluding immediate appeals as of right for orders denying disqualification motions comports with the underlying policy considerations of both the final judgment rule and the Cohen "collateral order" exception. It is suggested, however, that although the Armstrong court could be appealable when they pose the same problem as disqualification denials in that they do not present an important legal issue. Id. at 450 (Mulligan J., concurring in part, dissenting in part).

obtained the correct result, it misconstrued the requirements of Cohen. By interpreting the "public importance" test of Cohen as requiring that the appeal seek to review a question of law, and not one of fact, the Armstrong court has failed to take into account the "practical rather than technical construction" language in Cohen. 56

The Armstrong holding that orders denying disqualification motions are nonappealable aligns the Second Circuit with the District of Columbia, Sixth, Eighth, and Ninth Circuit Courts of Appeals. See In re Multi-Piece Rim Products Liability Litigation, 612 F.2d 377 (8th Cir.), cert. granted sub nom. Firestone Tire & Rubber Co. v. Risjord, 446 U.S. 934 (1980); Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979); Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022 (D.C. Cir. 1976); Chugach Elec. Ass'n v. United States Dist. Court, 370 F.2d 441 (9th Cir. 1966), cert. denied, 389 U.S. 820 (1967). Though the First Circuit has not ruled on this issue, it has noted its agreement with the circuits holding an immediate appeal to be appropriate. See In re Benjamin, 582 F.2d 121 (1st Cir. 1978). The circuits which have held orders denying disqualification motions to be nonappealable have based their decision on the prevalent use of such motions as a dilatory and strategic tool and the failure of such motions to comply with Cohen's "irreparable harm" requirement. See, e.g., Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979); Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022 (D.C. Cir. 1976).

Currently, the circuits which oppose Armstrong and permit immediate appeal of disqualification denials are the Third, Fourth, Fifth, Seventh, and Tenth. E.g., Aetna Casualty and Surety Co. v. United States, 570 F.2d 1197 (4th Cir.), cert. denied, 439 U.S. 821 (1978); Brown & Williamson Tobacco Corp. v. Daniel Int'l Corp., 563 F.2d 671 (5th Cir. 1977); Akerly v. Red Barn System, Inc., 551 F.2d 539 (3d Cir. 1977); Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706, 709 (7th Cir. 1976); State of New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir.), cert. denied, 429 U.S. 1121 (1976). Most of the circuit court decisions which hold disqualification denials to be immediately appealable categorically state such orders fall within the Cohen exception to the final judgment rule without discussing their reasoning. See, e.g., Aetna Casualty and Surety Co. v. United States, 570 F.2d 1197 (4th Cir.), cert. denied, 439 U.S. 821 (1978); State of New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir.), cert. denied, 429 U.S. 1121 (1976). The Seventh Circuit, however, has explained that disqualification denials meet the Cohen requisites because an erroneous order would deprive a movant of its chosen counsel thus causing it harm which could not be remedied by appeal from final judgment. Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706, 709 (7th Cir. 1976). This reasoning is faulty, however, because it fails to distinguish between grants and denials of disqualification motions. A denial of a motion for disqualification would not separate a party from his chosen counsel. Accordingly, this logic would not support the theory that the movant is irreparably harmed by refusing immediate review of a disqualification denial. It is apparent that although five circuits continue to hold denials of motions for disqualification to be appealable, none present persuasive reasons or arguments for doing so. Thus, it is submitted that the Armstrong court has correctly limited the application of the Cohen exception to the final-judgment rule. See 9 J. Moore, supra note 28, ¶ 110.13[10], at 190.

56 See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). Relying on the "practical not technical" language of Cohen, the Supreme Court has held that an order refusing to reduce bail, Stack v. Boyle, 342 U.S. 1 (1951), and an order refusing leave to proceed in forma pauperis, Roberts v. United States Dist. Court, 339 U.S. 844 (1950), are appealable under Cohen. Other orders that have been held appealable under Cohen include an order quashing writs of attachment and garnishment, American Oil Co. v. McMullin, 433 F.2d 1091 (10th Cir. 1970), an order denying a motion to dismiss an indictment on the ground of double jeopardy, Abney v. United States, 431 U.S. 651 (1977), and an order ap-
Moreover, the court’s reasoning is inconsistent with the Supreme Court’s determination that orders denying a motion to dismiss an indictment on double jeopardy grounds are appealable as of right notwithstanding that such orders often involve questions of fact. In addition, the suggestion that Cohen requires that the appeal involve a question of law would prevent immediate review as of right from orders granting disqualification since they too involve questions of fact.

