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The Future of the Chinese Wall Defense to Vicarious Disqualification of a Former Government Attorney's Law Firm

THE FUTURE OF THE CHINESE WALL DEFENSE TO VICARIOUS DISQUALIFICATION OF A FORMER GOVERNMENT ATTORNEY'S LAW FIRM*

A former government attorney in private practice must disqualify himself from participating in a matter[1] in which he had substantial responsibility[2] while a public employee.[3] Often, a former government at-

* After this article went to press, the Supreme Court vacated the Second Circuit's decision in Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980), *vacating en banc* 606 F.2d 28 (2d Cir. 1979), *aff'g on rehearing* 461 F. Supp. 622 (S.D.N.Y. 1978), citing the Supreme Court's recent opinion in Firestone Tire & Rubber Co. v. Risjord, 49 U.S.L.W. 4089 (Jan. 13, 1981). 49 U.S.L.W. 3514 (Jan. 20, 1981). *Armstrong* is the principal case discussed in this article. In *Armstrong*, the Second Circuit prospectively held that orders denying disqualification motions are not appealable immediately as a matter of right. 625 F.2d at 435; *see* text accompanying notes 39-53, 78-106 *infra*. The Second Circuit also implicitly approved the efficacy of screening to prevent the vicarious disqualification of a former government attorney's law firm in cases in which that attorney had substantial responsibility for a related matter while a public employee. *See* text accompanying note 119-20 *infra*. In *Firestone*, the Supreme Court held that orders denying a motion to disqualify counsel are not appealable immediately as a matter of right. 49 U.S.L.W. 4089, 4092 (Jan. 13, 1981). In vacating the Eight Circuit's decision in *Firestone*, the Supreme Court noted that the Eight Circuit was without jurisdiction to hear the appeal and, thus, improperly reached the merits of the case. *Id.*

In *Armstrong*, the Second Circuit chose to reach the merits because failure to reach the merits would leave the law of the Second Circuit on attorney disqualification muddled. 625 F.2d at 441; *see* note 60 *infra*. The Supreme Court apparently vacated *Armstrong* because the Second Circuit was without jurisdiction to hear the appeal as the Eight Circuit was without jurisdiction to hear the appeal in *Firestone*. The Second Circuit's decision in *Armstrong*, therefore, should stand as an advisory opinion detailing the Second Circuit's position on the propriety of using screening to prevent the vicarious disqualification of a former government attorney's law firm. *See* text accompanying notes 61-77, 107-21 *infra*.

The reader also should note the discussion of the prerequisites for exceptions to the final judgement rule under Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949). *See* text accompanying notes 43, 95-99 *infra*. Some commentators suggest that four *Cohen* prerequisites exist. *See* text accompanying note 97 *infra*. The *Firestone* Court, however, failed to state a fourth *Cohen* prerequisite. *See* 49 U.S.L.W. 4089, 4091 (Jan. 13, 1981) (stating three parts of *Cohen* "collateral order" test). *See also* text accompanying note 96 *infra*.

[1] The ABA suggests that the term "matter" means "a discrete or isolatable transaction or set of transactions between identifiable [sic] parties." ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, RECENT ETHICS OPINIONS, No. 342 (1975), *reprinted in* 62 A.B.A.J. 517, 519 (1976) [hereinafter cited as OPINION 342 and cited to 62 A.B.A.J.]. The same lawsuit is the same matter. The same issue of fact involving the same parties and the same situation is the same matter. *Id.*; *see* Note, *Business as Usual: The Former Government Attorney and ABA Disciplinary Rule* 5-105(D), 28 HASTINGS L.J. 1537, 1564-65 (1977) [hereinafter cited as *Business as Usual*] (interpreting definition of "matter" and suggesting that "matter" not be construed narrowly).

[2] The ABA defines "substantial responsibility" as a "responsibility requiring the official to become personally involved to an important, material degree in the investigative or deliberative processes regarding the transactions or facts in question." OPINION 342, *supra*

torney's law firm receives requests to act as counsel in matters in which the attorney may not participate. As an attempt to prevent vicarious disqualification[4] of the entire law firm, the firm may build a Chinese Wall[5] around the former government attorney.[6] The Chinese Wall screens the former government attorney from direct and indirect participation in the matter.[7] The effectiveness of the Chinese Wall's screening of a former government attorney and the appropriateness of the Chinese Wall's use to prevent vicarious disqualification are the subject of a continuing debate.[8] In *Armstrong v. McAlpin*,[9] the Second Circuit entered this debate. The court also addressed the collateral issue

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note 1, at 519. Thus, the chief official in a large government office does not have "substantial responsibility" in all matters handled by that office. *Id.*; *see Business as Usual, supra* note 1, at 1565-66 (suggesting that ABA's definition of substantial responsibility requires that degree of knowledge imputed to supervisory official from those working under him be construed narrowly).

[3] *See* text accompanying note 11 *infra*; note 13 *infra*.

[4] Vicarious disqualification refers to the imputing of an attorney's disqualification to his law firm. *See* text accompanying note 12 *infra* (ABA rule requiring vicarious disqualification).

[5] An organization constructs a Chinese Wall to control conflict of interest problems. Slade v. Shearson, Hammill & Co., 517 F.2d 398, 402 (2d Cir. 1974); *see* Harzel & Colling, *The Chinese Wall and Conflict of Interest in Banks*, 34 BUS. LAW. 73, 74, 75 n.2 (1978) [hereinafter cited as Herzel & Colling]. Investment banking departments of securities firms and banks are major users of Chinese Wall procedures. The wall prevents inside information concerning a customer from flowing to the securities firm's sales department or to the bank's trust department. *See generally* Slade v. Shearson, Hammill & Co., 517 F.2d 398 (2d Cir. 1974); Herzel & Colling, *supra*; Lipton & Mazur, *The Chinese Wall Solution to the Conflict Problems of Securities Firms*, 50 N.Y.U.L. REV. 459 (1975). The terms "screening" and "Chinese Wall" are synonymous. Screening requires that the law firm exclude the disqualified attorney from any discussion, contact, or participation in the matter in which he had substantial responsibility while a public employee. Additionally, the law firm must prevent the attorney from sharing in the remuneration attributable to the matter. *See* OPINION 342, *supra* note 1, at 521; *Business as Usual, supra* note 1, at 1540 n.11 (defining screening).

[6] For cases concerning law firms' use of Chinese Walls in an attempt to avoid vicarious disqualification see Armstrong v. McAlpin, 625 F.2d 433, 436-37, 442-46 (2d Cir. 1980), *vacating en banc* 606 F.2d 28 (2d Cir. 1979), *aff'g on rehearing* 461 F. Supp. 622 (S.D.N.Y. 1978); Central Milk Producers Co-Op. v. Sentry Food Stores, Inc., 573 F.2d 988, 990 (8th Cir. 1978); Kesselhaut v. United States, 555 F.2d 791, 792-93 (Ct. Cl. 1977). *See generally* Comment, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677 (1980) [hereinafter cited as *Chinese Wall Defense*].

[7] *See* note 5 *supra* (detailing requirements for screening).

[8] *See generally* G. HAZARD, ETHICS IN THE PRACTICE OF LAW, 111-13 (1978) [hereinafter cited as HAZARD]; Cutler, *New Rule Goes Too Far*, 63 A.B.A.J. 727 (1977) [hereinafter cited as *New Rule*]; Note, *The Former Government Attorney and the Code of Professional Responsibility: Insulation or Disqualification?*, 26 CATH. U.L. REV. 402 (1977) [hereinafter cited as *Insulation or Disqualification*]; Note, *Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification*, 1977 DUKE L.J. 512 [hereinafter cited as *Ethical Problems*].

[9] 625 F.2d 433 (2d Cir. 1980), *vacating en banc* 606 F.2d 28 (2d Cir. 1979), *aff'g on rehearing* 461 F. Supp. 622 (S.D.N.Y. 1978). All future cites to the *Armstrong en banc* decision will be 625 F.2d (*en banc*). The vacated panel decision will be cited as 606 F.2d (panel).

whether the denial of a disqualification motion should be appealable immediately as a matter of right.[10]

The American Bar Association (ABA) Code of Professional Responsibility's Disciplinary Rule (DR) 9-101(B) forbids a former government attorney from accepting private employment in a matter in which he had substantial responsibility while a public employee.[11] DR 5-105(D) forbids a partner or associate of a lawyer who must decline employment under a disciplinary rule from accepting or continuing such employment.[12] When DR 5-105(D) is read in conjunction with DR 9-101(B), a former government attorney's disqualification apparently extends to his law firm.[13] The ABA, however, did not consider the effect DR 5-105(D) would have on a former government attorney entering private practice when the ABA amended the Disciplinary Rule in 1974.[14] Consequently, the ABA issued Formal Opinion 342 in an attempt to restrict the blanket disqualification rule of DR 5-105(D) and to clarify the relationship between DR 9-101(B) and DR 5-105(D).[15]

In Opinion 342, the ABA Ethics Committee stated that DR 5-105(D) extended disqualification of a lawyer to his law firm to prevent the lawyer from circumventing the disciplinary rules.[16] The committee

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[10] 625 F.2d at 434-35, 437-41 (*en banc*).

