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District Attorney's Office Automatically Disqualified When Attorney in Office Had Counseled Defendant Previously in Same Case

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submitted that a uniform cooperative law, encompassing the applicable landlord-tenant statutes, would serve to identify remedies which properly may be employed by cooperative tenants.[136]

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DEVELOPMENTS IN NEW YORK LAW

District Attorney's office automatically disqualified when attorney in office had counseled defendant previously in same case

An attorney is confronted with a conflict of interest when after counseling a criminal defendant he joins the staff of the prosecuting District Attorney.[137] To neutralize this conflict and avoid dis-

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Cooperatives, Lofts, N.Y.L.J., Dec. 24, 1980, at 1, col. 3. It is suggested that the result in *Suarez* has helped balance the respective rights and remedies of the cooperative lessor and lessee by affording the lessee a defense to such proceedings. *See* Laight Coop. Corp. v. Kenny, 105 Misc. 2d 1001, 1003-04, 430 N.Y.S.2d 237, 239 (N.Y.C. Civ. Ct. N.Y. County 1980); Lehner & Sweet, *supra*, at 6, col. 2.

In Bourgeois v. Tangerine Realty Corp., 63 Misc. 2d 468, 312 N.Y.S.2d 232 (N.Y.C. Civ. Ct. N.Y. County 1970), however, the court held that cooperative shareholders could not bring a special proceeding under section 778 of article 7-A of the Real Property Actions and Proceedings Law. 63 Misc. 2d at 469, 312 N.Y.S.2d at 233. This proceedings allows tenants to move rent deposits from the possession of the landlord to a third party to be used for building repairs. *See* RPAPL § 778 (1979). In section 778, however, the statutory language was not alternatively worded as in section 235-b, rather it merely said "tenants," *id.*, which the court distinguished from tenant-shareholders. 63 Misc. 2d at 469, 312 N.Y.S.2d at 233. A statute which gives tenants the right to recover attorney's fees might not be appropriate in the cooperative setting. *See* N.Y. REAL PROP. LAW § 234 (McKinney Supp. 1980-1981). Indeed, the scheme of monetary distribution provided for by such a statute might better be decided by shareholders with equity interests. Moreover, it is suggested that section 235-b was not intended to apply to the condominium form of housing. In a cooperative, the resident occupies his apartment under a proprietary lease, but the individual condominium apartments are owned by the dwellers themselves. *See* P. ROHAN & M. RESKIN, *supra* note 114, § 1.02[3]. The absence of a lease in the condominium form of housing would seem to take such housing out of the scope of section 235-b.

[136] *See* Rohan, *Cooperative Housing: An Appraisal of Residential Controls and Enforcement Procedures*, 18 STAN. L. REV. 1323, 1337 (1966).

[137] *See* People v. DeFreese, 71 App. Div. 2d 689, 690, 418 N.Y.S.2d 959, 961 (2d Dep't 1979). The Code of Professional Responsibility requires an attorney to "preserve the confidences and secrets of a client." ABA CODE OF PROFESSIONAL RESPONSIBILITY (THE CODE), Canon 4 (1979). Thus, an attorney has a duty to a client to avoid employment which might compromise those confidences. Cardinale v. Golinello, 43 N.Y.2d 288, 294-95, 372 N.E.2d 26, 30, 401 N.Y.S.2d 191, 195 (1977). The proper functioning of the legal system requires this strict loyalty to the client, THE CODE, EC 4-1, and mandates that it continue after the attorney-client relationship terminates. THE CODE, EC 4-6. In addition, the Code prohibits even the appearance of improper conduct on the part of an attorney. THE CODE, Canon 9. It has been stated with respect to an attorney's responsibility that "confidence is reposed in him;

qualification, prosecutors' offices typically "screen" attorneys from cases involving defendants they previously represented.[138] Until re-

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life, liberty, character and property should be protected by him. He should guard, with jealous watchfulness, his own reputation, as well as that of his profession." People *ex rel.* Cutler v. Ford, 54 Ill. 520, 522 (1870); *see* THE CODE, EC 9-6. One commentator has noted that "[t]o maintain public confidence in the Bar it is necessary not only to avoid actual wrong doing but an appearance of wrong doing." H. DRINKER, LEGAL ETHICS 115 (1953). *See* Rotante v. Lawrence Hosp., 46 App. Div. 2d 199, 200, 361 N.Y.S.2d 372, 373 (1st Dep't 1974); Edelman v. Levy, 42 App. Div. 2d 758, 758, 346 N.Y.S.2d 347, 349 (2d Dep't 1973). Cases in which an attorney has been hired in the office which is prosecuting his former client have turned, nevertheless, on whether actual prejudice to the defendant has been shown. *See* note 139 and accompanying text *infra*.