The Armstrong court’s interpretation of the public importance requirement, however, does not mitigate the accuracy of its decision since denials of disqualification motions do not appear to comply with the second requisite of Cohen—the threat of irreparable harm to the movant. Since the possibility of disclosure of con-

proving a settlement in a class action, In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979), cert. denied, 444 U.S. 870 (1980). Orders that have been held nonappealable under the Cohen rule include an order denying a motion to dismiss an indictment for an alleged violation of the defendant’s right to a speedy trial, United States v. MacDonald, 435 U.S. 850 (1978), an order granting a motion to stay court proceedings and an order denying a motion to stay arbitration, New England Power Co. v. Asiatic Petroleum Corp., 466 F.2d 183, 188 (1st Cir. 1972), and an order denying a motion for summary judgment, Hodgson v. Board of Educ., 468 F.2d 1325 (3d Cir. 1972).

See Abney v. United States, 431 U.S. 651 (1977). The Abney Court stated that although orders denying a motion to dismiss an indictment on double jeopardy grounds are not final in the sense that they terminate the proceedings, such orders do fall within the Cohen collateral order exception. Id. at 659. The Court reasoned that such orders are final in the sense that there are “no further steps that can be taken in the District Court to avoid the trial” and collateral in the sense that they do not deal with the principal issue, namely the defendant’s guilt or innocence. Id. Moreover, the Court found that the irreparable harm requirement was met in that the double jeopardy clause guarantee against being put to trial twice for the same crime would be lost if a defendant were required to postpone appeal until after conviction. Id. at 660-61. The Court, however, failed to discuss whether the “public importance” requirement was met. Assuming, arguendo, that a question of law was involved in Abney, a motion to dismiss an indictment on double jeopardy grounds will often involve a question of fact. Not surprisingly, the Supreme Court’s failure to address this portion of the Cohen test has given rise to some doubt as to whether public importance is necessary for an order to fall within the collateral order exception. See, e.g., Abney v. United States, 431 U.S. 651 (1977); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), Swift & Co. Packers v. Compania Columbiana del Caribe, S.A., 339 U.S. 684 (1950). Many circuits, most notably the Second Circuit, have continued, however, to require public importance. See, e.g., Steering Comm. v. Mead Corp., 611 F.2d 86, 88 (5th Cir. 1980); Van-S-Aviation Corp. v. Piper Aircraft Corp., 551 F.2d 213, 217 (8th Cir. 1977); Phillips v. Tobin, 548 F.2d 408, 410 (2d Cir. 1976); Grinnell Corp. v. Hackett, 519 F.2d 595, 597-98 (1st Cir.), cert. denied, 423 U.S. 1033 (1975); General Motors Corp. v. City of New York, 501 F.2d 639, 647 (2d Cir. 1974); Donlon Indus. v. Forte, 402 F.2d 935, 937 (2d Cir. 1968); Bancroft Navigation Co. v. Chadade S.S. Co., 349 F.2d 527, 529-30 (2d Cir. 1965).

See note 56 supra.

See note 32 and accompanying text supra; Comment, supra note 27, at 466-57. It has been noted that the possible harm of an erroneous disqualification denial is similar to the
fidential information exists from the inception of the litigation, an immediate appeal would not be more effective in ameliorating the potential injury to the movant than an appeal from final judgment. If the unsuccessful advocate of disqualification were permitted an immediate appeal and won, he still has no assurance that confidential information was not imparted in the interim.

By limiting the reason for the non-appealability of orders denying disqualification to the failure of such orders to threaten irreparable harm, it is not inconsistent to hold that grants of disqualification are immediately appealable. Whereas no threat of irreparable harm exists when a disqualification order is denied, such is not the case when an order is granted. When a disqualification motion is granted, a party is not only deprived of the counsel of his choice, but countless hours must be spent in seeking out new counsel and familiarizing him with the facts of the case. In addition, because of pressure to keep the lawsuit moving, the newly appointed counsel may not have sufficient time to master the case harm that may be caused by an erroneous discovery order. See Comment, supra note 27, at 457. The effect of an erroneous discovery order may be to reveal confidential information or to suppress information necessary to maintain a fair trial. Id. at 457. Similarly, an erroneous disqualification denial also may result in the revelation of confidential information in the possession of counsel. Nonetheless, discovery orders have been held not to fall within the Cohen rule and, therefore, are nonappealable. See, e.g., Alexander v. United States, 201 U.S. 117 (1906); Baker v. United States Steel Corp., 492 F.2d 1074 (2d Cir. 1974); 9 J. Moore, supra note 28, ¶ 110.13[2], at 153-59.