[11] ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 9-101(B) (1979); *see* note 2 *supra* (defining "substantial responsibility"); note 1 *supra* (defining "matter").

[12] ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105(D) (1979).

[13] *E.g.*, Armstrong v. McAlpin, 606 F.2d at 30-31 (panel) (vicarious disqualification required); Moskowitz, *Can D.C. Lawyers Cut the Ties that Bind?*, JURIS DOCTOR, Sept. 1976, at 34 [hereinafter cited as Moskowitz]. The federal conflicts of interest statute, 18 U.S.C. § 207 (Supp. II 1978), permanently bars an attorney from acting on matters in which he was personally and substantially involved at any time while employed by the government. *Id.* § 207(a). The statute also forbids the attorney from becoming involved in any matter that was under his official responsibility during his final year of service with a particular department or agency for two years after leaving the government. *Id.* § 207(b). The federal statute does not address the issue of whether the former government attorney's law firm also must disqualify itself because of the attorney's disqualification. *See* note 25 *infra*. The statute only refers to partners of attorneys currently employed by the government. These partners cannot participate, except as an agent for the government, in any matter in which the government attorney "participates or has participated personally and substantially" during his government service. 18 U.S.C. § 207(g) (Supp. II 1978).

[14] *See* Moskowitz, *supra* note 13, at 34 (effect of DR 5-105(D)). Prior to the 1974 amendment, DR 5-105(D) required that an attorney's disqualification extend to his firm only when the attorney declined employment pursuant to DR 5-105. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105(D) (1972). The ABA amended DR 5-105(D) in an attempt to codify case law and prior ABA opinions.

The ABA probably did not intend to require disqualification of a law firm every time a disciplinary rule requires that a member of the firm disqualify himself. For example, DR 2-110(B)(3) requires a lawyer to withdraw from employment if his "mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively," ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110(B)(3) (1979). *See* Armstrong v. McAlpin, 606 F.2d at 30 n.2 (panel) (discussing DR 2-110(B)(3)).

[15] *See* OPINION 342, *supra* note 1, at 517-21.

[16] *Id.* at 520.

believed, however, that it must weigh the simplicity of DR 5-105(D)'s automatic disqualification of a former government attorney's law firm against policy considerations involving government employment.[17] The committee concluded that if the law firm, with the approval of the government agency that employed the disqualified attorney, screens the attorney from direct or indirect participation in the matter, the law firm will not violate DR 5-105(D) by accepting or continuing the representation.[18] The Ethics Committee reasoned that screening maintains the important policy objective that a special disciplinary rule relating only to former government attorneys should not broadly limit the attorney's employment after leaving government service.[19] The committee feared that if DR 5-105(D) always imputes the former government attorney's disqualification to his firm, law firms might not hire government attorneys. Consequently, lawyers would shun government service, and the government would have difficulty recruiting competent attorneys.[20] Furthermore, the committee reasoned that screening preserves the major policy considerations supporting DR 9-101(B).[21] One of these considerations is that a lawyer should not accept employment that requires him to advocate a position adverse to one that he formerly advocated for the government.[22] Disqualification of the attorney also safeguards confidential government information from future use by the attorney.[23] Moreover, DR 9-101(B) discourages government attorneys from handling particular assignments in order to enhance prospects for employment after leaving the government.[24] Since screening prevents the disqualified attorney from participating in or receiving financal benefit from the firm's handling of the matter, the committee concluded that screening would preclude the attorney from circumventing DR 9-101(B).[25]

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[17] *See id.* at 520-21.

[18] *Id.* at 521; *see* note 5 *supra* (requirements for screening).

[19] OPINION 342, *supra* note 1, at 518, 521.

[20] *Id.* at 518. If a disqualification rule is too harsh, the rule becomes a tool enabling a litigant to improve his prospects by depriving his opponent of competent counsel. *Id.*; *see* Board of Ed. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) (motion to disqualify used for tactical purposes). Also, the New York City Bar noted that the bar has an obligation to ensure the availability to the general public of skilled legal counsel equipped with expertise in necessary areas. *Opinion No. 889*, 31 RECORD OF N.Y.C.B.A. 552, 566 (1976) [hereinafter cited as *N.Y. Opinion 889*]. *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1 (1979) (public's need for legal services met only if able to obtain acceptable legal counsel).

[21] OPINION 342, *supra* note 1, at 518, 521. The Ethics Committee did not consider the appearance of impropriety as the most important policy consideration underlying DR 9-101(B). *Id.* at 518.

[22] *Id.* at 518

[23] *Id.*

[24] *Id.*

[25] *Id.* at 521. Congress arguably intended that the legal profession should govern questions of imputing disqualification and implicitly approved Opinion 342. Congress specifically excluded a provision for imputing disqualification from the federal conflicts of interest statute. *See* note 13 *supra*. The Senate Committee on the Judiciary considered that the issue was within the field of legal ethics and that the Canon of Ethics gave adequate

Prior to *Armstrong v. McAlpin*, the Second Circuit had not considered whether the screening procedures of Opinion 342 would prevent the vicarious disqualification of a former government attorney's law firm.[26] The controversy in *Armstrong* arose from a Securities and Exchange Commission (SEC) investigation of defendants Clovis McAlpin and Capital Growth Fund (Capital).[27] Theodore Altman, an Assistant Director of the SEC's division of Enforcement, supervised the investigation.[28] While Altman was with the SEC, the SEC obtained injunctive relief against the defendants for securities law violations, and the court appointed Michael Armstrong receiver for Capital.[29]

In 1975, Altman left the SEC and joined the firm of Gordon, Hurwitz, Butowsky, Baker, Weitzen & Shalov (Gordon, Hurwitz) in New York

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coverage. *See* S. REP. No. 2213, 87th Cong., 2d Sess. 12, *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 3552, 3862. For these reasons, the exclusion of an imputation provision indicates a congressional intent to allow the legal profession to govern the imputation issue. Although the Code of Professional Responsibility and Opinion 342 have superseded the Canon of Ethics, Congress revised the federal conflicts of interest statute in 1978. *See* 18 U.S.C. § 207 (Supp. II 1978). Congress did not change the substance of any statutory reference to partners or associates of government employees. *See* S. REP. No. 170, 95th Cong., 1st Sess. 155, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4216, 4371. Therefore, Congress still must intend the legal profession to govern questions of imputing disqualification and must have approved Opinion 342 implicitly. *See generally N.Y. Opinion 889*, *supra* note 20, at 569-70; Brief of SEC, *amicus curiae, on rehearing en banc* at 4 n.3, Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) [hereinafter cited as SEC brief].

[26] Prior to the *Armstrong* decision, only two courts had addressed an issue similar to *Armstrong*. *See* Central Milk Producers Co-Op. v. Sentry Food Stores, Inc., 573 F.2d 988 (8th Cir. 1978); Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977). *Kesselhaut* involved a former general counsel for the Federal Housing Authority. 555 F.2d at 792. While *Kesselhaut* is distinguishable from *Armstrong* because the attorney in *Kesselhaut* only had sporadic personal contacts with the matter, *see id.*, the Court of Claims, sitting *en banc*, voiced strong approval of Opinion 342. *Id.* at 793. The Court of Claims stated that disqualification of a law firm is too harsh when the law firm has implemented proper screening procedures and when truly unethical conduct has not occurred. *Id.*

Central Milk, however, provides no support for either side of the disqualification question because of the unique factual setting of the case. The court refused to disqualify the firm in question, since the opposing party approved the screening procedure two years before moving to disqualify the firm. 573 F.2d at 992-93.

[27] 625 F.2d at 435 (*en banc*).

[28] *Id.* at 436. The *Armstrong* court stated that Altman was not involved in the SEC's litigation against the defendants on a day-to-day basis, although Altman generally was aware of the facts and status of the case. The SEC's New York Office prepared and filed the SEC's complaint and handled the litigation against the defendants. *Id.* The *Armstrong* panel, however, depicted Altman's involvement as direct and personal. 606 F.2d at 34 (panel). The trial court suggested that Altman acted only in a supervisory capacity in the SEC investigation against the defendants and that the investigation did not involve Altman on a day-to-day basis. Armstrong v. McAlpin, 461 F. Supp. 622, 623 (S.D.N.Y. 1978), *aff'd on rehearing*, 625 F.2d 433 (2d Cir. 1980) (*en banc*).

