Vanderbilt Law Review

Volume 32
Issue 3 *Issue 3 - April 1979*

Article 5

4-1979

Access to the Work Product of an Attorney Disqualified for Opposing a Former Client: First Wisconsin Mortgage Trust

Edward S. Annunziato

RECENT DEVELOPMENT

Access to the Work Product of an Attorney Disqualified for Opposing a Former Client: *First Wisconsin Mortgage Trust*

TABLE OF CONTENTS

I. INTRODUCTION

When an attorney represents an interest adverse to that of a former client, a number of difficult ethical questions arise: will the confidences of the former client be used to his disadvantage; if not, will the appearance that those confidences may be used against the former client undermine the trust upon which the attorney-client relationship is based? Courts and attorneys confronting these questins generally look to Canons 4 and 9 of the American Bar Association's *Code of Professional Responsibility* for guidance.[1]

Although the Code attempts to provide detailed ethical guidance that will aid courts in policing the conduct of the practicing

1. Canon 4 provides that "a lawyer should preserve the confidences and secrets of a client." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 4 (as amended Aug. 1977) [hereinafter cited as ABA CODE]. Canon 9 states that "a lawyer should avoid even the appearance of professional impropriety." *Id.* Canon 9.

bar,[2] judicial enforcement of the Code has not been the panacea that the Code's authors envisioned. The problem of an attorney opposing a former client is one area that vividly illustrates the difficulty courts have had in translating the Code's guidance into judicial standards. Rather than focus on the Code's specific Disciplinary Rules, courts have seized the attractive but general language of Canons 4 and 9 as justification for disqualifying attorneys.[3] As a result, attorneys and courts confronting the former client question find the same vague, inadequate guidance the Code was designed to eliminate. In particular, the appropriate interrelationship between Canons 4 and 9 remains unclear.[4]

Recently, the Seventh Circuit raised additional questions regarding the disqualification of attorneys for opposing former clients by holding that under some circumstances the disqualified attorney's work product[5] could be passed on to succeeding counsel.[6] The disparate tests proffered by the opinions[7] in that case for determining when access to the work product would be proper exemplify the

2. The American Bar Association promulgated the new Code because the old Canons of Professional Ethics failed to provide attorneys with adequate guidance beyond the general language of the canons themselves. Moreover, the interrelationship between canons was unclear, and their general language did not prove conducive to disciplinary enforcement. *Id.* Preface. In order to provide more specific guidance, the new Code is organized into three interrelated parts: canons, ethical considerations, and disciplinary rules. The canons, like their predecessors, are general statements of the standards for professional conduct. The ethical considerations represent the highest ethical objectives toward which attorneys should strive in making specific ethical judgments. Finally, the disciplinary rules provide the minimum level of permissible conduct; violation of a disciplinary rule results in mandatory disciplinary action. *Id.* Preliminary Statement. Making no attempt to prescribe specific disciplinary procedures or penalties, the Code recognizes that its effectiveness depends upon vigorous judicial enforcement. *Id.*

3. *See* Schloetter v. Railoc of Ind., Inc., 546 F.2d 706 (7th Cir. 1976); Emle Indus. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973).

4. *See* Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to that of Former Client,* 55 B.U. L. REV. 61 (1975); Note, *Ethical Considerations When an Attorney Opposes a Former Client: The Need for a Realistic Application of Canon Nine,* 52 CHI.-KENT L. REV. 525 (1975); Note, *The Second Circuit and Attorney Disqualification*—Silver Chrysler *Steers in a New Direction,* 44 FORDHAM L. REV. 130 (1975).

5. Although difficult to define precisely, attorney's "work product" generally refers to the attorney's theories and conclusions as reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." Hickman v. Taylor, 329 U.S. 495, 511 (1947). In using the generic term "work product" to describe the materials with which the Seventh Circuit was concerned, however, it appears that the Seventh Circuit did not intend to include all types of materials that are covered by the work product rule of *Hickman.* The court indicated that the type of work product to which its opinion was addressed included only "routine lawyer work," a category that the court apparently considered less inclusive than the *Hickman* work product rule.

6. First Wis. Mortgage Trust v. First Wis. Corp., 584 F.2d 201 (7th Cir. 1978) (en banc), *rev'g on rehearing* 571 F.2d 390.

