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LAW AND THE FAMILY

## **"Conflicts and the Appearance of Impropriety"**

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[New York Law Journal](#)

May 27, 1997

**CONFLICTS AND ISSUES OF impropriety go way beyond questions of law; they deal with people's sense of integrity and often, personal ethics and values. A poorly understood topic, the issue of conflicts has evolved over the years through trial and error - mostly error. A significant step toward helping lawyers stay on course came in the Court of Appeals decision in Tekni-Plex Inc. v. Myner and Landis. [FN1]**

**A leading-edge decision involving questions of "conflict of interest" and "appearance of impropriety," Tekni-Plex is highly enlightening to members of the matrimonial bar who are so often faced with thorny ethical issues. In Tekni-Plex, the Court of Appeals established a "bright line" test that deals with and avoids any suggestion of impropriety on the part of an attorney. It was accompanied by the assertion that the test mandates disqualification, irrespective of actual detriment, "even when there may not, in fact, be any conflict of interest." With reader-friendly application, it is intended to allow self-enforcement among members of the bar.**

**Disciplinary Rule (DR) 5-108 provides: "(a) Except with the consent of a former client after full disclosure, a lawyer who has represented the former client in a matter shall not: (1) Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." Canon 9 of the Canons of Ethics instructs a lawyer to avoid the appearance of impropriety.**

**In Tekni-Plex Inc. the Court of Appeals held that under DR 5-108(a)(1), a party seeking disqualification of its adversary's lawyer**

must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel; (2) that the matters involved in both representations are substantially related, and (3) that the interests of the current client and former client are materially adverse.

By satisfying these three criteria there arises an irrebuttable presumption of disqualification. The court acknowledged significant competing interests inherent in attorney disqualification cases. Perhaps the most prominent is that disqualification conflicts with the general policy favoring a party's right to representation by counsel of choice and, thus, deprives current clients of an attorney familiar with the particular matter.

### Three Pivotal Inquiries

The Court of Appeals held that in assessing whether the moving party has met its burden of satisfying each of the three requirements for disqualification under DR 5-108, courts should avoid mechanical application of blanket rules. Rather, the three pivotal inquiries - whether there exists a prior attorney-client relationship, a substantial relationship between the representations and adversity of interests - require careful appraisal of the interests.

Tang, who had been a director and a shareholder of Tekni-Plex Inc. became its sole shareholder, president, chief executive officer and sole director in 1986. Myner and Landis (M&L), were retained as Tekni-Plex counsel in 1971. It represented both Tekni-Plex, on legal matters, and Tang individually, on personal matters. In March 1994, Tang and Tekni-Plex agreed to merge with TP Acquisition Corp., whereby Tang sold the company to Acquisition for \$43 million. M&L represented both Tekni-Plex and Tang personally. Under the Agreement, Tekni-Plex merged into Acquisition, and ceased its separate existence. It conveyed to Acquisition all of its assets and liabilities. All of Tang's shares in Tekni-Plex were canceled.

The Agreement contained representations and warranties by Tang about environmental matters and provided for indemnification of Acquisition by Tang for any losses incurred as the result of misrepresentation or breach of warranty by either Tang or Tekni-Plex.

Following the transaction, Acquisition changed its name to "Tekni-Plex Inc." (new Tekni-Plex). In June 1994, new Tekni-Plex commenced an arbitration against Tang, alleging breach of the representations and warranties regarding the former Tekni-Plex's

**(old Tekni-Plex) compliance with environmental laws. Tang retained M&L to represent him in the arbitration. Supreme Court concluded that M&L should be disqualified from representing Tang in the arbitration.**

### **Attorney-Client Relationship**

**The Court of Appeals affirmed. It held that new Tekni-Plex, as the party seeking M&L's disqualification, had the burden of satisfying the three-prong test for disqualification by establishing that (1) it assumed the role of M&L's "former client," (2) the matters involved in both representations were substantially related, and (3) the interests of M&L's present client Tang were materially adverse to the interests of the former client.**

**The Court concluded that an attorney-client relationship between M&L and new Tekni-Plex existed. It also found that there was a substantial relationship between the current and former representations and that M&L's earlier representation of old Tekni-Plex provided the firm with access to confidential information conveyed by old Tekni-Plex about the environmental compliance matters at issue in the arbitration. M&L's duty of confidentiality with respect to these communications passed to new Tekni-Plex; yet its current representation of Tang created the potential for the law firm to use these confidences against new Tekni-Plex in the arbitration.**

**In *Cardinale v. Golinello*, [FN2] which was referred to extensively in *Tekni-Plex Inc.*, a partner in Halperin, Somers & Goldstick, PC, had represented defendant Golinello in connection with the purchase of corporate stock. After the transaction had been completed, attorney Schiller joined the Halperin firm. The firm continued to represent Golinello after Schiller's arrival, but Schiller did not render legal services on Golinello's behalf. Schiller subsequently left the Halperin firm and became associated with King & King.**

**Thereafter, plaintiffs retained the King firm in connection with claims against Golinello and members of the Halperin firm arising out of the earlier stock purchase. Upon learning that Schiller had been retained by the King firm to handle the matter, Golinello moved to disqualify both the King firm and Schiller. Its motion was granted.**

**The Court of Appeals affirmed. It identified specific characteristics of the firm that caused an unmistakable conflict. Halperin was "a small firm whose activities were characterized by an understandable informality" in which "there was a 'constant cross-pollination'" and "'cross current of discussion and ideas'" among the employees.**