[29] 625 F.2d at 435 (*en banc*). A New York District Court awarded the SEC injunctive relief against the defendants for violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1979). SEC v. Capital Growth Company, S.A. (Costa Rica), 391 F. Supp. 593, 598 (S.D.N.Y. 1974).

City.[30] Five months after Altman joined Gordon, Hurwitz, Armstrong approached a partner of Gordon, Hurwitz and requested that the firm act as litigation counsel. The partner promptly advised Armstrong of the potential conflict problems arising out of Altman's prior role at the SEC. Despite this potential conflict, Armstrong and Gordon, Hurwitz concluded that the firm could represent Armstrong if the firm properly screened Altman according to the procedures of Opinion 342.[31] Twenty-one months after Armstrong initiated his suit against the defendants, the defendants moved to disqualify Gordon, Hurwitz because of Altman's prior SEC activity.[32] The district court denied the defendants' motion, and the defendants appealed.[33]

A three-judge panel of the Second Circuit reversed the district court and ruled that Gordon, Hurwitz must disqualify itself because of Altman's prior employment with the SEC.[34] The panel distinguished the disqualification of a former government attorney resulting from the attorney's active, personal participation in a matter from disqualification resulting from the attorney's nominal involvement as a supervisory official.[35] The panel held that screening procedures, however faithfully

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[30] 625 F.2d at 436 (*en banc*).

[31] *Id.* at 435-36; 606 F.2d at 29 (panel). Gordon, Hurwitz never disputed Altman's disqualification. When approached by Armstrong, Gordon, Hurwitz concluded that Altman should not participate in the firm's representation of the receiver. 625 F.2d at 436 (*en banc*). The firm screened Altman from the case by excluding him from participation in the action, by denying him access to relevant files, and by not allowing him to share in the funds that the firm would obtain from prosecuting the action. In addition, no one at the firm could discuss the matter in Altman's presence or permit him to view any document related to the action. *See* Armstrong v. McAlpin, 461 F. Supp. 622, 624 (S.D.N.Y. 1978) (discussing screening of Altman).

[32] 625 F.2d at 436-37 (*en banc*). Armstrong applied to District Judge Stewart, who had jurisdiction over the conduct of the plaintiff as receiver for Capital, for approval of Gordon, Hurwitz' retention. The receiver informed Judge Stewart of Altman's prior activities at the SEC and that the firm would screen Altman from the action. Judge Stewart approved the appointment of Gordon, Hurwitz four months before the plaintiff initiated his suit. *See id.* at 436; SEC Brief, *supra* note 25, at 8. Judge Stewart, however, did not preside on the defendant's motion to disqualify Gordon, Hurwitz. *See* Armstrong v. McAlpin, 461 F. Supp. 622 (S.D.N.Y. 1978) (Judge Werker presiding on defendants' motion to disqualify Gordon, Hurwitz). Further, the receiver informed the SEC of the retention of Gordon, Hurwitz. The SEC advised Armstrong in writing that the Commission did not object to the retention of Gordon, Hurwitz so long as the firm screened Altman from participation in the matter. 625 F.2d at 436 (*en banc*).

[33] The *Armstrong* trial judge found that the defendants had suffered no prejudice as a result of Gordon, Hurwitz' representation of the receiver and that this representation did not threaten the integrity of the trial. The judge found that Gordon, Hurwitz followed the bar association's ethical requirements in spirit and to the letter. 625 F.2d at 437 (*en banc*); 461 F. Supp. at 623-24.

[34] 625 F.2d at 443 (*en banc*); 606 F.2d at 34 (panel).

[35] 606 F.2d at 33 (panel). The *Armstrong* panel possibly limited the application of vicarious disqualification by creating a distinction between those cases in which disqualification of the former government attorney resulted from that attorney's active and personal participation in the matter and those cases in which disqualification resulted from the

observed, will not prevent a court from disqualifying a firm when the former government attorney had direct, personal involvement in a matter forming the basis of a private cause of action.[36] Disagreeing with Opinion 342, the panel found disqualification necessary as a prophylactic measure to guard against misuse of authority by a government attorney and to avoid any appearance of impropriety when, as in *Armstrong*, the attorney actively and personally participated in the matter.[37] The panel also required the elimination of any appearance of a possible future financial gain to a government attorney from his active personal involvement in a matter. The panel feared that a government attorney might shape a government action to enhance his employment prospects upon leaving government service.[38]

The Second Circuit granted a rehearing *en banc* of the panel decision.[39] The full circuit vacated the panel's decision and affirmed the district court's denial of the disqualification of Gordon, Hurwitz.[40] Additionally, the court prospectively held that orders denying disqualification motions are not appealable immediately as a matter of right.[41] The Second Circuit had requested that the parties brief the question of appealability because of the court's concern over the practical effects of the six year old unanimous *en banc* opinion in *Silver Chrysler Plymouth*,

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nominal relationship of a supervisory official. The panel noted that the number of cases in which a former government attorney had a direct, personal involvement in the matter would be small when compared with the number of cases where a former government attorney had only a formal, supervisory role. The panel, therefore, suggested that vicarious disqualification would not impair significantly the government's ability to recruit attorneys. *Id.* at 33 n.4. The SEC asserted, however, that attorneys serving for seven to eight years in a position similar to Altman's would have substantial responsibility for "scores, if not hundreds, of matters." SEC Brief, *supra* note 25, at 11 n.8. The panel reserved the question of whether screening is appropriate in cases in which the former government attorney had only a formal, supervisory relationship to the matter and when the matter offered no realistic opportunity for enhancing the prospects of private employment. 606 F.2d at 33 (panel).

[36] 606 F.2d at 34 (panel). The facts in *Armstrong* may not support the panel's characterization of Altman's activities as "direct, personal involvement." *See* note 28 *supra* (discussing Altman's participation in *Armstrong* matter).

[37] 625 F.2d at 443 (*en banc*); 606 F.2d at 34 (panel). Opinion 342 found the avoidance of the appearance of impropriety a policy consideration supporting the existence of DR 9-101(B), although not the most important consideration. OPINION 342, *supra* note 1, at 518. Opinion 342, however, found that effectively screening the personally disqualified attorney from participation in the matter avoids the appearance of impropriety. *Id.* at 521.

[38] 606 F.2d at 34 (panel). The panel found screening ineffective to prevent financial reward because no effective means exist to prevent an upward adjustment of a disqualified attorney's salary or partnership share. *Id.* The panel noted that a government lawyer would recognize the possibility of circumventing screening procedures if that government lawyer were tempted to misuse his authority for personal financial benefit. Further, the panel stated that an arrangement insulating the disqualified attorney from the case would not diminish the appearance of impropriety. *Id.*

[39] 625 F.2d at 434 (*en banc*).

[40] *Id.* at 435.

[41] *Id.*

Inc. v. Chrysler Motors Corp.[42] In *Silver Chrysler*, the Second Circuit held that appeals from the denial of disqualification motions fell within the narrow exception to the final judgment rule which the Supreme Court recognized in *Cohen v. Beneficial Loan Corp.*[43]

The *Armstrong* court noted that the availability of an immediate appeal contributed substantially to the proliferation of disqualification motions and the use of disqualification motions for purely tactical reasons.[44] The court also expressed concern over the practical effects on the administration of justice resulting from the tactical use of disqualification motions.[45] In overruling *Silver Chrysler*, the Second Circuit found flaws in the reasoning of that decision.[46] The *Armstrong* court suggested that the *Silver Chrysler* court simply found denials of disqualification motions to meet the *Cohen* prerequisites for immediate appeal of interlocutory orders without providing any detailed analysis of the *Cohen* prerequisites.[47]

The *Armstrong* court found that *Cohen* required three prerequisites for an exception to the final judgment rule. First, an interlocutory order from which a party seeks immediate appeal must be collateral to the merits. Second, the denial of an immediate appeal must result in irreparable harm to the party seeking review.[48] Third, the issue raised on appeal must present serious and unsettled questions that are too important to defer until adjudication of the entire case.[49] The *Armstrong* court held that denials of disqualification motions clearly were collateral to the merits but found that denials of disqualification motions did not meet the second and third *Cohen* requirements.[50] The Armstrong court pointed

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[42] 496 F.2d 800 (2d Cir. 1974) (*en banc*); *see* 625 F.2d at 435 (*en banc*).

