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THE FOURTH CIRCUIT REVIEW

FOREWORD

CLOTHED WITH INTEGRITY: THE CONSEQUENCES OF ATTORNEY DISLOYALTY IN THE FOURTH CIRCUIT

K. K. HALL*

INTRODUCTION

If everyone were clothed with integrity, if every heart were just. . .the other virtues would be well-nigh useless. . . ."¹

What are the essential attributes of an attorney? What determines whether a lawyer is functioning properly within the bounds of an adversary system? These are obviously broad questions that are not susceptible to simple answers. Yet, the practitioners of a profession bound by standards of ethical behavior must always hold these inquiries open. As a principal component in an organized attempt to achieve justice in the resolution of conflict, attorneys must always remember that their personal adherence to the standards of the legal profession may have consequences that extend far beyond an individual career.

The essential formulation of an attorney's ethical standards is contained in the American Bar Association's Code of Professional Responsibility (Code). The Code suggests that an attorney must embody two qualities: competence and integrity.² The remaining portions of the Code are largely efforts to amplify and explain these fundamental concepts. It must be remembered that the Code is more than a basis for individual discipline. It also provides an intellectual foundation from which the court can exercise a "non-delegable responsibility to insure that nothing, not even the appearance of impropriety, is permitted to tarnish the judicial process or shake the confidence of the public in the integrity of the legal profession."³

A social system that aims at resolving conflicts that are often bitter in nature must have the confidence of those it serves if its determinations are

* Circuit Judge, United States Court of Appeals for the Fourth Circuit. I gratefully acknowledge the editorial assistance of my law clerk, Michael L. Keller, J.D. West Virginia University, 1985, in the preparation of this article.

1. Moliere, *Le Misanthrope*, Act V, Scene 1.

2. Model Code of Professional Responsibility Canon 1 (1979).

3. *In re Asbestos Cases*, 514 F. Supp. 914, 919-20 (E.D. Va. 1981), *aff'd, sub nom, Greitzer & Locks v. Johns-Manville Corp.*, No. 81-1379 (June 17, 1982).

to be accepted. When a court inquires into the nature of an attorney's performance, it is, therefore, acting to preserve the essence of the legal system. In civil actions the operation of this duty may be reflected in disqualification proceedings against single attorneys or entire firms with potentially profound effects on the outcome of litigation. In the operation of criminal law the gravity of the court's duty is increased by the additional concerns of specific constitutional guarantees. The failure of a criminal defendant's counsel to meet the standards of the legal profession has profound constitutional significance which must always be of concern to the court.

It is the purpose of this article to briefly examine the judicial position in this circuit on the importance of attorney integrity. More specifically, the focus will be on integrity as it is exhibited within the framework of an attorney's loyalty to a client.⁴ It is hoped that this inquiry will raise more questions than it answers and that by stimulating discussion on the proper evaluation of loyalty, readers will be encouraged to re-examine their own commitment to ethical behavior.

It should be noted at the outset that when this article speaks of disloyalty, it is not addressing intentional betrayal, for an attorney may be disloyal without intent.⁵ Rather, we are examining a form of constructive disloyalty, a condition implied by law when an attorney's fidelity to a present or former client somehow appears objectively deficient. It may be argued that disloyalty in this sense is an elaborate fiction. It is this author's position, however, that within this circuit the consequences of disloyalty, real or constructive, are extensive and concrete.

I.

If integrity as revealed in the context of loyalty is the central theme of this article, some preliminary consideration must be given to the other major quality of an attorney—competence. Although both are fundamental to an ethical attorney, competence is measured from a substantially different perspective than is integrity.

In many ways competence may be the easier concept to grasp as well as the easier to measure. The United States Supreme Court has provided substantial guidance concerning attorney competence in its cases analyzing the sixth amendment right to effective counsel. The Court noted in *Powell v. Alabama*,⁶ that competence consists of such skill and knowledge as will render the trial a reliable adversarial testing process. In *Strickland v. Wash-*

4. *Strickland v. Washington*, 466 U.S. 688 104 S. Ct. 2052, 2067 (1984). "[T]he duty of loyalty [is] perhaps the most basic of counsel's duties. Moreover it is difficult to measure the precise effect . . . of representation corrupted by conflicting interests." *Id.*

5. Model Code of Professional Responsibility Canon 9 (1979). Canon 9 addresses the possibility that appearances alone can constitute impropriety. *Id.* Ethical Consideration 9-2 notes that even "ethical conduct of a lawyer may appear to laymen to be unethical." *Id.*

6. *Powell v. Alabama*, 287 U.S. 45 (1932).

ington,⁷ the Court stated that counsel's performance was within the range of acceptability as long as errors did not create a reasonable probability that the result of the judicial proceeding would be different.

As *Powell* and *Strickland* clearly demonstrate, competence is primarily linked to reliable factfinding. An analysis of competence operates with an internal focus that looks inward at the legal profession. A determination that an attorney has acted competently is made by measuring that attorney's level of performance against that of some other reasonably effective counsel. In the strictest sense, the expectations of the client are not relevant to a measure of competence.

II.

