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NOTE

ATTORNEY DISQUALIFICATION AND ACCESS TO WORK PRODUCT: TOWARD A PRINCIPLED RULE*

INTRODUCTION

Under the prevailing rule, courts will disqualify counsel on conflict of interest grounds if there exists: (1) former representation of a party to the present lawsuit, (2) present representation of a party adverse to the former client, and (3) a substantial relationship between the subject matter of the former representation and the issues of the present lawsuit.[1] In *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*,[2] the Seventh Circuit reversed en banc a panel decision that extended this rule to deny substitute counsel access to disqualified counsel's work product.[3] The panel had rea-

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* As this Note went to press, the Seventh Circuit reversed First Wis. Mortgage Trust v. First Wis. Corp., 571 F.2d 390 (7th Cir. 1978), in an en banc rehearing. *See* First Wis. Mortgage Trust v. First Wis. Corp., No. 77-1786 (7th Cir. Sept. 22, 1978). The en banc decision anticipates the conclusions in Part II of this Note.

[1] *See* Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 570 (2d Cir. 1973); Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 924 (2d Cir. 1954); First Wis. Mortgage Trust v. First Wis. Corp., 422 F. Supp. 493, 496 (E.D. Wis. 1976) (disqualification order), *appeal dismissed*, No. 77-1786 (7th Cir. Jan. 30, 1977); Marketti v. Fitzsimmons, 373 F. Supp. 637, 639 (W.D. Wis. 1974); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 394-95 (S.D. Tex. 1969); T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268 (S.D.N.Y. 1953); Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to that of Former Client*, 55 B.U. L. REV. 61, 78 (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, 525 (1975). Many courts and commentators refer to this rule as the "substantial relationship" test for attorney disqualification. *See, e.g.*, Emle Indus. v. Patentex, Inc., 478 F.2d at 570; Note, *supra*, 52 CHI.-KENT L. REV. at 525.

[2] No. 77-1786 (7th Cir. Sept. 22, 1978) (rehearing en banc). The district court disqualified defendants' counsel in 1976. First Wis. Mortgage Trust v. First Wis. Corp., 422 F. Supp. 493 (E.D. Wis. 1976) (disqualification order), *appeal dismissed*, No. 77-1786 (7th Cir. Jan. 30, 1977). The district court subsequently denied substitute counsel's motion for authorization to request access to disqualified counsel's work product. First Wis. Mortgage Trust v. First Wis. Corp., 74 F.R.D. 625 (E.D. Wis. 1977) (work product order). A three-judge panel of the Seventh Circuit affirmed (First Wis. Mortgage Trust v. First Wis. Corp., 571 F.2d 390 (7th Cir. 1978)), but was reversed upon rehearing en banc.

[3] The Supreme Court had defined "work product" to include, *inter alia*, a lawyer's written legal documents and his "mental impressions." *See* Hickman v. Taylor, 329 U.S. 495, 511 (1947). This Note uses the term work product to refer only to written legal documents. The work product sought in *First Wisconsin* consisted of a routine written

soned that "allowing [substitute counsel] to have access to the legal work of disqualified counsel negates the effect of the disqualification order."[4] A party need not prove that his former attorney actually received confidences or secrets in order to prevail on a motion to disqualify under the three-part rule.[5] The Seventh Circuit panel erroneously assumed that the three-part rule therefore creates an irrebuttable presumption that counsel received both confidences and secrets of his former client when the subject matter of the former representation and the issues of the subsequent adverse representation are substantially related.[6] Relying on this assumption, the panel concluded that substitute counsel can never use disqualified counsel's work product, even if it contains neither confidences nor secrets.[7] On rehearing, six of nine judges of the Seventh Circuit recognized that attorney disqualification does not automatically require denying access to the disqualified attorney's work product.

This Note addresses the problems of attorney disqualification[8]

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analysis of certain loan files. 571 F.2d at 400 (dissenting opinion, Pell, J.). For further discussion of the term work product and the confusion it may have caused in *First Wisconsin*, see note 77 *infra*.

[4] 571 F.2d at 398. "If an attorney's subsequent adverse representation in the form of his work product is not barred from use by substitute counsel, then there is little or no point in the initial disqualification." First Wis. Mortgage Trust v. First Wis. Corp., 74 F.R.D. at 627 (work product order), *cited in* First Wis. Mortgage Trust v. First Wis. Corp., 571 F.2d at 396.

[5] *See* note 1 *supra*.

[6] 571 F.2d at 397. The panel posited that "where a lawyer is disqualified for prior representation of a current adversary, it is unnecessary to establish that the lawyer actually possessed confidential information of the former client; such possession is presumed." *Id.* (citing Schloetter v. Railoc of Ind., Inc., 546 F.2d 706, 710 (7th Cir. 1976)). Concluding that "no reason [exists] to change this presumption when interpreting the *effects* of attorney disqualification" (*id.* (emphasis in original)), the Seventh Circuit panel held that disqualification automatically precludes access to disqualified counsel's work product (*id.* at 398-99). Because *Schloetter* did not involve former simultaneous representation, it does not support an irrebuttable presumption that counsel received confidences as well as secrets during his prior representation of the party moving to disqualify. *See also* notes 30-46 and accompanying text *infra*.

Beyond the policy of protecting former client confidences and secrets, the panel cited only the goal of avoiding the appearance of impropriety as a rationale for disqualification (571 F.2d at 396-97) and denial of access to work product (*id.* at 397). The court, however, did not discuss precisely why it would appear improper to permit substitute counsel to use work product that concededly contained no confidences or secrets of disqualified counsel's former client. For a discussion of appearance of impropriety, see notes 59-64 & 74-76 and accompanying text *infra*.

[7] 571 F.2d at 397-99. For further discussion see note 6 *supra*.

[8] Disqualification in this Note refers to a court order directing an attorney to withdraw from a case. The court order is ordinarily granted in response to an opposing party's motion. *See, e.g.*, Marketti v. Fitzsimmons, 373 F. Supp. 637 (W.D. Wis. 1974); T.C.

and access to the disqualified attorney's work product in the context of former simultaneous representation.[9] Multiple parties, notably joint venturers, often employ common counsel. Subsequent disputes between the clients, however, may prompt one or more of them to seek independent representation. The difficulties arise when, in ensuing litigation, those former clients move to disqualify their former counsel from appearing against them.

