**3.1: Fiduciary Duties**

Attorneys are fiduciaries of their clients. As fiduciaries, they have certain legal duties to their clients, which include:

| Duty of Care | Ordinary care under the circumstances. |
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| Duty of Loyalty | Absolute loyalty. |
| Duty of Impartiality | Absolute candor. |
| Duty of Confidentiality | Absolute confidentiality. |

The duties of care, loyalty, impartiality, and confidentiality attach whenever an attorney-client relationship begins and may continue after an attorney-client relationship ends. Accordingly, attorneys may owe duties to both current and former clients, which may affect an attorney’s ability to continue representing those clients or to represent new clients.

**The Duty of Care**

Attorneys must exercise reasonable care when representing their clients. Typically, courts expect attorneys to use the degree of care expected of an ordinary attorney in similar circumstances. In other words, the duty of care imposed on an attorney is a duty of professional care, reflecting the expectations of both the client and other attorneys. An attorney who fails to exercise reasonable care is negligent, and may be liable in tort for malpractice. Attorneys may have a duty of care to both current and former clients, and any negligent act in relation to representation of a client may create a malpractice claim.

In order to prove a legal malpractice claim for a breach of the duty of care, the plaintiff must show:

1. The existence of a duty of care,
2. A breach of the duty of care by the defendant, and
3. Harm to the plaintiff caused by the breach.

A duty of care exists only if an attorney-client relationship exists. Accordingly, the first element of a malpractice claim for breach of the duty of care requires the plaintiff to prove the existence of an attorney-client relationship. The second element requires the plaintiff to prove that the defendant’s actions or omissions breached the duty of care. Typically, an attorney breaches the duty of care by providing negligent legal advice or by negligently failing to act in the client’s interests. The third element requires the plaintiff to prove that the defendant’s breach of the duty of care caused harm to the plaintiff. Like any other tort, a plaintiff can recover on a legal malpractice action claim only if the malpractice caused harm, and only to the extent of the harm.

**The Duty of Loyalty**

Attorneys are fiduciaries of their clients because clients justifiably vest confidence, good faith, reliance, and trust in their attorneys. Accordingly, attorneys have a fiduciary duty to maintain an undivided loyalty to their clients at all times. Attorneys must ensure that their duties to their clients never conflict with their own financial interests, the interests of another client, or any other interest that would affect their ability to provide competent and diligent representation.

Under the duty of loyalty, attorneys cannot represent anyone with an interest adverse to one of their clients, because it would create a conflict of interest. If that interest becomes an issue, the attorney’s loyalty would be divided between the two clients. Obviously, an attorney cannot represent two parties with interests directly adverse to each other, like opposing parties in litigation, because the conflict of interest is fundamental and unavoidable. [M.R. 1.7, cmt. [8]](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/comment_on_rule_1_7/). But the restriction imposed by the duty of loyalty applies more broadly. Any adverse or potentially adverse interest may create a conflict of interest, even if that interest is not yet at issue.

**The Duty of Impartiality**

As fiduciaries of their clients, attorneys have a duty to provide candid and impartial advice. In order to satisfy the duty of impartiality, attorneys must be able to exercise their independent professional judgment, without any conflicts of interest. If a client’s interests are adverse or potentially adverse to the attorney’s interests or the interests of another client, a conflict of interest exists that will compromise the attorney’s impartiality. Under those circumstances, attorneys will have an incentive to provide advice that benefits themselves or their other clients, and withhold advice that does not. Even if the client is not harmed by the advice itself, the client is harmed by not receiving candid and impartial advice reflecting the full range of available options.

For example, if an attorney represents a client in a contract negotiation, and the outcome of the negotiation could affect the interests of another client, a conflict of interest exists, because the attorney has an incentive to provide advice that will benefit the first client and withhold advice that will harm the second client. Even if the advice benefits both clients, the client receiving the advice is harmed by not receiving candid and impartial advice. Likewise, if an attorney both represents and has a financial interest in a corporation, a conflict of interest exists, because the attorney has an incentive to provide advice that will benefit the attorney’s investment and withhold advice that will not, depriving the client of the full range of options.

| [Model Rule 2.1: Advisor](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/) |
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| In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. |

**The Duty of Confidentiality**

As fiduciaries of their clients, attorneys also have a duty to maintain the confidentiality of private information disclosed to them by their clients. Under the duty of confidentiality, attorneys must never disclose confidential client information to a third party not bound by the duty of confidentiality or use confidential client information to benefit themselves or another client. Clients are entitled to confide in their attorney, secure in the knowledge that the confidential information they disclose cannot be used against them.

