

IN THE MATTER OF
BRUNSWICK CORPORATION, ET AL.

Docket 9028. Interlocutory Order, Feb. 22, 1980

ORDER DENYING MOTION TO DISQUALIFY COUNSEL

By motion filed with the Secretary on December 26, 1979, respondents Brunswick Corporation and Mariner Corp. (hereinafter "Movants") move that the law firms of Mori and Ota and Pettit & Martin be disqualified as counsel for Yamaha Motor Company, Ltd. in this proceeding.¹ Movants contend that disqualification is required because of the actions of Ronald J. Dolan, a former Commission employee. For the reasons stated below, this motion is denied.²

I

The facts regarding this matter are set forth in Mr. Dolan's affidavits of December 14, 1979 ("Dolan Affidavit I") and January 11, 1980 ("Dolan Affidavit II"), the accuracy of which are supported by the December 14, 1979 ("Ferguson Affidavit I") and January 11, 1980 ("Ferguson Affidavit II") affidavits of John P. Ferguson; the January 9, 1980, affidavit of Jun Mori; the January 9, 1980, affidavit of Henry Y. Ota; and the December 11, 1979, affidavit of Shigeru Watanabe.

Prior to June 8, 1979, Mr. Dolan was an Assistant Director of the Commission's Bureau of Competition, and had served as the Commission's lead trial counsel in Dkt. 9028. Dolan Affidavit I ¶ 3. During his employment at the Commission, Mr. Dolan did not discuss with Mori and Ota either his own employment or the possibility that Pettit & Martin might serve as counsel for Yamaha. Dolan Affidavit II ¶ 16; Watanabe Affidavit ¶ 4. Mr. Dolan left the Commission's employment on June 8, 1979, and became employed by Pettit & Martin as "counsel" on July 2, 1979. In July 1979 an announcement of Mr. Dolan's employment by Pettit & Martin was sent to Jun Mori of Mori and Ota. Dolan Affidavit II ¶ 3.

On September 18, 1979, Mr. Mori telephoned Mr. Dolan and arranged to meet with him. *Id.* at ¶ 4. Mr. Dolan and Mr. Mori dined together on September 20, 1979, and Mr. Dolan "broached the possibility of Pettit & Martin handling some of the Washington legal business for Mori and Ota's clients." *Id.* at ¶ 5. Mr. Mori stated that the only Washington

¹ By motions of January 8 and 21, 1980, Movants sought a stay of the proceeding until the Commission ruled on their disqualification motion. By orders of January 18 and 23, 1980, the Commission denied these motions.

² The Commission having found oral argument on this motion to be unnecessary, Movants' request for such argument is denied. Movants' motion for leave to file their reply of January 21, 1980, is granted, as is Yamaha's motion for leave to file its reply of January 22, 1980.

anti-trust business then being handled by his firm was the *Brunswick* matter, in which Mori and Ota alone had represented Yamaha throughout the initial trial and appeal. Mr. Mori indicated his feeling that because of Mr. Dolan's previous involvement in the proceeding at the Commission, Mr. Dolan could not participate in any such representation. Mr. Dolan responded that Pettit & Martin could handle the matter so long as he personally was screened, and he suggested that John R. Ferguson, a Pettit & Martin partner, be asked to undertake the representation. Mr. Dolan described the nature of Mr. Ferguson's qualifications. This was the first discussion between Mr. Mori and Mr. Dolan regarding the possible representation of Yamaha by Pettit & Martin. *Id.*

At the time, the Commission had under consideration complaint counsel's appeal from the administrative law judge's dismissal of the complaint in this proceeding. At their September 20, 1979, meeting, Mr. Mori asked Mr. Dolan if he knew if the Commission would soon issue its decision, and Mr. Dolan replied that he did not know, but would inform Mr. Mori if he learned anything. *Id.* On October 3, 1979, Mr. Mori called Mr. Dolan to ask again if he knew whether publication of the Commission's decision was imminent. Mr. Dolan advised Mr. Mori that "rumor had it that the Commission would soon reverse the Administrative Law Judge's Initial Decision, but that this rumor had surfaced in the past and [had] proven to be unfounded." *Id.* at ¶ 6.