Former simultaneous representation complicates application of the three-part disqualification rule because a major rationale for disqualification—protection of privileged communications—does not apply. Communications between multiple clients and their common attorney are not privileged as between the multiple clients.[10] Other rationales—preventing misuse of client secrets,[11] avoiding the appearance of impropriety,[12] and enforcing fiduciary duties[13]—do support disqualification in some, but not all cases of former simultaneous representation. Only the need to protect client secrets, however, can justify denying access to work product.[14] Moreover, even this rationale carries little weight because courts can examine work product *in camera*. Regrettably, recent decisions obscure the rationales for attorney disqualification by

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Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953). The court may also issue the order on its own initiative. *See* Porter v. Huber, 68 F. Supp. 132 (W.D. Wash. 1946). Disqualification prevents employment in any capacity in the same case. *See* T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. at 270; Steeley v. State, 17 Okla. Crim. 252, 262, 187 P. 821, 824 (1920). This Note deals only with disqualification in civil cases. Policies peculiar to criminal law give rise to very different grounds for disqualification of prosecutors or criminal defense counsel. *See* R. WISE, LEGAL ETHICS 261-66 (1970).

[9] Conflict of interest issues arising at the time counsel attempts to represent multiple clients are beyond the purview of this Note. For collections of cases dealing with such conflict of interest problems, see Annot., 31 A.L.R.3d 715 (1970) (disqualification of attorneys in civil cases); Annot., 28 A.L.R.3d 389 (1969) (liability of attorneys for malpractice); Annot., 17 A.L.R.3d 835 (1968) (conflicts of interest exposing attorneys to disciplinary action); Annot., 79 A.L.R.2d 759 (1961) (disqualification of attorneys from representing trustees or receivers in bankruptcy).

[10] *See* Petty v. Superior Court, 116 Cal. App. 2d 20, 29, 253 P.2d 28, 33 (1953); Liberty Mut. Ins. Co. v. Engels, 41 Misc. 2d 49, 51, 244 N.Y.S.2d 983, 986 (1963); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 91, at 187-88 (2d ed. 1972); 8 J. WIGMORE, EVIDENCE § 2312 (McNaughton rev. ed. 1961). "The reason assigned for the rule is that, as between the [multiple] clients, communications made for the mutual benefit of all lack the element of confidentiality which is the basis of privileged communications." 81 AM. JUR. 2d *Witnesses* § 190, at 225-26 (1976).

[11] *See* text accompanying notes 37-47 & 77-83 *infra*.

[12] *See* text accompanying notes 59-64 & 75-76 *infra*.

[13] *See* text accompanying notes 48-58 & 75-76 *infra*.

[14] *See* text accompanying notes 75-83 *infra*.

mechanically applying the three-part rule.[15] The *First Wisconsin* panel's failure to recognize disqualification and access to work product as analytically separate issues illustrates the danger of mechanical application. This Note examines the cases and rationales underlying the three-part disqualification rule and concludes that neither justifies extending the rule to deny substitute counsel access to work product as an automatic consequence of attorney disqualification.

I

THE THREE-PART DISQUALIFICATION RULE: A STANDARD FOR ALL SITUATIONS?

In both its disqualification and work product decisions, the trial court in *First Wisconsin* relied extensively upon *E.F. Hutton & Co. v. Brown*,[16] which first applied the three-part test to former simultaneous representation. In *Hutton*, the plaintiff corporation brought an action for negligence and breach of fiduciary duty against Brown, its former vice-president. The court disqualified the plaintiff's counsel because counsel had simultaneously represented both parties in an earlier Securities and Exchange Commission investigation of matters substantially related to the present lawsuit. Brown knew at the time of the investigation that his conversations with counsel would be reported to corporate management.[17] Thus, counsel's subsequent representation of the corporation against Brown could not violate the attorneys' duty to preserve privileged communications.[18] Nevertheless, the court concluded that "receipt of confidential information is not a prerequisite to disqualification"[19] under its three-part rule and ultimately disqualified counsel. This section sets forth the rationales for disqualification and examines their judicial genesis and incorporation into the three-part *Hutton* rule.

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[15] *See* First Wis. Mortgage Trust v. First Wis. Corp., 422 F. Supp. at 496 (disqualification order); Marketti v. Fitzsimmons, 373 F. Supp. 637, 639 (W.D. Wis. 1974); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 394-95 (S.D. Tex. 1969).

[16] 305 F. Supp. 371 (S.D. Tex. 1969), *discussed in* First Wis. Mortgage Trust v. First Wis. Corp., 422 F. Supp. at 496 (disqualification order); First Wis. Mortgage Trust v. First Wis. Corp., 74 F.R.D. at 626-27 (work product order). The Seventh Circuit panel approved the district court's analysis without referring to that court's reliance on *Hutton*. *See* note 72 *infra*.

[17] 305 F. Supp. at 392.

[18] *See* note 10 and accompanying text *supra*.

[19] 305 F. Supp. at 395.

A. *Preservation of the Former Client's Confidences and Secrets*

1. *Definitions*

Hutton and other recent decisions[20] have loosely used the term "confidential information," not recognizing that the term assumes different meanings in different contexts. Courts and commentators have used "confidential information" to refer to either privileged communications alone or both privileged communications and secrets.[21] The ABA Code of Professional Responsibility draws a distinction:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarassing or would likely be detrimental to the client.[22]

Thus confidences are coterminous with information protected by the attorney-client privilege. Confidences encompass only direct communications between a client and his attorney[23] that are substantially related to the purpose for which the client sought legal counsel.[24] Client secrets consist of sensitive information not protected by the privilege. Secrets, therefore, generally refer to information that the attorney obtains during the course of representation from sources other than the client.[25] Analysis of the *Hutton*

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[20] *See, e.g.*, First Wis. Mortgage Trust v. First Wis. Corp., 571 F.2d 390, 397 (7th Cir. 1978), *rev'd on rehearing en banc*, No. 77-1786 (7th Cir. Sept. 22, 1978); Marketti v. Fitzsimmons, 373 F. Supp. 637, 639 (W.D. Wis. 1974).

[21] *See, e.g.*, First Wis. Mortgage Trust v. First Wis. Corp., 571 F.2d 390, 397 (7th Cir. 1978) (apparently both privileged communications and secrets), *rev'd on rehearing en banc*, No. 77-1786 (7th Cir. Sept. 22, 1978); Schloetter v. Railoc of Ind., Inc., 546 F.2d 706, 711 (7th Cir. 1976) (privileged communications); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 753-54 (2d Cir. 1975) (both privileged communications and secrets); Note, *supra* note 1, 55 B.U. L. REV. at 73-74 (both privileged communications and secrets); Note, *Disqualification of Attorneys for Representing Interests Adverse to Former Clients*, 64 YALE L.J. 917, 919 (1955) (privileged communications).