[43] 337 U.S. 541 (1949); *see* 625 F.2d at 437, 438 (*en banc*) (*Silver Chrysler* holding). The final judgment rule prevents a party from resorting to appellate review of a trial court's ruling on a motion prior to the trial court's rendering final judgment in the case. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE 669-70 (2d ed. 1977) (discussing final judgment rule). The narrow exception to the final judgment rule recognized by the Supreme Court in *Cohen v. Beneficial Loan Corp.* arguably is the only acceptable exception to the final judgment rule. *See* Note, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. CHI. L. REV. 450, 452-53 (1978) [hereinafter cited as *Appealability*]; text accompanying notes 48-49, 94-101 *infra* (discussing *Cohen* prerequisites for exceptions to final judgment rule). Orders granting or denying disqualification motions are not final decisions on the merits of a lawsuit and thus are not final judgments. *See Appealability, supra*, at 452.

[44] 625 F.2d at 437 (*en banc*).

[45] *Id.* In *Armstrong*, the defendants' motion to disqualify Gordon, Hurwitz delayed the litigation from the district court's decision in June, 1978, until the Second Circuit's *en banc* decision in June, 1980. *See id.* at 438 (defendants moved to disqualify Gordon, Hurwitz in June, 1978).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at 438-39.

[50] *Id.* at 438.

out that erroneous denials of disqualification motions do not differ significantly from other situations where no appeal is available as a matter of right.[51] The court noted that the second *Cohen* prerequisite was not met because immediate review through certification or a writ of mandamus, protective orders issued by the trial judge, or reconsideration of the disqualification motion prevents irreparable harm.[52] Further, the Second Circuit reasoned that the issues raised by the denial of disqualification motions are not sufficiently important to meet the third *Cohen* prerequisite. The issues raised involved factual rather than legal determinations and thus fell outside the meaning of serious and unsettled questions.[53]

The *Armstrong* court, however, did not reach the same conclusion with respect to orders granting disqualification motions. The *Armstrong* court found orders granting disqualification appealable immediately as a matter of right.[54] The court observed that allowing the immediate appeal of a grant of disqualification disrupts litigation no more than the disruption caused by the grant of disqualification.[55] A disqualification effectively requires postponement of litigation for the disqualified counsel's client to retain new counsel and for the party's new counsel to prepare.[56] Permanent damage to the disqualified law firm's reputation might result if the law firm cannot appeal its disqualification immediately.[57] The court also observed that an immediate appeal from a grant of disqualification has limited tactical use. The grant of a disqualification motion is a fair indication that the motion raised nonfrivolous issues.[58] Further, the court

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[51] *Id.* Immediate appeal is not available from orders requiring discovery over a work product objection or orders denying motions for recusal of the trial judge. *Id.*

[52] *Id.* at 438-39; *see* 28 U.S.C. § 1292(b) (1976) (allowing interlocutory appeal through certification). Section 1292(b) provides that when a district judge believes that an order, not otherwise appealable, involves a controlling question of law on which a substantial ground for difference of opinion exists and that an appeal may advance materially the termination of the litigation, the judge shall so state in the order. The court of appeals then has the discretion to grant an immediate appeal. 28 U.S.C. § 1292(b) (1976). The *Armstrong* court admitted that a party may have to bear the time and expense of a possible tainted trial if the trial court denies the party's disqualification motion and the appellate court also denies an immediate appeal. 625 F.2d at 438 (*en banc*).

[53] 625 F.2d at 439 (*en banc*). The factual questions normally raised by a disqualification motion include whether threat of taint to the underlying trial exists, whether the screening is adequate, and whether a substantial relationship exists between the prior and present representations. *Id.* The *Armstrong* court found immediate appeal through certification or by mandamus adequate in those cases that raise important and unresolved legal questions. *Id.*; *see* note 52 *supra* (appeal through certification or by mandamus).

[54] 625 F.2d at 440-41 (*en banc*).

[55] *Id.* at 441.

[56] *Id.*

[57] *Id.* The injury to a firm's reputation resulting from disqualification may never be corrected on appeal if the firm's former client is satisfied with the performance of his new counsel. *Id.*

[58] *Id.*

noted that disqualification effectively might terminate the litigation if the court denies an immediate appeal.[59]

After determining the advisability of reaching the merits of the appeal,[60] the *Armstrong* court considered the standard applicable to disqualification motions. The court noted that the appropriateness of including screening procedures as a part of this standard is currently a hotly contested issue.[61] The court stated, however, that entry into this debate was neither necessary nor appropriate.[62] The court nevertheless observed that rejecting the efficacy of screening procedures might hamper the government's efforts to hire qualified attorneys.[63]

The *Armstrong* court found the Second Circuit's approach to ethical questions in *Board of Education v. Nyquist*[64] dispositive of the standard applicable to disqualification motions.[65] The *Nyquist* court adopted a restrained approach to disqualification, emphasizing preservation of the integrity of the trial process.[66] In *Nyquist*, the court stated that, except in rare instances, the Second Circuit has ordered disqualification of counsel only under two situations.[67] The first situation occurs when an attorney's conflict of interest undermines the court's confidence in the attorney's representation.[68] The more common situation occurs when the attorney potentially can use privileged information concerning his opponent.[69] Consequently, the *Nyquist* court held that unless the attorney's conduct tends to "taint the underlying trial," the appearance of impropriety should not warrant a disqualification order.[70] The *Armstrong*

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[59] *Id.* The grant of a disqualification motion effectively would terminate litigation if the disqualified counsel's client cannot afford to begin litigation anew. *Id.*

[60] The *Armstrong* court found that a refusal to reach the merits would leave the Second Circuit's law on attorney disqualification muddled. *Id.* at 441. Failure to clarify the law of the circuit would leave the courts with diminished opportunities to obtain clarification in the future. *Id.* at 441-42. The *Armstrong* court also found that dismissal of the appeal without reaching the merits would waste judicial effort. *Id.* at 442.

[61] *Id.* at 444.

[62] *Id.* The *Armstrong* court failed to state why its entry into the debate over the appropriateness of screening as a standard was neither necessary nor appropriate. *Id.*

[63] *Id.* at 443.

[64] 590 F.2d 1241 (2d Cir. 1979).

[65] 625 F.2d at 444-45 (*en banc*).

[66] *See id.* at 444 (discussing *Nyquist*).

[67] 590 F.2d at 1246.

[68] *Id.* The *Nyquist* court was concerned with conflicts of interests which violate Canons 5 and 9 of the ABA Code of Professional Responsibility. *Id.* Canon 5 states that "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 5 (1979).

[69] 590 F.2d at 1246.

[70] *Id.* at 1246-47; *accord*, W.T. Grant Co. v. Haines, 531 F.2d 671, 677-78 (2d Cir. 1976); *see* Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976) (reasonable possibility must exist that some specifically identifiable impropriety occurred). Several courts have adopted or cited the *Nyquist* position approvingly. *See, e.g.*, United States v. Birdman, 602 F.2d 547, 559, 560 & n.56 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); Kerry Coal Co. v. District 5 UMW, 470 F. Supp. 1032, 1035-37 (W.D. Pa. 1979); Society for Good Will to

court additionally suggested that absent taint of the trial process, the legislature or the disciplinary machinery of the bar can address better the ethical issues raised during litigation.[71]

The *Armstrong* court found that disqualification was unnecessary under the *Nyquist* standard.[72] The Second Circuit noted that neither the trial judge nor the panel saw a threat of taint to the trial by Gordon, Hurwitz' continued representation of the receiver.[73] The *Armstrong* court found no reason to fear a lack of vigor by Gordon, Hurwitz[74] or that the firm would be in position to use privileged information which Altman obtained while a government official.[75] The SEC gave its files on the matter to the receiver long before Armstrong retained Gordon, Hurwitz.[76] The court also found no reason to believe that Armstrong retained Gordon, Hurwitz because of Altman. The court indicated that Gordon, Hurwitz, the receiver, and the district court considered Altman's association with Gordon, Hurwitz to be a hindrance to the receiver's retention of the firm.[77]

The Second Circuit's explicit overruling of *Silver Chrysler*[78] continued the trend away from the immediate appealability of denials of disqualification motions.[79] The circuits now are split evenly on the question of whether to allow immediate appeals.[80] The three circuits that most re-

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Retarded Children v. Carey, 466 F. Supp. 722, 724-25 (E.D.N.Y. 1979).

The *Nyquist* court reasoned that disqualification has an immediate adverse impact on the client by separating him from counsel of his choice. Additionally, a party often interposes disqualification motions for tactical reasons. Unless a taint exists in the trial, the *Nyquist* court concluded that the needs of efficient judicial administration outweigh the potential advantages of immediate preventive measures. 590 F.2d at 1246.

