

LEGAL ETHICS—ATTORNEY CONFLICTS OF INTEREST—THE EFFECT OF SCREENING PROCEDURES AND THE APPEARANCE OF IMPROPRIETY STANDARD ON THE VICARIOUS DISQUALIFICATION OF A LAW FIRM

Clinard v. Blackwood, 46 S.W.3d 177 (Tenn. 2001).¹

[A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.²

I. INTRODUCTION

The facts of *Clinard v. Blackwood* fit the phenomenon of lawyer mobility to the proverbial "T." In 1996, John and Edward Clinard filed a declaratory judgment action against C. Roger Blackwood in order to settle a boundary line dispute.³ Maclin P. Davis, Jr., a member of the law firm of Baker, Donelson, Bearman & Caldwell (the "Baker firm"), represented Mr. Blackwood (the "defendant") in the lawsuit and filed an answer and counterclaim on his behalf.⁴ Before becoming a member of the Baker firm, Mr. Davis was a member of the law firm of Waller Lansden Dortch & Davis (the "Waller

1. The Tennessee Supreme Court decided *Clinard v. Blackwood* under the Tennessee Code of Professional Responsibility ("Tennessee Code"). Therefore, Parts I through IV of this Case Note address *Clinard* as it was decided under the Tennessee Code. On August 27, 2002, the Tennessee Supreme Court amended Tennessee Supreme Court Rule 8, adopting an entirely new ethics scheme based on the Model Rules of Professional Conduct, which will become effective on March 1, 2003. TENN. RULES OF PROF'L CONDUCT (effective March 1, 2003); *In Re* Tenn. Rules of Prof'l Conduct, No. M2000-02416-SC- RL-RL (filed Sept. 12, 2002). A proper understanding of the Tennessee Supreme Court's rationale in *Clinard* under the Tennessee Code is nonetheless vital to understanding *Clinard* under Tennessee's new ethics rules. Parts V and VI of this case note consider the continued applicability of *Clinard*.

2. MODEL RULES OF PROF'L CONDUCT Preamble (2002).

3. *Clinard v. Blackwood*, 46 S.W.3d 177, 181 (Tenn. 2001). Plaintiffs John and Edward Clinard owned property that bordered defendant Blackwood's farm. *Clinard v. Blackwood*, No. 01A01-9801-CV-00029, 1999 Tenn. App. LEXIS 729, at *3 (Tenn. Ct. App. Oct. 28, 1999). The plaintiffs leased their property to several limestone companies that blasted and harvested at the limestone quarry on the property. *Id.*

4. *Clinard*, 46 S.W.3d at 181. The defendant and Mr. Davis planned to file a third-party claim against American Limestone Company, Inc., for "blasting damage to the [defendant's] property." *Id.*

firm"). Ultimately, Mr. Davis withdrew from representing the defendant,⁵ and the defendant sought legal counsel elsewhere.⁶ The defendant filed an amended counterclaim and third-party claim against the plaintiffs John and Edward Clinard and against American Limestone Company, Inc.⁷ Thereafter, the plaintiffs retained the Waller firm to represent them in the lawsuit.⁸ After the plaintiffs retained the Waller firm, Mr. Davis left the Baker firm and rejoined the Waller firm.⁹ Consequently, the Waller firm enacted its "Conflict of Interest Screening Procedures" in order to prevent Mr. Davis from disclosing information regarding the defendant's case to other lawyers in the Waller firm.¹⁰ Despite these measures, in September 1997 the defendant filed a motion to disqualify the Waller firm from continuing to represent the plaintiffs.¹¹

The Circuit Court for Robertson County ruled that the Waller firm was not disqualified from representing the plaintiffs, but the court allowed the defendant to pursue an interlocutory appeal.¹² The Court of Appeals reversed the trial court's decision and held that "the screening procedures employed by the Waller firm were insufficient to rebut the presumption of shared confidences between Mr. Davis and the members of the Waller firm with regard to the [defendant's] litigation."¹³ The Court of Appeals illustrated that the circumstances in the case were such that the defendant could reasonably perceive that Mr. Davis had "switched sides" in the litigation.¹⁴ Thus, the Court of Appeals remanded the case to the trial court with instructions to disqualify the Waller firm from representing the plaintiffs.¹⁵ Upon review by the Tennessee Supreme Court, *held*, affirmed.¹⁶ When an attorney has a conflict of interest resulting from a former representation that would prohibit representation of a present client, the attorney's law firm may prevent vicarious disqualification by implementing screening procedures sufficient to rebut the presumption of shared confidences, but a serious appearance of impropriety will still require disqualification of the firm. *Clinard v. Blackwood*, 46 S.W.3d 177 (Tenn. 2001).

5. *Id.* Mr. Davis was forced to withdraw as the defendant's attorney "because American Limestone was a client of the Baker firm in an unrelated matter." *Id.*

6. *Id.* The defendant hired attorney Winston S. Evans to represent him. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* The screening procedures were also intended to shield the other Waller firm members from Mr. Davis's secretary. *Id.*

11. *Id.*

12. *Clinard v. Blackwood*, No. 01A01-9801-CV-00029, 1999 Tenn. App. LEXIS 729, at *8 (Tenn. Ct. App. Oct. 28, 1999).

13. *Clinard*, 46 S.W.3d at 181-82 (citing the appellate court decision).

14. *Clinard*, 1999 Tenn. App. LEXIS 729, at *77.

15. *Id.* at *78.

16. *Clinard*, 46 S.W.3d at 189.

Under the Tennessee Code of Professional Responsibility ("Tennessee Code"),¹⁷ a lawyer must not simultaneously represent two clients who have adverse interests in the same subject matter.¹⁸ Similarly, a lawyer must not change sides in the middle of a conflict,¹⁹ nor must he represent a person with interests adverse to those of a former client.²⁰ In addition to these disqualification rules for individual lawyers, vicarious disqualification rules are necessary to deal with lawyers working in a firm.²¹ Although DR 5-105(D)²² of the Tennessee Code includes the doctrine of vicarious disqualification,²³ it does not "directly address conflicts of interest arising when a personally disqualified lawyer joins a firm that would not otherwise be disqualified."²⁴ Accordingly, many law firms have attempted to rectify such conflict of interest problems by enacting screening procedures that would "insulate the rest of the firm from the personally conflicted lawyer and would thereby provide evidence sufficient to rebut the presumption of shared confidences."²⁵ Until the *Clinard* case, however, the Tennessee Supreme

17. The Tennessee Code of Professional Responsibility is found in Tennessee Supreme Court Rule 8 until March 1, 2003. See *supra* text accompanying note 1.

18. TENN. CODE OF PROF'L RESPONSIBILITY DR 5-105(A) (2000); *Id.* EC 5-15; see *supra* text accompanying note 1; see also *State v. Tate*, 925 S.W.2d 548, 552 (Tenn. Crim. App. 1995) (defining a conflict of interest as "one attorney representing two or more parties with divergent interests").

19. See, e.g., *Henriksen v. Great Am. Savs. & Loan*, 14 Cal. Rptr. 2d 184, 187 (Cal. Ct. App. 1992); *Straub Clinic & Hosp. v. Kochi*, 917 P.2d 1284, 1290 (Haw. 1996); *State ex rel. Freezer Servs., Inc. v. Mullen*, 458 N.W.2d 245, 249 (Neb. 1990); *Kala v. Aluminum Smelting & Refining Co.*, 688 N.E.2d 258, 265 (Ohio 1998).

20. See, e.g., *Mills v. Crane*, No. 66, 1987 Tenn. App. LEXIS 3179, at *10 (Tenn. Ct. App. Apr. 10, 1987).

21. *Clinard v. Blackwood*, No. 01A01-9801-CV-00029, 1999 Tenn. App. LEXIS 729, at *28-29 (Tenn. Ct. App. Oct. 28, 1999).

22. Until March 1, 2003, DR 5-105(D) is located in Tennessee Supreme Court Rule 8, which is the Tennessee Code of Professional Responsibility. See *supra* text accompanying note 1.

23. TENN. CODE OF PROF'L RESPONSIBILITY DR 5-105(D) (2000) ("If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with that lawyer or that lawyer's firm may accept or continue such employment."). See *supra* text accompanying note 1.

24. *Clinard*, 1999 Tenn. App. LEXIS 729, at *32. However, many courts have simply invoked the vicarious disqualification doctrine in such cases "citing [Tennessee Supreme Court Rule 8], DR 5-105(A) & (D), DR 4-101 (the preservation of a client's confidences and secrets), and Canon 9 (the avoidance of an appearance of impropriety)." *Clinard*, 1999 Tenn. App. LEXIS 729, at *32.

25. *Id.* at *33; see also Randall B. Bateman, *Return to the Ethics Rules as a Standard for Attorney Disqualification: Attempting Consistency in Motions for Disqualification by the Use of Chinese Walls*, 33 DUQ. L. REV. 249, 256 (1995) (discussing the adoption of screening measures to protect client confidences while allowing access to their counsel of choice); Christopher J. Dunnigan, *The Art Formerly Known as the Chinese Wall: Screening in Law*

Court had yet to determine the viability of screening procedures and the specific circumstances in which a screening arrangement may be used to avoid the consequences of the vicarious disqualification doctrine.²⁶ In *Clinard*, the Tennessee Supreme Court queried whether a law firm—in this case the Waller firm—may employ screening procedures to prevent its vicarious disqualification under the Tennessee Code of Professional Responsibility and, specifically in this case, whether the appearance of impropriety standard nonetheless requires that firm's disqualification.²⁷

II. THE EFFECT OF LAW FIRM SCREENING PROCEDURES ON VICARIOUS DISQUALIFICATION

In the broadest sense, the growth of law firms and lawyer mobility during the last half of the twentieth century brought about a substantial proliferation of attorney conflict of interest issues.²⁸ Traditionally, in Tennessee, the rules and opinions of the Tennessee Supreme Court have been the most authoritative sources for the principles needed to decide these problems.²⁹ In 1909, the Tennessee Bar Association adopted portions of the American Bar Association's ("ABA") first ethics code,³⁰ and the Tennessee Supreme Court later adopted the ABA's Code of Professional Responsibility, which then had the force and effect of law in Tennessee.³¹ In 1981, the Tennessee Supreme Court empowered the Board of Professional Responsibility to issue ethics

Firms: Why, When, Where, and How, 11 GEO. J. LEGAL ETHICS 291, 303 (1998) (discussing the efficacy of screens in the legal profession).