[138] *See, e.g.*, People v. Cruz, 55 App. Div. 2d 921, 921, 390 N.Y.S.2d 442, 443 (2d Dep't 1977). Private law firms face problems of disqualification when attorneys who have worked for the opposite side join the firm. *See, e.g.*, Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754 (2d Cir. 1975) (en banc); Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, Inc., 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956). In larger firms, attempts have been made to "screen off" new attorneys from cases in which they had a preexisting interest. *See* Comment, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 678 (1980). The typical "screen" or "Chinese Wall" involves procedures designed to prevent the attorney "infected" with knowledge of confidential information about an adverse party from revealing it to other members of the firm by creating an "impermeable barrier" between the infected attorney and those attorneys involved in the case. *Id.* at 678. For the most part, courts have been reluctant to sanction screening procedures. *See* Cheng v. GAF Corp., 631 F.2d 1052, 1058 (2d Cir. 1980); Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 233 (2d Cir. 1977); Comment, *supra*, at 67. *But see* Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated and remanded on other grounds*, 449 U.S. 1106 (1981). In *Cheng*, an attorney, while employed with legal services, represented the plaintiff in an employment discrimination action against the defendant. 631 F.2d at 1054. The attorney subsequently was hired by the law firm representing the defendant. *Id.* The firm claimed that the attorney worked in a different department and had no involvement in the case. *Id.* The Second Circuit, noting the relatively small size of the firm, refused to accept this "Chinese Wall" defense. *Id.* at 1058. Because of day-to-day contacts, the danger of an unintentional transmitting of information was simply too great. The court stated:

> If after considering all of the precautions taken by the [disqualified] firm this Court still harbors doubts as to the sufficiency of these preventive measures, then we can hardly expect Cheng or members of the public to consider the attempted quarantine to be impenetrable.

Id. While the *Cheng* court primarily relied on DR 5-105(D), which provides that the disqualification of an attorney generally will disqualify all who are affiliated with him, the court also noted that fears of a tainted trial and appearances of impropriety, *see* THE CODE, Canon 9, required firm disqualification. 631 F.2d at 1059.

Notably, when the court is satisfied that the underlying trial will not be tainted, disqualification will not be ordered. 631 F.2d at 1058-59; Armstrong v. McAlpin, 625 F.2d at 445 (2d Cir. 1980) (en banc), *vacated and remanded on other grounds*, 449 U.S. 1106 (1981). *See also* Comment, *Firm Disqualification Motions—Screening and Immediate Appeals as of Right:* Armstrong v. McAlpin, 55 ST. JOHN'S L. REV. 346, 359-60 (1981). While the vacating of the *Armstrong* decision annuls its precedential value, the standard, requiring that the underlying trial be tainted before disqualification is necessary, remains valid. *Id.* at 359 n.82. *See generally* Comment, *Disqualification—"Screening to Rebut the Automatic Law*

cently, courts have refused to disqualify an entire district attorney's office absent a showing of actual prejudice resulting from continued prosecution.[139] In *People v. Shinkle,*[140] however, the Court of Appeals held that prior participation in a defendant's case by an attorney in the prosecutor's office disqualifies all office attorneys from prosecuting the case.[141]

In *Shinkle,* the defendant was indicted on felony charges.[142] Edward Leopold, as Executive Director of the Legal Aid Society of Sullivan County, advised the defendant and became familiar with his case.[143] Subsequently, Leopold left Legal Aid and accepted a position with the Sullivan County District Attorney.[144] To dispel any potential conflict of interest, Leopold had "conflict" stickers affixed to all pending cases, including *Shinkle,* in which the defen-

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Firm Disqualification Rule." Kesselhaut v. United States, *555 F.2d 791 (Ct. Cl. 1977),* 82 DICK. L. REV. 625 (1977); Comment, *Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification?,* 1977 DUKE L.J. 512; Comment, *The Chinese Wall Defense to Firm Disqualification,* 128 U. PA. L. REV. 677 (1980).