If confidential information were imparted between the time the disqualification motion was made and the granting of such motion on immediate appeal, there is a possibility that the prejudice could not be corrected thereafter. Upon an appeal from final judgment, however, a court could scrutinize whether confidential information was imparted and, if so, the court could grant a new trial if prejudice were found. Id. Thus, judicial resources would be preserved through the use of "hindsight" to determine whether disqualification is necessary. It may be argued, however, that a new trial will not always cure the resultant harm because any prejudicial information in the record is public and cannot be erased.

The circuits which have distinguished between the appealability of orders granting disqualification and those denying disqualification generally have limited their rationale to the fact that orders denying disqualification do not meet the irreparable harm requirement of Cohen. See, e.g., In re Multi-Piece Rim Products Liability Litigation, 612 F.2d 377 (6th Cir.), cert. granted sub nom., Firestone Tire & Rubber Co. v. Risjord, 446 U.S. 934 (1980); Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979); Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022 (D.C. Cir. 1976).

When disqualification is granted, the lawsuit is interrupted because the party deprived of his counsel must obtain new counsel who then must become familiar with the case. Thus, immediate appeal does not substantially prolong the litigation. In contrast, there is no interruption when disqualification is denied unless an immediate appeal is allowed. See Fleisher v. Phillips, 264 F.2d 515, 517 (2d Cir.), cert. denied, 359 U.S. 1002 (1959).
so that he can ably represent his client. A holding that orders granting disqualification may be appealed only after final judgment, therefore, would have the effect of eliminating any possible relief.\textsuperscript{64} Thus, a threat of irreparable harm is present.\textsuperscript{65}

In holding that denials of disqualification motions are not appealable under Cohen, the Armstrong court did not totally preclude an immediate appeal. Rather, the court suggested that such orders may be appealed through certification or writ of mandamus.\textsuperscript{66} It is submitted that the use of these two modes of review will help to eliminate the abuse that has attended the appealability of disqualification motions pursuant to the Cohen doctrine.\textsuperscript{67} Because the granting of an appeal by mandamus or certification is discretionary,\textsuperscript{68} a court need only choose to hear the more worthy cases, thus eliminating frivolous appeals.\textsuperscript{69} Moreover, in order to obtain an immediate appeal through mandamus or certification, standards more stringent than the Cohen requirements must be satisfied.\textsuperscript{70} Thus, the use of these two modes of review would en-

\textsuperscript{64} If a party wins the case after his attorney was disqualified, the disqualification becomes moot. E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 402 (S.D. Tex. 1969). If, after disqualification, the party loses the case, then the error most likely would be deemed non-prejudicial since to prove prejudice the party must show that the outcome of the case was affected by the relative unpreparedness and incompetence of the substituted counsel. Comment, supra note 27, at 458.

\textsuperscript{65} Cf. Abney v. United States, 431 U.S. 651 (1977) (appeal from final judgment would not vindicate defendant's Double Jeopardy Clause rights); United States v. Ryan, 402 U.S. 530, 533 (1971) (only where "denial of immediate review would render impossible any review whatsoever" will an exception to final judgment rule be allowed).

\textsuperscript{66} Armstrong v. McAlpin, 625 F.2d at 438.

\textsuperscript{67} See 9 J. Moore, supra note 28, ¶ 110.10, at 136.

\textsuperscript{68} See 28 U.S.C. § 1292(b) (1976); Fed. R. App. P. 21(a),(b).


\textsuperscript{70} One of the prerequisites to obtaining certification is that the order must involve a "controlling question of law." 28 U.S.C. § 1292(b) (1976). See note 33 supra. This prerequisite effectively will eliminate most disqualification denials from appeal through certification since, as stated in Armstrong, disqualification denials frequently present questions of fact, rather than law. Moreover, most courts have held that an abuse of the trial court's discretion does not constitute a controlling question of law. Garner v. Wolfinbarger, 433 F.2d 117, 119 (5th Cir. 1970); United States v. Salter, 421 F.2d 1393, 1394 (1st Cir. 1970); Phelps v. Burnham, 327 F.2d 812, 814 (2d Cir. 1964).

