Everybody's Doing It—But Who Should Be? Standing to Make a Disqualification Motion Based on an Attorney's Representation of a Client with Interests Adverse to those of a Former Client

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I. INTRODUCTION

Ideally, an attorney would like to represent as many clients as possible. Yet, when an attorney represents a client in court with interests that are conceivably adverse to a former client's interests, he does so at his peril. He risks finding himself the object of a disqualification motion charging him with violating the conflict of interest provisions of the American Bar Association's Model Code of Professional Responsibility (Code). Even if the former client is not a party to the litigation or has consented to the attorney's representation of the new client, the attorney may still face a disqualification motion. Some courts permit third parties (generally opposing counsel) to make disqualification motions based on a conflict of interest to which they have no personal relation.2


1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101 to -107 (1980) [hereinafter Code]. In 1970 the Code replaced the Canons of Professional Ethics that the American Bar Association had first promulgated in 1908. Since 1970, the Code has been amended five times. The Model Rules of Professional Conduct, which would replace the current Code, are presently under discussion by the ABA's Commission on Evaluation of Professional Standards.

The Code consists of three parts: (1) the Canons are nine short general "statements of axiomatic norms," (2) the Ethical Considerations are 138 aspirational guidelines "toward which every member of the profession should strive," but they are not mandatory, (3) the 41 Disciplinary Rules "state the minimal level of conduct below which no lawyer should fall without being subject to disciplinary action." Code, supra, at Preliminary Statement.

Most state courts have adopted all or at least substantial portions of the Code. D. MELINKOFF, LAWYERS AND THE SYSTEM OF JUSTICE 637-38 (1976).

2. See, e.g., Whiting Corp. v. White Mach. Corp., 567 F.2d 713 (7th Cir. 1977);
The ostensible purpose of a disqualification motion is to expose and eliminate unethical conduct in order to protect both the interests of the former client and the interest of the public in the integrity of the bar.\textsuperscript{3} Motions to disqualify, however, have become tools of the litigation process, used solely for strategic purposes.\textsuperscript{4} As a result, they have proliferated in the federal courts.

Federal courts are by no means blind to the strategic uses to which disqualification motions can be put.\textsuperscript{5} In ruling on the actual merit of disqualification motions, courts have grown increasingly sensitive to the hardships which inure to the client who loses his chosen counsel through disqualification.\textsuperscript{6}

To curb the strategic uses and abuses of disqualification motions, courts should look for reasons behind the proliferation of such motions. The standing rules have received little attention in this respect. Some federal courts have allowed parties other than the former client to make disqualification motions on the basis of an attorney's representation of a client with interests adverse to those of a former client.\textsuperscript{7} This practice has greatly expanded the number of litigants with standing to make disqualification motions.

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This article will examine the issue of standing for disqualification motions based on an attorney's representation of a client with interests adverse to those of a former client of the attorney. The article focuses on the appropriateness of granting standing to nonclients to make disqualification motions, particularly when the former client has not objected to the attorney's alleged conflict of interest. The question of standing in this situation cannot be disposed of merely by reference to general standing requirements applicable to other areas of law because the nature of the inquiry into a motion to disqualify is "ethical," not "legal," setting the treatment and consideration of disqualification motions apart from that of other litigation motions. Inasmuch as far more than legal issues are involved in motions to disqualify (such as the public's perception of the bar and the legal system) ethical concerns must play the major role in determining who should have the right to bring the disqualification issue to the attention of the court.

The question of who has standing to raise an issue is dependent upon whose rights are to be protected. Therefore, since the Code provides the source of the right, it is first necessary to examine the Code provisions implicated when an attorney is charged with a conflict of interest between present and former clients to discern what rights the Code wanted to safeguard. Second, this article will consider the standing of the former client to

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8. In general, the question of standing concerns whether the litigant is entitled to have the court decide the merits of the dispute or the particular issues. The inquiry involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise. The constitutional limits on standing eliminate claims in which a party has failed to make out a case or controversy between himself and his adversary. See U.S. Const. art. III. In order to satisfy Article III, the party must show that he personally suffered "a distinct and palpable injury to himself," Warth v. Seldin, 422 U.S. 490, 501 (1975); that is likely to be redressed if the requested relief is granted. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

A party who alleges sufficient injury in fact to satisfy these very minimal constitutional limitations on federal court jurisdiction may nonetheless be barred from federal court under prudential standing rules because he asserts a generalized grievance shared in substantially equal measure by all or a large class of citizens, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); or because he seeks to rest his claim on the legal rights or interests of third parties rather than his own. Warth v. Seldin, 422 U.S. 490, 501 (1975).


determine whose rights are being protected when he moves to disqualify and to provide a frame of reference for the analysis of nonclient standing. Finally, the bulk of this article will focus on the propriety of permitting nonclients to make disqualification motions. This article suggests that courts will provide better, long-term protection for the interests the Code seeks to safeguard by curtailing the standing rights of nonclients to make disqualification motions.

II. THE ROLE OF THE CODE IN THE DISQUALIFICATION PROCESS

The drafters of the Code designed the provisions concerning an attorney’s conflict of interest between former and present clients to: (1) foster confidence in the attorney-client relationship by protecting the client’s confidences (Canon 4) and ensuring the attorney’s undivided loyalty to his client (Canon 5),11 (2) aid in the maintenance of public confidence in the legal system (Canon 9),12 and (3) provide attorneys a standard by which to measure their professional conduct.13 Although the Code makes no attempt to prescribe either disciplinary procedures or penalties for Code violations,14 courts nevertheless look to it for guidance and will disqualify an attorney when they find an impermissible violation of the Code.15 Moreover, as set forth below, the Code was not designed as a basis for standing to make disqualification motions. However, such a result has, in fact, occurred.

A. Canon 4

Canon 4 requires a lawyer to preserve the confidences and secrets of a client.16 The Canon implicitly incorporates the admonition, embodied in old Canon 6 of the Canons of Professional Ethics17 that “the [lawyer’s] obligation to represent the client with undivided fidelity and not divulge his secrets or con-

11. Canon 4 states “a lawyer should preserve the confidence and secrets of a client;” Canon 5 states “a lawyer should exercise independent professional judgment on behalf of a client.”
12. CODE, supra note 1, at Canon 9 states: “A lawyer shall avoid even the appearance of professional impropriety.”
13. CODE, supra note 1, at Preliminary Statement.
14. CODE, supra note 1, at Preamble.
16. See supra note 11.
17. The Canons were superseded by the Code on January 1, 1970. See supra note 1.
fidences forbids also the subsequent retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." This ethical duty survives the termination of the attorney-client relationship.