[139] *See, e.g.,* People v. DeFreese, 71 App. Div. 2d 689, 690, 418 N.Y.S.2d 959, 961 (2d Dep't 1979); People v. Cruz, 55 App. Div. 2d 921, 921, 390 N.Y.S.2d 442, 443 (2d Dep't 1977). When a defendant claimed actual prejudice resulting from the transfer of his legal services attorney to the prosecutor's office, he was granted a new trial "if, and only if, he ha[d] been demonstrably prejudiced by the District Attorney's prior affiliation." 55 App. Div. 2d at 921-22, 390 N.Y.S.2d at 443 (citations omitted). *Cf.* Glasser v. United States, 315 U.S. 60, 76-77 (1942) (defendant must show that denial of codefendant's constitutional rights resulted in actual prejudice to him). *See also* People v. Loewinger, 37 App. Div. 2d 675, 676, 323 N.Y.S.2d 98, 100-01 (3d Dep't 1971) (per curiam), *aff'd,* 30 N.Y.2d 587, 281 N.E.2d 847, 330 N.Y.S.2d 801 (1972); Fox v. Shapiro, 84 Misc. 2d 223, 224, 375 N.Y.S.2d 945, 948 (Sup. Ct. Orange County 1975).

[140] 51 N.Y.2d 417, 415 N.E.2d 909, 434 N.Y.S.2d 918 (1980).

[141] *Id.* at 424, 415 N.E.2d at 912, 434 N.Y.S.2d at 922. Criminal courts are authorized to appoint special prosecutors pursuant to section 701 of the County Law which provides that "[w]henever the district attorney of any county . . . is disqualified from acting in a particular case . . . a superior criminal court . . . may . . . appoint some attorney at law having an office in or residing in the county, to act as special district attorney during the . . . disqualification of the district attorney . . . ." N.Y. COUNTY LAW § 701 (McKinney 1972 & Supp. 1980). Section 701 is intended to provide relief to a district attorney who cannot perform his duties due to illness, disqualification or other reasons. Board of Supervisors v. Aulisi, 62 App. Div. 2d 644, 406 N.Y.S.2d 570 (3d Dep't), *aff'd,* 46 N.Y.2d 731, 385 N.E.2d 1302, 413 N.Y.S.2d 374 (1978). When circumstances warrant, the Governor may appoint a special prosecutor at county expense. N.Y. EXEC. LAW § 63 (McKinney 1972 & Supp. 1980); *see* Berger v. Carey, 86 Misc. 2d 727, 728, 383 N.Y.S.2d 171, 172 (Sup. Ct. Suffolk County 1976).

[142] 51 N.Y.2d at 420, 415 N.E.2d at 910, 434 N.Y.S.2d at 919. The defendant was charged with rape in the first degree, petit larceny, unauthorized use of a motor vehicle and assault in the third degree. *Id.*

[143] *Id.* at 419, 415 N.E.2d at 910, 434 N.Y.S.2d at 919. The Court noted that Leopold had interviewed Shinkle extensively, had become "intimately familiar" with his file and had helped plan his defense strategy. *Id.*

[144] *Id.* at 419-20, 415 N.E.2d at 910, 434 N.Y.S.2d at 919.

dants had been represented by Legal Aid during Leopold's term as Executive Director.[145] In addition, Leopold was neither permitted access to those files nor allowed to discuss the cases with other members of the District Attorney's office.[146] Nevertheless, the defendant in *Shinkle* contended that a conflict of interest remained and repeatedly attempted to bar the office from prosecuting his case.[147] Notwithstanding the defendant's efforts, an attorney from the District Attorney's office prosecuted the case and secured the defendant's conviction.[148] The defendant appealed, claiming that Leopold's presence in the prosecutor's office was prejudicial to his defense.[149] The Appellate Division, Third Department, affirmed the conviction, maintaining that Leopold had successfully isolated himself from the case and that the defendant had failed to show actual prejudice to his defense.[150]

On appeal, a divided Court of Appeals reversed the decision of the appellate division.[151] Writing for the majority,[152] Judge Jones noted that the screening procedures followed by the District Attorney's office could not diminish the "inherent impropriety" which existed.[153] The Court rejected the view that the defendant must show actual prejudice, stating that since proof of impropriety

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[145] *Id.* at 420, 415 N.E.2d at 910, 434 N.Y.S.2d at 919.