A writ of mandamus is available pursuant to the All Writs Act, 28 U.S.C. § 1651(a) (1976). Due to the extraordinary nature of the remedy, it may only be used to correct a clear abuse of discretion or usurpation of judicial power. The Armstrong court did not discuss under what circumstances mandamus could serve as a remedy to permit appeals of disqualification and its effectiveness remains to be seen. See note 75 infra; Will v. United States, 389 U.S. 90, 95 (1967); Hospes v. Burmite Division of Whittaker Corp., 420 F. Supp. 806 (S.D. Miss. 1976); C. Wright, THE HANDBOOK OF THE LAW OF THE FEDERAL COURTS § 102, at
able the courts to determine, on a case by case basis, the propriety of an immediate appeal.

While noting the availability of these alternative remedies, the Armstrong court failed to discuss how they may be utilized. Although both modes of review are appropriate only when an appeal is not otherwise available,\(^\text{71}\) certification is available only to review questions of law,\(^\text{72}\) whereas mandamus is the correct vehicle for review where an abuse of discretion is alleged.\(^\text{73}\) Since a denial of disqualification will be reversed most often on the ground of abuse of discretion,\(^\text{74}\) mandamus appears to be more appropriate for review of such orders.\(^\text{75}\)

As this comment went to print, the Supreme Court decided Firestone Tire & Rubber Co. v. Risjord.\(^\text{76}\) In Firestone, the Court held that orders denying disqualification do not fall within the Co-

\(^{516}\) (3d ed. 1976).

\(^{71}\) See 28 U.S.C. § 1292(b) (1976); Ex parte Republic of Peru, 318 U.S. 578, 584 (1943); Cartier v. Secretary of State, 506 F.2d 191 (D.C. Cir. 1974); United States v. Hankish, 482 F.2d 316, 318-19 (4th Cir. 1972).


\(^{73}\) There are instances, however, where a denial of disqualification will involve a “controlling question of law” so that certification would be the proper avenue of review. For example, a controlling question of law would be present if there was a question as to whether the district court considered the proper factors in reaching its conclusion. See A. Olnick & Sons v. Dempster Brothers Inc., 365 F.2d 436, 442 (2d Cir. 1966). An abuse of discretion would exist, however, if the district court considered the correct factors but reached the wrong result. Id. at 442-43. Thus, certification would be appropriate only when the applicable standard for disqualification is uncertain. See Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022, 1028 n.40 (D.C. Cir. 1976).

\(^{74}\) Trone v. Smith, 553 F.2d 1207 (9th Cir. 1977). Thus far, at least two circuits have sanctioned the use of mandamus to review orders denying disqualification. See Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022, 1028 (D.C. Cir. 1976); Chugach Elec. Ass’n v. United States District Court, 370 F.2d 441 (9th Cir. 1966), cert. denied, 389 U.S. 820 (1967); Cord v. Smith, 338 F.2d 516, 521 (9th Cir. 1964). In Cord v. Smith, the court explained that mandamus was appropriate to review a nonappealable disqualification denial where the continued involvement of an attorney who properly should have been disqualified would cause irreparable harm. Id. The District of Columbia Circuit has likewise limited the availability of mandamus in disqualification denials to the “exceptional case” where irreparable injury is threatened. Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022, 1028 (D.C. Cir. 1976). In a situation closely analogous to a denial of disqualification—the refusal of a judge to disqualify himself—several courts have treated mandamus as the appropriate remedy. See, e.g., SCA Servs., Inc. v. Morgan, 557 F.2d 110, 117-18 (7th Cir. 1977); Rosen v. Sugarman, 357 F.2d 794, 797 (2d Cir. 1966).

hen collateral order exception and thus are not immediately appealable under section 1291 of title 28. The Firestone Court reiterated that collateral orders are orders that “conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from final judgment.”77 The Court stated that an order denying disqualification conclusively determines the disputed question and assumed, but did not decide, that the public importance requirement was met. The Court then focused on the third requirement and held that such an order is not “effectively unreviewable on appeal from final judgment.”78 It was reasoned that erroneous denials of disqualification are not orders which cause irreparable harm since there are several ways the movant may mitigate the potential harm or obtain review.79 The party may request a protective order diminishing counsel's ability to disclose confidential information or may seek review through certification or mandamus.80 Additionally, after final judgment the court of appeals may order a new trial if it determines that the denial of disqualification constituted prejudicial error.81 Thus, the Supreme Court has approved the Armstrong court's holding that orders denying disqualification are not immediately appealable. It should be noted that the Armstrong court held that such orders failed to fulfill the second and third requirements of the collateral order exception. The Supreme Court, however, based its decision on the failure to satisfy the third requirement without deciding whether the second requirement was met. The Court's rationale thus leaves open the question of whether an immediate appeal may lie from an order granting attorney disqualification.