If a client’s interests are adverse or potentially adverse to the attorney’s interests or the interests of another client, a conflict of interest exists that will compromise the attorney’s ability to maintain confidentiality. Under those circumstances, attorneys have an incentive to use the confidential information for their own benefit or the benefit of their other client. Even if the client is not harmed by the use of the confidential information, the client is harmed by the betrayal of trust.

| [Model Rule 1.6: Confidentiality of Information](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/) |
| --- |
| 1. A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted. |

**Limitations on the Duties of an Attorney**

While the absolute duties of loyalty, impartiality, and confidentiality are the quintessence of professional responsibility, they are not always enforced to the letter. Taken literally, they would inevitably preclude attorneys from ever representing more than one client. It is always possible that the interests of a potential client will conflict with those of a current client. It is always possible that advice given to one client will affect the interests of another client. And it is always possible that confidential information disclosed by one client will be relevant to another. In practice, the duties of an attorney must yield to the practical realities of representation.

Accordingly, the duties of attorneys are shaped by the rights of clients, attorneys, and the bar.

* Clients are entitled to hire the attorney of their choice, and may consent to representation, despite a formal conflict.
* Attorneys are entitled to represent more than one client, so long as they disclose any conflicts and the client consents.
* The bar is entitled to prevent parties from using conflicts strategically to disqualify opposing counsel.

In other words, clients may provide informed consent to certain conflicts of interest. Attorneys may represent clients with conflicts of interests under certain circumstances, so long as the clients provide informed consent. And under certain circumstances, the bar may even permit attorneys to represent parties with conflicting interests without consent.

However, attorneys must *always* observe the **duty of care**. An attorney who fails to exercise reasonable care under the circumstances is negligent and potentially liable for malpractice, even if the client consents.

| **CHECK YOUR KNOWLEDGE** |
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| T or F the Duty of Confidentiality protects the communications between the attorney and the client. |
| General Counsel for Acme Corporation, who is a 30% shareholder, is asked to advise on a purchase of land. General Counsel owns part of this land. Which duty might this violate? |
| Which duty can never be waived? |

| [***Ishmael v. Millington*, 241 Cal. App. 2d 520 (Cal. Ct. App. 1966)**](https://scholar.google.com/scholar_case?case=6017611332315624403) |
| --- |
| **Summary:** Earl F. Anders and Roberta Ishmael were married and owned a trucking company. Eventually, they decided to divorce. Under California law, Ishmael was entitled to 50% of the marital assets. Attorney Robert Millington had previously represented Anders and his company. Anders asked Millington to represent Ishmael. He agreed, and prepared a settlement agreement that Ishmael signed. Ishmael was entitled to $41,250, but under the agreement she received $8,807. Ishmael filed a malpractice action, and the trial court granted Millington’s motion for summary judgment. The appellate court reversed, holding that a jury could have found that Millington breached his duty of care. |

This is a legal malpractice action in which the plaintiff-client appeals from a summary judgment granted the defendant-attorney. The factual narrative will possess heightened significance against a backdrop of general doctrine:

Actionable legal malpractice is compounded of the same basic elements as other kinds of actionable negligence: duty, breach of duty, proximate cause, damage. Touching the first element, duty, the general rule is that “the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.”

In this case the defense is that the client sought no advice from the attorney and was given none; by the client's express admission, she did not rely on the attorney, thus, that her alleged damage was not proximately caused by the attorney's cause of action.

The facts are presented by summary judgment affidavits, which include extracts from depositions. There is no significant conflict in the evidence. Roberta Ishmael, the plaintiff, was formerly married to Earl F. Anders. The couple had three children. They lived in Gridley, where Mr. Anders was a partner in a family trucking business. Domestic difficulties resulted in a separation, and Mrs. Anders moved to Sacramento where she secured employment. She and her husband agreed upon a divorce and property settlement. She knew that she was entitled to one-half the marital property.