Canon 4 and its accompanying Disciplinary Rules, especially Disciplinary Rule 4-101(B), are designed to allay any apprehension that a client may have about frank discussion of sensitive information with counsel. Without strict enforcement of such ethical standards, a client would hesitate to discuss problems freely and extensively with his lawyer due to fear that the information the client reveals may one day be used against him. A lawyer's good faith efforts to follow the Code, when standing alone, are insufficient safeguards to protect the client from the possibility of disclosure. Courts have developed and applied a strict prophylactic rule to prevent any possibility that the attorney might violate Canon 4 by using confidential information acquired from a former client to the former client's disadvantage. This rule is embodied in the "substantial-relationship test" first articulated by Judge Weinfeld in T.C. Theatre Corp. v. Warner Brothers Pictures:

I hold that the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this matter can the lawyer's duty of absolute fidelity be enforced and spirit of the rule relating to privileged communications be maintained.

19. The Code states:

   Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
   1) Reveal a confidence or secret of his client;
   2) Use a confidence or secret of his client to the disadvantage of the client;
   3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Code, supra note 1, at DR 4-101(B).
22. Id. at 268-69.
Thus, if the former client facing his one-time attorney in litigation proves the existence of (1) the attorney-client relationship, and (2) a substantial relationship between the content of the two representations, a pair of presumptions arise that may lead to the disqualification of his former attorney.23 The first presumption is that the client disclosed confidences to the attorney, which the attorney should not reveal.24 The second presumption is that the attorney shared the knowledge of the former client’s confidences with all the members of his law firm.25 This presumption can lead not only to the disqualification of the attorney but also to the vicarious disqualification of his law firm.

B. Canon 5

Canon 5 requires a lawyer to exercise independent professional judgment on behalf of a client. Disciplinary Rule 5-10526

23. Of course, much litigation centers around the questions of whether an attorney-client relationship ever existed and whether the two matters are actually related. For a general discussion of the substantial relationship test, see Note, Motions to Disqualify Counsel Representing an Interest Adverse to a Former Client, 57 Tex. L. Rev. 726, 730-34 (1976).

24. Emle Indus. Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973). Some circuits consider this presumption to be irrebuttable, leading to automatic disqualification. Id. Other circuits have held the presumption to be a rebuttable one. See Arkansas v. Dean Foods Prods. Co., 605 F.2d 380 (8th Cir. 1979).


This presumption is sometimes rebuttable. See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975). But see Schloetter v. Railoc of Ind., Inc., 546 F.2d 706, 710-11 (7th Cir. 1976) (presumption is irrebuttable).

26. Code, supra note 1, at DR 5-105. DR 5-105 states:

Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent
contains a test for determining the propriety of an attorney representing a client; this test in effect consists of the lawyer's analysis of whether a given representation will so influence his independent professional judgment as to affect or to be likely to affect the interests of another client adversely. Disciplinary Rule 5-105 strives to ensure that the attorney represents each client with undivided loyalty. The Rule attempts to prevent an attorney from getting into a position in which, even unconsciously, the attorney will be tempted to "soft pedal" zealous representation of one client in order to avoid an obvious clash with another.27

Courts have interpreted Canons 4 and 5 to provide the former client with the right to move for the disqualification of an attorney who is in a position to use confidential information to the former client's detriment. The drafters of the Code designed these two Canons primarily to protect clients—to ensure that clients are able to obtain the best legal representation possible through candid discussion with their attorneys who can give undivided and unquestionable loyalty. When a court disqualifies a lawyer for violating Canon 4 or 5, it is the former client who is the direct and intended beneficiary of the court order. As a byproduct, albeit an important one, the disqualification enhances the public's perception of the legal system through increased confidence in the attorney-client relationship.

C. Canon 9

Unlike those of Canons 4 and 5, the broad injunction of Canon 9 against the "appearance of professional impropriety"

27. Estates Theatres, Inc. v. Columbia Pictures Indus., Inc., 345 F. Supp. 93, 99 (S.D.N.Y. 1972). Although the current DR 5-105 does not specifically refer to the representation of either current or former clients in the same matter, judicial opinions have expressly or impliedly found that the drafters of the Code intended to include the former client within DR 5-105. See, e.g., Black v. Missouri, 492 F. Supp. 848, 863 (W.D. Mo. 1980); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 394 n.63 (S.D. Tex. 1969). However, Canon 5 and DR 5-105(A)-(C) have their greatest impact in situations in which the interests of two current clients conflict. E.g., Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976); see Code, supra note 1. The issue of conflicts between current clients is beyond the scope of this article.
relates to the entire spectrum of lawyer conduct\textsuperscript{28} and does not limit itself to the protection of the interests of clients alone. The application of Canon 9 in the disqualification process has generated the most confusion and debate among courts and commentators alike precisely because the maxim does not confine itself to specific conduct or actual instances of impropriety.\textsuperscript{29} The drafters of the Canon did not try to protect clients alone, but intended to maintain public confidence in the legal profession and the administration of justice by eliminating conduct that appears to the lay person to be inconsistent with professional integrity.\textsuperscript{30} Courts consider the preservation of public trust in the legal system an essential goal, as important as the preservation of confidence in the attorney-client relationship.\textsuperscript{31}

A lawyer must not only be ethical but must be believed to be so by all who come in contact with him, whether in his professional or in his private life. His interest in public service and his position as an 'officer of the Court' require that he not only avoid evil but the appearance of evil as well.\textsuperscript{32}

There is, however, no Disciplinary Rule in the Code which instructs an attorney to avoid the appearance of professional impropriety.\textsuperscript{33} Only Canon 9 and Ethical Considerations 9-2 and 9-6 concern the appearance of professional impropriety.\textsuperscript{34}

\begin{thebibliography}{9}
\bibitem{29} \textit{See Annotated Code of Professional Responsibility} 400-15 (American Bar Foundation 1979).
\bibitem{30} United States v. Hobson, 672 F.2d 825, 828 (11th Cir. 1982).
\bibitem{31} \textit{See Arkansas v. Dean Foods Prods. Co.}, 605 F.2d 380 (8th Cir. 1979); IBM Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978); Whiting Corp. v. White Mach. Corp., 567 F.2d 713 (7th Cir. 1977).
\bibitem{32} R. Wise, \textit{Legal Ethics} 16 (2d ed. supp. 1979).
\bibitem{33} Code, supra note 1.
\bibitem{34} The Code states:
\textit{EC 9-2} Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.
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Preliminary Statement to the Code specifically states that "[t]he Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations. . . . The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character." Thus, it would seem that an attorney could not even be disciplined for conduct which appears improper, let alone be disqualified for it. Although seemingly improper attorney conduct violates no Disciplinary Rule, courts have treated Canon 9's maxim as though it were mandatory by stating their willingness to disqualify an attorney if his representation of a client with interests adverse to those of a former client appears improper. In addition, in considering motions to disqualify which allege inter alia a violation of Canon 9, courts weigh the apparent impropriety of the conduct in reaching their decisions.

Although judicial opinions warn that a court can disqualify an attorney solely on the basis of Canon 9 if the conduct appears pernicious enough, courts generally disqualify attorneys in two kinds of cases: (1) where an attorney's conflict of interest in violation of Canons 5 and 9 of the Code undermines the court's confidence in the vigor of the attorney's representation of his client, or, more commonly, (2) where the attorney is at least potentially in a position to use privileged information obtained from a former client in violation of Canons 4 and 9, thus giving

Id. at EC 9-2. The Code also states:

EC 9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

Id. at EC 9-2.