26. *Clinard*, 1999 Tenn. App. LEXIS 729, at *16.

27. *Clinard v. Blackwood*, 46 S.W.3d 177, 180-81 (Tenn. 2001).

28. See *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 753-54 (2d Cir. 1975); see also James F. Fitzpatrick, *Legal Future Shock: The Role of Large Law Firms by the End of the Century*, 64 IND. L.J. 461, 462 (1989) ("The four main characteristics of large law firms in the 1990s are that they will be bigger, more fluid, more risky, and much more diversified and commercially aggressive. Any strategy, either in a law firm or in a law school, should accommodate and respond to those characteristics.") (footnote omitted); James W. Jones, *The Challenge of Change: The Practice of Law in the Year 2000*, 41 VAND. L. REV. 683, 683 (1988) ("The past two decades have witnessed extraordinary changes that will have a lasting impact on the structure of the legal profession and the ways in which lawyers approach their practices.").

29. See *Smith County Educ. Ass'n v. Anderson*, 676 S.W.2d 328, 333 (Tenn. 1984) ("It is well settled that the licensing and regulation of attorneys practicing law in courts of Tennessee is squarely within the inherent authority of the judicial branch of government."); see also *Andrews v. Bible*, 812 S.W.2d 284, 291 (Tenn. 1991) ("[T]he courts of this state have under the inherent power to supervise and control their own proceedings, the authority to sanction attorneys. . . ."); *Ward v. Alsup*, 46 S.W. 573, 574 (Tenn. 1898) (explaining that all lawyers become officers of the court).

30. See Walter P. Armstrong, Jr., *Regulation of the Bar in Tennessee*, 53 TENN. L. REV. 723, 730-31 (1986). The code was known as the Canons of Professional Ethics. *Id.* at 730.

31. *Gracey v. Maddin*, 769 S.W.2d 497, 504 (Tenn. Ct. App. 1989).

opinions that construed the court's ethics rules.³² The vicarious disqualification doctrine took its form in Tennessee Supreme Court Rule 8 as DR 5-105(D) of the Code of Professional Responsibility.³³

In 1977, one of the earliest vicarious disqualification cases reached the Tennessee Court of Criminal Appeals.³⁴ In *Mattress v. State*, the court held that a district attorney general and his entire staff were not disqualified because a single assistant district attorney had previously represented the defendants while working at the University of Tennessee College of Law's Legal Clinic as a staff attorney.³⁵ Without addressing the issue of screening procedures, the court held that while the one attorney formerly employed at the legal clinic was disqualified, the entire district attorney general's staff was not disqualified.³⁶ Seven years later, the Tennessee Court of Criminal Appeals was faced with a vicarious disqualification issue of first impression.³⁷ In *State v. Phillips*, the court reversed a second-degree murder conviction because the defendant's former lawyer changed sides and aided the prosecution of the defendant as an assistant district attorney general.³⁸ Although the court never addressed the issue of screening procedures, it disqualified not only the assistant but also the district attorney's entire staff.³⁹ Thus, the Tennessee courts' lack of guidance in handling early vicarious disqualification cases was evidenced by these conflicting outcomes.

The roots of screening procedures in general can be traced to Formal Opinion 342, where the ABA approved the use of screening arrangements for former government lawyers. Many courts treated this as an amendment to the vicarious disqualification doctrine.⁴⁰ The starting point for determining whether vicarious disqualification was necessary was almost universally accepted to be the "substantial relationship" inquiry.⁴¹ In 1983, one year before *State v. Phillips*, the United States Court of Appeals for the Seventh Circuit held in *LaSalle Nat'l Bank v. County of Lake* that the standard for

32. See *State v. Jones*, 726 S.W.2d 515, 519 (Tenn. 1987). The formal ethics opinions are binding on the Board and on the person requesting the opinion but not on the courts. See *In re Youngblood*, 895 S.W.2d 322, 325 (Tenn. 1995); *Jones*, 726 S.W.2d at 519.

33. See TENN. CODE OF PROF'L RESPONSIBILITY DR 5-105(D) (2000); see also *supra* text accompanying 1.

34. See *Mattress v. State*, 564 S.W.2d 678, 679-80 (Tenn. Crim. App. 1977).

35. *Id.*

36. *Id.* at 680. The trial court concluded that, in refusing to disqualify the entire district attorney general's office, none of the principles in *Autry v. State*, 430 S.W.2d 808 (Tenn. Crim. App. 1967), were violated. *Id.*; see *Autry*, 430 S.W.2d at 809 (explaining that an attorney who has received confidences of a client cannot represent parties whose interests are adverse to that former client).

37. See *State v. Phillips*, 672 S.W.2d 427, 432 (Tenn. Crim. App. 1984).

38. *Id.* at 436.

39. *Id.*

40. See, e.g., *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977).

41. *LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252, 255 (7th Cir. 1983).

disqualification of an attorney who undertakes litigation against a former client is "whether there is a substantial relationship between the subject matter of the prior and present representation."⁴² Although the court in *LaSalle* held that the subjects of the attorney's past and present representation were substantially related,⁴³ the court explained that the presumption that the attorney received confidential information during his prior representation was rebuttable.⁴⁴ After deciding that the attorney failed to rebut this presumption, the court addressed whether the attorney's law firm could avoid vicarious disqualification through screening procedures.⁴⁵ The court in *LaSalle* first noted that the screening arrangements approved in other jurisdictions contained common characteristics.⁴⁶ In *Armstrong v. McAlpin*, for instance, the attorney involved was not given access to the relevant case files, did not receive profits from the representation in question, was not permitted to discuss the suit with other firm members, and was not allowed to see any documents related to the case.⁴⁷ In addition, all such arrangements were affirmed under oath.⁴⁸ Similarly, in *Kesselhaut v. United States*, a law firm was prohibited from discussing the case in question with the disqualified attorney, and the relevant files were kept from his sight.⁴⁹ The screening arrangements in *LaSalle*, however, were distinguishable in that they were not established until the disqualification motion was filed and they were not as specific as the screening arrangements in the approved cases.⁵⁰ Thus, the court held that the screening arrangements in *LaSalle* were not sufficient to prevent the entire firm from being disqualified.⁵¹

42. *Id.* In determining whether a substantial relationship exists, the court should make a three-level inquiry:

First, the trial judge must make a factual reconstruction of the scope of the prior legal representation. Second, it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters. Third, it must be determined whether that information is relevant to the issues raised in the litigation pending against the former client.

Id. at 255-56 (citing *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir. 1978)).

43. *Id.* at 257.

44. *Id.* at 256; see *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 (7th Cir. 1982).

45. *LaSalle*, 703 F.2d at 257. "[T]he knowledge possessed by one attorney in a law firm is presumed to be shared with the other attorneys in the firm." *Id.*

46. *Id.* at 259.

47. See *Armstrong v. McAlpin*, 625 F.2d 433, 442-43 (2d Cir. 1980).

48. *Id.*

49. See *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977); see also *Greitzer & Locks v. Johns-Manville Corp.*, No. 81-1379, 1982 U.S. App. LEXIS 21211, at *6-7 (4th Cir. Mar. 5, 1982).

50. *LaSalle*, 703 F.2d at 259.

51. *Id.*

Although the ABA had yet to establish a formal screening rule that applied to private law firms by the time *LaSalle* was decided, many courts began to examine screening procedures on a case-by-case basis rather than applying vicarious disqualification automatically. In 1983, following the ruling in *LaSalle*, the Seventh Circuit Court of Appeals' holding in *Schiessle v. Stephens*⁵² ultimately paved the way for screening procedure standards for private law firms in Tennessee. In *Schiessle*, the plaintiff appealed an order that vicariously disqualified the law firm representing her.⁵³ The court explained that cases of ethical propriety involving motions to disqualify counsel consist of a balancing test between "the sacrosanct privacy of the attorney-client relationship (and the professional integrity implicated by that relationship) and the prerogative of a party to proceed with counsel of its choice."⁵⁴ Accordingly, in balancing these interests, the court maintained that disqualification is an extreme measure that should be used only when absolutely necessary.⁵⁵ As in *LaSalle*, the court in *Schiessle* began its outline of vicarious disqualification with the "substantial relationship" inquiry:

If we conclude a substantial relationship does exist [between the subject matter of the prior and present representations], we must next ascertain whether the presumption of shared confidences with respect to the prior representation has been rebutted. *If we conclude this presumption has not been rebutted, we must then determine whether the presumption of shared confidences has been rebutted with respect to the present representation.* Failure to rebut this presumption would also make disqualification proper.⁵⁶

In determining whether the firm has rebutted the presumption of shared confidences with respect to the present representation, the court must examine whether "confidences and secrets" that the individual lawyer brought to the new firm were passed on to other members of the new firm.⁵⁷ Following *LaSalle*, the *Schiessle* court held that a firm could rebut the presumption of shared confidences by demonstrating that "specific institutional mechanisms' . . . had been implemented to effectively insulate against any flow of confidential information from the 'infected' attorney to any other member of his present firm."⁵⁸ The court explained that such determinations "must be made on a case-by-case basis" and should be "based on objective and verifiable evidence presented to the trial court."⁵⁹ The court added several

52. 717 F.2d 417 (7th Cir. 1983).

53. *Id.* at 418.

54. *Id.* at 420 (citing *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982)).