Mr. Anders called upon defendant Robert Millington, a Gridley attorney who had for some time represented him and his trucking firm. Mr. Millington advised Anders that if he could establish adulterous conduct by Mrs. Anders, he might be awarded more than one-half the community property. For one reason or another there was a decision that the wife rather than the husband would apply for divorce. At Anders’ request Mr. Millington agreed to act as the wife's attorney, to prepare the necessary papers and to file a divorce action for her. He drew up a complaint and a property settlement agreement and handed these documents to Mr. Anders, who took them to Sacramento and had his wife sign them. She knew that Mr. Millington had represented her husband in the past. Faulty recall prevents ascertainment whether Mrs. Anders ever met personally with the attorney before the papers were drawn. She did not discuss the property settlement agreement with the attorney before she signed it. Mr. Millington believed the divorce and property settlement arrangements were “cut and dried” between the husband and wife; he “assumed that she knew what she was doing;” he believed that she was actually getting half the property but made no effort to confirm that belief.

In her deposition the former Mrs. Anders testified that in signing the complaint and property settlement agreement she relied solely on her husband and did not rely on the attorney. Later, when so instructed, she traveled to the courthouse at Oroville, where she and her corroborating witness met Mr. Millington. He escorted her through a routine ex parte hearing which resulted in an interlocutory divorce decree and judicial approval of the property settlement.

According to her complaint, the former Mrs. Anders discovered that in return for a settlement of $8,807 she had surrendered her right to community assets totaling $82,500. Ascribing her loss to the attorney's negligent failure to make inquiries as to the true worth of the community property, she seeks damages equivalent to the difference between what she received and one-half the asserted value of the community.

By the very act of undertaking to represent Mrs. Anders in an uncontested divorce suit, Mr. Millington assumed a duty of care toward her, whatever its degree. Described in terms traditionally applicable to the attorney-client relationship, the degree of care exacted by that duty was that of a figurative lawyer of ordinary skill and capacity in the performance of like tasks.

The degree of care is related to the specific situation in which the defendant found himself. The standard is that of ordinary care under the circumstances of the particular case. A lawyer owes undivided loyalty to his client. Minimum standards of professional ethics usually permit him to represent dual interests where full consent and full disclosure occur. The loyalty he owes one client cannot consume that owed to the other. Most descriptions of professional conduct prohibit his undertaking to represent conflicting interests at all; or demand that he terminate the three-way relationship when adversity of interest appears. Occasional statements sanction informed representation of divergent interests in “exceptional” situations. Even those statements demand complete disclosure of all facts and circumstances which, in the attorney's honest judgment, may influence his client's choice, holding the attorney civilly liable for loss caused by lack of disclosure.

Divorces are frequently uncontested; the parties may make their financial arrangements peaceably and honestly; vestigial chivalry may impel them to display the wife as the injured plaintiff; the husband may then seek out and pay an attorney to escort the wife through the formalities of adjudication. We describe these facts of life without necessarily approving them. Even in that situation the attorney’s professional obligations do not permit his descent to the level of a scrivener. The edge of danger gleams if the attorney has previously represented the husband. A husband and wife at the brink of division of their marital assets have an obvious divergence of interests. Representing the wife in an arm’s length divorce, an attorney of ordinary professional skill would demand some verification of the husband’s financial statement; or, at the minimum, inform the wife that the husband's statement was unconfirmed, that wives may be cheated, that prudence called for investigation and verification. Deprived of such disclosure, the wife cannot make a free and intelligent choice. Representing both spouses in an uncontested divorce situation (whatever the ethical implications), the attorney’s professional obligations demand no less. He may not set a shallow limit on the depth to which he will represent the wife.

The general standard of professional care is appropriate to the garden variety situation, where the attorney represents only one of several parties or interests. It falls short of adequate description where the attorney's professional relationship extends to two clients with divergent or conflicting interests in the same subject matter. A more specific statement of the same rule is needed to guide the fact trier to the law's demands when the attorney attempts dual representation. In short, an attorney representing two parties with divergent interests must disclose all facts and circumstances which, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to make free and intelligent decisions regarding the subject matter of the representation.

In view of the degree of care imposed by law on an attorney in defendant's position, a fact trier might reasonably find him negligent in failing to disclose to plaintiff the limited representation she was receiving and in failing to point to the possibility of independent legal advice. The question of breach was thus a triable issue which could not be resolved on a summary judgment motion.

Legal malpractice may consist of a negligent failure to act. The attorney's negligence, whether consisting of active conduct or a failure to act, need not be the sole cause of the client's loss. Here the attorney is charged not with erroneous advice, but with failure to advise, failure to investigate, failure to disclose. The wife's reliance on her husband’s alleged misrepresentations is not at all inconsistent with the claim that her loss was the result of the attorney's negligent failure. A jury might find that the husband's misrepresentations were a realizable likelihood which made the attorney's inaction negligent, thus forming a concurrent (and not superseding) cause of harm. Causation was a jury question which could not be resolved as a matter of law.