35. Id. at Preliminary Statement.


37. See cases cited supra note 36.
his present client an unfair advantage in the litigation.\textsuperscript{38} This observation suggests that Canon 9, standing alone, is rarely enough support for a disqualification order.\textsuperscript{39} Yet, because some courts are unwilling to sanction egregiously apparent misconduct, they are not ready to emasculate completely Canon 9's possible deterrent power by declaring that it is not a sole basis for disqualification. Thus, Canon 9 remains a ground upon which a movant can attempt to rest a disqualification motion, even if the court will ultimately deny the motion.

Although courts rarely, if ever, grant motions to disqualify solely on the basis of Canon 9, they will still expend the time and energy necessary to consider the allegations in order to enforce a perceived purpose of the Code. Since courts have demonstrated a willingness to entertain disqualification motions based on Canon 9, litigants, conscious of the strategic value of disqualification motions, have responded by filing such motions even when they are not former clients.

Canon 9 also has a strong impact on disqualification motions made against former government attorneys.\textsuperscript{40} In this instance, a specific Disciplinary Rule, 9-101(B),\textsuperscript{41} addresses the potential former client conflicts that can develop when a lawyer leaves government service and enters a private law practice. The disqualification rules pertaining to former government attorneys differ from the ordinary Canon 4 and 5 related rules due to the

\textsuperscript{38} Board of Educ. v. Nyquist, 590 F.2d 1241, 1245-46 (2d Cir. 1979). \textit{But see} General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974). In \textit{General Motors}, a former government attorney was disqualified because of the apparent impropriety of his role as the city's attorney. No actual impropriety was found. Given the current judicial attitude concerning Canon 9, it is not clear whether the case would be decided the same way today.

\textsuperscript{39} \textit{But see} \textit{In re Coordinated Pretrial Proceedings} (City of Long Beach v. Standard Oil Co. of Cal.), 658 F.2d 1355, 1360-61 (9th Cir. 1981), cert. denied, 455 U.S. 990 (1982). In \textit{Long Beach}, the court stated: "After carefully reviewing the policy considerations on both sides, we hold that Canon 9 alone can be the basis for a disqualification motion. . . . This court will affirm such an order [of disqualification] only where the impropriety is clear and is one that would be recognized as such by all reasonable persons." \textit{Id.} at 1360-61.

\textsuperscript{40} \textit{See generally} \textit{Conflicts of Interest}, \textit{supra} note 9, at 1413-43.

\textsuperscript{41} \textit{Code}, \textit{supra} note 1, at DR 9-101(B). DR 9-101(B) states: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." The conflicts of interest which face a former government attorney will only briefly be addressed in this paper. For a thorough discussion of the issue, see Comment, \textit{Conflicts of Interest and the Former Government Attorney}, 65 Geo. L.J. 1025 (1977); Kaufman, \textit{The Former Government Attorney and the Canons of Professional Ethics}, 70 HARV. L. REV. 657 (1957).
special nature of the “former client” (the government) and the additional policy considerations underlying the former government attorney rules. Disciplinary Rule 9-101(B) forbids the attorney to accept private employment in a matter in which he had substantial responsibility while a government employee.

The policies underlying Disciplinary Rule 9-101(B) are not only to preserve the confidences of the “former client,” a policy which receives protection from Canon 4, but also to prevent present government attorneys from weakening the government’s position by acting in such a way as to further their chances for later private gain. Also clearly behind Disciplinary Rule 9-101(B), as evidenced by its placement in the Code under Canon 9, is the policy of maintaining public confidence in the legal profession by avoiding the apparent impropriety of a government attorney who appears to be “switching sides.” The weight to be accorded to this policy consideration is the subject of much debate. As a result, the courts have not decided whether a litigant can make a disqualification motion based on the apparent impropriety of a former government attorney’s subsequent representation.

D. Vicarious Disqualification

Disciplinary Rule 5-105(D) is of particular importance when used as one of the bases of a motion to disqualify because that Rule mandates the vicarious disqualification of an attorney’s entire law firm if the attorney must decline or withdraw from employment under any Disciplinary Rule. Thus, if a court disqualifies an attorney for violating Disciplinary Rule 4-101(B), the court may also disqualify the attorney’s entire law firm pursuant to Disciplinary Rule 5-105(D), because the Rule presumes the attorney’s partners and associates share his knowledge. The rationale for vicarious disqualification appears in the former Canons of Ethics: “The relations of partners in a firm are so

43. Id.
46. See supra note 26.
close that the firm, and all the members thereof, are barred from accepting any employment that any member is prohibited from taking.\textsuperscript{47}

The purpose of Disciplinary Rule 5-105(D) is, of course, to prevent the circumvention of the Code through the actions of partners, associates, or affiliates. Vicarious disqualification theoretically serves to promote the interests of both the former client and the public. The public and the former client might question whether the disqualification of one attorney for a conflict of interest between present and past clients eliminates the potential for the unethical use of confidential information if the attorney’s close associates continue the representation.

Although the logic of Disciplinary Rule 5-105(D) is plain, some critics favor limiting its application because of the frequently harsh results of vicarious disqualification, the worst of which falls on the current client.\textsuperscript{48} Vicarious disqualification can be a draconian measure especially when employed in conjunction with Canon 9. Indeed, some courts have attempted to limit the instances of vicarious disqualification to situations in which it appears necessary to protect the interest of the former client.\textsuperscript{49}

Disciplinary Rule 5-105(D) poses potential difficulties for the former government attorney and his new law firm by exposing both of them to disqualification motions. A strict interpretation of that Rule in conjunction with Disciplinary Rule 9-101(B) would prevent virtually any law firm’s participation in lawsuits involving the government agencies for which their attorneys formerly worked. Strict construction of these rules would discourage the hiring of former government attorneys, which would in turn deter many qualified lawyers from seeking government employment. While some bar associations and judicial opinions sanction waivers by government agencies of the conflicts of interest which might otherwise lead to vicarious disqualification so as to avoid this result,\textsuperscript{50} others have failed to embrace this concept,\textsuperscript{51} enabling disqualification motions to be made even

\textsuperscript{47} ABA Comm. on Professional Ethics and Grievances, Formal Op. 33 (1931).
after the "former client" has consented to the conflict.

In examining the issue of standing, it is important always to keep Disciplinary Rule 5-105(D) in mind. Vicarious disqualification has far-reaching effects which the moving party can use to his considerable advantage.

E. Summary

As this brief overview of the Code's relation to the disqualification process suggests, the drafters designed the Code to protect several different interests—those of clients, both present and former, those of attorneys, and those of the public. Since the Code's provisions are vague and subject to varying interpretations by the courts (especially Canon 9), often on a case-by-case basis, a litigant has broad discretion to file a motion to disqualify alleging a conflict of interest in violation of one or more of the rights protected by the Code. Such a motion compels the court to inquire into the allegations and possibly to disqualify the opponent's attorney and even the attorney's law firm.