55. *Schiessle*, 717 F.2d at 420 (quoting *Freeman*, 689 F.2d at 721).

56. *Id.* (emphasis added) (citing *LaSalle*, 703 F.2d at 255-56).

57. *Id.* at 421.

58. *Id.* (citing *LaSalle*, 703 F.2d at 259).

59. *Id.*

factors that the trial court should consider in examining screening procedures, including:

[T]he size and structural divisions of the law firm involved, the likelihood of contact between the "infected" attorney and the specific attorneys responsible for the present representation, the existence of rules which prevent the "infected" attorney from access to relevant files or other information pertaining to the present litigation or which prevent him from sharing in the fees derived from such litigation.⁶⁰

Therefore, the court held that "the district court erred in relying on an irrebuttable presumption to find that confidences and secrets had been shared between [the attorney] and other members of the [attorney's] firm because [the] decision[s] in . . . *LaSalle* makes it clear that the presumption of shared confidences can be rebutted."⁶¹ Nevertheless, the circuit court came to the same conclusion as the district court: the plaintiff's firm should be disqualified because "no evidence exist[ed] in the record establishing that the [attorney's] firm [had] 'institutional mechanisms' in effect insulating [the attorney] from all participation in and information about [the] case."⁶² The court concluded by stating that "when an attorney with knowledge of a prior client's confidences and secrets changes employment and joins a firm representing an adverse party, specific institutional mechanisms must be in place to ensure that information is not shared with members of the new firm, even if inadvertently."⁶³

In 1988, in *Manning v. Waring, Cox, James, Sklar & Allen*, the United States Court of Appeals for the Sixth Circuit followed the court's rationale in *Schiessle* and held that screening procedures provide private law firms with the same protection from vicarious disqualification when hiring an attorney in private practice as when hiring a former government lawyer.⁶⁴ At the trial court level in *Manning*, the United States District Court for the Western District of Tennessee concluded that screening procedures "cannot rebut the presumption of shared confidences when the confidences were obtained by the 'quarantined' lawyer from the former client while representing him in the same proceedings in which other members of the firm are now representing an opposing party."⁶⁵ On appeal to the Sixth Circuit, the court noted that it had yet to confront the precise issue at hand but concluded that the district court erred in ruling that screening procedures can never protect confidences

60. *Id.* (citing *LaSalle*, 703 F.2d at 259).

61. *Id.* (citing *LaSalle*, 703 F.2d at 259).

62. *Id.* (quoting *LaSalle*, 703 F.2d at 257) (internal quotes omitted).

63. *Id.* (citing *LaSalle*, 703 F.2d at 259).

64. *See Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 226 (6th Cir. 1988).

65. *Id.* at 224.

under the circumstances in *Manning*.⁶⁶ In the Sixth Circuit's view, the Seventh Circuit's reasoning in *Schiessle* and *LaSalle* was the most realistic way to resolve the "competing interests raised by such [vicarious] disqualification motion[s]." ⁶⁷ Rejecting automatic vicarious disqualification, the *Manning* court explained that it must first determine whether the confidences an attorney acquired in the course of a prior representation and brought to a new firm have been passed on to other members of that firm.⁶⁸ Citing *LaSalle*, the court stated that the presumption of shared confidences may be rebutted through the use of screening procedures.⁶⁹ Noting that the ABA had recognized screening procedures in Formal Opinion 342 "in the instance of lawyers who leave government service to enter private practice," the court in *Manning* further held that the ABA's opinion should apply not only to former government attorneys but also to "private attorneys who change their association."⁷⁰

The holding in *Manning* prompted a formal ethics opinion regarding the efficacy of screening procedures for Tennessee lawyers. In 1989, one year after *Manning*, the Tennessee Board of Professional Responsibility issued Formal Opinion 89-F-118.⁷¹ Citing the issue raised in *Manning*, the Board adopted the Seventh Circuit's three-step analysis, outlined in *Schiessle*, concerning motions to disqualify counsel.⁷² In the opinion, the Board stated that the presumption of shared confidences at an attorney's new firm could be rebutted by proof that the attorney's new firm had instituted appropriate screening procedures.⁷³ Therefore, the Board approved screening procedures "as a viable method to avoid the imputed or vicarious disqualification provisions of DR 5-105(D)."⁷⁴

The same year that the Board of Professional Responsibility adopted Formal Opinion 89-F-118, however, the Tennessee Court of Appeals significantly downplayed the opinion's significance in *King v. King*.⁷⁵ *King*

66. *Id.* The issue in *Manning* was "whether the entire law firm should be disqualified by a conflict of interest presented by the fact that a member of the firm had represented a certain client prior to his joining the firm." *Id.* at 226.

67. *Id.* at 225.

68. *Id.* (citing *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983)).

69. *Id.* The court also noted that under its holding "the sanctity of client confidences is maintained, since the former client is accorded a presumption of shared confidences which, if rebutted, will dictate disqualification." *Id.* at 227.

70. *Id.* at 226. The court reached its holding in light of the "changing nature of the availability of legal services." *Id.*

71. See Tenn. Bd. of Prof'l Responsibility, Formal Op. 89-F-118 (1989), available at 1989 WL 534365, at *1.

72. *Id.* at *2-3.

73. *Id.* at *3. The Board also ruled that the screening arrangements could be used for lawyers, law clerks, paralegals, and legal secretaries. *Id.*

74. *Id.*

75. See *King v. King*, No. 89-46-II, 1989 Tenn. App. LEXIS 675, at *15-16 (Tenn. Ct.

involved a divorce proceeding in which the secretary of the lawyer representing the wife took a job with the lawyer representing the husband.⁷⁶ The Court of Appeals reversed the trial court's disqualification of the husband's lawyer, stating that there was "[n]o Supreme Court Rule or Statute . . . cited or found which forbids a lawyer to hire a former secretary of a lawyer who opposes him in a lawsuit" and that there was no evidence that the secretary shared any of the wife's confidential information with the husband's lawyer.⁷⁷ Although the court reversed the disqualification, it belittled Formal Opinion 89-F-118 and screening procedures in general by observing that the ethics opinion was not binding on the courts and the use of screening procedures had not been made a part of Tennessee Supreme Court Rule 8.⁷⁸ Thus, as evidenced by *King*, the Tennessee Court of Appeals was still searching for an authoritative guidance concerning screening procedures.

In 1992, satisfied with the Board's interpretation of screening procedures, the Tennessee Court of Criminal Appeals adopted Formal Opinion 89-F-118 in *State v. Claybrook*.⁷⁹ The court stated that "[it] . . . commend[s] the applicable guidelines in Formal Ethics Opinion 89-F-118 of the Tennessee Board of Professional Responsibility to prosecutors and trial courts in the future."⁸⁰ In *Claybrook*, the defendant attempted to disqualify the district attorney general and his entire office because the district attorney general hired an attorney who practiced law with the defense counsel after counsel's representation of the defendant.⁸¹ Citing the Sixth Circuit Court in *Manning*, the Tennessee Court of Criminal Appeals explained that the presumption of shared confidences was rebuttable.⁸² Thus, in *Claybrook*, the court held that a district attorney general could prevent the vicarious disqualification of the entire office by proving "by clear and convincing evidence that the challenged attorney has been sufficiently screened from the remainder of the staff and its work on the pending case."⁸³

After the holding in *Claybrook*, the Tennessee Court of Criminal Appeals regularly declined to disqualify a district attorney general's entire office when timely screening procedures had been instituted. In *State v. West*, for example, the Tennessee Court of Criminal Appeals held that the trial court did not abuse its discretion in denying a defendant's motion to disqualify a district

App. Oct. 18, 1989).

76. *Id.* at *2-3.

77. *Id.* at *22-23.

78. *Id.* at *22-25.

79. *See State v. Claybrook*, No. 3, 1992 Tenn. Crim. App. LEXIS 89, at *33 (Tenn. Crim.

App. Feb. 5, 1992).

80. *Id.*

81. *Id.* at *17-18.

82. *Id.* at *23 & n.2.

83. *Id.* at *32. In reaching its conclusion, the court distinguished this case from *State v. Phillips*, 672 S.W.2d 427 (Tenn. Crim. App. 1984), by explaining that the migratory attorney in *Claybrook* lacked active involvement in both the defense and prosecution. *Id.* at *33.

attorney and his office.⁸⁴ Based on the *Claybrook* decision,⁸⁵ the *West* court concluded that the district attorney's agreement that no one would question or seek information from the "infected" attorney concerning cases he had formerly handled while in the Public Defender's Office was sufficient to prevent vicarious disqualification.⁸⁶

However, in 1995, three years after *Claybrook*, the Tennessee Court of Criminal Appeals held in *State v. Tate* that the entire Knox County District Attorney General's staff was disqualified from prosecuting the defendant in question.⁸⁷ In *Tate*, the district attorney general had previously questioned the defendant in open court while acting in his former position as a judge.⁸⁸ The court distinguished *Tate* from prior cases and determined that it was a unique case that falls outside the "general rule" because no attempts had been made to screen the infected lawyer's (the former judge) involvement in the prosecution.⁸⁹ Relying on principles in *Manning*, the court explained that because no screening procedures had been instituted, there was a presumption of shared confidences with "no attempt to rebut that presumption."⁹⁰ Thus, the court held that vicarious disqualification of the entire office was inevitable "[b]ecause the burden of proof must rest upon the state to establish that appropriate screening measures have been taken."⁹¹

Two years later, in *Watson v. Ameredes*, an entire private firm was again disqualified, this time by the Tennessee Court of Appeals.⁹² In *Watson*, however, the law firm had painstakingly complied with Formal Opinion 89-F-118 by implementing screening procedures to shield other members of the firm from the infected attorney.⁹³ Despite these procedures, the court held that the small size of the firm prevented a rebuttal of the presumption of shared confidences, if for no other reason because of the "appearance of impropriety" standard.⁹⁴ The court noted that the conflicted lawyer was not merely "on the periphery" of the case but actually "join[ed] forces with the lawyers suing his [former] client" in the same case in which he had previously represented the client.⁹⁵ Thus, in the court's view, screening procedures could be used to

84. See *State v. West*, No. 01-C-01-9107-CC-00202, 1992 Tenn. Crim. App. LEXIS 305, at *7 (Tenn. Crim. App. Mar. 31, 1992).