[22] ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1975).

[23] The common law attorney-client privilege, codified in most jurisdictions, applies only to direct communications between a client and his attorney. *See* 8 J. WIGMORE, *supra* note 10, § 2292, at 554-57. The privilege law of the forum state governs in federal court "with respect to an element of a claim or defense as to which State law supplies the rule of decision." FED. R. EVID. 501.

[24] *See* Fisher v. United States, 425 U.S. 391, 403 (1976); Modern Woodmen of America v. Watkins, 132 F.2d 352, 354 (5th Cir. 1942); 8 J. WIGMORE, *supra* note 10, § 2310, at 598-99.

[25] Some direct communications between client and attorney that are not protected by the attorney-client privilege may be secrets under the ABA Code of Professional Responsi-

rule thus requires examination of two distinct rationales: protection of confidences and protection of secrets.

2. *The Irrebuttable Presumption of Receipt of Confidences*

Courts must not permit an attorney who received privileged communications from a former client to represent an adverse party in a matter related to those confidences. Proving actual receipt of confidences, however, is often difficult.[26] The courts have therefore created an irrebuttable presumption that counsel received confidences from his former client if the former representation and the present suit are substantially related.[27] The irrebuttable presumption not only ensures protection of client confidences but also fosters public faith in the legal system by preventing even the appearance of improper use of privileged communications.[28] This,

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bility. For example, if the client reveals to his attorney past misconduct or embarrassing personal experiences that are unrelated to the purpose for which the client retained counsel, the communications may not be privileged. *See* 8 J. WIGMORE, *supra* note 10, § 2310, at 598-99. Nevertheless, the attorney must preserve the secret information. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1975), *quoted in* text accompanying note 22 *supra*. The *Hutton* disqualification rule, however, does not seek to protect secret communications unrelated to the subject matter of the former representation. *See* note 44 *infra*. Under the three-part *Hutton* rule, a party may move to disqualify his former attorney from representing others against him only if the subject matter of the former representation and the issues involved in the current adverse representation are substantially related. *See* note 53 and accompanying text *infra*. Thus, the small category of client communications that are secret but not privileged does not support attorney disqualification under the reasoning hehind the *Hutton* rule. In evaluating the *Hutton* rule, therefore, the term "secrets" designates sensitive information an attorney obtains from sources other than the client.

[26] *See* Note, *supra* note 21, 64 YALE L.J. at 919.

[27] *See, e.g.*, Emle Indus. Inc. v. Patentex, Inc., 478 F.2d 562, 570 (2d Cir. 1973); Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 924 (2d Cir. 1954); Fleischer v. A.A.P., Inc., 163 F. Supp. 548, 552 (S.D.N.Y. 1958) (dictum), *appeal dismissed sub nom.* Fleischer v. Phillips, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959); T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953). *See* Note, *supra* note 1, 52 CHI.-KENT L. REV. at 528-30; Note, *supra* note 21, 64 YALE L.J. at 919.

[28] "Underlying [the irrebuttable presumption] are strong reasons of policy: (1) to encourage and protect inviolate confidential communications between client and attorney; and (2) to inspire and maintain public respect for and trust in the law and lawyers." Fleischer v. A.A.P., Inc., 163 F. Supp. 548, 552 (S.D.N.Y. 1958) (dictum), *appeal dismissed sub nom.* Fleischer v. Phillips, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959). The courts' desire to avoid the appearance of impropriety embodies two distinct policies: promotion of general public trust in the legal system, and ensurance of individual client trust in lawyers in order to encourage uninhibited communication with counsel. The irrebuttable presumption of receipt of confidences, however, does not further the goal of maintaining general public faith in the legal system except in so far as it furthers the narrower policy of encouraging individual clients to trust their attorneys. Only a rule that prohibited lawyers from ever taking on representation against a former client would have broader effect. The prevailing three-part *Hutton* disqualification rule permits an attorney to represent interests

in turn, promotes clients' trust in attorneys and ensures full and free communication between client and counsel—a necessary prerequisite to adequate representation.[29]

3. *Relevance to Hutton*

The *Hutton* court viewed the issue presented—whether counsel who formerly represented multiple clients should be disqualified from representing one against another in litigation related to the former representation—as one of first impression.[30] Nevertheless, the court was "persuaded by two considerations suggested in some of the reported decisions."[31] Citing two irrebuttable presumption cases,[32] the court stated: "[One] consideration which has persuaded this Court concerns the difficulties involved in determining whether confidential information has been disclosed to the former attorney."[33] Unlike *Hutton*, however, the cited cases involved the possibility that counsel could misuse legally privileged communications. These cases reasoned merely that difficulties of proof justified a conclusive presumption of receipt of confidences.[34] In *Hutton*, the former simultaneous representation of multiple clients precluded any receipt of confidences by counsel.[35] *Hutton*, therefore, relied in part on cases holding that a client need not *prove* receipt of confidences in concluding that "receipt of confidential information is not a prerequisite to disqualification."[36] Unless

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adverse to those of a former client if the former representation and current adverse litigation are not substantially related. *See* note 53 and text accompanying notes 59-61 *infra*.

[29] *See* T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 269 (S.D.N.Y. 1953); ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1975); 8 J. WIGMORE, *supra* note 10, § 2291, at 545-49 (policy underlying the attorney-client privilege); Note, *supra* note 21, 54 YALE L.J. at 927.

[30] 305 F. Supp. at 394-95.

[31] *Id.* at 395.

[32] Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 924-25 (2d Cir. 1954); T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953), *cited in* E.F. Hutton & Co. v. Brown, 305 F. Supp. at 395 n.69. Courts and commentators commonly recognize *T.C. Theatre* as the source of the substantial reltionship test that *Hutton* incorporated into its disqualification rule for cases of prior simultaneous representation. *See, e.g.*, Schloetter v. Railoc of Ind., Inc., 546 F.2d 706, 710 (7th Cir. 1976); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754 (2d Cir. 1975); Note, *supra* note 1, 52 CHI-KENT L. REV. at 527-30.

[33] 305 F. Supp. at 395.

[34] *See* Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 924 (2d Cir. 1954); T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953).

[35] *See* note 10 and accompanying text *supra*.