III. The Right of the Former Client to Move to Disqualify

It is easy to understand why courts allow the former client to make a motion to disqualify. In accord with general requirements of standing applicable to other areas of the law, the former client may make a motion to disqualify in order to protect his personal interest in the attorney or his law firm not using the former client's confidential information to his disadvantage. The former client may suffer an injury if he cannot bring the alleged conflict of interest to the attention of the court. If the attorney is able to reveal the former client's confidences, then the former client may lose the litigation. Moreover, such tactics on the part of the attorney, an officer of the court, call into question the integrity of the trial.

If the attorney were to use confidential information to the detriment of the former client, the attorney would be violating Disciplinary Rule 4-101(B), a Rule aimed specifically at the protection of clients, both present and former, from such conduct. Since the Code strives to foster the attorney-client relationship by encouraging uninhibited discussion between the client and his lawyer, the former client may make a motion to disqualify in order to vindicate his own rights which the Code intended to
safeguard. In addition, disqualification precludes the attorney from profiting from his own unethical actions. If the former client could only proceed against the lawyer in a disciplinary proceeding, his interests would not be fully protected because his immediate injury would not be avoided. Although the attorney might face discipline if a violation of Disciplinary Rule 4-101(B) were proved, the client might still have lost the litigation due to the disclosure. Therefore, the federal courts assist the former client (and, as a consequence, the attorney-client relationship) by permitting him to make the disqualification motion and to attempt to utilize the presumptions which follow when the substantial relationship test is met. 53

When a former client (or his attorney) weighs making a disqualification motion, he considers only his personal interest in the conflict—whether potential disclosures of information would harm him, or whether a disqualification motion would be a useful litigation strategy. 54 As a byproduct, when the former client acts to protect himself from the disclosure of confidential information by disqualifying his adversary's attorney, the former client also helps to safeguard another interest protected by the Code, the maintenance of public confidence in the legal system through the avoidance of impropriety. In pursuing his own interests, the client exposes unethical or potentially unethical behavior, enabling the court to preserve the integrity of the proceedings by eliminating the offending attorney from representing a litigant during the trial.

However, public confidence in the legal system is not likely to be a motivating factor for a former client deciding whether to seek to disqualify his former attorney for conflict of interest. Even if he did consider public confidence a factor, the former client would probably not consider it as significant as a court would. Inasmuch as this factor will not weigh heavily in the former client's decision on a disqualification motion, he may consent to the employment of his former attorney by an opposing party in litigation, regardless of whether the subsequent representation appears improper to some members of the public. The client might fail to object in instances where he realizes that any prior disclosures he may have made to the lawyer will not

52. See supra notes 20-23 and accompanying text.
prejudice him in the new case.\textsuperscript{54}

The Code, in Disciplinary Rule 4-101(B)(3), permits an attorney to use a confidence or secret of one client for the advantage of a third person if the client "consents after full disclosure."\textsuperscript{55} Nowhere does the Code attempt to define either "consent" or "full disclosure." The language of the Code suggests that an attorney must request permission from the former client if he wishes to reveal confidential information to or use the information for the advantage of his current client.\textsuperscript{56} Once the former client evidences some type of consent, the attorney can reveal the information. The Code gives no indication as to whether the consent must be express or whether it can be implied from the client's failure to object.

The Code also does not make clear whether a former client can consent to all potential disclosures of information, thereby enabling the attorney to represent a subsequent client with interests that are adverse to those of a former client.\textsuperscript{57} If the former client does not consider disclosure of the information prejudicial, then the consent does not appear troubling. However, if the client's consent is to be meaningful, the former client must be fully apprised of all the potential consequences that may follow from disclosure. One can question the wisdom of allowing a former client to consent to her attorney's disclosure of confidential information to be used for the advantage of a third party. The client must possess enough information to make a reasoned decision.\textsuperscript{58} Since the Code does not define "full disclosure," the attorney must interpret its meaning on his own. The potential exists for the attorney to shape his discussion with the former client of possible outcomes of disclosure to minimize any potential adverse effects in order to encourage consent. Indeed, courts often assume that laymen do not fully understand or appreciate the potential conflict when an attorney uses consent as a defense in a subsequent representation.\textsuperscript{59}


\textsuperscript{55} See supra note 18.


\textsuperscript{57} See Conflicts of Interest, supra note 9, at 1333-34 (1981).


If one accords great weight to the aim of avoiding apparent impropriety which might diminish the public's respect for the legal system, there might be circumstances in which the former client should not be able to consent to an adverse representation as a matter of public policy, the lack of prejudice to the former client notwithstanding. For example, the appearance of impropriety might be so great that one private person's acquiescence will not justify the negative impact on the public's perception of the legal system. If such a situation is considered intolerable due to its implications for the perceived integrity of the bar, then the consent of the former client would not seem to preclude the making of a disqualification motion by someone else in order to bring the situation to the court's attention. Yet when parties other than the former client have standing to make disqualification motions on this basis, the potential for abuse is extensive.

Some courts permit only the former client to make a disqualification motion on the rationale that "the client is what the standards are all about." Canons 4 and 5 are certainly aimed primarily at the protection of clients, who can choose whether or not to waive their right to object. Other courts have recognized that if the former client is the only party permitted to move to disqualify, the public's interest in the integrity of the bar and the entire judicial process embodied in the multifarious Canon 9 might go unchampioned. In addition, the former client may not always be in a position to protect his interests completely.

The potential for such occurrences has prompted some federal courts to permit nonclients to move for the disqualification of an attorney for representation of a client with interests adverse to those of a former client. The fear that all of the interests safeguarded by the Code will not be protected if only the former client has standing to move to disqualify has been the justification for this practice, which tends to put the interests protected by Canon 9 on the same plane or above those protected by Canons 4 and 5. This article now considers the propri-

60. See Black v. Missouri, 492 F. Supp. 848 (W.D. Mo. 1980).
61. See Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 608 (8th Cir. 1977); In re Yarn Processing Patent Validity Litig., 530 F.2d 83 (5th Cir. 1976).
63. See In re Gopman, 531 F.2d 262 (5th Cir. 1976); Empire Linotype School v. United States, 143 F. Supp. 627 (S.D.N.Y. 1956).
ety of granting standing to nonclients to make disqualification motions.

IV. STANDING FOR NONCLIENTS TO MAKE MOTIONS

A. The Rationale for Nonclient Standing

Courts have given four reasons for granting standing to nonclients to make disqualification motions when the motions relate to an attorney's representation of a client with interests adverse to a former client. These grounds are: Disciplinary Rule 1-103(A), general public policy, Disciplinary Rule 9-101(B), and the rights of the former client.