The Commission's opinion and order remanding this matter to the administrative law judge for the taking of additional evidence was issued on November 9, 1979. Mr. Dolan learned of the Commission's decision, and obtained a copy of it, on November 16, 1979. *Id.* at ¶ 7. That same day, Mr. Dolan telephoned Mr. Ota of Mori and Ota to tell him of the Commission's decision. *Id.* at ¶ 8. Mr. Ota said he had already learned of the Commission's decision from the administrative law judge's clerk, but "indicated a continuing interest in retaining Pettit & Martin to represent Yamaha." *Id.* Later that evening, Mr. Dolan informed Mr. Ferguson of his discussion with Mr. Ota, and Mr. Dolan subsequently sent a copy of Mr. Ferguson's resume to Mori and Ota. *Id.*

Since November 16, 1979, Mr. Dolan has not spoken to anyone at Mori and Ota about this matter. *Id.* Mr. Dolan's subsequent discussions with Pettit & Martin personnel about this matter have been limited to discussions to enable Pettit & Martin to evaluate the propriety of its participation in this matter. *Id.* at ¶¶ 9-14. Since he left the Commission, Mr. Dolan has had no discussion with anyone at either law firm about the pre-complaint investigation in *Brunswick*, the facts or

theories involved in the litigation, trial tactics, or Commission procedures. *Id.* at ¶¶ 13-14; Ferguson Affidavit II ¶ 6; Mori Affidavit ¶ 3.

Based upon a telephone conversation between Mr. Ferguson and Mr. Ota on November 20, 1979, Pettit & Martin agreed to represent Yamaha in this proceeding. Ferguson Affidavit II ¶ 4. Yamaha retained Pettit & Martin with full knowledge that Mr. Dolan would not participate. Watanabe Affidavit ¶ 5. On November 21, 1979, Mr. Ferguson circulated a memorandum to all Washington, D.C. office personnel of Pettit & Martin³ disclosing Pettit & Martin's representation of Yamaha and the fact that Mr. Dolan could not participate. This memorandum directed that: (i) no documents concerning this matter be shown to Mr. Dolan; (ii) no discussions concerning this matter include Mr. Dolan; and (iii) Mr. Dolan not communicate with representatives of Yamaha.

These procedures have been followed. Ferguson Affidavit I ¶ 6. Mr. Dolan will receive no added compensation from Pettit & Martin as a result of its representation of Yamaha, and if Mr. Dolan becomes a partner during the course of Pettit & Martin's representation of Yamaha, "a compensation formula will be devised so as to assure that Mr. Dolan does not share in the fees attributable to such representation." Ferguson Affidavit I ¶¶ 4-5.

II

We turn first to the broadest issue presented, whether general ethical standards require that the personal disqualification of Mr. Dolan be imputed to his law firm, under the reasoning of *Armstrong v. McAlpin*, 606 F.2d 28 (2d Cir. 1979) *reh. en banc granted* (No. 79-7042, Dec. 12, 1979), despite the procedures announced in Mr. Ferguson's memorandum of November 21, 1979. We hold that Pettit & Martin's enforcement of screening measures that effectively isolate Mr. Dolan from this proceeding permits the law firm to participate. We thus respectfully disagree with the reasoning in *Armstrong*.

The facts and the panel's holding in *Armstrong* may be summarized as follows: An attorney at the Securities and Exchange Commission left that agency to join a law firm. While at the SEC, he had been personally involved in an enforcement action against an individual. Later his law firm was engaged to bring a private action against that same individual. The former SEC attorney, who was concededly disqualified from the matter, was screened from any participation in

³ No employee of Pettit & Martin outside the Washington office is involved in the representation of Yamaha. Ferguson Affidavit II ¶ 5.

the firm's representation, in accordance with the procedures set forth in Formal Opinion 342 of the American Bar Association.⁴ The district court, relying upon the efficacy of the screening, denied a motion to disqualify the firm.

A panel of the court of appeals for the Second Circuit reversed. Finding a risk that the conduct of government investigation and litigation may be influenced by future employment opportunities so long as the attorney has a direct, active, and personal involvement in such matters, the panel held that the attorney's disqualification alone was insufficient to forestall that harm, or its appearance. Rather, the individual's disqualification should be imputed to the attorney's firm as well. Screening procedures were deemed by the panel to be unsatisfactory because, in the panel's view, they do not create the appearance "to the public, that there will be no possibility of financial reward" for shaping government action to enhance private employment. 606 F.2d at 34.