[146] *Id.* The Sullivan County District Attorney's office consists of the District Attorney and four assistants. Telephone conversation with Joseph Jaffe, District Attorney for Sullivan County (March 9, 1981).

[147] 51 N.Y.2d at 420, 415 N.E.2d at 910, 434 N.Y.S.2d at 919. Shinkle instituted an article 78 proceeding to bar the District Attorney's office from prosecuting his case, but his application was denied both initially and upon reargument. *Id.* A similar application presented to the trial court was also denied. *Id.* at 420, 415 N.E.2d at 910, 434 N.Y.S.2d at 919-20.

[148] 73 App. Div. 2d 764, 764, 423 N.Y.S.2d 549, 550 (3d Dep't 1979).

[149] *Id.*

[150] *Id.* at 765, 423 N.Y.S.2d at 550. The majority in the appellate division emphasized that there was no evidence that Leopold revealed any confidences he may have gained through his association with the defendant. *Id.* Thus, there was no reason why the District Attorney's office could not prosecute the case. *Id.* The dissent focused on Leopold's extensive contact with the defendant and questioned the majority view that the defendant must bear the burden of proof that there was prejudice. *Id.*, 423 N.Y.S.2d at 551 (Kane, J., dissenting). The dissent maintained that, because of the difficulty the defendant would have in proving actual prejudice, a special prosecutor ought to be appointed even if the screening procedure was shown to be effective. *Id.* (Kane, J., dissenting) (citing People v. DeFreese, 71 App. Div. 2d 689, 690, 418 N.Y.S.2d 959, 962 (Hopkins, J., dissenting)).

[151] 51 N.Y.2d at 420, 415 N.E.2d at 911, 434 N.Y.S.2d at 920.

[152] Judge Jones wrote the majority opinion, joined by Judges Gabrielli, Wachtler, Fuchsberg and Meyer. Judge Jasen wrote a dissenting opinion in which Chief Judge Cooke concurred.

[153] 51 N.Y.2d at 421, 415 N.E.2d at 910, 434 N.Y.S.2d at 920.

would not be within the defendant's reach, it would be unjust to place such a burden on the defendant.[154] Judge Jones noted that the defendant would perceive that his former attorney was now prosecuting the case against him, thus denying him the right to an appearance of total loyalty on the part of attorney who would be defending him.[155] The Court concluded, therefore, that the failure to disqualify the District Attorney's office from the prosecution was a sufficient basis for the reversal of the conviction.[156]

Authoring a vigorous dissent, Judge Jasen characterized the majority's adoption of an automatic disqualification rule as an unnecessary and undesirable restriction on the prosecutor's office.[157] The dissent observed that the screening procedures employed in *Shinkle* adequately safeguarded the defendant's rights, and maintained that the defendant should be required to show at least some prejudice to his case before disqualification would be warranted.[158] Judge Jasen contended that automatic disqualification implies that, despite the existence of a code of ethics, government attorneys cannot be trusted either to discharge their duties faithfully or to maintain the confidences of former clients.[159] He further reasoned that appearances of impropriety would persist even were a special prosecutor to be appointed, since the prosecutor would have access to the files and personnel of the District Attorney's office.[160] Judge Jasen concluded that, when no evidence is pro-

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[154] *Id.* Implicit in the Court's rationale is the concern for the defendant's constitutional right to a fair trial. U.S. CONST. amend. VI. When a conflict of interest exists, an attorney's failure to disqualify himself denies the defendant the right to effective counsel. *See* Grant v. United States, 447 F. Supp. 732, 735 (S.D.N.Y.), *aff'd mem.*, 591 F.2d 1330 (2d Cir. 1978).

[155] 51 N.Y.2d at 421, 415 N.E.2d at 910, 434 N.Y.S.2d at 920. Judge Jones noted that the defendant would perceive that his own attorney was "personally championing the People's cause against him." *Id.*

[156] *Id.* at 421, 415 N.E.2d at 911, 434 N.Y.S.2d at 920.

[157] *Id.* (Jasen, J., dissenting).