In contrast, the absence of practitioner integrity is a fatal flaw in the judicial system that merits concern even when the factfinding is unimpaired. The Code of Professional Responsibility's Canon 9 command that an attorney avoid even "the appearance of impropriety" recognizes that the adversarial system operates effectively only when clients can have full and complete confidence in their counsel. Not surprisingly, therefore, integrity is examined from an external perspective that considers the reasonable expectations of the public. Inquiry focuses not on whether another reasonable attorney would find actions to be lacking in integrity or, as this article is approaching the question, disloyal. Rather, the evaluation looks to the position of the reasonably objective layperson.⁸

Loyalty is demonstrated primarily in an unswerving commitment of an attorney to the interests of his client within the ethical limits otherwise stated in the Code.⁹ A question of potential disloyalty is presented whenever the attorney's commitment is divided or diluted. There are essentially two conditions that place loyalty at risk: (1) joint representation of more than one client in a single proceeding and (2) successive representation where an attorney acts in opposition to a former client.

The problems attending joint representation have been examined by the Supreme Court in the context of criminal trials.¹⁰ The Court has stated that when multiple or joint representation creates a conflict of interest that adversely affects a lawyer's performance, an impermissible violation of the sixth amendment occurs.¹¹ Although this analysis seems to focus on the internal factfinding process for sixth amendment purposes, there is also strong implication that if a court clearly determines that a client is not prejudiced by joint representation, no reasonable layperson would find the

7. *Strickland v. Washington*, 466 U.S. 668 (1984).

8. *See, e.g., United States v. Smith*, 653 F.2d 126 (4th Cir. 1981).

9. Model Code of Professional Responsibility Canon 7 (1979) (recognizing that zealous representation of a client must remain within the bounds of law).

10. *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978).

11. *Cuyler v. Sullivan*, 446 U.S. at 350.

attorney's actions improper. The inquiry into loyalty, therefore, remains external.

The implications of successive representation have received less definitive judicial treatment. In many ways the dilemma presented by successive representation is more complex. In a fluid and mobile society, busy attorneys may well find themselves acting in opposition to former clients. Despite some concern with the "treachery of changing sides"¹² it is reasonably clear that merely opposing a party who has once been a client is not in itself impermissible disloyalty. It is the subject matter of the two representations that controls the inquiry. Since the law presumes that an attorney possesses all of the confidential information to which he had access in the representation of a client,¹³ any substantial similarity in the affairs being litigated raises the specter of a violation of confidence.¹⁴

In addition to examining the nature of the representation to determine if the successive representation involves substantially similar issues, some courts have considered other issues in a balancing process as a means of deciding if disloyalty is present. The Fifth Circuit, for example, concluded that Canon 9 "impropriety" should not be determined inflexibly. The court in *Woods v. Covington County Bank*,¹⁵ stated that a "client's right to counsel of his choice, the lawyer's right freely to practice his profession" and in the case of former government attorneys, "the government's need to attract skilled lawyers"¹⁶ all had to be weighed before finding that an attorney had exhibited disloyalty by changing sides.

The Fourth Circuit has not rejected a balancing analysis as a mechanism for determining impropriety. It is, however, the position of this article that this circuit, in its most recent efforts to grapple with the issue, has exhibited a practice of strictly applying the principles embodied in Canon 9. In the Fourth Circuit, the need for integrity arguably carries the greatest weight.

III.

The issue of loyalty in the civil context was before the Fourth Circuit in the appeal of the district court decision of *In Re Asbestos Cases*.¹⁷ The dispute in that case arose from a motion to disqualify attorney Neil R. Peterson and his employer, the law firm of Greitzer & Locks, from participation in a body of asbestos litigation known as the "Norfolk Cases."¹⁸

Peterson had been employed by the Department of Justice as a Special Litigation Counsel before entering private practice with Greitzer & Locks in

12. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975).

13. *Emle Indus., Inc. v. Patentex Inc.*, 478 F.2d 562 (2d Cir. 1973).

14. Model Code of Professional Responsibility Canon 4 (1979). EC 4-1 recognizes the paramount importance of confidentiality to the proper functioning of the legal system. *Id.*

15. *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976).

16. *Id.* at 812.

17. *Greitzer & Locks v. Johns-Manville Corp.*, No. 81-1379 (June 17, 1982).

18. *In re Asbestos Cases*, 514 F. Supp. at 917.

1980. His duties as Special Counsel had involved the general coordination of the defense of asbestos litigation against the United States and specifically the "Norfolk Cases."¹⁹ Since Greitzer & Locks also was involved extensively in asbestos litigation generally and the "Norfolk Cases" in particular, the firm sought a waiver of any imputed disqualification that might flow from an application of the Ethics in Government Act.²⁰ After insisting on a rigid screening procedure that barred Peterson's participation not only in the "Norfolk Cases," but also in *any* asbestos litigation in which the United States was a party, the Justice Department waived disqualification of the firm.²¹

In ruling on a subsequent motion to disqualify the firm, the district court declined to accept the Government's waiver as dispositive of the issue. The court concluded that its independent duty to safeguard the integrity of the judicial process required that it reconsider any disqualification questions in light of Canon 9. Regardless of whether any independent statutory limitations had been satisfied, the Code of Professional Responsibility could not be allowed to sink into the realm of "reverberating generalities."²²