Disqualification Standard82

The new “taint of trial” standard espoused by the Second Cir-

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77 Id. at 4091 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).
78 Id. at 4091.
79 Id. at 4091-92.
80 Id. at 4092 n.13.
81 Id. at 4091.
82 In light of Firestone Tire & Rubber Co. v. Risjord, 49 U.S.L.W. 4089 (Jan. 13, 1981), the Supreme Court has vacated the judgment in Armstrong and remanded it to the Second Circuit with instructions to dismiss the appeal for want of jurisdiction. 49 U.S.L.W. 3514 (Jan. 19, 1981). As a result, the Armstrong court's decision on the merits no longer is technically binding as stare decisis. There is no reason to believe, however, that the Second Circuit will deviate from the policy considerations set forth in Armstrong when confronted with a
cuit in Armstrong shifts the attention of the court from consideration of ethical violations to the integrity and quality of the trial. The decision thus follows the trend to mitigate the court's role as arbiter of ethical disputes that arise during litigation. The Armstrong court's rejection of a literal application of DR 5-105(D), however, should not be taken as an indication of a willingness to modify or reject the express provisions of the Code. Rather, when read in light of its underlying policy considerations—specifically, keeping open the revolving door between public and private practice and enabling the government to attract bright, able attorneys—the decision appears to implement the position of the American Bar Association as articulated in Formal Opinion 342.

A literal reading of DR 5-105(D) would require disqualification of a firm whenever a member of that firm has been disqualified under DR 9-101(B). ABA COMM. ON PROFESSIONAL ETHICS, OPINION No. 342 (1975), reprinted in 62 A.B.A.J. 517 (1976)[hereinafter cited as ABA OPINION 342]. The opinion stated that the presence of an appearance of impropriety is only one of the policy considerations underlying DR 9-101(B), id. at 518, and that a less stringent application of DR 5-105(D) is consistent with the overall purposes of DR 9-101(B), id. at 521. The opinion concluded that a government agency should be able to waive DR 5-105(B) disqualification when it is convinced that the screening techniques will effectively isolate the attorney and there is "no appearance of significant impropriety affecting the interests of the government . . . ." Id. The policy considerations weighed in limiting disqualification to situations where the attorney cannot be screened effectively included the possible restraint on the government's continued ability to attract qualified attorneys, preventing the use of the rule as a strategic tool to deprive an opponent of qualified counsel, and the possible unnecessary interference with a party's right to retain counsel of his choice. Id. at 518.
These policy considerations become obvious when it is recognized that firm disqualification under DR 5-105(D) is predicated upon the assumption that a lawyer's knowledge of a court's affairs is shared by other lawyers within his firm. Although this presumption was originally held to be one of law, more recent cases have held that it is only an inference. By rejecting the mere appearance of impropriety as the standard for firm disqualification, however, the Armstrong court has gone one step further and eliminated the presumption when a former government attorney is properly screened by his firm from participating in matters over which he had substantial responsibility as a public employee. The

In addition to the ABA, other groups have issued opinions expressing their views as to the proper interpretation of DR 5-105(D). See New York Bar Association Comm. on Professional and Judicial Ethics, Opinion No. 889, 31 The Record 552 (1976); Tentative Draft Opinion for Comment, Inquiry 19, District Lawyer, Fall 1976; 41 Fed. Reg. 41,106 (1976)(Chief Counsel's Advisory Committee on Rules of Professional Conduct—Final Report to the Hon. M. Whitaker, Chief Counsel).

Adopting a stance similar to that of the ABA, the opinion of the Association of the Bar of New York City noted the law's traditional abhorrence of unjustified, unnecessary restraints on individual employment, the adverse effect blanket disqualifications would have on the government's ability to hire and retain competent attorneys, and the responsibility of the bar to ensure that qualified lawyers are available to the public. New York Bar Assoc. Comm. on Professional and Judicial Ethics, Opinion No. 889, 31 The Record 552, 566 (1976). The opinion also voiced its agreement with the ABA on screening, noting that where a disqualified attorney can be effectively screened, the lawyer's firm or associates should not be disqualified. Id.