Contributory negligence on plaintiff's part was specially pleaded and, if established, would bar malpractice recovery. Plaintiff, as she testified, relied on her husband's list of assets; apparently did not trouble to investigate or even to inquire whether she was getting her share of property; was seemingly content to let her husband take charge; accepted his attorney for the limited purpose of piloting her through the divorce formalities. A court, however, cannot say that reasonable jurors would inevitably characterize her conduct as contributory negligence. That issue was a triable issue of fact.

Thus, notwithstanding the lack of conflict in the evidence, the summary judgment rests on the determination of issues reserved for decision by a fact trier and which could not be resolved as a matter of law. Since triable issues of fact existed, the motion should have been denied.

| **CHECK YOUR KNOWLEDGE** |
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| 1. Did Ishmael assert a violation of the duty of care, the duty of loyalty, or both? |
| 1. Did Ishmael show a violation of the duty of care, the duty of loyalty, or both? |
| 1. Could Ishmael have prevailed on a violation of either the duty of care or the duty of loyalty? |

**The Appearance of Impropriety**

*Let this, my young Readers, be your constant Maxim, That no Man can be good enough to enable him to neglect the Rules of Prudence; nor will Virtue herself look beautiful, unless she be bedecked with the outward Ornaments of Decency and Decorum.*[[1]](#footnote-0)

The ABA has long held that judges should avoid “the appearance of impropriety.” When the ABA adopted the Canons of Judicial Ethics in 1924, Canon 4 held that judges should avoid “the appearance of impropriety.” When it adopted the Code of Judicial Conduct in 1972, Canon 2 held that a judge should avoid “the appearance of impropriety in all his actions.” When it adopted the Model Code of Judicial Conduct in 1990, Canon 2A maintained the appearance of impropriety standard, holding that “the test for the appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.” And Rule 1.2 of the revised Model Rules of Judicial Conduct retains the same standard.

But lawyers have resisted applying the appearance of impropriety standard to themselves. When the ABA adopted the Model Code of Professional Responsibility in 1969, it included the appearance of impropriety standard only as an “ethical consideration,” rather than a “disciplinary rule,” making it aspirational, rather than mandatory. And when the ABA adopted the Model Rules of Professional Conduct in 1983, it eliminated the appearance of impropriety standard entirely.

**Model Code of Professional Responsibility**

**Canon 9: A Lawyer Should Avoid Even the Appearance of Professional Impropriety**

**Ethical Consideration 9-2**

Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

| **Restatement (Third) of the Law Governing Lawyers § 121(c)(iv): The perspective for determining conflict of interest** |
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| This Section employs an objective standard by which to assess the adverseness, materiality, and substantiality of the risk of the effect on representation. The standard of this Section is not the “appearance of impropriety” standard formerly used by some courts to define the scope of impermissible conflicts. That standard could prohibit not only conflicts as defined in this Section, but also situations that might appear improper to an uninformed observer or even an interested party.  The propriety of the lawyer's action should be determined based only on facts and circumstances that the lawyer knew or should have known at the time of undertaking or continuing a representation. It should not be evaluated in light of information that became known only later and that could not reasonably have been anticipated.  The standard of this Section allows consideration in a given situation of the social value of the lawyer's behavior alleged to constitute the conflict. For example, a lawyer's statement about a matter of public importance might conflict with a client's objectives, but the public importance of free expression is a factor to be considered in limiting the possible reach of the relevant conflicts rule.  Whether there is adverseness, materiality, and substantiality in a given circumstance is often dependent on specific circumstances that are ambiguous and the subject of conflicting evidence. Accordingly, there are necessarily circumstances in which the lawyer's avoidance of a representation is permissible but not obligatory. A lawyer also would be justified in withdrawing from some representations in circumstances in which it would be improper to disqualify the lawyer or the lawyer's firm. |

| [***Bd. Of. Ed. Of. NY City v. Nyquist*, 590 F. 2d 1241 (2d Cir. 1979)**](https://scholar.google.com/scholar_case?case=10526314715756644062) |
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| **Summary:** The Board of Education of the City of New York used separate seniority lists when deciding layoffs of male and female Health and Physical Education teachers (“HPETs”). The Commissioner of Education held that using separate lists was illegal, but the Department of Health, Education, and Welfare disagreed, arguing that merging the lists would violate Title IX by disproportionately affecting women. The Board filed a declaratory judgment action against three male and three female HPETs. The male HPETs were represented by James R. Sandner of New York State United Teachers. The female HPETs filed a motion to disqualify Sandner, on the ground that their union dues helped pay for his services. The district court granted the motion, but the Second Circuit reversed, holding that no conflict of interest existed, and that any appearance of impropriety was insufficient to require disqualification. |