7. Circuit Judge Pell wrote the majority opinion and Senior Circuit Judge Castle filed a forceful dissent on this issue.

effect of inadequate guidance in the disqualification cases.[8] The purposes of this Recent Development are to analyze the effect of the Seventh Circuit's work product decision on disqualification standards and to develop a consistent framework for determining whether access to the work product of an attorney disqualified for opposing a former client should be allowed. This Recent Development urges that in order to provide the effective guidance necessary for both voluntary compliance and judicial enforcement, the Code must incorporate those judicial standards that most closely reflect its standards in this area. Thus the Recent Development proposes an Ethical Consideration regarding access to work product that reflects the ethical concerns underlying Canon 4.

II. Disqualification for Representing Interest Adverse to That of Former Client

A. *Traditional Canon 4 Analysis: The Substantial Relationship Test*

The principal guideline for determining whether an attorney should be disqualified from representing a client to the detriment of a former client is Canon 4, which admonishes an attorney to preserve the confidences and secrets of his clients.[9] The attorney's obligation to preserve these confidences continues after his representation terminates.[10] Basically, Canon 4 is intended to foster the trust necessary for full and free disclosure between the client and his attorney.[11] The attorney's ethical obligation to preserve his client's confidences and secrets, however, is broader than the evidentiary attorney-client privilege.[12] In addition to the confidences protected by that privilege, Canon 4 applies to "secrets," including any information that would embarrass or disadvantage the client if disclosed.[13]

Courts attempting to translate Canon 4 into disciplinary action generally rely on the substantial relationship test formulated in the pre-Code case, *T.C. Theatre Corp. v. Warner Brothers Pictures.*[14]

8. *See* Part III *infra.*

9. ABA Code, *supra* note 1, Canon 4. Canon 4 combines Canons 6, 11, and 37 of the old Canons of Professional Ethics. *Id.*

10. *Id.* EC 4-6.

11. *Id.* EC 4-1.

12. *Id.* EC 4-4.

13. *Id.* DR 4-101.

14. 113 F. Supp. 265 (S.D.N.Y. 1953). Although *T.C. Theatre* and its progeny, *see* notes 15-24 *infra* and accompanying text, preceded adoption of the Code, the analysis developed in those cases continues to apply under Canon 4. *See, e.g.*, Schloetter v. Railoc of Ind., Inc., 546 F.2d 706 (7th Cir. 1976). The substantial relationship test enunciated in *T.C. Theatre* was actually formulated to enforce Canon 6 of the Canons of Professional Ethics, which in part provided: "The obligation to represent the client with undivided fidelity and not to

The *T.C. Theatre* test provides for disqualification of the attorney upon a showing by the former client that the subject matter of the adverse representation is substantially related to the subject matter of the prior attorney-client relationship.[15] Upon such a showing a presumption[16] arises that confidences were disclosed during the course of the former representation that bear upon the subject matter of the present case.[17] In justifying that presumption, the *T.C. Theatre* court reasoned that requiring the client to point to actual confidences reposed in the attorney and their possible value to the new client would destroy the secrecy necessary to the attorney-client relationship.[18]

The extent to which a court should scrutinize the prior attorney-client relationship was later clarified in *Consolidated Theaters Inc. v. Warner Brothers Circuit Management Corp.*[19] and *United States v. Standard Oil Company.*[20] *Consolidated Theaters* considered an antitrust suit in which an attorney opposed a client of his former law firm. Although he had never met the client, the attorney had worked on similar antitrust suits while at the firm and had been given access to the client's files. Although the former client could offer no specific evidence of confidential information reposed in the attorney, the court nevertheless ordered disqualification, holding that the client need only establish a reasonable inference that confidences might have passed to the attorney.[21] The court further concluded that it was irrelevant whether any confidential information actually had been or would be used against the client.[22] *Standard Oil* clarified *Consolidated Theaters* by explicitly holding that the client need only show that the attorney had access to sub-

---

divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." 113 F. Supp. at 268. Canon 6 has been incorporated into Canon 4 of the new Code. *See* note 9 *supra.*

15. 113 F. Supp. at 268.