[36] 305 F. Supp. at 395.

rationales other than preservation of confidences and secrets justified disqualification in *Hutton*,[37] the court's holding amounts to the creation of a conclusive presumption of receipt of secrets. That is, since there were no privileged communications in *Hutton*,[38] the only justification for the court's holding lay in the need to prevent actual or apparent misuse of client secrets that the court conclusively presumed to exist. Only if the policy of protecting client secrets requires the same rules of disqualification as the policy of protecting confidences does such a rule follow from the precedent cited in *Hutton*. The policies differ, and so require different vehicles of implementation.[39]

Because privileged communications were their primary concern, courts developing the irrebuttable presumption of receipt of

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[37] An additional disqualification rationale might have justified the decision in *Hutton*: enforcing the attorney's duty to disclose at the outset of simultaneous representation that he may choose to represent one client against the other should a dispute between the clients arise. *See* text accompanying notes 55-58 *infra*. The *Hutton* court, however, did not analyze counsel's failure to disclose the legal implications of potential business conflicts as a rationale for disqualification, but treated it instead as a factor negating counsel's waiver defense. *See* notes 55-56 and accompanying text *infra*.

[38] *See* text accompanying notes 17-19 *supra*.

[39] Although the *Hutton* court never distinguished secrets from confidences, the court did address the secrets rationale indirectly. The court criticized and refused to follow Croce v. Superior Court, 21 Cal. App. 2d 18, 68 P.2d 369 (1937), which equated the duty owed a former client with the attorney-client evidentiary privilege: "What the court in *Croce* failed to note is that the basis for the rule against representing conflicting interests is broader than the basis for the attorney-client evidentiary privilege." E.F. Hutton & Co. v. Brown, 305 F. Supp. at 394. The *Hutton* court's objection indirectly identified an attorney's duty not to misuse a client's secrets. The court, however, combined this objection with its discussion of fiduciary duty (*see* text accompanying note 50 *infra*), and thus failed to isolate the secrets rationale (*see* text accompanying note 51 *infra*).

Croce and a line of cases following it (*see, e.g.*, Nichols v. Elkins, 2 Ariz. App. 272, 408 P.2d 34 (1965); Petty v. Superior Court, 116 Cal. App. 2d 20, 253 P.2d 28 (1953)) involved litigation between former joint venturers who had employed common counsel. Therefore, the party moving to disqualify his former counsel could not claim violation of the attorney-client privilege. *See* note 10 and accompanying text *supra*. These courts held that since confidences of the former client were not involved as a matter of law, counsel could not be disqualified. *See* Nichols v. Elkins, 2 Ariz. App. at 277, 408 P.2d at 34; Petty v. Superior Court, 116 Cal. App. 2d at 29-31, 253 P.2d at 33-34; Croce v. Superior Court, 21 Cal. App. 2d at 19-20, 68 P.2d at 369-70. Although the *Croce* line of cases mistakenly limited the duty owed a former client to the attorney-client evidentiary privilege, the facts of one case, *Petty*, suggest that counsel did not receive any client secrets. In *Petty*, counsel merely drafted the agreements for two parties engaged in an oil well venture; he knew nothing about the joint venture except the information the parties communicated to him. 116 Cal. App. 2d at 24-26, 253 P.2d at 30-32. Thus, the decision in *Petty* not to disqualify counsel would have withstood scrutiny under the secrets rational. The court could have satisfied any concern over misuse of secrets by requiring counsel to plead in good faith that he had uncovered no secrets during the former representation. The moving party could not in good faith have denied such an allegation.

"confidential information" did not consider whether all sensitive information required such protection.[40] Two considerations justify limiting the conclusive presumption to client confidences. First, since confidences involve disclosures by the client to counsel,[41] even the appearance of their improper use could impede full and free communication with counsel.[42] Secrets, on the other hand, encompass sensitive information derived from sources other than the client.[43] Thus, possible revelation of secrets poses no significant threat to the policy of encouraging uninhibited communication between client and counsel.[44] Second, because secrets have independent sources, courts may be able to determine from the facts underlying the former representation that counsel did not come upon client secrets. For example, counsel's former representation of the party moving to disqualify may have involved no investigations or other contacts relevant to the current litigation from which secret information could have been obtained.[45] If the court finds that receipt of secrets was highly unlikely, it can then attempt to remove

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[40] *See, e.g.*, Cord v. Smith, 338 F.2d 516, 524 (9th Cir. 1964); Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 924 (2d Cir. 1954); Fleischer v. A.A.P., Inc., 163 F. Supp. 548, 552 (S.D.N.Y. 1958) (dictum), *appeal dismissed sub nom.* Fleischer v. Phillips, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959); T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953).

[41] *See* note 23 and accompanying text *supra*.

[42] *See* note 29 and accompanying text *supra*.

[43] *See* note 25 and accompanying text *supra*.

[44] A small category of direct communications between a client and his attorney may be "secrets" within the meaning of DR 4-101(A) of the ABA Code of Professional Responsibility. *See* note 25 *supra*. The category consists of client disclosures that are unrelated to the purpose for which the client retained counsel. In evaluating the *Hutton* rule, however, a distinction between client secrets and confidences that is based on their different sources remains viable. By excluding such extraneous disclosures, the attorney-client privilege embodies a judgment that their protection is not essential to the promotion of full and free client communication. The *Hutton* rule manifests a similar judgment; the rule was not designed to protect extraneous disclosures. Since extraneous disclosures do not relate to the subject matter of the former representation, they are beyond the intended scope of the *Hutton* rule, which turns upon a substantial relationship between the subject matter of the former representation and the issues of the present lawsuit. Protection of extraneous disclosures under the *Hutton* rule is *merely incidental* to a court's finding of such a substantial relationship; absent a substantial relationship between the former and current representations, the *Hutton* rule's disqualification test does not protect the former client's extraneous disclosures that are nevertheless "secrets." The *Hutton* rule thus seeks to protect only those secrets that are substantially related to the subject matter of the former representation. By definition, such secrets do not involve client communications. *See* note 25 and accompanying text *supra*. Therefore, possible revelation of secrets that the *Hutton* rule seeks to protect poses no threat to the policy of promoting uninhibited communication between client and counsel.