This unusual case presents difficult questions regarding the appropriate role of federal courts when called upon by disqualification motions to evaluate the conduct of attorneys who appear before them. Three male Health and Physical Education teachers (HPETs) in the New York City school system appeal from an order of the United States District Court for the Southern District of New York, disqualifying their counsel upon the motion of three female HPETs. Appellant male teachers claim that the order was an abuse of discretion because it disregarded their constitutional rights, and was without any sound basis. For reasons set forth below, we hold that the motion to disqualify should have been denied, and we therefore reverse the order of the district court.

The contending parties on appeal - the male and female HPETs - are all defendants in this declaratory judgment action brought by the Board of Education of the City of New York and the Chancellor of the City School District. In February 1977, these plaintiffs found themselves in the middle of apparently contradictory positions held by the Commissioner of Education of the State of New York and the office of Civil Rights of the Department of Health, Education and Welfare (HEW). In a case involving one of these appellants, the State Commissioner had ruled that the use of separate seniority lists for male and female HPETs for the purpose of layoffs was illegal. Shortly thereafter, HEW initially indicated to the Board that HEW took exactly the contrary view, that merger of the lists would violate Title IX. Caught in this apparent dilemma, plaintiffs provisionally merged the seniority lists of male and female HPETs and commenced this action for a declaratory judgment in which all concerned parties would be present. The complaint named as defendants HEW and its Secretary, the New York State Commissioner of Education, the State Division of Human Rights, three named male HPETs, individually and as representatives of all male HPETs, and three named female HPETs, individually and as representatives of all female HPETs. The male and female defendants have asserted counterclaims and cross-claims. The relief sought by plaintiffs is a judgment declaring that the provisional policy of merging the seniority lists, effective February 1, 1977 but not retroactively, is lawful.

The two classes of defendants are the actual contending parties in this litigation. The male HPETs allege that maintaining separate seniority lists for male and female HPETs is illegal and that:

all defendant male Health and Physical Education teachers who were laid off on or after September 1, 1975, are entitled to reinstatement with back pay and all other retroactive benefits incident to their positions to the date of their layoff if less senior female teachers were retained at that time or at any time thereafter.

The female HPETs allege that their seniority status perpetuates past discriminatory practices of plaintiffs and that if the provisional merged seniority list is used for layoff purposes “it will result in the layoff of at least six times as many female HPETs as male HPETs.” The stakes in the lawsuit are obviously high.

The male HPETs are represented in this action by James R. Sandner, Esq., who is also General Counsel of New York State United Teachers (NYSUT). That organization is an unincorporated membership association of approximately 180,000 teachers, librarians, guidance counsellors and other school related employees of the almost 800 school districts in New York State. We are told that in each of the school districts there is a separate local union, which is the exclusive bargaining representative for employees in that unit. The majority of these individual unions have chosen to affiliate themselves with NYSUT, but the latter does not collectively bargain for any public employees. It does, however, provide a number of services to its members, including a legal service program under the direction and control of Mr. Sandner. Both the male and female HPETs are represented in collective bargaining by the American Federation of Teachers (AFT), to whom they pay dues. A portion of the dues paid to the AFT is remitted to NYSUT, which, at least in part, apparently finances the legal service program.

Under the program, NYSUT’s members may apply to obtain legal representation free of charge. Mr. Sandner and his staff may take an applicant's case when, in their judgment, the claim is both job-related and meritorious. It is through this procedure that the male defendants retained Mr. Sandner as their attorney. NYSUT itself, however, has taken no position on the merits or on any other issue in this litigation.

The female HPETs moved to disqualify Mr. Sandner as counsel for the male HPETs or, in the alternative, to require NYSUT to furnish counsel for the female teachers. Judge Lasker concluded that “the female teachers are paying, in part, for their opponents’ legal expenses.” This violated “at least the spirit, if not the letter, of Canon 9 of the Code of Professional Responsibility that ‘A lawyer should avoid even the appearance of impropriety.’” Accordingly, the judge granted the motion and this appeal by the male HPETs followed.