1. Disciplinary Rule 1-103(A)

Disciplinary Rule 1-103(A), which has been adopted in some but not all jurisdictions,\(^6^4\) states: "A lawyer possessing unprivileged knowledge of a violation of DR 1-102\(^6^5\) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." Although the language of the Rule apparently encourages attorneys to report Code violations to their bar association's disciplinary committees, some courts have interpreted the rule to impose an ethical duty on members of the bar to bring all ethical violations to the attention of the court.\(^6^6\) This interpretation implies that an attorney who is aware of a violation of Canons 4, 5, and 9 has standing to make a motion to disqualify based on Disciplinary Rule 1-

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\(^6^4\) For example, the District of Columbia Code of Professional Responsibility's DR 1-103(A) reads: "A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges." *District of Columbia Code of Professional Responsibility, 2 Nat'I. Rep. on Legal Ethics and Professional Responsibility* V2:DC3 (1982).

\(^6^5\) Code, *supra* note 1, at DR 1-102 states:

(A) A lawyer shall not:

1) Violate a Disciplinary Rule.
2) Circumvent a Disciplinary Rule through actions of another.
3) Engage in illegal conduct involving moral turpitude.
4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
5) Engage in conduct that is prejudicial to the administration of justice.
6) Engage in any other conduct that adversely reflects on his fitness to practice law.

\(^6^6\) *E.g.*, Brown & Williamson Tobacco Corp. v. Daniel Int'l Corp., 563 F.2d 671, 673 (5th Cir. 1977); Black v. Missouri, 492 F. Supp. 848, 861 (W.D. Mo. 1980).
103(A) as well as a duty to report the violation to the bar association or the court's disciplinary committee. Taken to its logical extreme, this notion suggests that any member of the bar could and should make a motion to disqualify in any litigation involving an attorney who may have violated the Code. Applied pragmatically, standing grounded in Disciplinary Rule 1-103(A) permits opposing counsel to make a disqualification motion even when his sole interest is to harass his adversary, rather than to purify the bar.

2. Public Policy

Permitting nonclients to make disqualification motions on the ground of public policy rests on considerations similar to those which support Disciplinary Rule 1-103(A). When an attorney faces Code violation charges, the court must consider issues of public importance that have implications beyond the confines of the litigation. Since district courts have the responsibility to supervise the conduct of the attorneys who practice before them, some courts consider it their duty to investigate the allegations in a disqualification motion, regardless of who makes the motion or what motivated the litigant to make it. The concern is with purging potentially unethical conduct, not with scrutinizing the motives of the movant.

Public policy considerations are also the basis for permitting nonclients to make motions to disqualify for Canon 9 violations. Courts want to encourage attorneys to inform them of apparent as well as actual impropriety in order to prevent the proceedings from being "tainted" and to maintain public confidence in the legal system.

3. Disciplinary Rule 9-101(B)

When the government is the former client, policy considerations in addition to the preservation of confidences are important to courts in determining who can make a motion to disqual-

68. See supra note 3.
69. See supra note 67.
70. See Richardson v. Hamilton Int'l Corp., 469 F.2d 1382 (3d Cir. 1972).
ify on the basis of a violation of Disciplinary Rule 9-101(B). The policy considerations underlying that Rule are recognized to be the following: the treachery of a government attorney’s switching to work for an opposing private party, the safeguarding of confidential government information from future use against the government, the need to discourage government attorneys from favoring private parties whose firms may provide the government attorneys with future employment, and the professional benefit derived from avoiding any appearance of evil.\textsuperscript{71} In order to enforce these policy objectives, courts permit litigants to make disqualification motions based on Disciplinary Rule 9-101(B) against former government attorneys or their law firms when the former government attorney had substantial responsibility as a public servant for the matter involved in the litigation.\textsuperscript{72} The fact that the “former client” may have waived the conflict is not dispositive,\textsuperscript{73} both because it is the movant who might suffer direct injury due to the rule’s violation, and because of the appearance of impropriety when government attorneys make waiver decisions on behalf of their agency when they too may seek private employment later.\textsuperscript{74} For example, in Armstrong v. McAlpin,\textsuperscript{75} the defendant moved to disqualify a former Securities and Exchange Commission (SEC) attorney’s law firm from representing the plaintiff receiver in a lawsuit similar to an SEC enforcement action against the defendant, despite the fact that the SEC had approved the firm’s representation of the plaintiff. No one challenged the defendant’s standing to make the motion (which the court ultimately denied).\textsuperscript{76}

4. The Rights of the Former Client

When the former client is not a party to litigation or fails to object to the attorney's subsequent representation, the nonclient moving party can attempt to “stand in the shoes of the former

\textsuperscript{75} 625 F.2d 433 (2d Cir. 1980), vacated on other grounds, 449 U.S. 1106 (1981).
\textsuperscript{76} Id.
client” and assert his rights.\textsuperscript{77} If the former client has not consented to his former attorney’s adverse representation, one court has found it necessary to permit third parties to move to disqualify the former client’s attorney for the impermissible behavior. In \textit{Estates Theatres, Inc. v. Columbia Pictures, Inc.},\textsuperscript{78} the defendant moved to disqualify the plaintiff’s attorney on the ground that his former client, who was not a party to the litigation, had not consented to the new representation.\textsuperscript{79} Although the former client was not the moving party, he appeared by counsel to argue in favor of the disqualification.\textsuperscript{80} The adverse nature of the interests was open and obvious, confronting the courts with a clear duty to act. The court disqualified the attorney.\textsuperscript{81} On the other hand, this basis of standing is not well adapted to circumstances in which the former client has consented to the subsequent representation after full disclosure by his attorney. In \textit{In re Yarn Processing Patent Validity Litig.},\textsuperscript{82} the court refused “to allow an unauthorized surrogate to champion the rights of the former client”\textsuperscript{83} and “use the conflict rules for his own purposes.”\textsuperscript{84}

Thus, there are several bases on which third parties can move for the disqualification of an attorney based on a conflict of interest to which they have no personal interest at stake.\textsuperscript{85} In granting standing to third parties, courts have merely explained the basis for permitting the motion to be made by a nonclient; they have not considered the implications of the practice. The next sections will consider both the positive and negative aspects of nonclient standing.

\section*{B. The Potential Benefits to be Gained from Permitting Nonclients to Make Motions to Disqualify}

There are several conceivable, though speculative, benefits that might result from third party (nonclient) motions to dis-

\begin{footnotes}
\item[77.] See \textit{In re Yarn Processing Patent Validity Litig.}, 530 F.2d 83 (5th Cir. 1976).
\item[78.] 345 F. Supp. 93 (S.D.N.Y. 1972).
\item[79.] \textit{Id.} at 95.
\item[80.] \textit{Id.} at 97.
\item[81.] \textit{Id.} at 100.
\item[82.] 530 F.2d 83 (5th Cir. 1976).
\item[83.] \textit{Id.} at 90.
\item[84.] \textit{Id.}
\item[85.] The one possible exception to the general lack of personal interest involves DR 9-101(B). The former government attorney may have information obtained in his public post not available to the opposing side. See \textit{supra} text accompanying note 71.
\end{footnotes}
qualify. Most of these benefits relate to Canon 9's policy of avoiding apparent impropriety and safeguarding the public's interest in the integrity of the legal system through the elimination of unprofessional conduct. The less weight given to the policy behind Canon 9, the less significant these benefits become.