91 The rapid growth and expansion of today's law firms renders the presumption of imputed knowledge impractical as well as prohibitive. As a law firm grows larger, the potential number of conflicts of interest that may arise increases greatly. Further, most law firms no longer require its members to serve long terms of service, thereby increasing the number of potential conflicts. See Note, Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest, 73 Yale L.J. 1088, 1088-69 (1964); 82 Dick. L. Rev. 625, 628 (1978). Notably, in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 761 (2d Cir. 1978)(en banc), overruled on other grounds, Armstrong v. McAlpin, 625
effect of the *Armstrong* decision, therefore, is to place the onus squarely on the proponent of disqualification to show “taint of trial,” while alleviating the opposing party’s burden of rebutting the presumption of shared knowledge.92

The burden on the moving party was increased further by the *Armstrong* court’s implicit approval of screening as a means by which the prohibitions of DR 5-105(D) may be avoided.93 Thus, the movant must show the screening is ineffective to prevent taint of trial.94 This burden, however, is not as overwhelming as it may seem because of the court’s refusal to sanction screening in all situations. The *Armstrong* court indicated that screening will be rejected where the former government attorney’s firm attempts concurrently to represent adverse interests; where the former government attorney has knowledge of privileged information concerning his opponent; and where the former government attorney may have knowledge, gained while with the government, which is unavailable to an opponent in a subsequent suit.95

F.2d 433 (2d Cir. 1980)(en banc), the court noted that it would be “absurd” to assume that all attorneys entering large firms immediately attain knowledge of all confidential matters within the firm. *Id.* at 753-54.

92 See generally 9 J. Wigmore, Evidence § 2489 (3d ed. 1940).

93 See note 45 and accompanying text supra. The *Armstrong* court agreed with the contentions of various amici that a rejection of screening might impede the government’s ability to employ well-qualified attorneys by deterring attorneys from entering government service for fear of severe restriction on their later ability to return or switch to private practice. 625 F.2d at 443. Moreover, attorneys currently in government service might refuse to accept greater authority in anticipation of future career limitations. *Id.*

94 See Cheng v. GAF Corp., 631 F.2d 1052 (2d Cir. 1980); *Armstrong*, 625 F.2d at 445 (2d Cir. 1980)(en banc). It is suggested that standard screening procedures should be set up by firms which specialize in government litigation. In particular, prior to hiring, each attorney should be questioned carefully to ascertain what matters the attorney had substantial responsibility over while in government employ. The firm also should circulate a memorandum to all members setting forth the screening procedures which should include exclusion of the disqualified attorney from all discussions of the case and denial of access to any relevant files and documents. Additionally, the attorney should be prohibited from receiving any remuneration from the case and physically separated from attorneys working on cases from which the individual attorney is disqualified. *See Comment, The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. Pa. L. Rev. 677, 678 (1980).

95 *Armstrong v. McAlpin*, 625 F.2d at 444. *See Board of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979). In *Nyquist*, the board of education brought a declaratory judgment action to determine whether the school district must maintain separate seniority lists for male and female physical education instructors for use in layoffs. The plaintiff sought a judgment declaring that the merger of the lists would be lawful. The named defendants included several male and female teachers. 590 F.2d at 1243. The male teachers alleged that the maintenance of separate seniority lists was unlawful. The female teachers, however, claimed that separate seniority lists were necessary to remedy the past discrimination created by their seniority status and that if the merged list was used, it would result in the
Applying the standards promulgated by the *Armstrong* court, there are several other situations in which screening most likely would be deemed ineffective. Assume, for example, that in a suit against the Small Business Administration (SBA) alleging favoritism among bidders, the law firm retained by the plaintiffs hires a former SBA attorney who had defended the SBA in a number of similar suits. Under the *Armstrong* guidelines, screening would be ineffective for several reasons. Unlike Altman, the SBA attorney is "potentially in a position to use privileged information obtained through prior representation of the other side." Moreover, there is a substantial appearance of impropriety, despite screening, which would justify disqualification of the firm.