16. Some courts have described this presumption as irrebuttable. These courts have explained that once a former client establishes that the attorney was previously involved in matters substantially related to the subject matter of the instant suit, an irrebutable presumption arises that confidences were disclosed to the attorney regarding those matters. The attorney, however, would be able to rebut initially the allegation of substantial relationship between the two matters. *See* Consolidated Theaters, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 924 (2d Cir. 1954). Other courts have suggested, however, that the attorney may rebut the presumption that confidences were disclosed by establishing that he in fact received no confidential information. *See* Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975).

17. 113 F. Supp. at 268.

18. *Id.* at 269.

19. 216 F.2d 920 (2d Cir. 1954).

20. 136 F. Supp. 345 (S.D.N.Y. 1955).

21. 216 F.2d at 924.

22. *Id.* at 925.

stantially related material to establish the inference that the attorney received confidences.[23] The court reasoned that this access rule was necessary to protect the client from being compelled to reveal specific confidences in an evidentiary hearing.[24] Thus, under traditional Canon 4 analysis, inquiry into the prior attorney-client relationship was limited to determining whether the attorney had access to material substantially related to the issues in the present case. Moreover, the former client's burden in showing that the attorney had access did not necessitate disclosure of any confidences or secrets.

B. Canon 9: Avoiding the Appearance of Impropriety

Courts confronting the former client problem since the adoption of the new Code have had to reconsider the *T.C. Theatre* approach in light of Canon 9. Canon 9, which did not appear in the old Canons,[25] provides that "a lawyer should avoid even the appearance of professional impropriety." Generally, the purpose of Canon 9 is to promote public confidence in the legal profession and the legal system by discouraging conduct that may appear to laymen to be unethical.[26] Thus, in addition to weighing the interests of the attorney in seeking clients, the new client in selecting counsel, and the former client in protecting his confidences, courts must consider whether Canon 9 requires placing increased emphasis on the public perception of the legal profession.

One of the first decisions applying Canon 9 to a lawyer opposing a former client was *Emle Industries v. Patentex, Inc.*[27] In *Emle* plaintiff's attorney had previously represented defendant on the identical issue in another suit.[28] Although the facts presented a classic Canon 4 case that could have been resolved by the substantial relationship test alone, the *Emle* court chose to rely on Canon 9 as well.[29] Reasoning that the attorney's role in the litigation pro-

23. 136 F. Supp. at 354.

24. *Id.* at 355.

25. *See* General Motors Corp. v. City of New York, 501 F.2d 639, 649, n.19 (2d Cir. 1974) (observing that, although Canon 36 of the old Canons of Professional Ethics had been interpreted as supporting the "appearance of evil" doctrine, it was Canon 9 of the Code that expressly recognized that doctrine).

26. ABA CODE, *supra* note 1, EC 9-2.

27. 478 F.2d 562 (2d Cir. 1973).

28. Defendant Patentex, Inc. was owned in part by defendant Burlington Industries. Emle Industries brought suit alleging unlawful manipulation and control of Patentex by Burlington to improperly acquire and illegally use patents to control prices in the yarn processing and knitting industry. Plaintiff's attorney had previously defended Burlington on a counterclaim in another suit alleging the same unlawful manipulation of Patentex. *Id.* at 564, 565-66.

29. The court emphasized that "[n]owhere is Shakespeare's observation that 'there is

cess was far too critical and that process far too subtle to permit even the slightest doubt concerning the attorney's ethical conduct, the court concluded that Canon 9 required the application of a rule that prevented even the slightest possibility of the former client's confidences being used to his detriment.[30] The court also refused to consider any contention that the attorney in fact had not had access to confidential information because such an inquiry would compel the former client to describe the very information he sought to protect.[31] Thus, by holding that Canon 4 coupled with Canon 9 required that the former client need only establish the slightest possibility that confidences might be used to his disadvantage, the *Emle* court indicated that a showing of something less than a substantial relationship would be sufficient to obtain disqualification. Moreover, the client would not be forced to describe any confidential information, even if the attorney asserted nonaccess as a defense to disqualification.