In so concluding, the panel focused on two factors: the possibility that the screened-out lawyer may nevertheless receive some sort of compensatory bonus or indirect share in the firm's earnings from the matter; and the belief that a firm's internal screening procedures are unlikely to be known "to casual observers" or to be persuasive to "the more informed." *Id.* Although the panel asserted that it was not attempting to formulate a general rule for imputed disqualification of a firm (*id.* at 33), it nevertheless declared that its decision did not turn on the particular facts, but on its rejection of the view that "the principle of using screening procedures to enforce DR 9-101(B) is applicable to this type of case. . . ." *Id.* at 34 n.7. Indeed, Movants would have us apply the rationale of the panel's decision in this proceeding. However, the Commission declines to accept this rationale, believing it to be incorrect in its underlying assumptions, and contrary to sound public policy.

The panel's rejection of screening procedures rests upon a chain of assumptions. Law firms adopting screening, the panel reasoned, may nevertheless provide some sort of compensation to screened attorneys attributable to the matter in which they are disqualified. Government attorneys, it was said, will be aware of this prospective benefit, and

⁴ Opinion 342, issued on November 25, 1975, and appearing at 62 A.B.A.J. 517 (1976), clarifies and ameliorates the effects of Disciplinary Rules 5-101(D) and 9-101(B). DR 9-101(B) bars an individual lawyer from accepting employment "in a matter in which he had substantial responsibility while he was a public employee"; and DR 5-101(D) prohibits a law firm from accepting employment in a matter if any lawyer at the firm is disqualified from that matter. Opinion 342 states that the disqualified lawyer's firm need not be disqualified if it has adopted screening measures sufficient to "effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it," so long as these measures are satisfactory to the government agency concerned, and so long as "there is no appearance of significant impropriety affecting the interests of the government." The final proposal of the District of Columbia Bar, now pending before the D.C. Court of Appeals, likewise provides for a screening mechanism. Proposed DR 9-102(B)-(D); see 3 *District Lawyer* No. 5, at 56 (April/May 1979).

thus will continue to perceive an incentive that may influence their official actions even when they know they will be personally disqualified and screened.

The Department of Justice, in its brief *amicus curiae* on rehearing in *Armstrong*, has argued that these assumptions about lawyers' behavior were unsupported in the record of that case. We find them to be unsupported here. Screening procedures must, under ABA Opinion 342, bar direct or indirect compensation to a disqualified attorney.⁵ In view of this, the probability that government lawyers will nevertheless anticipate some post-employment reward for their official actions is so low as to be without significance. Moreover, our experience does not support the panel's apparent assumption that a significant number of private firms or government attorneys will seek to evade the strictures of Disciplinary Rule 9-101(B) and Opinion 342. As the Justice Department said in its *amicus* brief, at 43:

Government lawyers engaged in investigation and litigation know that their future employment prospects in private practice depend on other factors. These are chiefly their reputation for professional competence in their chosen specialty, their demonstrated vigor in exercising that competence solely in the public interest, and complete personal integrity. The possibility of either direct or indirect post-employment compensation for official action is thus too speculative and unsupported to outweigh the adverse impact that a total rejection [of] screening would have on the recruitment of government attorneys.

We do not share the panel's conclusion that the entire firm must be disqualified because of the "appearance" that internal screening procedures are inadequate. The standard for judging the appearance of impropriety is not governed by what "casual observers" might perceive, or by what may be unpersuasive to a skeptic. It is measured by the perception of a reasonable person. On-the-record public disclosure, as here, that a former government attorney has disqualified himself and has been screened from a firm's participation in a matter is amply sufficient to meet the test of reasonableness. Absent a showing of unethical conduct that would taint the underlying proceeding, "... appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases." *Board of Education v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979). See also *Woods v. Covington County Bank*, 537 F.2d 904, 813 (5th Cir. 1976); *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Claims 1977).

The panel's holding is, in our view, inconsistent with the conflict-of-interest restrictions enacted by Congress in amending 18 U.S.C. 207. This statute specifically covers a former government employee's prior

⁵ The record before us shows that Mr. Dolan is barred from such compensation. *Ferguson Affidavit I* ¶¶ 4-5.

involvement, both directly and in a supervisory capacity. Congress declined, however, to extend the statute's restrictions, in either case, to the former government employee's current associates. In framing the scope of these restrictions, Congress explicitly considered their impact on important policy goals, such as the government's recruitment capabilities. S. Rep. No. 95-170, 95th Cong., 1st Sess. 32 (1977); H.R. Rep. No. 96-115, 96th Cong., 1st Sess. 3-6 (1979); 125 Cong. Rec. H3391-3403 (daily ed., May 16, 1979); *id.* at H3689-3698 (daily ed., May 24, 1979).