We begin the discussion by noting that, curiously, the power of the federal courts to disqualify attorneys in litigation pending before them has long been assumed without discussion, and attention has focused on identifying the circumstances in which exercise of the power is appropriate. Our reading of the cases in this circuit suggests that we have utilized the power of trial judges to disqualify counsel where necessary to preserve the integrity of the adversary process in actions before them. In other words, with rare exceptions disqualification has been ordered only in essentially two kinds of cases: (1) where an attorney's conflict of interests in violation of Canons 5 and 9 of the Code of Professional Responsibility undermines the court’s confidence in the vigor of the attorney's representation of his client, or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example, in violation of Canons 4 and 9, thus giving his present client an unfair advantage. In such cases, we note Chief Judge Kaufman's oft-quoted admonition that,

When dealing with ethical principles, we cannot paint with broad strokes. The lines are fine and must be so marked. Guideposts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after a painstaking analysis of the facts and precise application of precedent.

But in other kinds of cases, we have shown considerable reluctance to disqualify attorneys despite misgivings about the attorney's conduct. This reluctance probably derives from the fact that disqualification has an immediate adverse effect on the client by separating him from counsel of his choice, and that disqualification motions are often interposed for tactical reasons. And even when made in the best of faith, such motions inevitably cause delay. For example, this lawsuit has been at a standstill now for close to a year.

Weighing the needs of efficient judicial administration against the potential advantage of immediate preventive measures, we believe that unless an attorney's conduct tends to “taint the underlying trial” by disturbing the balance of the presentations in one of the two ways indicated above, courts should be quite hesitant to disqualify an attorney. Given the availability of both federal and state comprehensive disciplinary machinery, there is usually no need to deal with all other kinds of ethical violations in the very litigation in which they surface.

With these thoughts in mind, we turn to the ethical problems presented by the instant appeal. The district court disqualified Mr. Sandner because a “layman's faith would be severely troubled” by the fact that “the female teachers are paying, in part, for their opponents' legal expenses.” There is no claim, however, that Mr. Sandner feels any sense of loyalty to the women that would undermine his representation of the men. Nor is there evidence that his representation of the men is anything less than vigorous. There is also no claim that the men have gained an unfair advantage through any access to privileged information about the women. Were there any such problem, the women would not be asking, and the district judge would not have ordered, as an alternative to disqualification of Mr. Sandner, that NYSUT pay their attorney's fees. Thus, in no real sense can Mr. Sandner's representation of the men be said to taint the trial.

We agree that there is at least some possibility that Mr. Sandner's representation of the men has the appearance of impropriety, because of the large number of union members involved and the public importance of the civil rights issue at the heart of the dispute. But in any event, we think that disqualification was inappropriate. We believe that when there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases. This is particularly true where, as in this case, the appearance of impropriety is not very clear. We note that while on one hand there is an element of unfairness to the women, on the other it seems probable that if NYSUT were to take a position on the merits of this litigation, Mr. Sandner's representation of the men would apparently be within the protection of the "fair representation" cases. This means that the question whether Mr. Sandner's conduct is unethical could be a very close one. Since disqualification entails immediate disruption of the litigation, it is better to relegate any questions about Mr. Sandner's conduct to other appropriate proceedings. In addition to the possibility of grievance proceedings and an internal union attack on the legal plan, it may be that judicial construction of the plan, in an appropriate lawsuit, could provide some relief for the women.

We therefore reverse the order of the district court disqualifying counsel, and remand for continuation of the action.

| **CHECK YOUR KNOWLEDGE** |
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| 1. Who does Sandner represent? Does he represent the female members of the teachers union? Does he have any duties to the plaintiffs in this action? |
| 1. Why might someone be concerned about an appearance of impropriety under these circumstances? Why did the court find that any appearance of impropriety did not prevent Sandner from representing the male teachers? |
| 1. Do you agree with the court’s conclusion? Would you feel differently if the male teachers were paying for their own representation? Would you feel differently if the union provided representation for the female teachers? |

[**Model Code of Judicial Conduct: Canon 1**](https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/mcjc_canon_1/)

[**Rule 1.2: Promoting Confidence in the Judiciary**](https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/mcjc_canon_1/ruke1_2promotingconfidenceinthejudiciary/)

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

[**Rule 1.2, Comment 5**](https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/mcjc_canon_1/ruke1_2promotingconfidenceinthejudiciary/commentonrule1_2/)

The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.