First, allowing nonclients to make motions to disqualify at trial ensures that more instances of actual, potential, or arguably unethical behavior will be brought to the attention of the courts. By giving members of the bar essentially an incentive or reward (i.e., using a disqualification motion as a tactical weapon) for making the motions, courts encourage attorneys to report ethical violations. Although Disciplinary Rule 1-103(A)'s language appears to require attorneys to notify the appropriate tribunal or authority of all Code violations including violations concerning conflicts of interest, the Rule has met with little success, due to a recognized failure by members of the legal profession to call attention to the Code violations of their fellow attorneys. Simple logic suggests that an attorney is more likely to inform the court of another lawyer's violation of the Code if the informing attorney's client is in a position to benefit from court action on the violation. Thus, an attorney might be willing to make a disqualification motion on the basis of another attorney's conflict of interest whereas the same attorney would not be willing to report the identical behavior to the local bar association to institute disciplinary proceedings. As a result, if former clients were the only parties permitted to make motions to disqualify at trial, certain types of attorney misbehavior might continue unchallenged because the conduct would not be reported to the bar association.

A second benefit from granting standing to nonclients, as well as former clients, to make motions to disqualify is that attorneys might exercise more caution in undertaking the representation of new clients with interests that may conflict with those of a former client. An attorney might more fully investigate potential conflict problems before agreeing to represent the new client. If he uncovered the existence of any conflicts, he would either decline the representation or be certain to discuss the situation fully with the former client in order to obtain con-

86. See ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 23 (American Bar Foundation 1979).
87. Id.
sent. This result would occur because the attorney would be cognizant of the fact that his opponent in litigation would have an incentive to unearth any conflicts of interest in order to move to disqualify him. Thus, in close cases, an attorney might be less inclined to represent a new client with interests at least arguably adverse to those of a former client if the opposing attorney could make a disqualification motion than if only the former client could object. Law firms, as well as individual attorneys, might also be more prudent in their decisions about what new clients the firm should represent and what new attorneys (especially former government attorneys) the firm hires. Ideally then, the exercise of caution by lawyers and law firms would eliminate some borderline unethical behavior that might otherwise take place.

However, the ability of someone other than a client to make a disqualification motion certainly does not guarantee that courts will grant all motions filed by nonclients. In most instances, courts have denied nonclients’ motions to disqualify, thereby lessening any potential deterrent effect of giving nonclients standing to make the motions. The Supreme Court’s decision in Firestone Tire & Rubber Co. v. Risjord is likely to increase denials of motions to disqualify because the motions are no longer immediately appealable. Realizing that such motions will not lead to their disqualification, attorneys are not likely to moderate their behavior out of fear of disqualification motions. Currently, attorneys are aware that disqualification motions are frequently made and a common incident of many lawsuits.

Permitting nonclients to make disqualification motions in instances in which Disciplinary Rule 9-101(B) is violated serves to further all policies underlying the former government attorney rule because the rule is designed not only to protect the

88. "A lawyer's adversary will often be in the best position to discover unethical behavior." In re Gopman, 531 F.2d 262, 265 (5th Cir. 1976).
90. 449 U.S. 368 (1981). In that case, the Supreme Court held that denials of motions to disqualify are not appealable orders under 28 U.S.C. § 1291.
91. See supra notes 3-7 and accompanying text.
92. See supra note 75 and accompanying text.
former client but also to deter former government attorneys from profiting at the public's expense from their prior experience.\textsuperscript{93} The government agency is not in a position to protect all interests which the rule is designed to safeguard and may even waive the conflict, although the conflict injures another party.\textsuperscript{94} When the former client is a government agency, it may waive the conflict in litigation in which it is not even a party.\textsuperscript{95} This waiver itself might create the appearance of impropriety because the persons granting the waiver may be exhibiting favoritism or setting a standard that will later apply to them.\textsuperscript{96} Therefore, Disciplinary Rule 9-101(B) will be enforced more often when one who stands to be injured (the former government attorney's opponent) can move to disqualify.

A final potential benefit of nonclients' disqualification motions is greater attention to the public's interest in the integrity of the bar and of the legal system through the elimination of conflicts of interest and apparent impropriety. As discussed previously,\textsuperscript{97} when a former client considers whether to object to the attorney's subsequent representation, he takes into account primarily his personal interests. If he perceives no threat to these interests and no tactical advantage to a disqualification motion, he is not likely to protest the representation, regardless of how improper it may appear. Since the ethical issues implicated in a motion to disqualify are matters that have an impact on the public as well as an effect on private individuals, it is important that the issues receive attention and proper resolution. The perceived significance of the public's confidence in the legal system may mandate that the resolution of ethical questions ought not to be constrained by restrictions on standing.\textsuperscript{98} In essence, as one commentator has suggested, the more instances of apparent or actual impropriety that are brought before a court for resolu-

\textsuperscript{96} See supra note 74.
\textsuperscript{97} See supra text accompanying notes 52-54.
\textsuperscript{98} Fordham, There are Substantial Limitations on Representation of Clients in Litigation which are not Obvious in the Code of Professional Responsibility, 33 Bus. Law. 1193, 1213 (1977) (supplemental remarks).
tion, the better the result for the legal system. If one accepts this view, then an increase in the number of disqualification motions filed by nonclients is a positive signal that the public's interest is receiving consideration.

Thus, the increase in the number of disqualification motions in the federal courts is the consequence of encouraging the disclosure of unethical or apparently improper conduct which might serve to undermine the integrity and validity of the trial process. This result, however, is certainly not without its serious costs.

C. The Costs of Permitting Nonclients to Make Motions to Disqualify

There are many costs and problems associated with permitting nonclients to make motions to disqualify, especially in those situations where the former client has not objected to the subsequent representation and the nonclient is basically proceeding on a Canon 9 theory. Although the premise behind the lack of standing requirements for motions to disqualify is the ethical obligation of attorneys to expose all Code violations and real or apparent improprieties, the widespread use of the motion does not always serve the purpose of maintaining public confidence in the legal system. There are high costs associated with disqualification motions based on conflicts of interest especially when the movant is seeking vicarious disqualification. These costs are so severe that, with the exception of the case of a former government attorney, courts should impose standing requirements.

First, if the former client does not make the motion to disqualify, it is almost always the opponent who moves to disqualify an attorney for representing a client with interests adverse to those of a former client. Although courts generally do not examine the movant's motives and will investigate the charge regardless of the reason it is brought, strategic considerations probably motivate the moving party. He is undoubtedly aware of the burden disqualification motions place on the opposing attor-

99. Id. at 1217 (commentary by Charles Lister).
100. Id.
102. See supra note 69.
103. Id.
ney and his client who must defend against the motion. The moving attorney may employ the Code as a tactical weapon for the advantage of his own client, clearly a use to which the Code was not intended to be put. The manipulation of the Code for the purpose of gaining an advantage in litigation is a practice that itself appears improper and calls into question the moving attorney’s own ethical conduct.\textsuperscript{104}

As more persons can make disqualification motions, more motions are filed and must be handled by the courts. Regardless of whether the motion to disqualify is meritorious or is interposed purely for tactical purposes, the motion will cause delay in the trial on the merits and considerable expense.\textsuperscript{105} Once an attorney files the disqualification motion, most courts investigate the allegations in order to fulfill their duty to supervise the conduct of the lawyers who practice before them.\textsuperscript{106} The disqualification motion immediately puts the attorney or the law firm to be disqualified on the defensive and generally diverts the attorney’s and the firm’s attention from prosecuting the lawsuit to defending his conduct. Both the attorney and his current client must expend time and money to defeat the motion.