85. *Id.*

86. *Id.* at *4-7.

87. *State v. Tate*, 925 S.W.2d 548, 549 (Tenn. Crim. App. 1995).

88. *Id.*

89. *Id.* at 556-57.

90. *Id.* at 558.

91. *Id.* at 557.

92. See *Watson v. Ameredes*, No. 03-A-01-9704-CV-00129, 1997 Tenn. App. LEXIS 884, at *18 (Tenn. Ct. App. Dec. 10, 1997).

93. *Id.* at *4-6.

94. *Id.* at *17. This Case Note will discuss the "appearance of impropriety" standard in the next part.

95. *Id.* at *12.

prevent the disqualification of a law firm only when the personally conflicted lawyer was superficially involved with the former client.

In October 2000, the Tennessee Supreme Court briefly alluded to the use of screening procedures in *State v. Culbreath*.⁹⁶ Although the court ultimately decided *Culbreath* by the appearance of impropriety standard, the court, in one of its rare references to screening procedures, noted that "there were . . . no efforts to screen [the attorney] from other members of the District Attorney General's office."⁹⁷ In short, by the time *Culbreath* reached the Tennessee Supreme Court, both the intermediate appellate courts and the Board of Professional Responsibility in Tennessee had determined that the three-part test established in *Schiessle* was at least an appropriate way of addressing vicarious disqualification.⁹⁸ Nevertheless, in 2000, the Tennessee Supreme Court had yet to provide an authoritative interpretation of DR 5-105(D)'s vicarious disqualification doctrine and the effect on that doctrine of the screening procedures outlined in *Schiessle* and in Formal Opinion 89-F-118.

III. THE EFFECT OF THE APPEARANCE OF IMPROPRIETY STANDARD ON VICARIOUS DISQUALIFICATION

Appearances to the mind are of four kinds. Things either are what they appear to be; or they neither are, nor appear to be; or they are, and do not appear to be; or they are not, and yet appear to be. To hit the mark in all these cases is the wise man's task.⁹⁹

By the time the Tennessee Supreme Court decided *Culbreath*, most courts had held that the "appearance of impropriety" standard was uniquely related to screening procedures and to the determination of a law firm's vicarious disqualification.¹⁰⁰ The history of this standard can be traced to 1932, when the ABA concluded that "[a]n attorney should not only avoid all impropriety but should likewise avoid the appearance of impropriety."¹⁰¹ In 1969, the

96. See *State v. Culbreath*, 30 S.W.3d 309, 316-17 (Tenn. 2000).

97. *Id.* The court upheld the trial court's ruling to disqualify the district attorney general's office based on the appearance of impropriety created by the infected attorney's conflict of interest. *Id.* at 316-18.

98. See *Lemm v. Adams*, 955 S.W.2d 70, 74 (Tenn. Ct. App. 1997); *State v. Tate*, 925 S.W.2d 548, 557-58 (Tenn. Crim. App. 1995); *State v. Claybrook*, No. 3, 1992 Tenn. Crim. App. LEXIS 89, at *28-29 (Tenn. Crim. App. Feb. 5, 1992).

99. Roberta K. Flowers, *What You See is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 699 (quoting as a preamble Epictetus, *The Discourses*, in DISCOURSES AND ENCHIRIDION 68 (Thomas Wentworth Higginson trans., 1944)).

100. See, e.g., *United States v. Smith*, 653 F.2d 126, 128 (4th Cir. 1981); *Lee v. Todd*, 555 F. Supp. 628, 631-32 (W.D. Tenn. 1982); *Heringer v. Haskell*, 536 N.W.2d 362, 366-67 (N.D. 1995).

101. Bruce A. Green, *Conflicts of Interest in Legal Representation: Should the*

ABA alluded to this ethical obligation several times in its enactment of the Model Code of Professional Responsibility.¹⁰² Initially, “the appearance of impropriety [standard] was meant to serve as an aspirational principle to guide lawyers in the exercise of their independent judgment,” rather than a disqualification rule.¹⁰³ Some courts nevertheless began to use the appearance of impropriety standard “as a catch-all to address the [Model] Code’s perceived shortcomings.”¹⁰⁴ Moreover, early in its creation, the appearance of impropriety standard was used by courts to address conflicts of interest with both government and private lawyers.¹⁰⁵

The appearance of impropriety standard took form in Tennessee in Tennessee Supreme Court Rule 8 as Ethical Consideration 9-6 of Canon 9 of the Tennessee Code of Professional Responsibility.¹⁰⁶ The Canon stated that “[e]very lawyer owes a solemn duty . . . to avoid not only professional impropriety but also the appearance of impropriety.”¹⁰⁷ Similarly, in Formal Opinion 89-F-118, the Tennessee Board of Professional Responsibility demonstrated the continued relevance of the appearance of impropriety standard even when adequate screening procedures are established.¹⁰⁸ Despite widespread criticism,¹⁰⁹ the appearance of impropriety standard was applied to vicarious disqualification cases in numerous jurisdictions, ultimately leading to its acceptance by the Tennessee Supreme Court.¹¹⁰ Consequently, the Tennessee Supreme Court drew upon the holdings of several different courts in order to establish an authoritative rationale for adopting the appearance of impropriety standard.

In 1974, in *General Motors Corp. v. City of New York*, the United States Court of Appeals for the Second Circuit explained that the purpose of Canon 9 (appearance of impropriety rule) was to maintain “in the public mind, a high

Appearance of Impropriety Rule Be Eliminated in New Jersey—Or Revived Everywhere Else?, 28 SETON HALL L. REV. 315, 315 (1997) (internal quotes omitted) (quoting ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 77 (1932)).

102. *Id.* at 316-17.

103. *Id.* at 317.

104. *Id.*

105. *Id.*

106. *See* TENN. CODE OF PROF’L RESPONSIBILITY EC 9-6 (2000).

107. *Id.*

108. *See* Tenn. Bd. of Prof’l Responsibility, Formal Op. 89-F-118 (1989), available at 1989 WL 534365, at *4 (“The Board reiterates that protection of the client and client confidences is of the utmost importance. Protection of the image of the profession from ‘even the appearance of impropriety’ is also vitally important.” (internal citation omitted)).

109. *See, e.g.,* King v. King, No. 89-46-II, 1989 Tenn. App. LEXIS 675, at *33 (Tenn. Ct. App. Oct. 18, 1989) (Koch, J., concurring) (stating that “except in the rarest of cases, the appearance of impropriety alone is ‘simply too slender a reed on which to rest a disqualification order.’”).

110. *See supra* note 97 and accompanying text.

regard for the legal profession."¹¹¹ Seven years later, citing *General Motors*, the Fourth Circuit added in *United States v. Smith* that the mere possibility of impropriety was insufficient to warrant vicarious disqualification of a law firm.¹¹² The court stated that "[i]t cannot be a fanciful, unrealistic or purely subjective suspicion of impropriety that requires disqualification."¹¹³ In other words, the court established that "[t]he appearance of impropriety must be real."¹¹⁴ One year after *Smith*, the United States District Court for the Western District of Tennessee followed this approach in *Lee v. Todd*, holding that the appearance of impropriety standard must be objective so as to promote public confidence in the legal system.¹¹⁵ Thus, the court concluded that the objective opinion of the public should govern rather than the subjective and biased perceptions of the litigants.¹¹⁶

In 1983, the United States Court of Appeals for the Seventh Circuit held in *Analytica, Inc. v. NPD Research, Inc.* that the appearance of impropriety standard is clearly applicable in certain circumstances despite the proper use of the screening procedures established in *LaSalle*.¹¹⁷ In *Analytica*, an attorney received confidential information from his client regarding a stock transfer.¹¹⁸ Months later, the attorney's law firm became counsel for the client's adversary.¹¹⁹ Comparing the facts in *Analytica* to cases in other jurisdictions, the Seventh Circuit concluded that "where the same law firm represented adversaries in substantially related matters . . . it would have made no difference whether 'actual confidences were disclosed' even if the law firm had set up a [screening procedure] between the teams of lawyers working on substantially related matters."¹²⁰ The *Analytica* court stated that even though the *LaSalle* decision allows law firms to "avoid disqualification by showing that effective measures were taken to prevent confidences from being received by whichever lawyers in the new firm are handling the new matter[,] [t]he exception is inapplicable here."¹²¹ The court explained its holding by stating

111. *See General Motors Corp. v. City of New York*, 501 F.2d 639, 649 (2d Cir. 1974).

112. *United States v. Smith*, 653 F.2d 126, 128 (4th Cir. 1981).

113. *Id.*

114. *Id.*; accord *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 370 F. Supp. 581, 589 (E.D.N.Y. 1973).

115. *Lee v. Todd*, 555 F. Supp. 628, 632 (W.D. Tenn. 1982); *see also State v. Tate*, 925 S.W.2d 548, 551 (Tenn. Crim. App. 1995).

116. *Lee*, 555 F. Supp. at 632; *see also Roberts & Schaefer Co. v. San-Con, Inc.*, 898 F. Supp. 356, 359 (S.D. W. Va. 1995) (stating that the appearance of impropriety standard is objective).

117. *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1267 (7th Cir. 1983).

118. *Id.* at 1265.

119. *Id.*

120. *Id.* at 1267 (citing *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir. 1978)).