| [***In re Disciplinary Proc. Against Sanders*, 145 P. 3d 1208 (Wa. 2006)**](https://scholar.google.com/scholar_case?case=8588667049531434772) |
| --- |
| **Summary:** Justice Sanders of the Washington Supreme Court visited the Special Commitment Center on McNeil Island, which houses people civilly committed as sexually violent predators. During the visit, Sanders accepted documents from inmates and asked them about volitional control, among other things. The Attorney General of Washington filed a complaint against Sanders with the Washington Commission on Judicial Conduct. After an investigation and a hearing, the Commission found that Sanders violated Canon 1 by failing to enforce high standards of judicial conduct and also violated Canon 2(A) by failing to promote public confidence in the integrity and impartiality of the judiciary. Sanders appealed and the court affirmed. |

A visit by a judicial officer to a special facility for sexually violent predators is not in itself inappropriate conduct under the Code of Judicial Conduct. However, conversations with the residents of the facility concerning the reasons for their confinement, particularly when one or more of these residents has a matter or matters pending before the court on which the judge sits, can violate the Code of Judicial Conduct. By asking questions of inmates who were litigants or should have been recognized as potential litigants on issues currently pending before the court, Justice Richard B. Sanders violated the Code of Judicial Conduct. His conduct created an appearance of partiality as a result of ex parte contact.

The Washington Commission on Judicial Conduct received a complaint on March 18, 2003, regarding Justice Sanders' conduct while visiting the Special Commitment Center (SCC) on McNeil Island. The Commission conducted an independent investigation of the allegations, determined that sufficient evidence existed to support the complaint, and sent a Statement of Allegations to Justice Sanders on October 8, 2003. In April 2004, the Commission determined that probable cause existed to believe that Justice Sanders violated Canons 1, 2(A) and 3(A)(4) of the Code of Judicial Conduct. After a fact-finding hearing, the Commission issued its decision holding that Justice Sanders violated Canons 1 and 2(A), but did not violate Canon 3(A)(4). The Commission found that Justice Sanders' conduct violated Canon 1 by failing to enforce high standards of judicial conduct and also violated Canon 2(A) by failing to promote public confidence in the integrity and impartiality of the judiciary. The Commission imposed the sanction of admonishment. Under Discipline Rules for Judges 3, Justice Sanders filed a notice of contest.

Justice Sanders embarked on a tour of the SCC despite warnings from his colleagues on the Supreme Court about potential ex parte contact with litigants. During the tour of this facility, Justice Sanders accepted documents on two separate occasions from the inmates. Moreover, in meetings with the residents, some of whom had cases pending before the court, he directly asked them about the issue of volitional control.

At the time of the visit, the Supreme Court was in the process of deciding *In re Detention of Thorell*. Drafts of both a majority opinion and a dissent by Justice Sanders were circulating among the justices at the Supreme Court. *Thorell* was a seminal case in which separate actions by six petitioners were combined, including at least one of the SCC residents with whom Justice Sanders met. A pivotal issue before the Supreme Court in *Thorell* was volitional control. The court was weighing whether the “fact finder must determine that the person facing commitment as a sexually violent predator (SVP) has serious difficulty controlling behavior and, if so, whether this determination must be a separate finding based upon a jury instruction.” Thus, the factual record was before the court in each of the consolidated six cases.

The Commission held, and we agree, that the record established through clear, cogent, and convincing evidence that Justice Sanders violated Canons 1 and 2(A). In support of that holding, the findings reference two of the three letters from resident Andre Brigham Young inviting the justices to visit McNeil Island. Those letters indicate that the residents were looking for something more than just a tour of the facility. In fact, Young suggested that others (opposing counsel and defense attorneys) should be asked to attend to avoid “the appearance of partiality.” The letters in and of themselves should have given sufficient notice to Justice Sanders that this visit had the potential of being more than an institutional tour. Additional warning flags were also raised by three justices who expressed concerns about the visit and potential problems. Moreover, a simple computer check would have revealed that Rickey Calhoun and Andre Brigham Young, two people mentioned in the prior communication with Justice Sanders, had cases pending before the Supreme Court. When Justice Sanders met with the residents in small groups, he warned the residents that he could not hear their particular case issues. However, these warnings were followed by specific questions asking the residents about their confinement and what they thought of volitional control.

The Commission justifiably found that Justice Sanders, with full awareness of the potential for situations that could conflict with the Code of Judicial Conduct, embarked on the tour and met with litigants who had pending cases before the court. Further, by raising such critical issues as volitional control with these litigants, Justice Sanders created a situation that clearly violated both the letter and the spirit of the canons and created serious concern for both counsel and fellow jurists about the appearance of partiality.