[71] 625 F.2d at 446 (*en banc*).

[72] *Id.* at 445-46.

[73] *Id.* at 445; *see* 606 F.2d at 34 (panel) (finding no threat of taint of underlying trail); 461 F. Supp. at 625 (trial judge finding no threat of taint to underlying trial).

[74] 625 F.2d at 445 (*en banc*). The court noted that Gordon, Hurwitz was not using a Chinese Wall to justify simultaneous representation of conflicting interests. *Cf.* Fund of Funds, Ltd. v. Arthur Anderson & Co., 567 F.2d 225, 229-32 (2d Cir. 1977) (Chinese Wall ineffective to prevent disqualification when single law firm represents two adverse clients); Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1385-87 (2d Cir. 1976) (law firm disqualified because partner in firm also partner in firm representing adverse party).

[75] 625 F.2d at 445 (*en banc*).

[76] *Id.*; *see* note 109 *infra*.

[77] 625 F.2d at 445 (*en banc*); *see* text accompanying notes 113-16 *infra* (why Gordon, Hurwitz chosen as counsel).

[78] The *Armstrong* court overruled *Silver Chrysler* and held that orders denying disqualification motions are not appealable immediately. 625 F.2d at 440 (*en banc*).

[79] *See* T. Lewin, *The Rising Tide of Conflicts*, NAT'L L.J. May 26, 1980, at 1, col. 1 [hereinafter cited as *Rising Tide*] (quoting statement by L. Ray Paterson, Dean, Emory Law School, that *Armstrong* continues trend away from appealability of disqualification motions).

[80] Five circuits now allow interlocutory appeals of denials of disqualification motions. *See* Westinghouse Elec. v. Kerr-McGee Corp., 580 F.2d 1311, 1322 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); Aetna Cas. & Sur. Co. v. United States, 570 F.2d 1197, 1200 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978); Brown & Williams v. Daniel Int'l. Corp., 563 F.2d 671,

cently have considered the question have denied immediate appeals.[81] The Supreme Court has granted certiorari to review the decision of the Eighth Circuit in *Firestone Tire & Rubber Co. v. Risjord*[82] and may consider the apealability of the denial of disqualification motions.[83]

By overruling *Silver Chrysler*, the Second Circuit also continued the development of a pattern of periodic reconsideration and reversal of the question whether denials of disqualification motions are appealable immediately. The Second Circuit first considered the appealability of denials of disqualification in 1956.[84] In *Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc.*,[85] the court found denials of disqualification to fall within the *Cohen* exception to the final judgement rule.[86] Three years later, the Second Circuit reversed *Harmar* in *Fleischer v. Phillips*.[87] *Silver Chrysler* overruled *Fleischer* in 1974.[88] This pattern of

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672-73 (5th Cir. 1977); Akerly v. Red Barn Systems, Inc., 551 F.2d 539, 542-43 (3d Cir. 1977); New Mexico v. Aamodt, 537 F.2d 1102, 1106 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1978). Five circuits do not allow interlocutory appeals of denials of disqualification motions. *See* Armstrong v. McAlpin, 625 F.2d 433, 435, 441 (2d Cir. 1980) (*en banc*); *In re* Multi-Piece Rim Prods. Liab. Litig., 612 F.2d 377, 378 (8th Cir.), *cert. granted sub nom.*, Firestone Tire & Rubber Co. v. Risjord, 100 S. Ct. 2150 (1980); Melamen v. ITT Continental Baking Co., 592 F.2d 290, 295-96 (6th Cir. 1979); Community Broadcasting, Inc. v. FCC, 546 F.2d 1022, 1026-27 (D.C. Cir. 1976); Chucagh Elec. Ass'n v. United States Dist. Ct. for the Dist. of Alaska, 370 F.2d 441, 444 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967). The First Circuit has not considered the question. In Grinnele Corp. v. Hackett, 519 F.2d 595 (1st Cir.), *cert. denied*, 423 U.S. 1033 (1975), the First Circuit appeared to express its disapproval of *Silver Chrysler*. The *Grinnele* court stated that *Silver Chrysler* reflected an over concern for judicial economy. *Id.* at 587 n.4.

[81] *See* Armstrong v. McAlpin, 625 F.2d at 433; *In re* Multi-Piece Rim Prods. Liab. Litig., 612 F.2d 377, 378 (8th Cir.), *cert. granted sub nom.*, Firestone Tire & Rubber Co. v. Risjord, 100 S. Ct. 2150 (1980); Melamen v. ITT Continental Baking Co., 592 F.2d 290, 295-96 (6th Cir. 1979).

[82] 100 S. Ct. 2150, *granting cert. sub num.*, *In re* Multi-Piece Rim Prods. Liab. Litig., 612 F.2d 377 (8th Cir. 1980).

[83] *See Rising Tide*, *supra* note 79, at 1, col. 1 (discussing *Multi-Piece Prods.*). Only two issues are before the Supreme Court in *Firestone Tire*. The first issue is whether a denial of disqualification is a final decision in a collateral matter so as to qualify for an appeal pursuant to the *Cohen* exception to the final judgment rule. The other issue is whether the court below erred in allowing a potential reoccurring conflict by sanctioning simultaneous representation of both plaintiffs over the defendant's objections. *See* 48 U.S.L.W. 3701 (April 29, 1980) (issues before the Court in *Firestone Tire*).

[84] Prior to 1956 the Second Circuit allowed immediate appeals of grants of disqualification. *See* Fisher Studio, Inc. v. Loew's, Inc., 232 F.2d 199, 204 (2d Cir.), *cert. denied*, 352 U.S. 836 (1956) (denial of disqualification separate and collateral to merits); Lansky Bros. of W. Va., Inc. v. Warner Bros. Pictures, 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956) (failing to address appealability question); Consolidated Theatres v. Warner Bros. Cir. Mgt. Corp., 216 F.2d 920 (2d Cir. 1954) (failing to address appealability question).

[85] 239 F.2d 555 (2d Cir.), *cert. denied*, 355 U.S. 824 (1956).

[86] *Id.* at 556. The *Harmar* court stated that no distinction exists between orders granting and orders refusing disqualification. *Id.*

[87] 264 F.2d 515, 517 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959).

[88] Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800, 806 (2d Cir. 1974) (*en banc*).

reconsideration and reversal was not a result of a rapid and dramatic change in the Second Circuit's application of *Cohen* to denials of disqualification.[89] The pattern of reconsideration and reversal occurred because of the Second Circuit's overriding concern for the practical effect of its decisions on the progress of litigation.[90] The Second Circuit apparently used its interpretation of *Cohen* as a method of judicial regulation of the flow of litigation.[91] This practical approach to *Cohen* follows the *Cohen* mandate that the *Cohen* prerequisites receive a practical rather than a theoretical construction.[92] Therefore, the *Armstrong* court

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[89] In *Harmar* (1956) and *Silver Chrysler* (1974), the Second Circuit held that denials of disqualification were appealable immediately. *See* text accompanying notes 86 & 88 *supra*. The *Silver Chrysler* court stated that it was returning to the wisdom of *Harmar*. 496 F.2d at 805.

In *Fleischer* (1959) and *Armstrong* (1980), the Second Circuit held that denials of disqualification were not appealable immediately. *See* text accompanying notes 41 & 87 *supra*. Similarities exist in the analyses used in the *Fleischer* and *Armstrong* opinions. The *Armstrong* court found that the harm caused by an erroneous denial of a disqualification motion did not differ significantly from the harm caused by the denial of a motion for recusal of the trial judge or of a motion for discovery over a workproduct objection. 625 F.2d at 438 (*en banc*). The *Fleischer* court found that the denial of disqualification causes no harm to the party requesting disqualification and that party's status compares to the status of a party calling a possible instance of misconduct to the attention of the court. 264 F.2d at 516. The *Armstrong* court stated that appeals from denials of disqualification result in delays. 625 F.2d at 437 (*en banc*). The *Fleischer* court stated that the availability of immediate appeals led to wasteful litigation. 264 F.2d at 517. Both courts also noted that orders granting disqualification seriously disrupt litigation and sully the reputation of the disqualified attorney. 625 F.2d at 441 (*en banc*); 264 F.2d at 517.

[90] The *Fleischer* court noted that *Harmar* led to wasteful appeals resulting in lengthy delays in the progress of litigaion. 264 F.2d at 517. The *Silver Chrysler* court indicated that overruling *Fleischer* would prevent waste of judicial and attorney time. 496 F.2d at 806. The *Armstrong* court noted that the use of appeals from denials of disqualification to delay litigation raises grave questions of judicial administration sufficient to justify reconsideration of *Silver Chrysler*. 625 F.2d at 437-38 (*en banc*).