[45] *See, e.g.*, Petty v. Superior Court, 116 Cal. App. 2d 20, 253 P.2d 28 (1953), *discussed in* note 39 *supra*.

any remaining doubts through *in camera* inquiries of counsel. Counsel's good faith assurances that he came upon no secrets during the former representation will often effectively eliminate the secrets rationale for disqualification; judicial sanctions can help ensure counsel's good faith.[46]

The distinction between confidences and secrets waxes critical when courts extend the three-part disqualification rule to disqualified counsel's work product. Even if closed session inquiries cannot satisfy a court that counsel acquired no secrets during the former representation, a court can conclusively determine by *in camera* inspection whether disqualified counsel's work product contains secrets of the former client.[47]

B. *Fiduciary Duties and the Appearance of Impropriety*

The *Hutton* court summarized the second consideration underlying its decision: "If courts protect only a client's disclosures to his attorney, and fail to safeguard the attorney-client relationship itself—a relationship which must be one of trust and reliance—they can only undermine the public's confidence in the legal system as a means for adjudicating disputes."[48] The court's proposition suggests at least three rationales for disqualification. First, the statement reflects a basic premise discussed in the previous section: Courts must protect a client's secrets as well as his disclosures to his attorney. Second, the need to "safeguard the attorney-client relationship itself—a relationship which must be one of trust and reliance—"[49] impliedly imposes on counsel a fiduciary duty to former clients that encompasses more than the preservation of confidences and secrets. Third, by avoiding even the appearance of counsel's improper use of his client's disclosures, courts promote full and free communication between client and counsel. This section examines the fiduciary-duty and appearance-of-impropriety rationales.

1. *Counsel's Fiduciary Duty to a Former Client*

In reaching its decision to disqualify counsel, the *Hutton* court posited a broad fiduciary duty for attorneys:

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[46] *Cf., e.g.*, Bardin v. Mondon, 298 F.2d 235, 238 (2d Cir. 1961) (costs and damages); FED. R. CIV. P. 11 (disciplinary proceedings).

[47] *See* note 77-78 and accompanying text *infra*.

[48] 305 F. Supp. at 395.

[49] *Id.*

> The evidentiary privilege and the ethical duty not to disclose confidences both arise from the need to encourage clients to disclose all possibly pertinent information to their attorneys, and both protect only the confidential information disclosed. The duty not to represent conflicting interests, on the other hand, is an outgrowth of the attorney-client relationship itself, which is confidential, or fiduciary, in a broader sense. Not only do clients at times disclose confidential information to their attorneys; they also repose confidence in them. The privilege is bottomed only on the first of these attributes, the conflicting-interests rules, on both.
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> . . . .
>
> . . . If an attorney is permitted to defend a motion to disqualify by showing that he received no confidential information from his former client, the client, a layman who has reposed confidence and trust in his attorney, will feel that the attorney has escaped on a technicality.[50]

The court stressed the need to protect not only the client's "confidential information,"[51] but also the "confidence" he "re-

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[50] *Id.* at 394-95. Although referred to in *Hutton*'s discussion of fiduciary duty, the ABA Code of Professional Responsibility did not control because the Southern District of Texas had not adopted it by rule of court. 305 F. Supp. at 377 n.7. Even where it does control by statute or rule of court, the ABA Code of Professional Responsibility does not clearly define the attorney's obligation to former clients. *See* Note, *supra* note 1, 55 B.U. L. REV. at 63-65. Indeed, it does not address subsequent adverse representation except in the Canon 4 obligation to preserve client confidences and secrets. The conflict of interest provision addresses only potential future conflicts:

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

ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) (1975).

The predecessor to DR 5-105(A), the third paragraph of ABA Canons of Professional Ethics No. 6, also provided little guidance:

> The obligation to represent the client with undivided fidelity and not to 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.

Relying in part on this language, the *Hutton* court concluded that a client's "repose of confidence" in his counsel is conceptually broader than "confidential information." 305 F. Supp. at 394. The drafters of Canon 6 most probably did not intend "confidence . . . reposed" to mean more than client confidences and secrets in the case of *subsequent* representation. Admittedly, the Canon 6 duty not to represent conflicting interests is broader than the duty to preserve confidences and secrets in the context of *simultaneous* representation of multiple clients because independence of professional judgment is then at stake. This consideration is absent, however, in the case of *subsequent* adverse representation.

[51] For a discussion of the confusion arising from use of the imprecise term "confiden-

poses" in his attorney. Unfortunately, the court did not indicate whether the latter "confidence" referred merely to client secrets or to some broader fiduciary notion. The quoted section could therefore imply an attorney's fiduciary duty never to represent interests adverse to those of a former client, even if the attorney received neither confidences nor secrets. Such a reading of the attorney's duty misled the district court in *First Wisconsin*. The court quoted *Hutton* and concluded:

> [A]lthough all three elements are essential to a determination that counsel should be disqualified, subsequent adverse representation most directly violates the confidence that the former client placed in his counsel . . . . What greater violation of that confidence could there be than for that attorney in a subsequent court proceeding to actively represent interests opposed to those of his former client?[52]

This conclusion ignores the implications of the accepted doctrine that adverse representation is clearly permissible if the issues of the former and subsequent representations are not substantially related.[53] Permitting counsel to defend on a motion to disqualify by showing he received neither confidences nor secrets looks no more like "escap[ing] on a technicality" than allowing counsel to show that the complex issues of the former and current representations are not substantially related. Yet, the latter showing clearly defeats a motion to disqualify. Given the substantial similarity of proving no relation of issues and proving no risk of misuse of secrets despite relation, the district court's fiduciary duty rationale collapses where confidences and secrets do not exist. The lawyer's duty of

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tial information," see notes 20-21 and accompanying text *supra*.

[52] 74 F.R.D. at 626-27 (work product order). The Seventh Circuit panel did not deal explicitly with fiduciary duty as a rationale for disqualification. The panel cited ABA Code of Professional Responsibility Canon 4 ("A Lawyer Should Preserve the Confidences and Secrets of a Client") and Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety") as the controlling principles for both the disqualification and the work product issues. 571 F.2d at 396. Nevertheless, the Seventh Circuit panel did approve of the district court's "scholarly opinion" (*id.* at 396) and allude to that court's fiduciary duty analysis: "Without citing [the ABA Code of Professional Responsibility], the district court in the present case followed [its] guidelines in determining that the sanctity of a former attorney-client relationship . . . would be threatened if the use of predisqualification work product by substitute counsel were permitted" (*id.* at 396 n.12).

[53] A former client will succeed on a motion to disqualify only if the subject matter of the adverse representation is substantially related to the subject of the former one. *See* Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754-57 (2d Cir. 1975); American Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1128 (5th Cir. 1971); Big Bear Mun. Water Dist. v. Superior Court, 269 Cal. App. 2d 919, 926-27, 75 Cal. Rptr. 580, 585 (1969).

undivided loyalty to a client, often characterized as fiduciary, ends when the professional relationship terminates.[54] The fiduciary duty language of *Hutton* and the district court in *First Wisconsin* only muddies the waters; it merely reflects a lawyer's duty to preserve a former client's secrets as well as his confidences.