Justice Sanders claims that a violation of Canons 1 and 2(A) cannot be found without a concomitant violation of a proscribed act or canon and thus the Commission's failure to find a direct violation of Canon 3(A)(4) precludes it from finding a violation of the other canons. We disagree.

In our view, *Turco* is dispositive. There, the court found that the judge's act of striking his wife in public had a sufficient nexus to the judicial role, particularly when the judge heard domestic violence cases. If extrajudicial tortious conduct can provide a nexus to the judicial role, then a fortiori, judicial conduct can provide a basis for a violation of Canons 1 and 2(A). In the instant case, Justice Sanders’ actions were not simply undertaken as a private citizen, but rather within the context of his judicial duties. Our conclusion is underscored by the decision in *In re Disciplinary Proceeding Against Ritchie*. In that case, Judge John G. Ritchie argued that Canons 1 and 2(A) of the Code of Judicial Conduct, together with the statute regulating the behavior, were too vague to give him adequate notice of the prohibited behavior. In denying the claim, the court stated:

It is true the conduct pursuant to which he was disciplined is not clearly proscribed by RCW 3.58.040, insofar as the statute does not expressly prohibit judges from combining business and pleasure trips, and does not define “reasonable traveling expenses” or “business of the court”.

Judge Ritchie's vagueness challenge is ultimately immaterial, however, because he was not disciplined for violating the statute. Rather, he was censured for violating Canons 1 and 2(A) of the Code of Judicial Conduct which hold judges to a higher standard of integrity and require avoiding even the appearance of impropriety.

As noted in the Commission's decision, there are a number of facts in this case that, when taken together, clearly demonstrate that a predictable appearance of partiality could be foreseen.

Where a judge’s decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence can be debilitating. The canons of judicial conduct should be viewed in broad fashion, and judges should err on the side of caution. Under Canon 3(D)(1), “judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.” In *Sherman*, the court found that where a trial judge “may have inadvertently obtained information critical to a central issue on remand, a reasonable person might question his impartiality.” The court set the test for determining impartiality:

In deciding recusal matters, actual prejudice is not the standard. The Commission recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating. The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that “a reasonable person knows and understands all the facts.”

This court in *In re Disciplinary Proceeding Against Sanders* noted that the interest of the State in maintaining and enforcing high standards of judicial conduct under the auspices of Canon 1 is a compelling one. In *Sanders*, this court balanced that interest against Justice Sanders' First Amendment rights and found that an independent basis for finding a violation of Canon 1 under those circumstances was not possible. Justice Sanders argues that the language in Canon 1 is hortatory and therefore cannot stand as an independent basis for a violation of the Code of Judicial Conduct. In the instant case, Canon 1 sets the conceptual framework under which Canon 2(A) operates. Canon 2(A) provides the more specific restraint, to wit: “Judges should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Under the circumstances of this case, Canon 1 taken in conjunction with Canon 2(A) provides a sufficiently specific basis to find a violation of the Code of Judicial Conduct. Here, it was clear that there was a substantial basis and expectation that Justice Sanders would be in contact with possible litigants who had pending litigation before the court and that this contact would be viewed as improper. We concur with the Commission's finding that it was clearly reasonable to question the impartiality of the justice under the circumstances of this case.



| **CHECK YOUR KNOWLEDGE** |
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| 1. Why did the court hold that visiting the Special Commitment Facility did not create an appearance of impropriety, but speaking to a resident of the facility did? |
| 1. Would it create an appearance of impropriety for a judge to visit a prison? What if the judge spoke to an inmate? |
| 1. Would it create an appearance of impropriety for a judge to speak with a person who had a pending civil action? |
| 1. What should the judge have done to learn about volitional control among inmates civilly committed as sexually violent predators, other than speaking to inmates directly? |

**Further Reading:**

* [Peter W. Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 Stan. L. Rev. 593 (1992)](https://www.jstor.org/stable/pdf/1228976.pdf?seq=1#page_scan_tab_contents)
* [W. Bradley Wendel, *Impartiality in Judicial Ethics: A Jurisprudential Analysis*, 22 Notre Dame J.L. Ethics & Pub. Pol'y 305 (2008)](https://scholarship.law.nd.edu/ndjlepp/vol22/iss2/3/)
* [Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 Hofstra Law Review 1337 (2006)](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=926437)

1. Henry Fielding, *The History of Tom Jones, A Foundling* (1749). [↑](#footnote-ref-0)