Although *Emle*'s broad application of Canon 9 has been followed by a number of courts,[32] some recent decisions have attempted to restrict the Canon's potentially limitless scope.[33] In *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*[34] plaintiff's attorney previously had been an associate of the law firm representing defendant. During his tenure at the firm, the attorney's contact with defendant's legal affairs was limited to research on specific points of law, writing briefs, and informal discussions on procedural matters.[35] Although stating that Canon 9 required that doubts should be resolved in favor of disqualification, the Second Circuit concluded that the Canon was not intended to disrupt the balance developed under *T.C. Theatre* and its progeny.[36] The court further concluded that the attorney could rebut the inference that his association with the law firm gave him access to the client's confidences.[37] Finally, noting that the client is in the best position to show that the attorney had such access, the court found that the client's affidavits to that effect amounted to no more than conclusory state-

nothing either good or bad but thinking makes it so,' more apt than in the realm of ethical considerations." *Id.* at 571.

30. *Id.*

31. *Id.*; Hull v. Celanese Corp., 513 F.2d 568, 571-72 (2d Cir. 1975).

32. *E.g.*, Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 236 (2d Cir. 1977); Schloetter v. Railoc of Ind., Inc., 546 F.2d 706, 712 (7th Cir. 1976); General Elec. Co. v. Valeron Corp., 428 F. Supp. 68, 74 (E.D. Mich. 1977) (sufficiently close relationship test).

33. *E.g.*, Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 609 (8th Cir. 1977); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 757 (2d Cir. 1975).

34. 518 F.2d 751 (2d Cir. 1975).

35. *Id.* at 756.

36. *Id.* at 757. *See* Part II(A) *supra.*

37. 518 F.2d at 757.

ments and thus refused to disqualify the attorney.[38] Although it is not clear how far the *Silver Chrysler* court expected the client to go in describing the attorney's contact with confidential information, one court has suggested that the nature of the information should be described in sufficient detail to permit the court to make a practical evaluation of its potential significance.[39]

Thus, review of recent former client disqualification cases reveals considerable uncertainty regarding the appropriate interrelationship between Canons 4 and 9. One decision that provides guidance in dealing with Canon 9 is *Woods v. Covington County Bank.*[40] Although *Woods* was a disqualification case arising solely under Canon 9 and did not involve the former client problem, the court's detailed analysis of the mechanics of applying Canon 9 is of general utility. Noting that disqualification motions commonly are used for purely strategic purposes, the court warned that an overly broad application of Canon 9 could arouse public suspicion by unnecessarily delaying and otherwise frustrating litigation.[42] While recognizing that Canon 9 implies that no proof of actual wrongdoing should be necessary, the court nevertheless concluded "that there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur."[43] Thus, by limiting the application of Canon 9 to situations in which there has been a showing of a reasonable possibility that a specific impropriety has in fact occurred, the *Woods* court struck a balance between the need for strict ethical standards and the problems created by overzealous enforcement.

These conflicting considerations produced the split between *Emle* and *Silver Chrysler* concerning whether Canon 9 should affect the traditional Canon 4 approach to disqualification.[44] Although *Emle* interpreted Canon 9 as reducing the former client's burden in Canon 4 disqualification cases, the *Woods* rationale suggests that

38. The court pointed to an example of the client's affidavits: "[Schreiber] obtained unmeasurable confidential information regarding the practices, procedures, methods of operation, activities, comtemplated conduct, legal problems, and litigations of [Chrysler]." *Id.* at 757 n.8.

39. Moritz v. Medical Protective Co., 428 F. Supp. 865, 875 (W.D. Wis. 1977). The court also suggested that the client could try "to persuade the court that there was no way in which he could adequately describe the nature of the confidences and secrets without disclosing their content too fully." *Id.*

40. 537 F.2d 804 (5th Cir. 1976).

41. In *Woods* a naval reserve attorney had investigated securities fraud allegedly perpetrated on returning former POW's. His continued representation of these former POW's while in private practice was challenged as a violation of Canon 9. *Id.* at 807-09.

42. *Id.* at 813.