[158] *Id.* (Jasen, J., dissenting). The success of an appeal in which an apparent conflict has been alleged by the defendant has turned on the defendant's ability to show that his case has been prejudiced by the conflict. *See* note 139 and accompanying text *supra*. *See also* People v. Poplis, 30 N.Y.2d 85, 89, 281 N.E.2d 167, 169, 330 N.Y.S.2d 365, 368 (1972); People v. Little, 44 App. Div. 2d 873, 874, 355 N.Y.S.2d 654, 655 (3d Dep't 1974); People v. Moore, 30 App. Div. 2d 720, 721, 291 N.Y.S.2d 706, 708 (3d Dep't 1968). The dissent also argued that an abuse of confidence, if one exists, could be ascertained from the proof offered by the prosecutor. 51 N.Y.2d at 423-24, 415 N.E.2d at 912, 434 N.Y.S.2d at 922 (Jasen, J., dissenting).

[159] 51 N.Y.2d at 424, 415 N.E.2d at 912, 434 N.Y.S.2d at 922 (Jasen, J., dissenting).

[160] *Id.* (Jasen, J., dissenting). It appears likely that a special prosecutor will require access to prosecutor's files. In addition, he may need to discuss the pre-trial stages if disqualification does not take place immediately. Thus, the danger that confidential informa-

duced showing disclosure of confidential information, the appointment of a special prosecutor is not necessary to protect the integrity of the prosecution.[161]

The *Shinkle* Court's adoption of an automatic disqualification rule is an appropriate method of ensuring that the integrity of the prosecutor's office is protected.[162] It is suggested that when a criminal defendant has shared confidences with an attorney he has a right to be free from the appearance of impropriety which naturally would arise should that attorney join the District Attorney's office prosecuting his case.[163] Moreover, the defendant should not have the burden of proving prejudice since the Code of Professional Responsibility, by requiring the attorney to avoid any appearance of impropriety, operates to prevent such dilemmas.[164]

It is submitted, however, that *Shinkle* should not be read as requiring blanket disqualification of all prosecutors' offices under all circumstances.[165] Rather, courts should consider the size of the

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tion will be divulged, in Judge Jasen's view, would continue to exist. *Id.* at 424, 415 N.E.2d at 912, 434 N.Y.S.2d at 922 (Jasen, J., dissenting).

[161] *Id.* (Jasen, J., dissenting).

[162] The Court of Appeals, by adopting a *per se* disqualification rule, apparently has rejected the requirement of actual prejudice dictated by the lower courts. *E.g.*, People v. DeFreese, 71 App. Div. 2d 689, 690, 418 N.Y.S.2d 959, 961 (2d Dep't 1979); People v. Cruz, 55 App. Div. 2d 921, 921, 390 N.Y.S.2d 442, 443 (2d Dep't 1977). *See* note 139 and accompanying text *supra*. In People v. Zimmer, 51 N.Y.2d 390, 395, 414 N.E.2d 705, 707, 434 N.Y.S.2d 206, 209 (1980), the Court of Appeals noted that "no matter how firmly and conscientiously a District Attorney may steel himself against the intrusion of a competing and disqualifying interest, he never can be certain that he has succeeded in isolating himself from the inroads on his subconscious." *Id.* While *Zimmer* involved a more direct conflict of interest than that in *Shinkle*, the decision nevertheless was indicative of the Court's determination to apply a strict standard whereby any reasonable possibility of impropriety will result in disqualification. *See* Greene v. Greene, 47 N.Y.2d 447, 451, 391 N.E.2d 1355, 1357, 418 N.Y.S.2d 379, 381 (1979); Cardinale v. Golinello, 43 N.Y.2d 288, 296, 372 N.E.2d 26, 30, 401 N.Y.S.2d 191, 195 (1977). *But see* People v. Wilkins, 28 N.Y.2d 53, 55, 268 N.E.2d 756, 757, 320 N.Y.S.2d 8, 10 (1971); People v. Little, 44 App. Div. 2d 873, 874, 355 N.Y.S.2d 654, 655 (3d Dep't 1974); People v. Clement, 278 App. Div. 1040, 1040, 106 N.Y.S.2d 812, 813 (3d Dep't 1951).

[163] *See* People v. DeFreese, 71 App. Div. 2d 689, 691, 418 N.Y.S.2d 959, 962 (2d Dep't 1979) (Hopkins, J., dissenting). Judge Hopkins argued that "[i]rrespective of any actual detriment, the first client is entitled to freedom from apprehension and to certainty that his interest will not be prejudiced . . . ." *Id.*

[164] *See* note 137 and accompanying text *supra*.