121. *Id.* (citations omitted).

that “[w]hile [the] ‘appearance of impropriety’ as a principle of professional ethics invites and maybe has undergone uncritical expansion because of its vague and open-ended character, in this case it has meaning and weight.”¹²²

Eight years after *Analytica*, the Tennessee Supreme Court laid the foundation for its stance on the appearance of impropriety standard in *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*¹²³ In *Lazy Seven*, the court implied that the appearance of impropriety standard is an independent basis for vicarious disqualification.¹²⁴ The court explained that although a lawyer cannot be held liable for circumstances that only “look[] bad,” “the appearance of impropriety may be the basis for disciplinary proceedings against the lawyer and perhaps the basis for disqualification in a legal proceeding.”¹²⁵ Two years later, in *Pennsylvania Mutual Life Insurance Co. v. Cleveland Mall Associates*, the United States District Court for the Eastern District of Tennessee accorded much weight to the appearance of impropriety standard in considering a motion to disqualify a plaintiff’s counsel.¹²⁶ Citing *Analytica*, the court granted the motion to disqualify and explained:

[T]here is nevertheless a legitimate concern about the appearance of impropriety here which lends weight to the proposition that [the firm] should be disqualified. . . . For all practical purposes, the lawyers have switched sides. Clients must feel free to share confidences with their lawyers. This will not occur if we permit lawyers to be today’s confidants and tomorrow’s adversaries.¹²⁷

Two years later, in 1995, the Supreme Court of North Dakota established a benchmark rule for the appearance of impropriety standard that most courts followed.¹²⁸ In *Heringer v. Haskell*, the court held that the existence of an appearance of impropriety should be determined from the perspective of a reasonable layperson.¹²⁹ The court reasoned that because judges and lawyers have privileged knowledge of the legal system, they may fail to find an appearance of impropriety where one would be found by a “person on the street.”¹³⁰ To “preserve public confidence in the legal profession,” the

122. *Id.* at 1269.

123. 813 S.W.2d 400 (Tenn. 1991).

124. *Id.* at 410.

125. *Id.*

126. 841 F. Supp. 815, 818 (E.D. Tenn. 1993).

127. *Id.*; see also *Analytica, Inc.*, 708 F.2d at 1269. *But see* *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 723 (7th Cir. 1982) (stating that the appearance of impropriety standard is “too slender a reed on which to rest a disqualification”).

128. See *Heringer v. Haskell*, 536 N.W.2d 362 (N.D. 1995).

129. *Id.* at 367.

130. *Id.* In *Heringer*, the court expressed its view that a “person on the street” would consider a law firm’s “switching sides” in the middle of a conflict to be an objectionable action. *Id.* The court noted the simplicity of the layperson’s view that perceives as unethical a law firm

standard for an appearance of impropriety must be established in terms of the public's understanding.¹³¹ Later that year, the Tennessee Court of Criminal Appeals in *State v. Tate* disqualified the district attorney general's entire office based on the appearance of impropriety.¹³² Linking the application of the appearance of impropriety standard to screening procedures, the court explained that "[t]he failure [of the judge] to later screen himself from participation irretrievably taints those employed in his newer office."¹³³ The court based its holding on the notion that "[t]he perception of a fair trial is just as important as the reality."¹³⁴ The court hinted at its future direction by adding:

Anything that reflects upon the majesty of the law and the absolute and complete impartiality of those that conduct trial proceedings, must be avoided scrupulously. We cannot allow public confidence in the complete fairness and impartiality of our tribunals to be eroded and nothing which casts any doubt on the fairness of the proceedings should be tolerated.¹³⁵

Two years after *Tate*, the Tennessee Court of Appeals held in *Watson v. Ameredes* that a plaintiff's law firm was vicariously disqualified based on the appearance of impropriety.¹³⁶ Citing to *Pennsylvania Mutual*,¹³⁷ the *Watson* court held that a law firm could not prevent vicarious disqualification based on the appearance of impropriety even though it instituted screening procedures in accordance with Formal Opinion 89-F-118.¹³⁸ The court

representing both sides of a conflict. *Id.* Thus, in order to maintain "public confidence in the legal profession, . . . law firms must not be allowed to 'switch sides'" in the middle of a dispute. *Id.*

131. *Id.*

132. *State v. Tate*, 925 S.W.2d 548, 558 (Tenn. Crim. App. 1995). The court stated that "[a] former judge who, in his previous capacity, had undertaken substantial responsibility in the disposition of a case, and who later supervises the prosecution of [that case], gives rise to the appearance of impropriety." *Id.* at 557.

133. *Id.* at 557.

134. *Id.* at 558.

135. *Id.* at 555 (quoting *Johnson v. McReynolds*, No. 35, 1990 Tenn. App. LEXIS 876, at *9 (Tenn. Ct. App. Dec. 17, 1990)).

136. See *Watson v. Ameredes*, No. 03-A-01-9704-CV-00129, 1997 Tenn. App. LEXIS 884, at *18 (Tenn. Ct. App. Dec. 10, 1997). Although the court disqualified the firm based on the appearance of impropriety standard, it conceded that such action should only be taken in "the rarest of cases." *Id.* at *12. The court considered *Watson* to be such a case because there was a perception that the lawyers "switched sides." *Id.* at *17-18. See also *King v. King*, No. 89-46-II, 1989 Tenn. App. LEXIS 675, at *33 (Tenn. Ct. App. Oct. 18, 1989) (Koch, J., concurring) (stating that "except in the rarest of cases, the appearance of impropriety alone is 'simply too slender a reed on which to rest a disqualification order.'").

137. *Watson*, 1997 Tenn. App. LEXIS 884, at *15-16 (citing *Pa. Mutual Life Ins. Co. v. Cleveland Mall Assocs.*, 841 F. Supp. 815, 818 (E.D. Tenn. 1993)).

138. *Id.* at *17.

reasoned that the appearance of impropriety standard was “essential to engender, protect, and preserve the trust and confidence of the client.”¹³⁹ Finally, in 2000, the Tennessee Supreme Court held in *Culbreath* that when determining the disqualification of a lawyer apart from his associates, courts should “consider whether conduct has created an appearance of impropriety” even “[i]f there is no actual conflict of interest.”¹⁴⁰ The court added that when conduct gives rise to an appearance of impropriety “the trial court must also determine whether the conflict of interest or appearance of impropriety requires disqualification of the entire . . . office.”¹⁴¹ The court concluded by stating that “governments have a responsibility to the public to avoid even the appearance of impropriety and to act to reduce the opportunities and incentives for unethical behavior by their officials and employees.”¹⁴²

IV. *CLINARD V. BLACKWOOD*: SWITCHING TEAMS IN THE MIDDLE OF THE GAME

In *Clinard v. Blackwood*, a four-one decision, the Tennessee Supreme Court held that when an attorney has a conflict of interest resulting from a former representation that would prohibit representation of a present client, the attorney’s law firm may prevent vicarious disqualification by implementing adequate screening procedures to overcome the presumption of shared confidences.¹⁴³ Nevertheless, a serious appearance of impropriety will still require disqualification of the firm.¹⁴⁴ Justice Janice Holder wrote the majority opinion, which first addressed the use of screening procedures as a means to prevent the vicarious disqualification of a law firm.¹⁴⁵

Justice Holder began her analysis by highlighting that DR 5-105(D) “provides for the vicarious disqualification of an attorney’s firm when [an] attorney would be prohibited by the Disciplinary Rules from undertaking the representation.”¹⁴⁶ The court then cited *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, explaining that, under a strict application of DR 5-105(D), automatic vicarious disqualification would be required whenever an attorney had a conflict of interest because a conflicted attorney is presumed to have

139. *Id.* at *18.

140. *State v. Culbreath*, 30 S.W.3d 309, 312-13 (Tenn. 2000).

141. *Id.* at 313 (citing *State v. Tate*, 925 S.W.2d 548, 550 (Tenn. Crim. App. 1995)).

142. *Id.* at 316 (quoting *Flowers*, *supra* note 99, at 733). The court also agreed that “government officials must be held to high ethical standards to make certain their activities are conducted in the public’s interest.” *Id.* (quoting *Flowers*, *supra* note 99, at 733). Thus, the court concluded that “the trial court did not abuse its discretion in disqualifying the District Attorney General’s staff based on the appearance of impropriety created by [the lawyer’s] conflict of interest.” *Id.*

143. *Clinard v. Blackwood*, 46 S.W.3d 177, 181 (Tenn. 2001).

144. *Id.*

145. *Id.* at 180-81.

146. *Id.* at 183; *see supra* text accompanying note 1.

shared his or her former client's confidences with his or her new firm.¹⁴⁷ Justice Holder noted that the Tennessee Supreme Court rules that govern attorney conduct have never acknowledged a screening exception, even though the Tennessee Board of Professional Responsibility endorsed the use of such procedures in Formal Opinion 89-F-118.¹⁴⁸ Citing its holding in *Culbreath*, however, the court noted its growing inclination to accept screening procedures as a sufficient method to prevent vicarious disqualification.¹⁴⁹ Accordingly, in *Clinard*, the Tennessee Supreme Court adopted "Formal Opinion 89-F-118 as an exception to the DR 5-105(D) rule of vicarious disqualification."¹⁵⁰

In adopting Formal Opinion 89-F-118, Justice Holder set forth the three-step analysis pronounced in *Schiessle v. Stephens* to determine "whether an attorney's prior representation mandates vicarious disqualification [of the attorney's law firm]."¹⁵¹ The court then accepted the factors listed in Formal Opinion 89-F-118 as an adequate means to establish "whether . . . screening mechanisms reduce to an acceptable level the potential for prejudicial misuse of client confidences such that the presumption of shared confidences is rebutted."¹⁵²

Once the court set forth the three-step analysis delineated in *Schiessle*, it applied that analysis to the case at hand.¹⁵³ First, Justice Holder pointed out that "there is no question that there was a substantial relationship between Mr. Davis's (the conflicted lawyer) former representation of the [defendants] and his [new] firm's present representation of the [plaintiffs]."¹⁵⁴ Second, the court explained that because it was clear that the presumption of shared confidences in the former representation between Mr. Davis and the defendant had not been rebutted, the case turned to the third step of "whether the presumption of shared confidences [had] been rebutted [by the Waller firm] with respect to the present representation [of the plaintiffs]."¹⁵⁵ In answering this question, the court considered several factors regarding the Waller firm's

147. See *Clinard*, 46 S.W.3d at 183 (citing *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400, 409 (Tenn. 1991)).