Delay and expense necessarily occur whenever a disqualification motion is made, whether by the former client or a third party. However, these effects are particularly disturbing in the nonclient context. First, the nonclient is usually charging either an infringement of the rights of the former client who has not objected to the representation or the appearance of impropriety; the nonclient rarely charges any infringement or injury to his own Code-protected right.\textsuperscript{107} In addition, the nonclient may be seeking vicarious disqualification.\textsuperscript{108} In other areas of the law

\textsuperscript{104} The ABA’s Committee on Evaluation of Professional Standards noted this potential for abuse in its comments to the proposed Conflict of Interest rules in the proposed final draft of the Model Rules of Professional Conduct. See \textit{Model Rules of Professional Conduct} Rules 1.7, 1.9 comments (Final Draft 1982) [hereinafter cited as \textit{Model Rules}]; see \textit{infra} note 138.

\textsuperscript{105} The effect of the recent Supreme Court decision in \textit{Firestone Tire & Rubber Co. v. Risjord}, 449 U.S. 368 (1981), on the amount of delay is yet to be seen. Certainly, the delay involved in appeals of denials to disqualify will be eliminated. However, there is nothing in \textit{Firestone} which deters attorneys from making the motions in the first instance.

\textsuperscript{106} See \textit{supra} note 3.


\textsuperscript{108} Thus there exists the anomalous situation of a nonclient who was not a party to
general standing requirements would prevent the nonclient, in the absence of a statute giving him a right of action, from asserting the rights of others when he personally has suffered no injury.109 Disciplinary Rule 1-103(A) was not specifically intended to provide a private right to make disqualification motions, but courts have interpreted it to do so in order to facilitate attorneys' fulfilling their obligation to report Code violations. Although the ethical nature of the disqualification inquiry makes general standing requirements useful only as a reference,110 such practice as nonclient standing would not be permitted in other areas of the law, and this article suggests that it should not be permitted in all circumstances in the context of disqualification motions. Second, the effects of delay and expense are especially disturbing in the nonclient situation because it is apparent that although the nonclient has no immediate personal interest at stake,111 he will benefit from the delay and expense whether the court grants or denies the motion. If his concern were really to fulfill his Disciplinary Rule 1-103(A) obligation, he could always do so by instituting disciplinary proceedings.

Another cost associated with permitting nonclients to make disqualification motions is the potential loss to the current client. As the number of disqualification motions increases, so do an attorney's chances of being disqualified. A disqualification motion is intended to be a sanction for an attorney's violation of the Code but it is not only the attorney who suffers an injury, his current client suffers also. When a court disqualifies an attorney, he and his firm lose business. Inasmuch as disqualification motions have become so common, the disqualification of an attorney or his law firm probably does relatively little to taint their reputations. In most instances, the attorney has other clients to represent. On the other hand, the current client suffers a direct injury.112

If a court disqualifies the attorney, it also immediately sepa-

the conflict seeking the disqualification of an attorney who himself was not a party to the actual conflict.

111. In the case of a former government attorney, there may be a personal stake for all clients or members of the public. See Code, supra note 1, at DR 9-101(B).
112. For an overview of the practical effects of motions to disqualify, see Attorney Disqualification Motions, PRAC. LAW. 11 (Oct. 15, 1980).
rates the client from counsel of his choice.\textsuperscript{113} The attorney may have represented the client for a number of years and the two may have had a close working relationship.\textsuperscript{114} The client must obtain new counsel, a formidable task if the litigation is complex or specialized.\textsuperscript{115} The client will also incur the expense of educating new counsel.\textsuperscript{116} This cost includes not only legal fees but also time lost to the client instructing the new attorneys about the litigation. In a complex case, the task of repeating factual and legal analyses can be extremely time-consuming.\textsuperscript{117} Although the motion to disqualify attempts to maintain the integrity of the bar, the direct beneficiary of the motion is the movant, while the real loser is the disqualified attorney's client. Although this result is tolerable if the former client has demonstrated that the attorney was in a position to violate confidences protected by Canon 4, it is less justifiable when a nonclient has convinced the court that the conflict might appear improper to some cynical member of the public, even though the former client has not objected. The current client's loss is tangible; the public's gain, if any, is impossible to measure; the nonclient's benefit is clear.

Another cost of permitting nonclients to make disqualification motions is that an appearance of impropriety results from the very making of the motion, which infringes on other interests of the public. The public has an interest not only in the maintenance of the integrity of the bar but also in the fairness and efficiency of the judicial process.\textsuperscript{118} As one court noted\textsuperscript{119} when denying a motion to disqualify made by a nonclient,

\begin{quote}
more damage would arise if the perception were created that a party to the litigation could be denied the counsel of his or her choice due to counsel's prior representation of a client which is not a party to the action at issue [and] which has not been demonstrated to have an adverse interest to the present client.\textsuperscript{120}
\end{quote}

\textsuperscript{114} See IBM Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978); Black v. Missouri, 492 F. Supp. 848, 871 (W.D. Mo. 1980).
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Board of Educ. v. Nyquist, 590 F.2d 1241, 1245-46 (2d Cir. 1979).
\textsuperscript{120} Id. at 44.
While courts are paying more attention to the public's interest in the administration of justice when considering disqualification motions based on allegations of an appearance of impropriety,\textsuperscript{121} they have not considered this factor in determining who should have the right to file the motions. The prevalence of disqualification motions exacerbates public dissatisfaction with the slowness of the civil litigation process,\textsuperscript{122} particularly when these litigants have no personal stake in the conflicts of interest they allege.

A large part of the problem with the entire disqualification process is determining what role, if any, Canon 9 should play.\textsuperscript{123} If Canon 9 is "simply too slender a reed on which to rest a disqualification order,"\textsuperscript{124} then movants should not be permitted to make motions to disqualify on that basis. As long as courts state their willingness to disqualify attorneys solely on the basis of Canon 9, they invite nonclients to bring examples of apparent impropriety to their attention. Since apparent impropriety is in the "eye of the beholder" it is easy to make a disqualification motion on this basis. The delay, harassment, and expense which result from disqualification motions, particularly those filed by nonclients, outweigh any potential gain from the avoidance of apparent impropriety. Another part of the problem is the lack of guidance for attorneys who want to know how to conduct their professional behavior without running afoul of Canon 9. No mechanism exists by which attorneys can learn in advance what actions not clearly proscribed by the Code are improper. The unsettled nature of the law on disqualification contributes to the number of motions made.