43. *Id.*

44. *See* text accompanying notes 30 & 36 *supra.*

Canon 9 need not be applied in Canon 4 cases at all. Application of *Woods* to the Canon 4-Canon 9 issue present in *Emle* and *Silver Chrysler* would entail answering one question: does traditional Canon 4 analysis result in disqualification when there is only a reasonable possibility that an attorney's conduct violates Canon 4? If traditional Canon 4 analysis requires disqualification when there is no more than this minimal showing, then under the *Woods* approach any appearance of impropriety has been avoided. In that event, Canon 9 would add nothing to the *T.C. Theatre* formula traditionally used for implementing Canon 4. While the *Woods* approach has never been applied by a court considering the interface between Canons 4 and 9, it is apparent that the answer to the question posed above should be yes. Traditional Canon 4 analysis would result in disqualification if the former client can establish a reasonable inference that the attorney received confidences or secrets.[45] Once this inference is established the attorney is disqualified because the court assumes that there is a reasonable possibility that he will use those confidences in violation of Canon 4. Thus, under the *Woods* rationale, Canon 4 analysis already eliminates any reasonable appearance of impropriety and Canon 9 should not be used to broaden the scope of the Canon 4 analysis developed in *T.C. Theatre* and its progeny.

III. Access to Disqualified Attorney's Work Product: *First Wisconsin Mortgage Trust*

A. *"Taint" of Confidentiality Standard*

Until recently, no court had permitted substitute counsel to have access to the work product[46] of an attorney disqualified under Canon 4.[47] In *First Wisconsin Mortgage Trust v. First Wisconsin Corp.* the Seventh Circuit held that under some circumstances, to be determined on a case-by-case basis, substitute counsel should be

45. *See* text accompanying note 21 *supra.*

46. For a discussion of the *First Wisconsin* court's definition of the term "work product," see note 5 *supra.*

47. Recently, in IBM v. Levin, 579 F.2d 271 (3d Cir. 1978), a court authorized an attorney disqualified under Canon 5 to turn over his work product to substitute counsel. The considerations relevant in that situation, however, differ from those in the case of a Canon 4 disqualification. Canon 5 provides that "a lawyer should exercise independent professional judgment on behalf of a client." ABA Code, *supra* note 1, Canon 5. Since the attorney's loyalty to his client is no longer divided after disqualification, the adverse effect to the client is normally eliminated at that point. Hence, there is no prospect of injury to the client through use of the disqualified attorney's work product after his departure. Canon 4, on the other hand, seeks to protect the client's confidences and secrets. As the *First Wisconsin* court noted, the prospect of the client being adversely affected by use of those secrets remains as long as the potentially "tainted" work product is used. 584 F.2d at 216.

provided access to disqualified counsel's work product.[48] In *First Wisconsin* a real estate investment trust (Trust) had been established under the sponsorship of defendant corporation. Trust was advised on its investments by a wholly owned subsidiary of defendant corporation. The law firm of Foley & Lardner served as general counsel to Trust, defendant corporation, and its subsidiaries. Trust was jointly involved in a number of loan transactions with defendant First Wisconsin National Bank, one of the corporation's subsidiaries. Two years after Trust was established, a series of loan defaults occurred when the borrowers experienced financial difficulty. After trying to work out the loan problems between Trust and defendant corporation, Foley & Lardner withdrew as general counsel for Trust and recommended that Trust retain separate counsel to deal with the problem loans. The Foley firm continued to represent defendant corporation and analyzed the approximately 300 real estate investment transactions in controversy. After failing to resolve the loan problems through negotiations, Trust filed suit charging defendant corporation and its subsidiaries with federal securities violations.[49]

Upon the filing of the suit, the Foley firm requested that Trust consent to Foley's representation of defendants. Trust refused and moved for disqualification, alleging violations of Canons 4 and 9.[50] Applying the substantial relationship test,[51] the court disqualified Foley & Lardner because the firm was present at the meetings during which the investments were discussed and had advised Trust with respect to those investments.[52] Shortly after disqualification, defendant's new counsel entered into informal negotiations with Trust regarding access to the loan analyses previously prepared by Foley.[53] When these negotiations proved fruitless defendant formally moved the court for authorization to request the Foley firm for access to the work product. The district court denied that motion[54] and a three-judge panel of the Court of Appeals affirmed.[55]

48. 584 F.2d at 202.

49. *Id.* at 202-03.

50. First Wis. Mortgage Trust v. First Wis. Corp., 422 F. Supp. 493, 495 (E.D. Wis. 1976). Although Trust did not cite Canons 4 and 9, it alleged a prior representation substantially related to the subject matter of the pending suit and an appearance of impropriety. *Id.*

51. *See* notes 14-17 *supra* and accompanying text.

52. The court stated: "Foley & Lardner, as part of the legal services it furnished the Trust, was present at the meetings when the Advisor consulted with the Trustees and furnished them with advice and recommendations with respect to the making, the acquiring, the holding, and the disposition of the investments." 422 F. Supp. at 497.