148. *Id.*

149. *Id.*; see *State v. Culbreath*, 30 S.W.3d 309, 317 (Tenn. 2000). In *Culbreath*, the court disqualified an entire district attorney general's staff because there were "no efforts to screen [the conflicted prosecutor] from other members of the District Attorney General's office." *Culbreath*, 30 S.W.3d at 317.

150. *Clinard*, 46 S.W.3d at 184. The court stated that the exception would be "applicable on a case-by-case basis to attorneys, law clerks, paralegals, and legal secretaries." *Id.*

151. *Id.*; see *Schiessle v. Stephens*, 717 F.2d 417, 420-21 (7th Cir. 1983).

152. *Clinard*, 46 S.W.3d at 184 (internal quotes omitted); see Tenn. Bd. of Prof'l Responsibility, Formal Op. 89-F-118 (1989), available at 1989 WL 534365, at *3.

153. *Clinard*, 46 S.W.3d at 184-86.

154. *Id.* at 184.

155. *Id.* at 184-85.

written policy entitled "Conflict of Interest Screening Procedures."¹⁵⁶ Justice Holder placed substantial weight on the evidence that, in addition to properly implementing the screening procedure in anticipation of Mr. Davis's arrival, the Waller firm issued a memorandum that forbade Mr. Davis from any involvement in the plaintiff's case.¹⁵⁷

After applying the three-step analysis and examining the Waller firm's screening procedures, the court disagreed with the decision of the Court of Appeals that the Waller firm did not rebut the presumption of shared confidences.¹⁵⁸ Based on the evidence, the court declared that the presumption of shared confidences was adequately rebutted by the Waller firm's implementation of screening procedures to prevent Mr. Davis "from accessing or communicating any information regarding the [plaintiff's and defendant's] matter."¹⁵⁹ Therefore, the court concluded that there had been no violation of DR 5-105(D), the vicarious disqualification rule.¹⁶⁰

The majority next determined whether the appearance of impropriety standard—EC 9-6 of Canon 9—required the vicarious disqualification of the

156. *Id.* at 185. The court noted that the Waller firm was comprised of over one hundred attorneys and that the firm had the screening policy in effect since 1989. *Id.* The policy dictated what action the firm would take when a conflict of interest was detected concerning a newly hired attorney:

(a) the Managing Partner will compile a list of all matters where a potential conflict of interest exists because of previous employment;

(b) all attorneys, summer associates, paralegals, and legal secretaries will be instructed in writing not to discuss the specified matter or matters with, or in the presence of, the newly hired individual or to permit such individual to have access to any files pertaining to such matters;

(c) all attorneys, summer associates, paralegals, and legal secretaries will be instructed in writing to place brightly colored labels on all files pertaining to the specific client or matter which will state the following: "The person listed below is not allowed to access this file and no discussions should be had with or around this person regarding this case. This is in accordance with Ethics Opinion 89-F-118 of the Tennessee Board of Professional Responsibility. (Individual's name)";

(d) all attorneys in the Firm will be advised that no reference shall be made to the case or matters in the Firm's daily newsletter;

(e) the newly hired attorney . . . shall, if possible, be located on a different floor or on a different part of the floor, than the attorneys, paralegals and secretaries involved in the case(s) under question; and

(f) the Managing Partner will fully inform any affected client of the conflict in writing before the new employee reports to work.

Id.

157. *Id.* In addition, "Mr. Davis was a non-equity member of the firm and therefore did not share in any fees from the Clinard/Blackwood matter." *Id.*

158. *Id.*; see *Clinard v. Blackwood*, No. 01A01-9801-CV-00029, 1999 Tenn. App. LEXIS 729, at *78 (Tenn. Ct. App. Oct. 28, 1999).

159. *Clinard*, 46 S.W.3d at 185-86.

160. *Id.* at 186.

Waller firm despite the proper use of screening procedures.¹⁶¹ Although the majority agreed with the trial court's order that the screening procedures implemented by the Waller firm rebutted the presumption of shared confidences, it found that the trial court abused its discretion in failing to apply the appearance of impropriety standard.¹⁶² Justice Holder began her analysis of this issue by noting that "[t]he Board's reference to the appearance of impropriety standard in Formal Opinion 89-F-118 speaks to its continued relevance to vicarious disqualification even when adequate screening measures have been employed."¹⁶³ The majority then cited several cases that highlight the subtle yet identifiable "contours of the rule that aid in its application."¹⁶⁴ After analyzing the cases, the majority determined the following: (1) "the mere possibility of impropriety is insufficient to warrant disqualification . . . [and is] [t]he appearance of impropriety must be real,"¹⁶⁵ (2) "the standard is objective. . . [and] intended to promote public confidence in the legal system,"¹⁶⁶ and (3) "[t]he existence of an appearance of impropriety should . . . be determined from the perspective of a reasonable layperson."¹⁶⁷ Finally, the court pointed to its holdings in *Culbreath* and *Lazy Seven*, which state that even "if there is no actual conflict of interest, the court must nonetheless consider whether conduct has created an appearance of impropriety"; therefore, the "appearance of impropriety" is . . . an independent ground upon which disqualification may be based."¹⁶⁸

Analyzing the facts in *Clinard* in light of the totality of the circumstances, the majority concluded that the case at hand was rare in that, even though adequate screening procedures were implemented, "the taint of the appearance of impropriety can be purged only by disqualification."¹⁶⁹ Justice Holder effectively illustrated the extreme circumstances in *Clinard* by drawing a baseball analogy: "Mr. Davis has not only switched teams, he has switched teams in the middle of the game after learning the signals. That Mr. Davis has

161. *Id.*

162. *Id.* at 189.

163. *Id.* at 186; see Tenn. Bd. of Prof'l Responsibility, Formal Op. 89-F-118 (1989), available at 1989 WL 534365, at *4 ("Protection of the image of the profession from 'even the appearance of impropriety' is also vitally important." (quoting DR 9-101)).

164. *Clinard*, 46 S.W.3d at 187; see *United States v. Smith*, 653 F.2d 126, 138 (4th Cir. 1981); *Lee v. Todd*, 555 F. Supp. 628, 631 (W.D. Tenn. 1982); *Heringer v. Haskell*, 536 N.W.2d 362, 367 (N.D. 1995).

165. *Clinard*, 46 S.W.3d at 187; see *Smith*, 653 F.2d at 128.

166. *Clinard*, 46 S.W.3d at 187; see *Lee*, 555 F. Supp. at 631-32.

167. *Clinard*, 46 S.W.3d at 187; see *Heringer*, 536 N.W.2d at 367.

168. *Clinard*, 46 S.W.3d at 187 (quoting *State v. Culbreath*, 30 S.W.3d 309, 312-13 (Tenn. 2000) (internal quotes omitted)); see *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400, 410 (Tenn. 1991) (stating that "the appearance of impropriety may be the basis for disciplinary proceeding against the lawyer, and perhaps the basis for disqualification in a legal proceeding").

169. *Clinard*, 46 S.W.3d at 187-88.

been benched by his new team does little to ameliorate the public perception of an unfair game.”¹⁷⁰ Because Mr. Davis “switched sides” under these circumstances, “[a] reasonable layperson . . . would no doubt find a substantial risk of disservice to the [defendant’s] interest in this case, despite the use of screening procedures.”¹⁷¹ Moreover, said Justice Holder, the Waller firm should be vicariously disqualified based on the appearance of impropriety even though “the wall built between Mr. Davis and the Waller firm may have prevented any impropriety.”¹⁷² Thus, the Tennessee Supreme Court reached the same result as the Court of Appeals but for different reasons.¹⁷³

Justice William Barker concurred in the majority opinion and judgment but wrote separately to explain his “views concerning vicarious disqualification of law firms based on . . . the appearance of impropriety [standard].”¹⁷⁴ Justice Barker agreed that “the Waller firm . . . properly rebutted the presumption of shared confidences . . . through its screening mechanism,” and he also recognized that vicarious disqualification based on the appearance of impropriety standard, in this case, was essential “to promote public confidence in the legal system and to maintain the highest standards of the profession.”¹⁷⁵ He stated that the majority’s holding “is so sound that it could constitute a *per se* prohibition under the Code of Professional Conduct,” even though the opinion “is limited to the particular facts of this case.”¹⁷⁶ Thus, Justice Barker suggested that “[a] *per se* rule of vicarious disqualification under the appearance-of-impropriety standard in similar cases, notwithstanding the adequacy of the screening mechanism employed by the new firm, should alleviate any difficulty encountered by members of the bench and bar in deciding whether such conduct is prohibited under EC 9-6.”¹⁷⁷

There is no substantive difference between the majority opinion and Justice Barker’s concurrence regarding the appearance of impropriety standard.¹⁷⁸ While the majority did not promulgate a *per se* rule of vicarious disqualification under the appearance of impropriety standard, implicit in the opinion is the conclusion that a law firm will be vicariously disqualified under

170. *Id.* at 188.

171. *Id.*

172. *Id.* at 189.

173. *Id.* The Court of Appeals disqualified the Waller firm because its “use of screening arrangements with regard to Mr. Davis and his secretary was not sufficient to rebut the presumption of shared confidences between Mr. Davis and the other members of the Waller firm with regard to the pending litigation between the [defendants] and the [plaintiffs].” *Clinard v. Blackwood*, No. 01A01-9801-CV-00029, 1999 Tenn. App. LEXIS 729, at *78 (Tenn. Ct. App. Oct. 28, 1999).

174. *Clinard*, 46 S.W.3d at 189 (Barker, J., concurring).

175. *Id.* at 189-90 (Barker, J., concurring).