The *Fleischer* and *Armstrong* courts properly found that immediate appeals of denials of disqualification motions result in delays in the progress of litigation. *See* note 45 *supra* (delay in *Armstrong* litigation caused by immediate appeal of denial of disqualification). The availabilty of immediate appeal of denials of disqualification also contributes substantially to the use of disqualification motions for purely tactical reasons. Armstrong v. McAlpin, 625 F.2d at 433, 437 (*en banc*); *see Appealability*, *supra* note 43, at 450-51 (tactical use of disqualification motions); *Rising Tide*, *supra* note 79, at 1, col. 3 (commentators hope Supreme Court will limit tactical use of disqualification motions); note 20 *supra* (use of disqualification motion for tactical purposes).

[91] In *Fleischer*, the Second Circuit indicated that litigation would not advance materially if courts allow immediate appeals of denials of disqualification. 264 F.2d at 517. In *Silver Chrysler*, the Second Circuit allowed immediate appeals of denials of disqualification to prevent waste of judicial time. 496 F.2d at 806. In *Armstrong*, the Second Circuit reconsidered *Silver Chrysler* because of the grave questions of judicial administration raised by the use of immediate appeals of denials of disqualification to delay litigation. 625 F.2d at 437-38 (*en banc*).

[92] The *Cohen* Court stated that the final judgement statutes have long been given a practical rather than a technical construction. Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1949). A truly "practical" construction of the finality statutes requires that the courts

should have admitted that it based its decision on the practical application of *Cohen* rather than on the flawed "conceptual basis" of *Silver Chrysler*.[93]

Ironically, the basis of the *Armstrong* court's reasoning was flawed. The court misstated the *Cohen* prerequisites for exceptions to the final judgement rule.[94] The Supreme Court recently articulated these standards in *Abney v. United States*.[95] Under *Abney*, the district court's order first must dispose fully of the issue to be appealed. Second, the issue decided must be completely collateral to the cause of action asserted. Third, the decision must involve an important right that would be lost, probably irreparably, if an immediate appeal were not possible.[96] The *Cohen* Court indicated, however, that a fourth prerequisite also exists for exceptions to the final judgment rule. The fourth prerequisite is that the issue raised on appeal present serious and unsettled questions too important to deny an immediate appeal.[97] The *Armstrong* court stated this possible fourth *Cohen* requirement as the third *Cohen* requirement.[98] If the serious and unsettled questions requirement was a fourth *Cohen* prerequisite, this fourth reprequisite apparently did not survive *Abney*.[99] Additionally, the *Armstrong* court ignored the first *Cohen* requirement articulated in *Abney* and misnumbered the *Abney* Court's statement of the second *Cohen* requirement as the first *Cohen* requirment.[100] The *Armstrong* court's statement of the second *Cohen* requirement was a close, but not completely accurate, statement of the *Abney* Court's articulation of the third *Cohen* requirement. Thus, the *Armstrong* court should have stated that the third *Cohen* prerequisite requires that the trial court's decision involve an important right that

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treat an order as final only if the order effectively disposes of litigation. Orders denying disqualification, therefore, are not final because such orders do not terminate the litigation, either practically or theoretically. *See Appealability*, *supra* note 43, at 454 n.17 (practical application of *Cohen* to disqualification motions).

[93] *See* 625 F.2d at 438 (*en banc*) (*Armstrong* court overruled *Silver Chrysler* because "conceptual basis" of *Silver Chrysler* flawed).

[94] *See* text accompanying notes 48-49 *supra* (*Armstrong* court's statement of *Cohen* requirements).

[95] 431 U.S. 651, 658 (1977).

[96] *Id.*

[97] *See* 337 U.S. at 546-47 (trial court's order denying security bond was too important to be denied an immediate appeal and presented serious and unsettled questions); *Appealability*, *supra* note 43, at 455 (discussing fourth *Cohen* requirement)

[98] *See* 625 F.2d at 438 (*en banc*) (stating *Cohen* requirements); text accompanying note 49 *supra* (*Armstrong* court's statement of third *Cohen* requirement).

[99] *See* 431 U.S. at 658 (no mention of fourth *Cohen* requirement). *But see Appealability*, *supra* note 43, at 455-56, 461-64 (suggesting that fourth *Cohen* prerequisite still required). The two most recent Supreme Court cases to cite *Cohen* relied on *Abney's* statement of the *Cohen* prerequisites for exceptions to the final judgment rule. Coopers & Lybrand v. Livesay, 437 U.S. 436, 468 (1978); United States v. MacDonald, 435 U.S. 850, 855 (1978).

[100] *See* text accompanying notes 48 & 96 *supra* (stating *Cohen* prerequisites for exceptions to final judgment rule).

would be lost, probably irreparably, if an immediate appeal were not possible.[101]

Despite the *Armstrong* court's misstatement of the *Cohen* prerequisites, the *Armstrong* court properly found that denials of disqualification motions are not appealable under *Cohen*. The Second Circuit correctly stated that any harm resulting from the denial of disqualification is not irreparable. Certification or a writ of mandamus provides a means for immediate review in cases in which an important right would be lost.[102] Further, the appellate court can grant a new trial if, on appeal from final judgment, the appellate court determines that the trial court incorrectly denied disqualification.[103] The denial of a disqualification motion arguably does not dispose fully of the question presented by a disqualification motion. The trial court can hear new evidence and grant disqualification later in the litigation.[104]

The *Armstrong* court also correctly found orders granting disqualification motions to be appealable as a matter of right. Orders denying disqualification do not present the practical problems that orders granting disqualifications present.[105] Further, irreparable harm to a law firm's reputation might result if the law firm may not appeal the firm's disqualification immediately. Review of the grant of disqualification would occur only if the firm's former client appealed the final judgment on the merits. Therefore, harm to the firm's reputation resulting from an erroneous grant of disqualification would remain uncorrected if the law firm's former client chose not to appeal.[106]

In addition to correctly finding that denials of disqualification motions are not appealable as a matter of right, the *Armstrong* court properly determined that the disqualification of Gordon, Hurwitz was unnecessary. The *Armstrong* court's acceptance of the *Nyquist* standard was sound. Emphasizing the avoidance of taint to the underlying trial prevents a court from basing the grant or denial of disqualification on form over substance. A court should not disqualify a law firm merely to avoid a possible appearance of impropriety if no threat of a conflict of interest actually exists. The *Armstrong* court's application of the *Nyquist*

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[101] *Id.*

[102] *See* note 52 *supra* (discussing immediate review through certification).

[103] 625 F.2d at 438 (*en banc*).

[104] The Supreme Court in *Abney* addressed the question of whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is appealable immediately under *Cohen*. 431 U.S. at 653. In analyzing the first *Cohen* requirement, that the decision fully disposed of the question, the *Abney* Court stated that no further steps were available to the defendant to prevent the trial that the defendant claimed double jeopardy barred. *Id.* at 659. A court, however, can revise an order denying disqualification. A party can move anew for disqualification if the disqualified attorney's law firm does not effectively screen the attorney after the original motion to disqualify. *See* 625 F.2d at 438-39 (*en banc*).

[105] *See* text accompanying notes 55-56, 59 *supra* (discussing disruption in litigation resulting from grant of disqualification motion).

[106] 625 F.2d at 441 (*en banc*); *see* note 57 *supra* (damage to disqualified firm's reputation may never be corrected if former client fails to appeal).

standard to the facts of *Armstrong* also was sound. Neither the trial judge nor the panel found a threat of taint if the firm continued to represent Armstrong.[107] Altman also was not in a position to convey privileged information obtained while a government official.[108] The SEC opened its files on the matter to the receiver prior to the receiver's retaining Gordon, Hurwitz. Therefore, the firm had access to the SEC files through the receiver.[109] Further, Armstrong and Gordon, Hurwitz received court approval for screening Altman when Judge Stewart authorized the firm as litigation counsel.[110] The *Armstrong* court stated that Gordon, Hurwitz followed these court approved screening procedures.[111]

Altman's presence in the *Armstrong* controversy also did not fulfill the panel's fear that a government attorney would shape a government action to enhance his future employment prospects.[112] Armstrong did not retain Gordon, Hurwitz because of Altman's association with the firm.[113] Armstrong approached Gordon, Hurwitz only after abortive negotiations with two other firms.[114] Armstrong chose Gordon, Hurwitz because a partner of the firm was involved in legal action in Costa Rica, while another partner had specialized experience in prosecuting complex fraud cases.[115] In addition, the firm was willing to delay payment for its services.[116]

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[107] 625 F.2d at 455 (*en banc*); *see* 606 F.2d at 34 (panel) (finding no threat of taint to underlying trial); 461 F. Supp. at 615 (trial judge's finding of no threat of taint to underlying trial.