96 In a decision subsequent to *Armstrong*, the Second Circuit demonstrated that it would not permit screening procedures in all situations. In *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980), one of the associates with the defendant's law firm had previously worked for the legal aid service representing Cheng. Disqualifying defendant's counsel pursuant to DR 5-105(D), the court held screening ineffective because there was a danger that confidential information would be revealed. *Id.* at 1058. The court distinguished the facts from *Armstrong* on several grounds. In *Cheng*, the size of the law firm was fairly small in contrast to the Gordon firm in *Armstrong*. *Id.* at 1058 n.7. The disqualified associate in *Cheng* was not a former government attorney so that the many policy considerations underlying *Armstrong* were absent. *Id.* In *Cheng*, a threat of taint of trial existed whereas none existed in *Armstrong*. *Id.* Additionally, the former employer in *Cheng* had objected to the defendant firm's continued representation whereas the Securities and Exchange Commission, Altman's former employer, had approved of the screening procedures used in *Armstrong*. *Id.* Finally, the separation of the defendant from its law firm would not pose as serious a hardship as was threatened in *Armstrong*. *Id.*

97 This example represents the more common situation in which the former government attorney has the ability to use confidential information received while employed by the government. Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979). See, e.g., United States v. Kitchin, 592 F.2d 900, 903 (5th Cir.), cert. denied, 444 U.S. 843 (1979); United States v. Ostrer, 597 F.2d 337 (2d Cir. 1979). Cf. Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 233 (2d Cir. 1977)(nongovernment attorney disqualification under Canons 4 and 9); Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973)(nongovernment attorney disqualification under Canons 4 and 9).

98 *Armstrong v. McAlpin*, 625 F.2d at 444.

99 See ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 4. Where former government attorneys defends private litigants against the former employer there is a significant appearance of impropriety because it may appear that the attorneys may have "conduct[ed] their
Similarly, firm disqualification would be warranted when a former attorney for the Justice Department who had substantial responsibility over the investigation and prosecution of an antitrust action was subsequently hired as an associate with a firm which had begun a similar action against the same defendants. Assuming the Justice Department has no interest in the private action and does not assist in its prosecution in any way, the firm will be unable to avoid disqualification even if the former government attorney is conscientiously and thoroughly screened from participation. Unlike the SEC in *Armstrong*, the Justice Department did not turn over its files to the firm nor did it approve the screening techniques used. Therefore, the former government attorney might use information in the private action which was gained in confidence as a public employee and was unavailable to the other side.102

In another situation, an antitrust action is brought against odd-lot firms by buyers and sellers of the firm's securities. An attorney who is “of-counsel” to plaintiff's co-counsel is currently employed by the SEC, and assigned to an investigation of the defendant firms. The attorney has a substantial responsibility over the SEC investigation, and is clearly disqualified under DR 9-101(B). A motion is made to disqualify plaintiff's counsel for violation of Canons 5 and 9.103 The firm probably will be disqualified even if it argues that it has effectively screened the attorney by use of a “Chinese Wall.”104 In such a situation, the appearance of im-

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100 See *Armstrong v. McAlpin*, 625 F.2d at 445. See *ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS 5 & 9; notes 2 & 3 supra.*

101 In *Armstrong*, the SEC had given the receiver all of its files and records prior to the retention of the Gordon firm. 625 F.2d at 445. Altman, therefore, possessed no information which was not already known to the receiver and the Gordon firm.

102 In *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980), the court noted that one of the factors militating against the efficacy of screening was the prior employer's objection to the use of screening procedures. Id. at 1058 n.7. Where the former employer, however, not only approves of screening but also cooperates in the subsequent litigation, there is little threat of the former government attorney unfairly using privileged information unavailable to the other side. See *Armstrong v. McAlpin*, 625 F.2d at 445.


104 A “Chinese Wall” is essentially the same as screening; both techniques are designed to create an impermeable barrier to intrafirm exchange of confidential information . . . [by] isolat[ing] the disqualification to the lawyer . . . infected with the privileged information that is the source of the ethical problem and
propriety is significant, and the violation of Canon five's proscription against simultaneous adverse representations is apparent. Additionally, permitting the co-counsel to continue representation, in light of the *Armstrong* directives, would either taint or pose a threat of taint to the underlying trial.

From the above examples it is apparent that the efficacy of screening was limited by the *Armstrong* court to only a few well-delineated situations. Thus, the movant's burden of proving that screening will be ineffective is not as onerous as it may appear.

**Conclusion**


It appears that screening will not be sufficient to avoid a disqualification order in a concurrent representation case. Thus far, the Seventh and the Second Circuits have rejected the efficacy of screening in such a case. See *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir.), cert. denied, 439 U.S. 955 (1978); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977).