Attorneys do owe clients a duty of disclosure, however, that can properly be characterized as fiduciary. Both *Hutton* and the trial court in *First Wisconsin* stressed counsel's failure to disclose the legal implications of potential conflicts of interest:

> "As heretofore indicated, it was the duty of counsel to call to the attention of both [clients] the existence and legal implications of any potential conflict of interest. Receipt of such advice would be *the bare minimum predicate for a waiver* by [the former client] of his right to object to a subsequent adverse representation." . . .
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> It is the finding of this Court that one of the legal implications of the potential conflicts was the possibility that [counsel] would withdraw from its representation of the Trust [one of four multiple clients] and choose to continue representing the defendants [the remaining clients] in litigation with the Trust. [Counsel] failed to disclose this possibility to the Trust at the time of its establishment. In order for the Trust to have waived its objection to [counsel's] representation of the defendants, it had to have been made aware of this possibility.[55]

Although the courts treated the problem as a waiver issue,[56] an attorney's failure to disclose the legal implications of potential business conflicts among multiple clients taints the subsequent adverse representation with breach of trust. An attorney should disclose at the outset of simultaneous representation the possibility that he may choose to continue representing some clients against the others in the event of a client dispute.[57] As a rationale distinct from

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[54] For discussion of the distinctions between the duties a lawyer owes current clients and those he owes former clients, see note 50 *supra*.

[55] First Wis. Mortgage Trust v. First Wis. Corp., 422 F. Supp. at 496 (emphasis in original) (disqualification order) (quoting E.F. Hutton & Co. v. Brown, 305 F. Supp. at 400).

[56] Counsel in *First Wisconsin* claimed to have fulfilled their professional obligation by disclosing potential conflicts of interest between the multiple clients. 422 F. Supp. at 496 (disqualification order). Counsel argued further that the trust waived its right to object to the subsequent adverse representation by failing to object when counsel informed the trust of potential business conflicts. *Id.* Similarly, counsel in *Hutton* argued that movant Brown, by consenting to the simultaneous representation, waived his right to object to counsel's continued representation of E.F. Hutton & Co. 305 F. Supp. at 400.

[57] If an attorney knows with reasonable certainty at the outset of simultaneous representation which of the multiple clients he would choose to continue representing if a

protecting confidences and secrets, the policy of deterring attorneys from breaching client trust warrants disqualifying lawyers who fail to disclose the legal implications of potential conflicts. This rationale does not, however, justify punishing the *client* of disqualified counsel by denying the client access, through substitute counsel, to disqualified counsel's work product.[58]

2. *Avoiding the Appearance of Impropriety*

Hutton's treatment of appearance of impropriety as an independent rationale for attorney disqualification stood on the same ground as its fiduciary duty analysis and was similarly flawed. The court reasoned that counsel's appearance against their former client will always "appear unseemly, regardless of the amount of representation they afforded him, or the secrecy of their discussions and advice to him at the time."[59] Again, the court ignored the implications of the substantial relationship requirement of its own three-part disqualification rule: Attorneys can represent interests adverse to those of a former client if the former and current representations are not substantially related.[60] Such representation cannot appear improper per se. Under the *Hutton* rule, apparent impropriety justifies disqualification only when courts cannot adequately ensure, in a manner credible to laymen, that counsel received no confidences or secrets during the former representation.[61] Moreover, some policies underlying the "appearance" rule

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dispute arose, he should probably disclose his intended allegiance. The trial court in *First Wisconsin* did not indicate whether counsel should have disclosed his particular intended allegiance or merely the general possibility of subsequent adverse representation to all. *See* text accompanying note 55 *supra*.

[58] *See* text accompanying note 83 *infra*.

[59] 305 F. Supp. at 399.

[60] *See* note 53 and accompanying text *supra*.

[61] Some might argue that proving no substantial relationship of issues in the former and current representations precludes an appearance of impropriety in the eyes of the layman in a way that proving counsel received no confidences or secrets does not. The argument has merit only if courts cloud the concepts of confidences and secrets with technical definitions that laymen cannot understand. Courts can, however, explain these concepts in terms laymen can understand: If an attorney possesses no confidences or secrets of his former client, he enjoys no advantage over any other lawyer in a later representation against that former client. Admittedly, a lawyer might obtain psychological or intangible knowledge about a client over the course of representation. But neither the substantial relationship test nor the rule against misusing a client's confidences or secrets can eliminate this problem. Only an absolute ban against opposing a former client would remove the possibility of "psychological advantage."

Courts should recognize preservation of confidences and preservation of secrets as the rationales underlying the substantial relationship test for disqualification. Once the courts

for confidences do not pertain to secrets. Avoiding even the appearance of improper use of confidences furthers the policy of ensuring full and free communication between client and counsel.[62] This rationale does not apply to secrets because secrets are obtained from sources other than the client.[63] Thus, the "appearance" rationale lacks force under the *Hutton* rule in cases of simultaneous representation where the former attorney could not, by definition, have received any client confidences.[64]

To summarize, the *Hutton* rule evolved from cases and doctrines addressing the problem of preserving confidences of former clients. Other policies—preventing misuse of secrets, enforcing fiduciary duties and avoiding the appearance of impropriety—justify attorney disqualification in some, but not all cases. In cases of former simultaneous representation, where the confidences rationale is inapplicable, the remaining policies do not justify unthinking application of the *Hutton* disqualification rule. Courts should therefore consider the factors influencing the *Hutton* rule and the separate rationales for disqualification. Proper disposition of issues arising subsequent to disqualification particularly requires such consideration. The next section applies the proposed analysis to an issue generated by disqualification of counsel in *First Wisconsin:* access to disqualified counsel's work product.

II

Attorney Disqualification and Access by Substitute Counsel to Work Product: Separating the Issues

In *First Wisconsin*, defendant First Wisconsin Corporation originally sponsored the plaintiff real estate investment trust. Defen-

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explain these rationales in the context of representation against a former client, the legal system can determine issue by issue how best to avoid an unseemly appearance that an attorney misused client confidences or secrets.

Clarification of the underlying rationales of the substantial relationship test is also necessary for proper analysis of issues arising subsequent to disqualification. For example, the predisqualification legal work that substitute counsel sought in *First Wisconsin* involved "a routine, tedious analysis of loan files" (571 F.2d at 400 (dissenting opinion, Pell, J.)) that substitute counsel or any lawyer could easily reproduce (*id.*). *See* note 77 *infra*. Requiring substitute counsel to repeat such work merely imposes a financial burden on the client of disqualified counsel. *See* note 79 and accompanying text *infra*. The Seventh Circuit panel nevertheless ruled that attorney disqualification automatically precludes use of any of disqualified counsel's work product. 571 F.2d at 397-99.