53. 584 F.2d at 203.

54. First Wis. Mortgage Trust v. First Wis. Corp., 74 F.R.D. 625 (E.D. Wis. 1977).

55. First Wis. Mortgage Trust v. First Wis. Corp., 571 F.2d 390, *rev'd*, 584 F.2d 201 (7th Cir. 1978).

On en banc rehearing, the Seventh Circuit reversed the district court and three-judge panel, granting access to the work product in question.[56] The court reasoned that denial of access unfairly punished the client for the attorney's indiscretion. The court further reasoned that the practical effect of denial of access would be to place the client in the difficult position of having to dismiss his attorney upon a motion to disqualify or incur the risk of automatically losing the attorney's predisqualification work product.[57] Thus, concluding that access should be analyzed separately from disqualification, the court suggested that the inquiry be whether transfer of the work product resulted in "any taint of confidentiality or *other* improper advantage" gained from the prior representation.[58] Moreover, the court concluded that the former client seeking to deny access is in the best possible position to point out those aspects of the prior relationship, especially confidences and secrets, that might reflect on the current litigation.[59]

Characterizing the loan analyses as "routine lawyer work" that any competent attorney could produce and noting that Trust had not challenged defendant's contention that preparation of the analyses was not influenced by confidential information, the court found that the work product had no "taint" of confidentiality and that defendant's access to this product would create no unfair advantage.[60] Thus the *First Wisconsin* majority analyzed the access question in terms of litigation advantages rather than in terms of the Canon 4 and Canon 9 considerations underlying disqualification. The majority also placed a greater burden on the former client by requiring him to describe more fully the confidential information in question than had prior courts applying traditional disqualification analysis.[61]

B. Reasonable Possibility of Confidentiality Standard

Although the *First Wisconsin* dissent[62] agreed that disqualification and access should be analyzed separately, the dissent argued that analysis of the access question should focus on the same ethical

56. 584 F.2d at 211.

57. *Id.* at 205.

58. *Id.* at 209 (emphasis in original).

59. *Id.* The court noted that this might be done in camera. *Id.*

60. *Id.* at 204.

61. *See* text accompanying notes 23-24 & 31 *supra*. *But see* notes 38-39 *supra* and accompanying text.

62. The opinion by Senior Circuit Judge Castle concurred with the majority insofar as it held that the court had jurisdiction to hear the appeal but dissented on the merits. 584 F.2d at 211.

factors considered in disqualification analysis.[63] The dissent contended that the majority, by trying to draw fine ethical lines based upon the content of the work product, had in fact adopted an approach to judicial enforcement of ethics that has been repeatedly rejected.[64] The dissent also criticized the majority's suggestion that the former client should point out the confidences used in the work as being a direct reversal of the burden of proof in Canon 4 cases.[65] After noting that traditional Canon 4 analysis is directed at eliminating the possibility of an attorney using confidential information against a former client,[66] the dissent concluded that granting access to a disqualified attorney's work product based upon a failure of the client to show specific use of confidential information undermines the purpose of disqualification.[67] Instead, the dissent suggested that Canon 4 analysis requires that access cases should turn upon "whether there exists a reasonable possibility of confidential information being used in the formation of, or being passed to substitute counsel through, the work product in question."[68] Applying this test to the *First Wisconsin* facts, the dissent concluded that there was a reasonable possibility that the work product had been affected by confidential information since the Foley firm had prepared these analyses with the instant issues in mind and had had the opportunity to sit in on discussions and decisions relevant to those issues.[69]

Although the dissent's reasonable possibility standard sounds very much like a reformulation of the substantial relationship test,[70] the dissent maintained that application of the standard would not result in per se preclusion of access in every disqualification case.[71] The dissent pointed to two examples in which there would be little or no possibility that confidences or secrets could be used against the former client. One example, focusing on timing, is when the conflicting representation arises after the work product has been

63. *Id.* at 214-15.
64. *Id.* at 213.
65. *Id.*
66. *Id.* at 214.
67. *Id.* at 215.
68. *Id.* at 217.
69. *Id.* at 217-18. The dissent specified some of the confidential information that might be embodied in the work product:

> One example of confidential information which possibly could be *passed* through the work to substitute counsel is, given that some of the underlying claims are grounded in securities law, that Foley & Lardner knew the reaction of plaintiff's Trustees to specific loan offerings and the amount of their reliance upon the representations of defendants in relation thereto. Foley & Lardner could have used those insights in determining what facts in the loan files were important and should be highlighted in the analyses.