## **Improper Appearance**

**Given that atmosphere, the Court believed Schiller had likely become aware of confidential information concerning Golinello while with Halperin. It was of "no moment" that Schiller had never rendered legal services to Golinello, because, by being an attorney associated with Golinello's attorney, the possibility was simply too great that he had wittingly or unwittingly acquired confidential information concerning Golinello. It also expressed concern over the appearance of impropriety, for if Schiller were allowed to represent plaintiffs in the action, laypersons might well believe that he was being hired not only because of his legal talent, but also because he possessed confidential information.**

**It concluded that Schiller was properly disqualified from the litigation. No inquiry was required. Disqualification arose "simply from the fact that the lawyer, or the firm with which [the lawyer] was then associated, represented the former client in matters related to the subject matter of the second representation." The King firm was similarly disqualified under the principle that if one attorney in a firm is barred from representing a client, then all attorneys in a firm are also precluded.**

**The Court of Appeals 1994 opinion in Solow v. Grace & Co. [FN3] was also referred to in Tekni-Plex Inc. Creating a framework for the "bright-line" test established by Tekni-Plex Inc., it distinguished large firms from small law firms in applying the rule. In Solow, Stroock & Stroock & Lavan represented plaintiffs in an action to recover damages for asbestos contamination from materials manufactured by defendant W. R. Grace & Co. Stroock had previously defended Grace in "City of Enterprise" litigation, an action that also involved the contamination of a premises by asbestos.**

**Grace moved to disqualify the Stroock firm, and its motion was granted. The Appellate Division affirmed, but the Court of Appeals reversed the order of disqualification. It stated that there was an irrebuttable presumption of shared confidences among attorneys employed by the firm that foreclosed the firm from representing others in the future in substantially related matters. However, it distinguished the case because the attorney who represented Grace in the prior matter, one of 372 attorneys employed by Stroock, left the firm well before it was retained in the litigation.**

**The Court concluded that in these circumstances, the strict enforcement of the irrebuttable presumption rule gave too much weight to ethical concerns and unduly impaired policy objectives**

**involving the right of clients to select counsel of their choice and favoring the mobility of attorneys.**

### **Competing Policy**

**The Court of Appeals stated that any fair rule of disqualification should consider the "circumstances of the prior representation." If an attorney has represented a client in an earlier matter and then attempts to represent another in a substantially related matter which is adverse to the interests of the former client, the presumption of disqualification is irrebuttable. However, under circumstances such as the Solow case, the ethical considerations that support a per se disqualification rule have considerably less force and may be overridden by competing policy concerns.**

**The Court reasoned that in such a situation the court must presume that the rights of the former client are jeopardized by Stroock's subsequent representation of plaintiffs, but Stroock should be allowed to rebut that presumption by facts establishing that the firm's remaining attorneys possess no confidences or secrets of the former client. It noted that this procedure does no violence to existing rules:**

**In firms characterized by the informality exhibited by the Halperin firm in *Cardinale*, disqualification will be imposed as a matter of law without a hearing. If the firm can demonstrate prima facie that there is no reasonable possibility that any of its other attorneys acquired confidential information concerning the client, a hearing should be held after which the court may determine that disqualification may be unnecessary. The evidence must be sufficient, however, to establish that the former client's interests are fully protected and to overcome any suggestion of impropriety. (emphasis supplied)**

**One may question whether Solow was considered by two later appellate matrimonial cases that never refer to Solow. In *Lammers v. Lammers*, [FN4] the wife's motion to disqualify the husband's attorney was granted where the husband's counsel on the appeal represented the wife during the months of February through April 1987 and concurrently represented her husband in connection with a conservatorship proceeding filed in April 1987.**

**The wife alleged that during the course of conferences with the attorney he obtained confidential information that he later used in a Family Court proceeding against her to create the impression that she had separate property. Although the attorney denied having acquired any confidential information, the record supported the**

wife's allegations by establishing, among other things, that counsel charged her \$6,693 for 46 hours of billable time that included more than 2 1/2 hours of conferences with her.

In *Leisman v. Leisman* [FN5] an action for a divorce, the Appellate Division affirmed an order that disqualified the wife's attorney. The husband had a preliminary consultation with the wife's attorney regarding a prior action between the husband and his former wife, which the court held may bear a substantial relationship to the current litigation and that would be subject to the attorney-client privilege.

### Conclusion

Motions to disqualify an attorney based on "conflict of interest" claims are almost always coupled with "appearance of impropriety" claims. The usual situation is where the attorney or the law firm has been retained or consulted by the movant spouse, who discloses confidences. Subsequently the attorney or the firm represents the other spouse. The principal of attribution "suggested impropriety" in *Cardinale* sufficient to disqualify the attorney and his law firm based on an irrebuttable presumption of shared confidences among attorneys employed by a small firm, which foreclosed it from representing the client in substantially related matters.

In *Solow*, the Court of Appeals distinguished between small and large law firms in applying a per se disqualification rule for "conflict of interest" or "appearance of impropriety" giving the large firm the opportunity to overcome any "suggestion of impropriety." In *Tekni-Plex Inc.*, a case involving a small law firm, the Court of Appeals enunciated a three-prong test that is applicable to small law firms including matrimonial practices and intended to be applied to both "conflict of interest" and "suggestion of impropriety" claims

A party seeking disqualification must prove the existence of a prior attorney-client relationship; the matters involved in such representation must be substantially related and the interests of the current-client and former client-client are mutually the same. These rules must not be mechanically applied. "Big Brother" with a close eye is watching.

**FN1.** 89 NY2d 123.

**FN2.** 43 NY2d 288 (1977).

**FN3.** 83 NY2d 303 (1994).

**FN4. 205 AD2d 432 (1994, 1st Dept.).**

**FN5. 208 AD2d 688 (1994, 2d Dept.).**

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**5/27/97 NYLJ 3, (col. 1)**

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