[62] *See* note 29 and accompanying text *supra*.

[63] *See* notes 25 & 44 and accompanying text *supra*.

[64] *See* note 10 and accompanying text *supra*.

dant First Wisconsin Mortgage Company, a wholly-owned subsidiary of the corporation, advised the trust on its investments. The three parties utilized common counsel for their joint business venture. A dispute arose over the underwriting and administration of particular loans[65] and the trust retained independent counsel.[66] Because the parties were joint venturers, no information they disclosed to common counsel could be confidential as among them.[67] Further, it appears that counsel did not obtain any secrets during the simultaneous representation.[68] Nevertheless, the trial court invoked the *Hutton* rule and disqualified counsel.[69]

The plaintiff did not move to disqualify until well into the dispute.[70] Consequently, defendant's counsel prepared a substantial work product prior to the court's disqualification order.[71] Relying on *Hutton*'s disqualification reasoning, the district court denied substitute counsel's request for access to this work product.[72] The

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[65] 422 F. Supp. at 494 (disqualification order).

[66] *Id.*

[67] *See* note 10 and accompanying text *supra*.

[68] *See* 571 F.2d at 400 (dissenting opinion, Pell, J.).

[69] 422 F. Supp. at 496 (disqualification order).

[70] The dispute between the trust and the defendants arose in February 1974. The trust, on the suggestion of general counsel (counsel disqualified in the ensuing litigation), retained independent counsel. Thereafter the trust and the defendants negotiated at arms length, although counsel for defendants did not withdraw as general counsel for the trust until September 1974. The trust did not indicate that it would object to its former counsel's continued representation of defendants until spring of 1975. 422 F. Supp. at 494-95 (disqualification order). The primary reason for delay was the parties' expectation that the dispute would end short of litigation.

Because a disqualification motion is an equitable proceeding, the court has discretion to deny the motion if a party does not move to disqualify until several years into the litigation. *See* Milone v. English, 306 F.2d 814, 818 & n.5 (D.C. Cir. 1962); Marco v. Dulles, 169 F. Supp. 622, 632 (S.D.N.Y. 1959). But counsel may build up an expensive work product in a much shorter time. *See* note 79 and accompanying text *infra*.

[71] *See* Brief for Defendants-Appellants at 15, First Wis. Mortgage Trust v. First Wis. Corp., 571 F.2d 390 (7th Cir. 1978). Even after the plaintiff moved to disqualify, defendants' counsel did not act unreasonably in continuing to generate work product. Counsel and defendants believed that the issues of the former representation of the trust were not substantially related to the subject matter of the current litigation. *See* Defendants' Reply Brief Opposing Motion to Disqualify at 1-5, First Wis. Mortgage Trust v. First Wis. Corp., No. 77-1786 (7th Cir. Jan. 30, 1978). Given the prevailing substantial-relationship-of-issues requirement and the complexity of issues involved in many cases, counsel often cannot predict whether a court will grant the motion to disqualify. Barring use of predisqualification work product therefore creates a significant risk that clients will suffer severe economic hardship. *See* text accompanying notes 80-82 *infra*.

[72] 74 F.R.D. at 627-28 (work product order) (quoting E.F. Hutton & Co. v. Brown, 305 F. Supp. at 394). The Seventh Circuit panel relied indirectly on *Hutton*'s disqualification reasoning by paraphrasing with approval the "scholarly opinion" of the district court. 571 F.2d at 396. The panel agreed with the court below that the work product issue "should be

district court deemed the content of the work product irrelevant:

> To attempt to divorce [former counsel's] work product from its representation of the defendants would be an absurd position . . . .
>
> . . . .
>
> Although the court in *Hutton* was referring to a proffered defense to disqualification, this Court feels that [*Hutton*'s] reasoning applies equally to the question posed by the [work product] motion.[73]

The court skipped several logical steps. In joint venture situations, courts can adequately protect client secrets—the only applicable concern—without a per se rule denying access to work product.[74]

A. *Breach of Fiduciary Duty and Appearance of Impropriety*

Of the four rationales underlying disqualification, only two seek to protect the former client against potential harm from the adverse representation: preservation of confidences and preservation of secrets. The others—enforcing fiduciary duty and avoiding the appearance of impropriety—seek instead to punish counsel or to further some public interest. At the outset of simultaneous representation, an attorney should disclose to his multiple clients that, should a dispute arise, he may choose to represent one against the other. If he fails to do so and subsequently undertakes adverse representation, the attorney commits a breach of trust.[75] The threat of disqualification for this breach of trust encourages attorneys to fully disclose the legal implications of potential conflicts of interest. Punishing the *client* by denying him access to disqualified counsel's work product, however, furthers no legitimate interest

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resolved in accordance with the same principles as applied in the original disqualification decision." *Id.* at 397. By limiting its review of the district court's work product order to a determination of whether that court had abused its discretion, the panel allowed the district court considerable leeway in applying ethical principles. *Id.* at 399.

The parties in *First Wisconsin* raised no factual issues concerning the disputed work product. 74 F.R.D. at 627 (work product order). Recent decisions have seriously questioned the propriety of the abuse-of-discretion standard of review in attorney disqualification cases where only legal questions are at issue. For example, the Fifth Circuit concluded that "[i]n disqualification cases . . . , where the facts are not in dispute, District Courts enjoy no particular functional advantage over appellate courts in their formulation and application of ethical norms." Woods v. Covington City Bank, 537 F.2d 804, 810 (5th Cir. 1976). *Accord*, Aetna Cas. & Sur. Co. v. United States, 571 F.2d 1197, 1200 (4th Cir. 1978).

[73] 74 F.R.D. at 627 (work product order).

[74] The Seventh Circuit, in its en banc decision, rejected the per se approach in favor of a flexible rule.

[75] *See* text accompanying notes 55-58 *supra*.

unless the work product contains confidences or secrets of the former client. The client should not suffer unnecessarily for his attorney's breach of fiduciary duty.

When confidences of the former client are not at issue, only potential misuse of client secrets can taint adverse representation with an appearance of impropriety. Unlike apparent misuse of client confidences, the "appearance" rationale lacks independent justificatory force when applied to secrets.[76] Thus, in cases of former simultaneous representation, if a court determines that disqualified counsel's work product contains no secrets of the former client, it cannot logically apply the "appearance" rationale.