Id. at 218 (emphasis in original).
70. *See* notes 14-24 *supra* and accompanying text.
71. 584 F.2d at 216.

produced.[72] The other example, focusing on the type of work in question, is when the work is so ministerial in nature and so easily available that no measurable disadvantage to the client could result.[73] Thus, in spite of differing views of the relevant policy considerations, both the majority and dissent in *First Wisconsin* would authorize access to a disqualified attorney's work product in some Canon 4 situations.

IV. Analysis of Access Standards

Although the Seventh Circuit's decision to grant access to the work product of an attorney disqualified under Canon 4 recognizes that automatic preclusion of such access is unnecessarily harsh, the court's taint of confidentiality standard for determining when to grant access may be unworkable. Moreover, the practical effect of the *First Wisconsin* decision could be to undermine the purpose of the attorney's disqualification. First, the court's willingness to use the term "work product" in its decision and analysis makes its potential effect too broad. Imprecise language such as "work product" could be seized as justification for granting access to material considerably more complex than the court intended. The court's attempt to qualify use of that term by characterizing the work product as "routine lawyer work" is not helpful. "Routine lawyer work" could include material ranging from interrogatories to deposition schedules, all of which would be products of the attorney's legal conclusions and strategy, and some of which might embody the attorney's special insight into the former client's operations.

Second, and more importantly, the *First Wisconsin* decision to require the former client to bear the burden of pointing to the confidences that taint the work product contravenes the purpose of Canon 4 by forcing him to disclose the confidence he seeks to protect. Moreover, there is little justification for imposing this burden on the former client because it is unlikely to aid significantly a judge attempting to determine whether the work product is tainted. In most cases, the former client will be unable or unwilling to make the showing necessary to establish that the work product is tainted. In some cases, the client will be unable to recall exactly what specific confidences have been reposed in the attorney or unable to discern the significance of those that he can recall. In other cases, not know-

72. The court pointed to the scenario in which a law firm representing one party hires a lawyer who had access to confidences or secrets of the other party that are substantially related to the pending litigation. If that attorney is hired after substantial work product has been generated, then the work product generated before his arrival cannot possibly be influenced by the confidences or secrets to which he had access. 584 F.2d at 216.

73. *Id.*

ing exactly what is contained in the work product because it has been privileged from discovery, the former client will be unwilling to submit a list of all the confidence or secrets that might have influenced the attorney's work.

Last, it is unfair to grant access based solely upon the former client's failure to show that the work product was tainted because, without a showing that the product is *not* tainted, the possibility that confidences were used still exists. A defendant's contention that no confidential information could possibly have influenced the work product does not dispose of that possibility. Since neither the defendant nor his new attorney has had access to the work product, they cannot know that no confidential information was used. Thus the possibility that the disqualified counsel subconsciously used his former client's confidences or secrets in preparing the work product remains.

V. Proposed Framework for Analyzing the Access Question

The question whether a court should grant access to a disqualified attorney's work product must be analyzed consistently with Canon 4. Canon 4 is directed at preserving the confidences and secrets of the client at all times. The attorney must be guided by that principle whether or not he is currently opposing the interests of a former client or has in fact withdrawn or been disqualified from such representation. Thus a court ordering access to such an attorney's work product must be equally attentive to the underpinnings of Canon 4. Moreover, in balancing the policies relevant to determining the access issue, ethical considerations should carry considerably more weight than the tactical advantages denial of access would confer.[74] Courts have at their disposal sufficient means of