Although the district court recognized that other societal interests, including the right to counsel of choice, were invoked in a disqualification controversy, it clearly found that these interests could not outweigh a reasonable public perception of disloyalty. Once its analysis of the screening procedure determined that the "lay public cannot be expected to perceive the screening [of Peterson] to be effective," the court found that disqualification of Greitzer & Locks was mandated.²³

This strict application of Canon 9 was considered by the Fourth Circuit Court of Appeals sitting en banc. The judgment of the district court was affirmed by an equally divided court. Although the mechanism seems somewhat equivocal, this circuit impliedly accepted a position that Canon 9 has sharp teeth. Attorneys intrude upon the ethical standards Canon 9 sets at substantial risk to themselves and their employers.

IV.

Attorney Peterson's experience in *In Re Asbestos Cases* demonstrated the consequences of allowing even constructive disloyalty to reach the level of perceived impropriety in civil matters. Similar conduct in criminal proceedings may have even more dramatic results. The Fourth Circuit recently considered such a situation in *United States v. Schell*.²⁴

19. *Id.*

20. 18 U.S.C. § 207(a) (1980).

21. *In re Asbestos Cases*, 514 F. Supp. at 919.

22. *In re Asbestos Cases*, 514 F. Supp. at 920 (quoting *Empire Linotype School v. United States*, 143 F. Supp. 627, 633 (S.D.N.Y. 1966)).

23. *In re Asbestos Cases*, 514 F. Supp. at 925. "[T]he right of the public to retain counsel of its choice is secondary in importance to the Court's duty to maintain the highest standards of professional conduct to insure and preserve trust in the integrity of the bar." *Id.*

24. *United States v. Schell*, 775 F.2d 559 (4th Cir. 1985).

In *Schell*, a private attorney, David Jividen, was contacted by two individuals, John B. Cain and Freda G. Wilson, who had been subpoenaed as part of a grand jury investigation of a sizeable drug organization in northern West Virginia. Jividen's representation of the two was apparently limited to telephoning the United States Attorney's Office on behalf of Cain and to advising Wilson in preparation for her appearance before the grand jury.²⁵

Four months later, Jividen was employed as an Assistant United States Attorney for the Northern District of West Virginia. In that capacity, he was involved in the preparation of Government cases against what was known as the Gallo drug organization. Among those ultimately indicted and tried on a variety of drug-related charges were Cain, Wilson and thirty-seven other defendants.

Following their convictions of numerous crimes including violations of the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, Cain and Wilson appealed, contending that Jividen's involvement in the case violated their right to a fair trial. The Government argued that there had been no actual conflict of interest, impropriety or appearance of impropriety attendant to Jividen's participation. The Government contended that Jividen had been insulated completely from the portion of the prosecution involving Cain and Wilson. The Government further maintained that Jividen never obtained any confidential information from either defendant.²⁶

Whatever merit the Government's position might have had in another context, this circuit totally rejected its application to a case in which the criminal defendant's attorney had changed sides. In criminal proceedings, a client's right to a loyal attorney is protected not only by Canon 9, but also by the requirements of fundamental fairness embodied in the due process clauses of the fifth and fourteenth amendments.²⁷ That additional protection requires that an examination of loyalty move beyond the perspective of the reasonable layperson and consider whether there is any potential for an impairment of the attorney-client relationship.

As the Fourth Circuit in *Schell* stated:

The relationship between an attorney and his client is a sacred one. In that relationship, the client must be secure in the knowledge that any information he reveals to counsel will remain confidential. The confidentiality of the attorney-client relationship is severely compromised, if not destroyed, when, after representing a client, a lawyer joins in the criminal prosecution of that client *with respect to the identical matter about which the attorney originally counseled the client*. Such switching of sides is fundamentally unfair and inherently prejudicial.²⁸

25. *Id.* at 562.

26. *Id.* at 565.

27. *Id.*

28. *Id.*

The loyalty of an attorney is obviously far more than a personal virtue. It is an indispensable ingredient in a "sacred relationship" as well as a fundamental right of a criminal defendant.²⁹

CONCLUSION

It should not be assumed that either *Schell* or *In Re Asbestos Cases* are the ultimate or definitive words on the issue of attorney loyalty in this circuit. Certainly it may be argued that the strict position taken by the courts in each is attributable in part to the involvement of present or past government attorneys. There is obviously an additional concern for public responsibility in such situations.³⁰ Nevertheless, this circuit has twice exhibited an unmistakable willingness to hold attorneys to the highest standards of their profession and to exact a high price for failure to meet those standards. The clothes of integrity are in fashion in the Fourth Circuit.

29. *Id.*

30. Model Code of Professional Responsibility Canon 9 (1979). In addition to statutory limitations such as the Ethics in Government Act, and the general ethical standards set in the Code of Professional Responsibility, the former government attorney is subject to the specific constraints set forth in EC 9-3 and DR 9-101(B). *Id.*; see 18 U.S.C. § 207 (1980).