176. *Id.* at 190 (Barker, J., concurring).

177. *Id.* (Barker, J., concurring).

178. *See id.* at 189-90 (Barker, J., concurring).

circumstances such as those in *Clinard*.¹⁷⁹ Further, both Justice Barker's concurrence and the majority opinion recognize that vicarious disqualification of law firms based on the appearance of impropriety standard should be reserved for the rarest of cases, that is, those in which it is necessary to "promote public confidence in the legal system."¹⁸⁰

Concurring in part and dissenting in part, Justice Frank Drowota first agreed with the majority for adopting Formal Opinion 89-F-118 as an exception to the vicarious disqualification rule.¹⁸¹ Justice Drowota agreed that "[l]aw firms should be able to rely on screening [procedures] to avoid imputed disqualification" and that the Waller firm's screening policy did in fact prevent Mr. Davis "from accessing or communicating any information regarding" the plaintiff's and the defendant's litigation.¹⁸² In Justice Drowota's view, however, the inquiry should have ended after the court found that Mr. Davis was properly screened from the Waller firm, thus requiring a reversal of the Court of Appeals.¹⁸³ Basing his dissent on two factors, Justice Drowota opined that the majority's adoption of the appearance of impropriety standard was "unnecessary and unwise."¹⁸⁴

Justice Drowota first asserted that to hold that a law firm has properly applied screening procedures "is to hold that [the] presumption has been rebutted, which, in turn, is to hold that the ethical problem has been cured."¹⁸⁵ Thus, Justice Drowota declared that the majority's imposition of a second standard of review, the appearance of impropriety standard, over screening arrangements undercuts a lawyer's reliance on screening procedures as an adequate cure of ethical problems.¹⁸⁶ In other words, Justice Drowota contended that the majority unjustifiably made the rules more convoluted by "tak[ing] away with one hand what it gives with the other."¹⁸⁷

Justice Drowota then criticized the adoption of the appearance of impropriety standard because it "is too imprecise to carry the weight the majority gives it."¹⁸⁸ Justice Drowota asserted that the appearance of impropriety standard is subjective and "necessarily falls short of that level of clarity lawyers should expect of ethical rules, the violation of which has significant consequences."¹⁸⁹ Justice Drowota's primary concern with the

179. *See id.*

180. *Id.* at 190 (Barker, J., concurring). Justice Holder explained in the majority opinion that "[w]e recognize that disqualification of one's counsel is a drastic remedy and is ordinarily unjustifiable based solely upon an appearance of impropriety." *Id.* at 187.

181. *Id.* at 190 (Drowota, J., concurring in part and dissenting in part).

182. *Id.* (Drowota, J., concurring in part and dissenting in part).

183. *Id.* (Drowota, J., concurring in part and dissenting in part).

184. *Id.* (Drowota, J., concurring in part and dissenting in part).

185. *Id.* (Drowota, J., concurring in part and dissenting in part).

186. *Id.* (Drowota, J., concurring in part and dissenting in part).

187. *Id.* (Drowota, J., concurring in part and dissenting in part).

188. *Id.* at 191 (Drowota, J., concurring in part and dissenting in part).

189. *Id.* (Drowota, J., concurring in part and dissenting in part).

standard's imprecision was that "its application is governed by the 'reasonable layperson' test."¹⁹⁰ He asserted that lawyers will no longer be able to employ screening procedures as a "clear and certain" method of complying with ethical rules because the lawyer "must also consider how a reasonable layperson would assess the ethical dilemma."¹⁹¹

The chief difference between the majority opinion and the dissent centers around the philosophical question of whether screening procedures can *completely* cure an ethical dilemma. While Justice Drowota argues in his dissent that the implementation of adequate screening procedures necessarily cures an ethical problem,¹⁹² the majority asserts that there can still be an appearance of unethical conduct even if the screening procedures rebut the presumption of shared confidences, that is, even if no impropriety *actually* exists.¹⁹³ The majority opinion responded to such criticisms by pronouncing its position that the *appearance* of an impropriety is just as damaging to public confidence in the legal system as an *actual finding* of impropriety.¹⁹⁴ Regarding the dissent's criticism that the appearance of impropriety standard is vaguely defined, the majority explained that "[t]he standard's imprecision results more from necessity than fault."¹⁹⁵ Justice Holder added that "[e]thical rules must necessarily be broad and flexible so as to have some application in various ethical dilemmas, and the appearance of impropriety standard can work well when more specific rules may be ineffective."¹⁹⁶

The Tennessee Supreme Court's holding in *Clinard v. Blackwood* is a refreshing interpretation of the ethical obligations of law firms. Because Tennessee has "no express 'screening' exception" in the Supreme Court's old ethical rules, *Clinard* provides guidelines for determining whether under the old rules screening procedures in Tennessee are adequate to prevent a law firm's disqualification from a case.¹⁹⁷ The court clearly outlined the steps that a firm must take in order to rebut the presumption of shared confidences when a conflict of interest arises, while also establishing that the Tennessee bench and bar will not tolerate the appearance of unethical conduct.

The court's holding, which adopts Formal Opinion 89-F-118, is a sound decision for both law firms and public confidence in the legal system. In addition, by holding that law firms may prevent vicarious disqualification by screening an attorney who has a conflict of interest,¹⁹⁸ the decision meets the

190. *Id.* (Drowota, J., concurring in part and dissenting in part).

191. *Id.* (Drowota, J., concurring in part and dissenting in part).

192. *Id.* at 190 (Drowota, J., concurring in part and dissenting in part).

193. *Id.* at 189.

194. *Id.* at 187-88.

195. *Id.* at 186 (citing *Roberts & Schaefer Co. v. San-Con, Inc.*, 898 F. Supp. 356, 359 (S.D. W. Va. 1995)).

196. *Id.* (citation omitted).

197. *Id.* at 183.

198. *Id.* at 181.

needs of law firms that are concerned about being forced to discontinue representation of clients that they are otherwise qualified to represent. By holding that a serious appearance of impropriety requires a law firm's vicarious disqualification despite the implementation of adequate screening procedures,¹⁹⁹ the decision meets the needs of laypersons by supplying them with much-needed confidence in the legal system. Thus, when all appearances of unethical conduct have been cured, the holding allows clients to seek representation from the counsel of their choice without fostering clouds of suspicion.

Law firms should be required to make the necessary arrangements to prevent not only the *occurrence* of ethical improprieties but also the *appearance* of ethical improprieties. The *Clinard* decision will encourage widespread and more uniform implementation of screening measures that will help law firms rebut the presumption of shared confidences when an attorney conflict of interest arises. Further, the decision alerts law firms to the importance of preventing even an appearance of unsavory conduct. As the court pointed out repeatedly, the facts in *Clinard* were such that a reasonable layperson would perceive Mr. Davis as "switching sides" in the dispute between the plaintiff and defendant.²⁰⁰ Tennessee courts will no longer tolerate such appearances.

Justice Holder did not mention explicitly in the majority opinion the issue of whether the circumstances in this case constitute a *per se* vicarious disqualification based on the appearance of impropriety standard. This issue was discussed briefly in Justice Barker's concurrence where he concluded that the "majority's opinion appears to be limited to the particular facts of this case."²⁰¹ In Justice Holder's words, the application of Formal Opinion 89-F-118 as an exception to DR 5-105(D) will be done on a "case-by-case basis to attorneys, law clerks, paralegals, and legal secretaries."²⁰² Although it seems implicit that future cases with facts similar to *Clinard* would result in vicarious disqualification, Justice Holder could have set a less ambiguous precedent by declaring that a *per se* prohibition exists "when an attorney changes law firms so as to stand in an adversary position to a former client with respect to the subject of the former representation."²⁰³ Any ambiguity in the majority's ruling, however, is likely outweighed by its flexible application in various ethical dilemmas.

On the facts of the case, the *Clinard* holding is somewhat disconcerting. All members of the court agreed that "the Waller firm ha[d] properly rebutted the presumption of shared confidences . . . th[r]ough its screening mechanism and that the record contain[ed] no evidence of actual sharing of

199. *Id.*

200. *Id.* at 188.

201. *Id.* at 190 (Barker, J., concurring).

202. *Id.* at 184.

203. *Id.* at 189 (Barker, J., concurring).

confidences.”²⁰⁴ Nevertheless, the majority concluded that the Waller firm should be vicariously disqualified from representing the plaintiff.²⁰⁵ In his concurring and dissenting opinion, Justice Drowota expressed the sentiment best when he asserted that “[t]o hold that screening . . . has been applied properly . . . is to hold that [the] presumption has been rebutted . . . [and] is to hold that the ethical problem has been cured.”²⁰⁶ On the facts of this case, such a syllogism appears to logically follow. Justice Drowota failed to acknowledge, however, that an ethical problem is *not* cured when an *appearance* of wrongdoing still hangs over a case. The actual non-existence of impropriety resulting from adequate screening procedures is a different issue and is immaterial to the fact that the *appearance* of an impropriety remains. Admittedly, there is a subtle vagueness when the appearance of impropriety standard is coupled with screening procedures. In the world of lawyering, however, ethical problems can dramatically affect clients’ lives, and, as the holding in *Clinard* explains, it is best to err on the side of caution.

V. *CLINARD V. BLACKWOOD* UNDER TENNESSEE’S NEW ETHICS RULES

Clinard v. Blackwood was decided under the Tennessee Code of Professional Responsibility.²⁰⁷ On August 27, 2002, the Tennessee Supreme Court amended Tennessee Supreme Court Rule 8, adopting an entirely new ethics scheme, which is based on the Model Rules of Professional Conduct and which will become effective on March 1, 2003.²⁰⁸ Thus, the relevant question is now centered on the status of *Clinard v. Blackwood* under the newly adopted Tennessee Rules of Professional Conduct. Rule 1.10 (vicarious or “imputed” disqualification) of the new Tennessee Rules of Professional Conduct will replace DR 5-105(D) of the old Tennessee Code of Professional Responsibility.²⁰⁹

In language that conforms to the *Clinard* majority’s rationale, Rule 1.10 follows the *Clinard* holding explicitly. In addition, the *Clinard* decision enjoys an esteemed position as the subject of Comment [9] of Rule 1.10, which promptly dispels any doubts about the case’s applicability under the new rules.²¹⁰ In no small measure, the adoption of Tennessee’s new ethics rules has converted the *Clinard* holding into a disciplinary rule itself.