[165] It seems clear that the *Shinkle* majority primarily was concerned with Leopold's active representation of the defendant. 51 N.Y.2d at 420, 415 N.E.2d at 910, 434 N.Y.S.2d at 919; note 143 *supra*. It is suggested, however, that the Court adopt a two-step approach. First, it should determine whether an attorney on the District Attorney's staff personally represented a particular defendant. Any personal representation should result in disqualification of the entire prosecutor's office. Second, absent personal representation, the individ-

prosecutor's office and the extent of the transferring attorney's contacts with the defendant before ruling on disqualification.[166] Indeed, a finding of "inherent prejudice," while justifiable in the small office setting of *Shinkle,* should not be automatic when contact is remote and screening is reasonable and feasible.[167] It is submitted that a contrary interpretation, requiring wholesale disqualification, would impede justice by necessitating inefficient prosecutions by inexperienced outside attorneys.[168] Thus, courts

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ual attorney from the Legal Aid office which handled the defendant's case should be disqualified, even though he had no personal dealings with the case. At the same time, a hearing should be held to determine if the defendant nonetheless would be prejudiced if the District Attorney's office continued to prosecute the case. Otherwise, one legal aid attorney's familiarity with a case need not be imputed to another. *Compare* People v. Wilkins, 28 N.Y.2d 53, 55, 268 N.E.2d 756, 757, 320 N.Y.S.2d 8, 10 (1971) *with* Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, Inc., 224 F.2d 824, 827 (2d Cir. 1955). To make a double presumption, that is, a presumption of knowledge of a case at legal aid and then an imputation of that knowledge to the District Attorney's office would be unjustified and result in unfounded and unnecessary disqualifications. *See* Comment, *The Chinese Wall Defense to Law-Firm Disqualification,* 128 U. PA. L. REV. 677, 682 n.24 (1980). One court has refused to presume that the knowledge of an assistant district attorney will be divulged to other members of the same staff. *See* People v. Schiraldi, 93 Misc. 2d 343, 351, 400 N.Y.S.2d 472, 477 (N.Y.C. Crim. Ct. Queens County 1977).

An interesting approach to the issue of imputed knowledge in a district attorney's office has been taken by a California court. Chadwick v. Superior Ct., 106 Cal. App. 3d 108, 164 Cal. Rptr. 864 (Ct. App. 1980). The *Chadwick* court indicated that DR 5-105(D) of the Code, which prohibits one member of a firm from accepting employment that another member could not, had no application to government lawyers. *Id.* at 118, 164 Cal. Rptr. at 868. *See* ABA COMM. ON PROFESSIONAL ETHICS OPINIONS, No. 342 (1975), *reprinted in* 62 A.B.A.J. 517 (1976). Furthermore, the *Chadwick* court noted that the prosecutor has an affirmative obligation "to seek justice, not merely to convict." 106 Cal. App. 3d at 118, 164 Cal. Rptr. at 868. *Cf.* People v. Zimmer, 51 N.Y.2d 390, 393, 414 N.E.2d 705, 707, 434 N.Y.S.2d 206, 207 (1980) (prosecutor's mission is to achieve a just result); ABA STANDARDS, THE PROSECUTION FUNCTION § 3-1.1(c) (1979) (duty of prosecutor to seek justice, not to convict). The facts in *Chadwick* were distinguishable from those in *Shinkle* in that the attorney in conflict in *Chadwick* strictly handled juvenile matters, had an office in a different building than the district attorney's office and had been supervised by a deputy who did not handle the conflicting case. 106 Cal. App. 3d at 112, 164 Cal. Rptr. at 864. Under these circumstances, the appearance of impropriety may be dispelled.

[166] *See* note 138 and accompanying text *supra.* It is suggested that a case in which a Legal Aid attorney enters a District Attorney's office of two hundred attorneys should not be treated on the same plane as a case in which an attorney joins a four-member office. Rather, courts should determine whether the defendant's trial will be tainted by virtue of the presence of his former attorney in the prosecutor's office.

[167] *Id.*

[168] When the court is forced to appoint a special prosecutor, a private attorney, not necessarily familiar with prosecution procedure, is given the case, *see* note 141 *supra.* Presumably much of the work done by the attorney will be a duplication of work done by the district attorney's office. Increases in cost and delays in time are often the result. Telephone conversation with Joseph Jaffe, District Attorney for Sullivan County (March 9, 1981).

should cautiously apply the disqualification rule in a manner calculated to fulfill the dual purposes of avoiding impropriety and ensuring the fair and efficient administration of justice.