V. AN ALTERNATIVE TO STANDING FOR NONCLIENTS TO MAKE DISQUALIFICATION MOTIONS: A RESTRAINED APPROACH

As the preceding section demonstrates, the current practice of nonclient standing to make disqualification motions based on Canon 9 or the former client's rights invites abuse and accentuates all the problems of delay and harassment which have resulted from the current popularity of the use of disqualification motions.


\textsuperscript{122} See Board of Educ. v. Nyquist, 590 F.2d 1241, 1245-46 (2d Cir. 1979).

\textsuperscript{123} For a summary of the confusion of courts over the role of Canon 9, see ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 400-15 (American Bar Foundation 1979).

\textsuperscript{124} Board of Educ. v. Nyquist, 590 F.2d 1241, 1245 (2d Cir. 1979).
tion motions as tools of litigation. Nonclient standing does little to further the aims of the Code, the protection of the former client and the maintenance of public confidence in the legal system. Instead, it encourages litigants to bombard the federal courts with motions to disqualify.

The Second Circuit Court of Appeals has recently adopted a “restrained approach” in dealing with the merits of motions to disqualify, first articulating it in Board of Education v. Nyquist\(^{125}\) and then reiterating it in Armstrong v. McAlpin.\(^{126}\)

Weighing the needs of efficient judicial administration against the potential advantage of immediate preventive measures, we believe that unless an attorney’s conduct tends to “taint the trial” by [violating Canon 4 or 5] courts should be quite hesitant to disqualify an attorney. Given the availability of both federal and state comprehensive disciplinary machinery, there is usually no need to deal with all other kinds of ethical violations in the very litigation in which they surface.\(^{127}\)

The Nyquist court indicated that it will no longer disqualify an attorney on the basis of Canon 9 alone,\(^{128}\) stating that disqualification was only warranted at trial in instances where Canon 4 or 5 was violated\(^{129}\) thereby tainting the trial. Canons 4 and 5 protect the clients, the parties who will be directly injured if the canons are violated.

Although Nyquist was directed at the determination of the merits of a motion to disqualify, the court’s analysis is applicable to the standing question. Courts should take the restrained approach of Nyquist a step further by limiting standing to make a motion to disqualify to former clients with interests adverse to the attorney’s new client and to opponents of former government attorneys. Further, the grounds for a disqualification motion should not rest solely on allegations of apparent impropriety. Courts will further the aims of the Code by only considering disqualification motions based on the policies underlying Canons 4 and 5, and Disciplinary Rule 9-101(B).

The right to enforce the policies embodied in Canons 4 and 5 belongs only to the former client. The Canon’s drafters

125. 590 F.2d 1241 (2d Cir. 1979).
127. 590 F.2d at 1245-46.
128. Id. at 1245.
129. Id. at 1245-46.
designed the rules specifically for the former client’s protection, and he is in the best position to enforce them. He is the one most likely to know whether a subsequent representation will injure him. Disqualification motions are intended to safeguard the former client’s interests. The former client is free to take advantage of their strategic value if he can satisfy the substantial relationship test. Inasmuch as disqualification from subsequent representation is for the protection of the former client, courts should allow him to waive the protection and consent to the adverse representation. However, a waiver should be effective only if there is adequate disclosure of all the circumstances, including the lawyer’s intended role on behalf of the new client.

When the former client is a government agency, the waiver of the conflict of interest should not preclude parties in litigation against the former government attorney from moving for disqualification. Disciplinary Rule 9-101(B) is not intended solely to protect the former client but also to prevent the former government attorney from profiting at the expense of the public by using his government position to enhance his opportunities for private employment. The former government attorney is not permitted to use special knowledge he gained while in government employ on behalf of a private law firm against an adversary in litigation which meets the test of Disciplinary Rule 9-101(B). Therefore, these different policy considerations justify the former government attorney’s adversary moving to disqualify him or his law firm to enforce that Rule even when the government agency has waived the conflict.

Disciplinary Rule 1-103(A), however, should not be read to grant standing to nonclients to make disqualification motions. This practice is an inappropriate method for courts to encourage attorneys to inform them of ethical violations. Lawyers’ failure to report violations of the Code by their fellow attorneys to disciplinary authorities cannot serve to justify permitting non-

130. See supra text accompanying notes 61-63.
131. See supra note 37 and accompanying text.
132. See Model Rules, supra note 104, at Rule 1.9 comment.
133. Id.
134. Id. at Rule 1.10 comment.
clients to be rewarded for fulfilling an ethical obligation which is ostensibly mandatory. The final draft of the Model Rules of Professional Conduct, which would replace Disciplinary Rule 1-103(A),\textsuperscript{137} alters its language and serves to make the point that an attorney's duty is to report serious ethical violations to the appropriate disciplinary authorities. The drafters of the Model Rules suggest that they are not a basis for standing in collateral proceedings.\textsuperscript{138}

Canon 9 alone should not be a basis for anyone to have standing to make a motion to disqualify.\textsuperscript{139} It has been "used promiscuously as a convenient tool for [the making of] disqualification motions when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules,"\textsuperscript{140} and has served to encourage the making of disqualification motions. This practice has had negative effects. As one court noted, "[t]he danger of damage to public confidence in the legal system would be great if we were to allow unfounded charges of impropriety to form the sole basis for . . . disqualification."\textsuperscript{141}

VI. Conclusion

The public's interest in the integrity of the legal system will not be ignored by permitting only former clients to make disqualification motions. A restrained approach to all aspects of disqualification motions will serve to increase the fairness and

\textsuperscript{137} Model Rules, supra note 104, at Rule 8.3 states: A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

\textsuperscript{138} Model Rules, supra note 104, at Preamble states: [T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Moreover, in their notes to Model Rule 1.7, the drafters state: "Ordinarily, a party whose interests are unaffected by an asserted conflict has no standing to urge disqualification of opposing counsel." Model Rules of Professional Conduct Rule 1.7 notes (Proposed Final Draft 1981).

\textsuperscript{139} Rule 1.9 does not employ the appearance of impropriety formula of Canon 9. See Model Rules, supra note 104, at Rule 1.9 comment.

\textsuperscript{140} International Elec. Corp. v. Flanzer, 527 F.2d 1288, 1295 (2d Cir. 1975).

efficiency of the judicial process, two important components of public confidence in the legal system. Moreover, all lawyers can fulfill their responsibility to the public more effectively by reporting instances of unethical or improper conduct to the appropriate disciplinary authority rather than by making disqualification motions based on conflicts of interest which do not personally affect them or their clients. If the heart of the ethical problem is really the failure of lawyers to regulate their profession by voluntarily informing their bar associations of unprofessional conduct, then the solution lies in a reformulation of Disciplinary Rule 1-103(A) and lawyers' attitudes toward what the rule represents, not by manipulation of the disqualification process by lawyers with no genuine interest in the former client or in public confidence in the legal system. The elimination of these manipulative practices will ultimately do more to enhance the public perception of the legal system than any tangential benefits of the current system.