74. The ethical considerations relevant to the access question are fundamental to the attorney-client relationship and this should never be outweighed by a given litigant's interest in obtaining access to avoid the setback of having the work redone. Granting access when there is still the possibility that a client's confidences may be used against him results in permanent injury to the attorney-client relationship by discouraging free disclosure by the client to his attorney. Even though the party seeking access suffers some delay and expense, all litigants are benefited by preserving the sanctity of the attorney-client relationship. It is incumbent upon the courts to prevent the short-term interests of individual litigants from overriding the long-term interests of the legal system. Moreover, the loss that a party suffers when a court decides that ethical considerations warrant denial of access can be mitigated to some extent. First, the litigant can obtain a substantially similar work product from the substitute attorney. Second, the litigant may not be required to compensate the attorney for the work he cannot use as a result of the attorney's ethical violation. Although the question whether an attorney should be denied compensation for work that is rendered useless because of an ethical violation is beyond the scope of this Recent Development, a discussion of compensation of attorneys disbarred or suspended during litigation can be found in 24 A.L.R.3d 1193.

controlling unfair tactical advantages in the adversary process;[75] it is unnecessary to place clients in a position that their confidences and secrets may be used against them. In the long run, all litigants should benefit from preserving the confidentiality of the attorney-client relationship.

Courts searching for the proper standards for implementing Canon 4 should look to the traditional Canon 4 analysis developed in *T.C. Theatre, Consolidated Theatres,* and *Standard Oil.*[76] Those cases establish a presumption that an attorney has obtained confidences with regard to a given issue upon a showing by the former client that the attorney worked for the client on matters substantially related to those of the adverse representation. The attorney may avoid the establishment of that presumption by convincing the court that he did not have access to substantially related material. If he fails to sustain that burden of persuasion, the attorney is disqualified. The justification for disqualification is that the attorney, having had access to confidences that substantially relate to the issues in the present case, might inadvertently let those confidences influence his preparation of the case.

After an attorney is disqualified because he might inadvertently use confidences against a former client, a court should not grant access to any material that those confidences might have affected. The dissent in *First Wisconsin* suggested that this determination should turn upon whether there is a reasonable possibility that confidences may have been used in the formation of the work product. Although the dissent's test correctly identifies the ethical considerations underlying Canon 4, it fails to provide guidelines for determining whether that possibility exists with regard to a specific collection of materials. Proceeding from the premise that the attorney might subconsciously have used confidences in his preparation of the case, the court should examine the requested material and ask two questions: first, was the work product generated at a time when the attorney could have been influenced by the former client's confidences; and second, is the material in question a product of the attorney's judgment, impressions, or strategy?[77] If the answer to

75. *See, e.g.,* ABA CODE, *supra* note 1, DR 1-102(A)(5).

76. *See* Part II(A) *supra.*

77. This approach would place the burden of going forward with the evidence on the moving party. In cases in which the former client has moved to enjoin access, that burden, of course, would fall upon him. The burden of producing evidence under this approach, however, would not require the former client to show or describe any confidences or secrets. Instead, the former client would be required to show that the challenged material was a product of the attorney's judgments, impressions, or strategy. The party opposing the motion to enjoin access would then attempt to show that the material was not a product of the attorney's subjective thought processes.

both of those questions is in the affirmative, then the court must presume that the material has been influenced by the attorney's knowledge of his former client's confidences and secrets and must deny access.[78]

In order to provide guidance to future courts and to attorneys facing the former client dilemma, the Code should incorporate those standards that most effectively achieve the purpose of Canon 4. That purpose, preserving the confidences of the client, has been most effectively achieved in those cases that have sought to protect against any reasonable possibility that the client's confidences may be used to his disadvantage. In the access context, this approach requires a court to focus on the material in question to determine if it is the type of work that may embody those confidences that the disqualified attorney is presumed to have received from his former client. In order to incorporate these standards into the Code, this Recent Development urges that the American Bar Association adopt Proposed Ethical Consideration 4-7:

> EC 4-7 An attorney who withdraws or is disqualified from representing a client because of the possibility that he may use the confidences or secrets of a former client to the former client's disadvantage should not provide substitute counsel, or any other person opposing the interest of his former client, with material that is the product of his judgment, impressions, or strategy.[79]

EDWARD S. ANNUNZIATO

78. The presumption is really no more than a finding that a reasonable possibility of inadvertent use exists.

79. The purpose of Canon 4 could be achieved in the federal courts through adoption of a Federal Rule of Civil Procedure that imposes the same standard:

> Proposed Federal Rule 87: A court should not authorize access to any material that is the product of the judgment, impressions, or strategy of an attorney who withdraws or is disqualified from representing a client because of the possibility that he may use the confidences or secrets of a former client to the former client's disadvantage.