[108] 625 F.2d at 445 (*en banc*).

[109] The SEC opened its files in the *Armstrong* controversy to the receiver in accord with the SEC's long-standing practice of assisting the efforts of court appointed receivers in SEC law enforcement actions. SEC Brief, *supra* note 25, at 7. J. Robert Lunney, counsel for the *Armstrong* defendants, claims that Gordon, Hurwitz is using confidential information that Altman gathered during the course of his employment at the SEC and that the SEC and Gordon, Hurwitz specifically refused to give this information to the defendants. Telephone interview with J. Robert Lunney, Lunney & Crocco (August 19, 1980); *accord*, Reply Brief for Appellant *on rehearing en banc* at 13, Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980). Once litigation between the receiver and a third party ensues, however, the SEC provides both sides equal access to the SEC's files on the matter through discovery. SEC Brief, *supra* note 25, at 7. Since the *Armstrong* court did not address this charge by Mr. Lunney and found that Gordon, Hurwitz effectively screened Altman, the *Armstrong* court must have determined that Mr. Lunney's charge was unfounded.

[110] 625 F.2d at 436 (*en banc*); *see* note 32 *supra* (court approval of screening of Altman).

[111] 625 F.2d at 437, 442-43, 445 (*en banc*); *see* note 31 *supra* (discussing trial court's finding that Gordon, Hurwitz followed court approved screening procedures).

[112] *See* 606 F.2d at 33 (panel) (*Armstrong* panel's fear that government attorney would shape government action to enhance his future employment prospects).

[113] 625 F.2d at 445 (*en banc*).

[114] *Id.* at 436. Armstrong originally retained Barrett, Smith, Shapiro & Simon as counsel. Two years later, Barrett, Smith became aware of a potential conflict of interest involving one of the firm's institutional clients. The receiver concluded that the receiver should substitute litigation counsel. *Id.* at 435.

[115] *Id.* at 436. The receiver's action against McAlpin and Capital involved complex allegations of security fraud violations. The action also required litigation in Costa Rica because McAlpin fled to Costa Rica with most of Capital's assets. *Id.* at 435-36

[116] *Id.* at 436. Only limited funds were available to the receiver to retain new counsel. Thus, substitute counsel would receive little or no interim compensation. *Id.* at 435-36.

In *Armstrong*, the Second Circuit had an opportunity to resolve the controversial question of whether screening can prevent vicarious disqualification of a former government attorney's law firm. The court chose not to address this issue directly and explicitly deferred the decision to the state and federal bar associations.[117] By deferring the question of screening, the *Armstrong* court arguably abdicated the court's judicial duty to regulate the conduct of attorneys practicing before it.[118] The court, however, neither abdicated its judical duty nor completely deferred the question of screening to the bar. By adopting the *Nyquist* standard of prevention of taint to the underlying trial, the *Armstrong* court implicitly accepted the efficacy of screening.[119] The screening procedures of Opinion 342 clearly appear to prevent taint to the underlying trial when effectively enforced.[120] Further, the Second Circuit suggested that the bar must enforce any standard stricter than required by *Nyquist* through its disciplinary machinery.[121] Thus, the bar must decide whether to adopt a stricter standard. Unless the bar adopts a stricter standard, the *Armstrong* decision provides the courts and former government attorneys with a standard that considers disqualification appropriate only when taint to the underlying trial results from ineffective enforcement of the screening procedures of Opinion 342.

Prior to the *Armstrong en banc* decision, but subsequent to the panel decision, the ABA's Commission of Evaluation of Professional Standards (Kutak Commission) addressed the issue of whether to base disqualification of a law firm on actual impropriety or on an appearance of impropriety. On February 20, 1980, the Kutak Commission published the Discussion Draft of the ABA Model Rules of Professional Conduct (Discussion Draft).[122] The Kutak Commission apparently found that the ideal of absolute disqualification outweighed the need to limit vicarious

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[117] *Id.* at 444, 446.

[118] The ABA Code of Judicial Conduct provides that a judge should take appropriate disciplinary measures against a lawyer for unprofessional conduct. ABA CODE OF JUDICIAL CONDUCT, Canon No. (B)(3) (1972); *see Ethical Problems*, *supra* note 8, at 529 n.68 (judge has obligation to regulate conduct of attorneys practicing before him).

[119] The *Armstrong* court stated that resolution of the ethical propriety of the screening procedure was unnecessary as long as the trial court justifiably regarded screening as an effective means of isolating Altman from litigation. 625 F.2d at 445 (*en banc*).

[120] The *Armstrong* court found that underlying trial untainted because the screening procedures of Opinion 342 effectively isolated Altman from the litigation. *Id.* at 442-43, 445.

[121] The *Armstrong* court stated that if no taint to the underlying trial exists, the disciplinary machinery of the bar is a better vehicle to address possible ethical conflicts arising during litigation. *Id.* at 446.

[122] DISCUSSION DRAFT OF ABA MODEL RULES OF PROFESSIONAL CONDUCT (1980), *reprinted in* 540 SEC. REG. & L. REP. (BNA) 1-31 (Feb. 20, 1980) [hereinafter cited as DISCUSSION DRAFT and cited to 540 SEC. REG. & L. REP.]. The Kutak Commission will revise the Discussion Draft based on written submissions and public commentary. After making these revisions, the Kutak Commission will submit the final proposed rules to the ABA House of Delegates for consideration in February, 1981. *See* Kutak, *Coming: The New Model Rules of Professional Conduct*, 66 A.B.A.J. 46, 49 (1980) [hereinafter cited as Kutak] (introducing Discussion Draft).

disqualificiation. Section 1.1(e) of the Discussion Draft imposes mandatory vicarious disqualification on the law firm of a former government attorney when that attorney participated personally and substantially in the matter in controversy while a public employee.[123] The Discussion Draft does not allow the waiver of vicarious disqualification permitted by Opinion 342.[124]

The Discussion Draft appears to incorporate the *Armstrong* panel's concept that a court should consider the nature of a former government attorney's participation in a matter when ruling on a disqualification motion.[125] Section 1.11(a) requires disqualification of the former government attorney only when the attorney participated personally and substantially in the matter while a government employee.[126] The *Armstrong* panel created a distinction between those cases in which a former government attorney's disqualification results from the attorney's active, personal participation in a matter and those cases in which disqualification results from the attorney's nominal involvement as a supervisory official.[127] The Discussion Draft, however, does not incorporate this distinction successfully. Section 1.11(f) allows the appropriate government agency to waive personal disqualification of the former government attorney.[128] Therefore, the waiver of section 1.11(a) disqualification allowed by section 1.11(f) gives the government agency the power to waive disqualification of a former employee who participated personally and substantially in the matter in controversy while employed by that agency. The ABA should eliminate the waiver of section 1.11(a) disqualification allowed by

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[123] Under § 1.11(a) of the Discussion Draft, a former government attorney cannot accept employment in a matter in which he participated personally and substantially as a public employee. Section 1.11(e) prohibits a partner or associate of a lawyer who must decline employment under § 1.11(a) from accepting such employment. DISCUSSION DRAFT, *supra* note 122, at 9. The Draft does not specifically prohibit the screening procedure approved in Opinion 342 since the draft cites Opinion 342 in the comments. *See id.* at 10. The authors of the Discussion Draft, however, intended mandatory vicarious disqualification. *See* Kutak, *supra* note 122, at 49 (Discussion Draft requires mandatory vicarious disqualification); Patterson, *An analysis of the Proposed Model Rules of Professional Conduct*, 31 MERCER L. REV. 645, 658 (1980) (Discussion Draft requires mandatory vicarious disqualification); Memorandum of Thomas D. Morgan and Ronald D. Rotunda to Users of PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (July 1980) at 10 (interpreting Discussion Draft to require mandatory vicarious disqualification).

[124] While § 1.11(f) of the Discussion Draft explicitly allows waiver of personal disqualification of the former government attorney, the section does not mention waiver of § 1.11(e)'s provision for vicarious disqualification. DISCUSSION DRAFT, *supra* note 122, at 9. Therefore, the exclusion of vicarious disqualification from the waiver section indicates the authors' intention that vicarious disqualification may not be waived. *Cf.* note 123 *supra* (Discussion Draft authors intended absolute vicarious disqualification).

[125] A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT DRAFT WOULD IMPOSE NEW BURDENS ON CORPORATE COUNSEL, 541 SEC. REG. & L. REP. (BNA) A-3 at A-4, A-5 (Feb. 20, 1980).

[126] DISCUSSION DRAFT, *supra* note 122, at 9; *see* note 123 *supra*.