Richard J. Bowler

Evidence of post-accident design modification held admissible in strict products liability manufacturing defect action

Evidence of post-accident repairs or design modifications traditionally has been held inadmissible in a negligence cause of action.[169] It had been unclear, however, whether this exclusionary

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[169] *See* Corcoran v. Village of Peekskill, 108 N.Y. 151, 155, 15 N.E. 309, 309-10 (1888); Reed v. New York Cent. R.R., 45 N.Y. 574, 580 (1871); C. McCORMICK, EVIDENCE § 275, at 666-67 (Cleary 2d ed. 1972); W. RICHARDSON, EVIDENCE § 168, at 136-37 (10th ed. J. Prince 1973). There are two well-accepted reasons for excluding evidence of post-accident design modifications in negligence suits. First, such evidence lacks probative force, since subsequent design modification, as well as subsequent repairs, represent "after-the-fact" conduct irrelevant to the issue of foreseeability. *See* 2 J. WIGMORE, EVIDENCE § 283, at 151 (McNaughton rev. ed. 1961); Note, *Products Liability and Evidence of Subsequent Repairs*, 1972 DUKE L.J. 837, 840-41; Note, *Evidence of Subsequent Repairs: Yesterday, Today, and Tomorrow*, 9 U. CAL. D. L. REV. 422, 422-23 (1976). The second reason for excluding evidence of post-accident design modifications rests on policy grounds. A tortfeasor may be deterred from making improvements or otherwise correcting a defective condition if evidence of the change could be introduced as an admission of prior negligence. *See, e.g.*, Bolm v. Triumph Corp., 71 App. Div. 2d 429, 436, 422 N.Y.S.2d 969, 974 (4th Dep't 1979); Costello & Weinberger, *The Subsequent Repair Doctrine and Products Liability*, 51 N.Y.S.B.J. 463, 464 (1979). This deterrence rationale has been criticized. *See, e.g.*, Schwartz, *The Exclusionary Rule on Subsequent Repairs—A Rule in Need of Repair*, 7 FORUM 1, 6 (1971). Nonetheless, some commentators believe that this policy consideration is the more compelling reason for not permitting evidence of subsequent design modifications or repairs. *See* 2 J. WIGMORE, *supra*, § 283, at 151; 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, ¶ 407[02], at 407-09 & n.5 (1981).

Notwithstanding the relevancy and policy rationales which underlie the rule excluding post-accident design modifications or repairs as proof of negligence, such evidence has been found admissible for other relevant purposes. W. RICHARDSON, *supra* § 168, at 137. Evidence of subsequent repairs is admissible to prove maintenance and control, *see, e.g.*, Slattery v. Marra Bros., 186 F.2d 134, 137 (2d Cir. 1951); Xavier v. Grunberg, 67 App. Div. 2d 632, 632, 412 N.Y.S.2d 22, 23 (1st Dep't 1979); Mason v. City of N.Y., 29 App. Div. 2d 922, 923, 288 N.Y.S.2d 990, 991 (1st Dep't 1968); Olivia v. Gouze, 285 App. Div. 762, 765, 140 N.Y.S.2d 438, 441 (1st Dep't 1955), *aff'd*, 1 N.Y.2d 811, 135 N.E.2d 602, 153 N.Y.S.2d 71 (1956), to impeach the testimony of a witness, *see* Devaney v. Degnon-McLean Constr. Co., 79 App. Div. 62, 64, 79 N.Y.S. 1050, 1052 (2d Dep't 1903), *aff'd*, 178 N.Y. 620, 70 N.E. 1098 (1904), or to prove the feasibility of a safety precaution, *see* Bolm v. Triumph Corp., 71 App. Div. 2d 429, 436, 422 N.Y.S.2d 969, 974 (4th Dep't 1979); J. WEINSTEIN & M. BERGER, *supra*, ¶ 407[04], at 407-16; Note, *Products Liability and Evidence of Subsequent Repairs*, *supra*, at 842. For a discussion of the rule's apparent weakness as a consequence of these exceptions, see Slough, *Relevancy Unraveled—Part III: Remote and Prejudicial Evidence*, 5 KAN. L.