Seeking to establish an unlawful conspiracy in restraint of trade by various corporations involved in the uranium industry, the plaintiff in *Westinghouse* retained the law firm of Kirkland and Ellis to represent it. Concurrent with its representation of Westinghouse, the law firm was retained by the American Petroleum Industry (API) of which three of the defendants were members. As counsel for API the law firm released a report which took a positive stand on the issue of competition in the uranium industry in seeming opposition to its stand for Westinghouse. *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d at 1312. The court disqualified the firm, citing violations of Canons 4, 5, and 9. In so doing, the court rejected the Chinese Wall theory as modifying the presumption of imputed knowledge. *Id.* at 1321. The court further noted that the large size of the firm and its greater exposure to conflict of interest problems did not justify application of a more lenient imputation of knowledge standard than would be applied to smaller firms and sole practitioners. *Id.*

In *Fund of Funds*, a law firm undertook representation of a mutual fund even though it knew the latter was considering a suit against Arthur Andersen & Company (Andersen), an accounting firm which the law firm also represented. 567 F.2d at 227. Although the law firm assisted the mutual fund in obtaining new counsel in the suit against Andersen, the Second Circuit nevertheless held that the new counsel was disqualified because it assisted the first firm in violating Canon 5, was in a position to misuse confidential information about Andersen in violation of Canon 5, and had violated the Canon 9 prohibition against an appearance of impropriety. *Id.* at 233. Moreover, the court found that a Chinese Wall erected in the first firm was ineffective to dispel the appearance of impropriety.

*Cf.* *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980) (screening ineffective where attorney of small firm representing defendant had previously worked for nongovernmental agency currently representing plaintiff). *See* note 96 *supra.*
concluded that the successful use of such motions as a delay tactic, as well as the availability of alternative modes of review and redress upon appeal from final judgment, militate against permitting immediate appeals as of right. Such a result is consistent with the express federal policy against broadening the scope of Cohen and preserves the policy and purpose of the final judgment rule.

The Armstrong court has demonstrated a renewed faith in the trustworthiness and integrity of former government attorneys and their firms. In holding that a mere appearance of impropriety is insufficient to disqualify a firm, the court has eliminated the presumption of shared knowledge that arises when a former government attorney is involved.

It is suggested that the Armstrong court's approval of screening, although limited, is a trend-setting decision in the area of professional responsibility and ethical conduct. It is suggested, moreover, that to ensure the propriety of screening procedures bar associations should establish committees to regulate screening procedures and issue uniform guidelines for firms to follow in setting up screens. Such committees would serve to allay the fear that

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107 See note 27 and accompanying text supra.
108 See Baker v. United States Steel Corp., 492 F.2d 1074, 1077 (2d Cir. 1974); Weight Watchers v. Weight Watchers Int'l, Inc., 455 F.2d 770, 773 (2d Cir. 1972); West v. Zurhorst, 425 F.2d 919, 921 (2d Cir. 1970); Comment, Appealability of Denials of Motions to Disqualify Counsel, 1975 WASH. U.L.Q. 212, 226.
109 See note 28 and accompanying text supra.
110 The en banc majority in Armstrong noted that twenty-six prominent former government attorneys as amici curiae had contended that they had all been affected by the assumption of the original Second Circuit panel in Armstrong that government attorneys cannot be trusted to adhere to screening techniques or to faithfully carry out their duties while with the government. 625 F.2d at 443. Indeed, the original panel had warned that the government attorney "must understand, and it must appear to the public, that there will be no possibility of financial reward if he succumbs to the temptation to shape the government action in the hope of enhancing private employment." Armstrong v. McAlpin, 606 F.2d 28, 34 (2d Cir. 1979).
111 Prior to its decision in Armstrong, the Second Circuit advocated that ethical conflicts which involve only an appearance of impropriety should be dealt with by the disciplinary powers of the various bar associations. See Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979); Lefrak v. Arabian American Oil Co., 827 F.2d 1136, 1141 (2d Cir. 1987); Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975).
112 See note 91 and accompanying text supra.
113 Cf. Note, Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification? 1977 DUKE L.J. 512, 528-30 (calling for judicial approval of screening techniques). It has also been suggested that the disqualified attorney and his firm be required to certify under oath that they will faithfully adhere to the screening techniques. Comment, Conflicts of Interest and the Former Government Attorney, 65 GEO. L.J. 1025, 1047-48 (1977). Another procedure would be the promulgation of criminal
the public's distrust of, and disillusionment with, the judicial process will be magnified by permitting a firm to continue representation when a mere appearance of impropriety exists.¹¹⁴

Ziporah Janowski

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¹¹⁴ See note 110 and accompanying text supra.