[127] *See* text accompanying note 35 *supra* (distinction created by *Armstrong* panel).

[128] DISCUSSION DRAFT, *supra* note 122, at 9. *See also* note 124 *supra*.

section 1.11(f) if the ABA accepts the Discussion Draft. If the ABA permits waiver of section 1.11(a) disqualification, a government agency could misuse this power by allowing a former employee to pursue a government objective in private practice free from the restrictions imposed on government personnel.[129] Further, the former government attorney would benefit from his knowledge of confidential information received while a public employee.

In an attempt to offer an alternative to the Discussion Draft, the Association of Trial Lawyers of America requested that the Roscoe Pound-American Trial Lawyers Foundation establish the Commission on Professional Responsibility.[130] The Commission on Professional Responsibility recently published a public discussion draft of the American Lawyer's Code of Conduct (Lawyer's Code of Conduct).[131] Section 9.15 of the Lawyer's Code of Conduct explicitly requires vicarious disqualification of a former government attorney's law firm when that attorney participated personally and substantially in a related matter while in public service.[132] The comments to section 9.15 clearly indicate that the Lawyer's Code of Conduct does not approve screening.[133] Also, section 9.15 does not allow any waiver of disqualification.[134]

The current reconsideration of vicarious disqualification by the American Association of Trial Lawyers, the ABA, and the Second Circuit is particularly timely. The size of law firms and the number of government attorneys have increased dramatically over the past ten years. These changes have resulted in an increase in the number of cases in which a former government attorney faces a possible conflict of interest.[135] As a result of this increase, motions for vicarious disqualification of a former government attorney's law firm soon may become standard. Further, if courts regularly grant vicarious disqualification, the revolving door between private practice and government service would stop. Former government attorneys would become "Typhoid Marys"[136] shunned by prospective employers. Employment of former government attorneys might result in an entire firm's disqualification in a wide range of cases.[137] Additionally, the government no longer could attract bright

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[129] The *Armstrong* panel expressed fear that a former government attorney might pursue the goverment's objective in an action through private litigation. 606 F.2d at 33 (panel).

[130] Commission on Professional Responsibility, The Roscoe Pound-American Trial Lawyers Foundation, *The American Lawyer's Code of Conduct*, 16 TRIAL 44, 45 (August 1980).

[131] *Id.* at 48-63. (reprinting public discussion draft of proposed American Lawyer's Code of Conduct).

[132] *Id.* at 60.

[133] *See id.* at 62-63 (comments to § 9.15).

[134] *See id.* at 60, 62-63 (§ 9.15 and comments to § 9.15).

[135] *See* Landua, *Practical Aspects of Dealing With Conflicts of Interest in the Corporate Practice of Law Firms*, 10 INST. OF SEC. REG. 405, 407-08 (1979) (discussing increasing number of conflict of interest motions).

[136] Kesselhault v. United States, 555 F.2d 791, 793 (Ct. Cl. 1977) (*per curiam*).

[137] *See* 625 F.2d at 443 (*en banc*); Kesselhault v. United States, 555 F.2d 791, 793 (Ct. Cl. 1977); *Insulation or Disqualification*, *supra* note 8, at 410 n.36.

young lawyers or experienced and qualified attorneys to fill policymaking positions.[138]

An end to the debate over vicarious disqualification of the law firm of a former government attorney may be closer as a result of the Second Circuit's decision in *Armstrong v. McAlpin*. The Second Circuit's adoption of the *Nyquist* standard of prevention of taint to the underlying trial will discourage a routine disqualification motion in every case in which an appearance of impropriety exists.[139] Further, the court's acceptance of a standard based on avoiding the taint to the underlying trial[140] may force acceptance of screening.[141] The ABA should reject the Kutak Commission's Discussion Draft, and the Association of Trial Lawyers of America should reject the Commission on Professional Responsibility's Lawyer's Code of Conduct in light of the Second Circuit's holding in *Armstrong*. Both bodies also should reject the proposed ethical codes because the government's inability to attract the best personnel available is too high a price to pay for absolute vicarious disqualification. Rejection of absolute vicarious disqualification also would eliminate the invalid presumption that misconduct will occur unless an absolute rule exists to preclude any possibility of unethical conduct.[142] Further, if courts base disqualification on an appearance of impropriety when no threat of taint to the underlying trial exists, greater damage to the public's confidence in the legal profession will occur than if courts allow the appearance of impropriety.[143] Public confidence also will diminish if the public experiences increased difficulty in retaining counsel of its choice as a result of an increase in the number of firm disqualifications.[144]

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[138] *See* HAZARD, *supra* note 8, at 111-13 (effects of absolute vicarious disqualification on government's ability to attract attorneys); *New Rule*, *supra* note 8, at 725-26 (noting effect of absolute vicarious disqualification on named government employees).

[139] A party would hesitate to bear the financial burden of a disqualification motion knowing that the court would deny the motion because no threat of taint to the underlying trial exists. *See* text accompanying note 70 (*Nyquist* requires disqualification only if attorney's conduct tends to taint underlying trial).

[140] *See* text accompanying notes 64-70 *supra* (discussing adoption of *Nyquist* standard).

[141] *See* text accompanying notes 119-21 *supra* (question before bar after *Armstrong*).

[142] *See* Wiley, *Speaking Out Against Ethics Committee Inquiry 19*, DIST. LAW., Winter 1976, 35 (criticizing absolute vicarious disqualification because of its presumption that impropriety would occur unless any possibility of impropriety is barred absolutely).

[143] Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 589 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975); *see* 625 F.2d at 446 (*en banc*) (restrained approach to vicarious disqualification reinforces public confidence in fairness and efficiency of judicial process).

[144] The bar fulfills its obligation to meet the public's need for legal counsel only if acceptable counsel is available. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-1 (1979). If the bar is unable to fulfill its obligation to provide the public with acceptable counsel, the public's confidence in the legal profession will diminish. *See* OPINION 342, *supra* note 1, at 521 (inflexible vicarious disqualification would inhibit opportunity for all litigants to obtain competent counsel of own choosing); *N.Y. Opinion 889*, *supra* note 20, at 566 (approving screening because of bar's obligation to provide skilled legal counsel); *Business as Usual*, *supra* note 1, at 1562 (public suspicion of bar and judiciary increases as frequency of unnecessary disqualifications increases).

The ABA, the Association of Trial Lawyers of America, and the courts should adopt standards for ethical conduct for former government attorneys that specifically approve screening.[145] The standards should require court approval of the screening procedures at the outset of litigation.[146] The standards also should require both the disqualified attorney and his law firm to file affidavits at the outset of litigation attesting to their intention to follow court approved screening procedures and at the conclusion of litigation attesting to adherence to the screening procedures.[147] Finally, an appropriate standard should allow a party, upon showing a breach of the screening procedures, to move to disqualify the personally disqualified attorney's law firm at any time during the litigation.[148]

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[145] Although the *Armstrong* court's implicit acceptance of screening was sound, explicit acceptance of screening would have defined more clearly the law of the Second Circuit.

[146] Judicial approval of screening avoids requiring consent of the government agency that formerly employed the disqualifed attorney. The government attorney consenting for the agency might favor screening because of his or the agency's own self-interest or because he personally knows the attorney in question. *See N.Y. Opinion 889*, *supra* note 20, at 566-67; *Ethical Problems*, *supra* note 8, at 520-21, 528-29; Note, *Conflicts of Interest and the Former Government Attorney*, 65 GEO. L.J. 1025, 1051 (1977) [hereinafter cited as *Conflicts of Interest*]. Judicial approval of screening falls within the court's duty to regulate the conduct of the members of the bar practicing before the court. *See* note 118 *supra* (court's obligation to regulate conduct of attorneys practicing before it). Some commentators recommend approval of screening by an impartial committee or board. *See New Rule*, *supra* note 8, at 726, 727-28 (independent approval of screening); *Conflicts of Interest*, *supra* (committee or board comprised of general public and disinterested members of bar).

[147] Requiring affidavits would ensure that screening is effective. An attorney would be more cautious in his adherence to screening measures knowing that he must attest to adherence under oath. The D.C. Bar Association proposed a requirement of affidavits in its Final Revolving Door Proposal submitted to the D.C. Court of Appeals. The Final Revolving Door Proposal specifically approved screening. *Final Revolving Door Proposal Submitted to D.C. Court of Appeals*, DIST. LAW., Ap.-May, 1979, at 62-63.

[148] Specifically allowing parties to move for disqualification at any point during litigation should ensure the effectiveness of court approved screening. Few law firms would risk malpractice suits by their clients by circumventing the screening of an attorney in order to obtain an advantage for that client.

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