B. *Preservation of Secrets*

A court considering a former client's motion to disqualify cannot always ensure that counsel received no secrets while representing his former client. The court, however, can remove any uncertainty about work product[77] by inspecting *in camera* the documents sought by substitute counsel.[78] Such inspection is justified because

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[76] *See* text accompanying notes 59-64 *supra*.

[77] Substitute counsel in *First Wisconsin* used the term "work product" to describe the legal documents they sought from disqualified counsel. *See* 571 F.2d at 392. The Seventh Circuit panel read the term more broadly:

> There is apparently no dispute that defendants seek the "work product" of prior counsel as that term is commonly used. That is, defendants seek
>
> > [T]he information [prior counsel] has assembled and the mental impressions, the legal theories and strategies that he has pursued or adopted as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, mental impressions, personal beliefs, and other tangible or intangible means.
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> *State ex rel. Dudek v. Circuit Court*, 34 Wis. 2d 559, 589, 150 N.W.2d 387, 404 (1967); *Hickman v. Taylor*, 329 U.S. 495 . . . (1947).

571 F.2d at 396 n.9. Applying this all-inclusive definition, the Seventh Circuit panel concluded that disqualification automatically precludes any use of disqualified counsel's "work product". *Id.* at 396-99. The legal work that substitute counsel sought in *First Wisconsin*, however, involved merely "a routine, tedious analysis of loan files relating to some 300 complex transactions . . . . which any competent lawyer by spending the substantial time which would be required could accomplish just as well as did [disqualified counsel]." *Id.* at 400 (dissenting opinion, Pell, J.). The dissent went on to remark that "[t]he only apparent advantage I have been able to see that will accrue to the [former client] is that of harassment of an opponent in litigation." *Id.* Thus, the *First Wisconsin* panel majority failed to examine the precise nature of the requested legal work once it decided that the documents fell within its broad definition of work product.

[78] In Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602 (8th Cir. 1977), the Eighth Circuit confronted a question of first impression: "Does a lawyer's representation of A, codefendant with B in a prior suit, disqualify the lawyer as representative of C against B in a subsequent related suit." *Id.* at 606. The district court had utilized *in camera* inspection to ensure that counsel had not received confidences or secrets of movants through movants'

the client will often suffer severe economic hardship if the court forces substitute counsel to repeat the work that produced the requested documents.[79] In *First Wisconsin*, for example, a team of fifteen lawyers had worked for more than a year prior to their disqualification to prepare the requested written materials.[80] Two factors create a substantial likelihood that work product prepared prior to disqualification will be extensive. First, formal litigation often does not begin until well into a dispute. Thus, counsel amasses a substantial work product before his former client is in a position to move for disqualification.[81] Second, given the *Hutton* rule's substantial relationship requirement and the complexity of issues involved in many cases, counsel cannot always anticipate disqualification. Even after a motion to disqualify, therefore, work often continues because counsel believes in good faith that no substantial relationship between the two representations exists.[82] Finally, although the financial loss to clients justifies imposing the burden of inspection on courts, courts may in some cases avoid this burden by relying on disqualified counsel's good faith assurances that his work product contains no secrets.[83]

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attorneys in the former suit. *Id.* at 605. The Eighth Circuit found no abuse of discretion. *Id.* at 610. *Cf.* Garner v. Wolfinbarger, 430 F.2d 1093, 1104 (5th Cir. 1970) (dictum) (courts can use *in camera* inspection to preserve confidentiality in trade secret cases), *cert. denied*, 401 U.S. 974 (1971). The Seventh Circuit en banc majority seemed receptive to *in camera* inspection of predisqualification work product. *See* No. 77-1786, slip op. at 9 n.6 (7th Cir. Sept. 22, 1978).

[79] Clients stand little chance of recovering, from disqualified counsel, fees paid for lost work product. Neither tort nor contract law provides a sound basis for recovery. Because of the great difficulties attorneys face in predicting whether a court will ultimately find the former and current representation substantially related, disqualification does not necessarily imply negligence on the part of counsel in continuing representation. Counsel can further eliminate any grounds for a negligence action by disclosing the risk of disqualification to the multiple clients and requiring them to decide whether to obtain new counsel before counsel does substantial work. Assuming such disclosure precludes a finding of fault on the part of counsel, the judicial disqualification order constitutes an impossibility defense that will excuse counsel from further performance of the employment agreement. *See* 6 S. WILLISTON, CONTRACTS § 1939 (rev. ed. S. Williston & G. Thompson 1938). If the client has already paid for legal work performed, he must bear the loss which arises when counsel cannot complete performance. *Id.* Attorneys may provide in the employment agreement that once counsel has disclosed the possibility of disqualification, the client bears the risk of lost work product.

[80] 571 F.2d at 392.

[81] For a discussion of this problem as it arose in *First Wisconsin* see note 70 *supra*.

[82] *See* note 71 *supra*.

[83] *See* text accompanying notes 45-46 *supra*. Alternatively, a court might order a master to inspect, *in camera*, the requested documents and assess the cost to the party seeking access to the work product.

CONCLUSION

Attorneys can often represent interests adverse to those of a former client without breaching any ethical duties. Unfortunately, the prevailing disqualification rule loses sight of the duties an attorney owes a former client. Courts seeking to prevent misuse of a former client's confidences developed a pragmatic disqualification test substituting relationship of issues for inquiry into whether counsel actually received confidences: If the subject matter of counsel's former representation and the issues in the current litigation are substantially related, the court will disqualify counsel without further inquiry. *E.F. Hutton & Co. v. Brown* incorporated this test into its disqualification rule, but applied the rule to a situation—former simultaneous representation—that precluded by definition receipt of confidences. *Hutton*'s adoption of the substantial relationship test for such cases obscures the rationales for attorney disqualification. Policies other than preventing misuse of client confidences—preventing misuse of secrets, avoiding the appearance of impropriety, and enforcing fiduciary duties—justify attorney disqualification in some, but not all cases in which the *Hutton* rule requires disqualification. Regrettably, courts have applied the *Hutton* rule to disqualification cases without examining the rule's separate underlying rationales. Moreover, courts failing to isolate these rationales have distended the rule to deny automatically access to all predisqualification work product. In the context of former simultaneous representation, only the need to preserve secrets of the former client bears on the work product issue. Courts can ensure that disqualified counsel's work product contains no secrets of the former client by inspecting *in camera* the requested documents. The severe financial hardship the current client of disqualified counsel may suffer from loss of work product outweighs any burden *in camera* inspection imposes on the court.

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