204. *Id.* (Barker, J., concurring).

205. *Id.* (Barker, J., concurring).

206. *Id.* at 190 (Drowota, J., concurring in part and dissenting in part).

207. *Id.* at 182.

208. TENN. RULES OF PROF’L CONDUCT (effective March 1, 2003), available at <http://www.tsc.state.tn.us> (last visited Jan. 12, 2003).

209. *See id.* R. 1.10.

210. *Id.* R. 1.10 cmt. [9].

Paragraphs (c) and (d) of Rule 1.10 address situations in which a conflict of interest is created when a lawyer moves from one firm to another firm.²¹¹ Paragraph (c) of Rule 1.10 codifies the first part of the *Clinard* holding by stating that screening procedures²¹² are viable means for a law firm to prevent vicarious disqualification when an attorney has a conflict of interest resulting from a former representation that would prohibit representation of a present client.²¹³ Paragraph (c) continues by listing four requirements, one of which is screening procedures, that the conflicted lawyer and the lawyer's firm must meet in order for the firm to proceed with representation and avoid vicarious disqualification.²¹⁴ However, paragraph (d) sets forth a seemingly narrow exception in which the screening procedures and other requirements established under paragraph (c) may *not* be used to avoid vicarious disqualification of a firm.²¹⁵ This exception is based precisely on the facts in *Clinard*, that is, switching teams in the middle of the game.²¹⁶ The exception is divided into three parts, and it renders screening procedures insufficient to prevent a firm's vicarious disqualification if:

- (1) the disqualified lawyer was substantially involved in the representation of a former client; and
- (2) the lawyer's representation of the former client was in connection with an adjudicative proceeding that is directly adverse to the interests of a current client of the firm; and
- (3) the proceeding between the firm's current client and the lawyer's former client is still pending at the time the lawyer changes firms.²¹⁷

211. *Id.* R. 1.10(c), (d), cmt. [4].

212. The use of screening procedures is one of the four requirements listed in Paragraph (c) that prevent a law firm's vicarious disqualification. *Id.* R. 1.10(c)(3).

213. *Id.* R. 1.10(c).

214. *Id.* In order for a firm to avoid vicarious disqualification under paragraph (c), the conflicted lawyer and the lawyer's firm must act reasonably to:

- (1) identify that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and
- (2) determine that no lawyer representing the current client has acquired any information from the personally disqualified lawyer that is material to the current matter and is protected by Rule 1.9(c); and
- (3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm; and
- (4) advise the former client in writing of the circumstances that warranted the implementation of the screening procedures required by this rule and the actions that have been taken to comply with this Rule.

Id. R. 1.10(c).

215. *Id.* R. 1.10(d).

216. *Id.* R. 1.10 cmt.[9].

217. *Id.* R. 1.10(d).

Therefore, the same circumstances that the majority in *Clinard* labeled an “appearance of impropriety” are now codified as an exception to screening procedures in Rule 1.10.²¹⁸

The conversion of *Clinard* into a disciplinary rule will have two primary effects on future vicarious disqualification cases. First, there is now a per se disqualification rule in cases where the facts are the same as those in *Clinard*.²¹⁹ Second, it would seem to follow that disqualification based on the facts of *Clinard* will no longer be described using the “appearance of impropriety” phrasing.²²⁰ In other words, there is no longer an “appearance of impropriety” in circumstances such as *Clinard*; instead, there is a *violation* of a rule. This second point raises the question of whether the Tennessee Supreme Court will respect proper screening procedures in all circumstances other than the exception in paragraph (d) of Rule 1.10 or whether the court will reserve the right to apply the appearance of impropriety standard in other vicarious disqualification situations. Taking the question a step further, does the conversion of the *Clinard* holding into a disciplinary rule signal an abandonment of “appearance of impropriety jurisprudence” in general with respect to the vicarious disqualification of a firm *and* with respect to attorney discipline?²²¹ Although the application of the rule in future cases may provide a definitive answer, the comments to Rule 1.10 shed some light on these questions.

The comments to Rule 1.10 indicate that screening procedures will be sufficient to prevent vicarious disqualification in most circumstances.²²² Comment [7] states that the personal disqualification of a lawyer moving to a new firm “will not be imputed to other lawyers in the personally disqualified lawyer’s new firm if they act reasonably to protect the confidentiality interests of the person being represented by the personally disqualified lawyer’s former firm.”²²³ Comment [8] adds that the determination of whether “screening procedures are effective to prevent the flow of information about the matter between the personally [disqualified] lawyer and the other lawyers in the firm is a question of fact.”²²⁴ In each case, the fundamental question is “whether

218. *Id.* R. 1.10 cmt. [9]. It is important to note that Paragraph (e) of Rule 1.10 states “that [a] disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.” *Id.* R. 1.10(e).

219. *See id.* R. 1.10(c).

220. *See id.* R. 1.10(d).

221. It is important to differentiate between the role of the appearance of impropriety standard in firm disqualification and its role in attorney discipline. Attorney discipline situations may involve sanctions that have nothing to do with litigation. The relevant issue is whether the Tennessee Supreme Court will reserve the right to use the appearance of impropriety standard where it sees fit in any situation, be it an issue of firm disqualification or an issue of attorney discipline.

222. *See id.* R. 1.10 cmt. [7].

223. *Id.*

224. *Id.* R. 1.10 cmt. [8]. There are several factors listed in Comment [8] to determine the

the screening mechanism effectively reduces to an acceptable level the potential for misuse of information related to the representation of the personally disqualified lawyer's former client."²²⁵ Moreover, the exception to screening procedures found in paragraph (d) of Rule 1.10 appears to be quite limited. Although Comment [9] of Rule 1.10 states that "the *Clinard* rule continues under the present Rules,"²²⁶ it also clearly reads that "this narrow exception to [paragraph] (c) will vicariously disqualify the law firm only when the interests of a client of that firm are presently and directly adverse with those of a person who was formerly represented in substantial part by the disqualified lawyer."²²⁷ Thus, it seems that courts will only hold screening procedures insufficient in cases with the same circumstances as those in *Clinard*. Nevertheless, Rule 1.10's comments fail to indicate whether the appearance of impropriety standard will be used to vicariously disqualify firms in future cases where the court finds such disqualification appropriate.²²⁸

VI. CONCLUSION

The decision in *Clinard v. Blackwood*, as adopted in the new Tennessee Rules of Professional Conduct, represents the Tennessee Supreme Court's willingness to recognize that law firms may be suited to represent their clients despite the fact that an individual attorney has a conflict of interest. The decision imposes a duty on law firms to take reasonable steps to screen "infected" attorneys from other firm members. At the same time, the court's decision represents an unwillingness to accept circumstances where there is an *appearance* of impropriety. Although the use of the appearance of impropriety standard under the new rules is uncertain, the *Clinard* decision will have positive effects for Tennessee law firms and will promote public confidence in the legal system. *Clinard* will allow responsible law firms to retain the right to represent their clients and will serve to heighten the ethical

effectiveness of screening procedures:

Factors to be considered include a written affirmation by the personally disqualified lawyer and the lawyers and firm personnel handling the matter in question that they are aware of and will abide by the screening procedures implemented by the firm; the structural organization of the law firm or office; the likelihood of contact between the personally disqualified lawyer and the lawyers handling the matter in question; and the existence of firm rules and a filing system that prevents unauthorized access to files with respect to the matter in question. Although this Rule does not require that the personally disqualified lawyer be prohibited from sharing in any fee generated by the representation in question, such a prohibition can be considered in determining the effectiveness of the screening procedures employed by the firm.

Id.

225. *Id.*

226. *Id.* R. 1.10 cmt. [9].

227. *Id.* (emphasis added).

228. *See id.* R. 1.10.

standards of the legal profession in Tennessee.

The importance of these results is unmistakable when considering that legal outsiders comprise the majority of the public. Non-lawyers often find difficulty in understanding how lawyers have the power to do the things that they do. This is one reason why the legal profession has an unfavorable reputation.²²⁹ The more “delicate and strange [the lawyer’s] work . . . the less we love him.”²³⁰ Carl Sandburg expresses this sentiment best in his poem *The Lawyers Know Too Much*: “Too many slippery ifs and buts and howevers, / Too much hereinbefore provided whereas, / Too many doors to go in and out of.”²³¹

Indeed, *Clinard* is a complicated case. Neither the conflicted lawyer nor the conflicted lawyer’s new firm conducted itself “unethically” in any way. Nevertheless, there would have been substantial damage to the legal profession’s image if the conflicted lawyer’s new firm was not disqualified. On its face, a contrary holding would clearly have tainted the reputation of the legal profession in the public’s eyes. A contrary holding would have encouraged the perception that something was awry and the lawyers found a legal, court-endorsed way around the conflict, the perception that “[t]he lawyers, Bob, kn[ew] too much.”²³² The *Clinard* opinion soothes the public perception of the legal profession by demonstrating that lawyers also know not to support situations that even appear to be unethical. Thus, individual clients will have no reason to think the judicial system is treating their case unfairly, nor will the general public who observes the judicial system have such a perception.²³³

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229. See KARL LLEWELLYN, *THE BRAMBLE BUSH* 171 (Oceana Publ’ns, Inc. 1960) (1930).

230. *Id.*

231. CARL SANDBURG, *THE COMPLETE POEMS OF CARL SANDBURG* 189 (1970).

232. *Id.*

233. See *supra* note 2 and accompanying text.