Finally, we note that our rejection of any general prophylactic ban on screening devices is consistent with other recent expressions on this subject. On December 14, 1979, the Administrative Conference of the United States adopted Recommendation 79-7, "Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency." This recommendation contains a section directly addressed to the *Armstrong* issue:

[T]he disqualification of a former employee to act in a matter ordinarily should not extend to his firm or organization. Instead, the former employee should be barred from both personal participation in the matter and receiving compensation for anyone else's work done on it. An affidavit that the former employee is thus "screened" should be submitted by a partner in the firm, not as a basis for government approval, but to assure that the firm has in fact recognized the issue and taken steps to deal with it. A court should retain its authority to decide that the circumstances in a particular case require a broader disqualification. In considering whether to do so, it should give special weight to the agency's view as to whether the "screening" arrangement affords adequate protection to its interest. 45 Fed. Reg. 2310 (Jan. 11, 1980).

In addition, the Federal Legal Council, a forum of fifteen agency general counsels established by Executive Order, adopted a resolution declaring that: "[T]he public interest, the legal profession, and the various Federal legal offices are best served by scrupulous adherence to existing laws . . . and the existing ethical guidelines of the American Bar Association (particularly Formal Opinion 342 of the A.B.A.'s Committee on Professional Ethics, which sets forth an approved screening procedure to be applied in situations such as found in the *Armstrong* case)"

Such support for the use of screening mechanisms reflects not only a considered belief in their efficacy but also a proper regard for the detrimental consequences that the *Armstrong* principle would produce. The Commission believes that a general rule of imputed disqualification without the possibility of screening would seriously impair its ability to attract qualified attorneys to its service. As the Senate Committee on Government Operations observed when it endorsed the ABA screening mechanism:

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We have no doubt that the proposed restrictions [i.e., imputed disqualification without the possibility of screening] would have a detrimental effect on the government's ability to recruit able and experienced regulators from the legal community: those with established careers might not be interested in jeopardizing later practice by a stint in government, and those without established practices may view agency service as a limitation upon future career alternatives and options. For both reasons, the effectiveness of government could be adversely affected. Study on Federal Regulations, Vol. I, 95th Cong., 1st Sess. 87 (1977).

See also Resolution of the Federal Legal Council, *supra*, at 1-2 ("The [Armstrong] holding would have a serious adverse effect on the ability of Government legal offices to recruit and retain well-qualified attorneys.")

For these reasons, we decline to adopt the reasoning of the Armstrong panel decision in the regulation of practitioners who appear before this agency.⁶ We hold that the firm of Pettit & Martin has adopted and enforced satisfactory screening procedures.⁷ The firm is accordingly not automatically disqualified from participation in this matter because of the personal disqualification of Mr. Dolan.

III

We also conclude that neither law firm has violated the Commission's Rules of Practice, though as we discuss *infra*, the actions of Mr. Dolan and Pettit & Martin cause concern and prompt us to adopt, for the first time, an interpretation of our rule intended to prohibit active solicitation by a disqualified attorney which secures for his or her law firm new business from which the attorney is disqualified.

Movants contend that Mr. Dolan, Pettit & Martin, and Mori and Ota have violated Rule 4.1(b)(1). This rule prohibits former Commission employees from "appear[ing] as attorney or counsel or otherwise participat[ing] through any form of professional consultation or assistance in any proceeding or investigation, formal or informal, which was pending in any manner in the Commission," unless the former member or employee served with the Commission while such Commission authorizes such participation. Mr. Dolan has not obtained authorization to appear in this proceeding, nor could he, because he participated personally and substantially in the proceeding while at the Commission. See Rule 4.1(b)(3)(i). However, in accordance with the Rule, Mr. Dolan is not currently participating in Pettit & Martin's

⁶ We similarly decline to adopt the result in *Price v. Admiral Insurance Co.*, No. 78-2812 (E.D. Pa. Sept. 28, 1979), which was based upon the particular circumstances of that case and which contains no discussion of Formal Opinion 342 and the policy considerations underlying it.

⁷ Under the Commission's current practice, which is consistent with the Administrative Conference recommendation, specific advance approval of a screening mechanism need not be sought.

representation of Yamaha, and Pettit & Martin has established procedures to ensure that he will not do so.⁸

Thus, the issue raised by Movants is not Mr. Dolan's current participation in the proceeding, but that of Pettit & Martin and Mori and Ota. These firms are not literally disqualified by Rule 4.1(b)(1), the terms of which expressly apply only to the activities of former employees themselves. Movants argue, however, that the law firms have violated Rule 4.1(b)(4), which states that if a former employee is disqualified from a matter, "his services shall not be utilized in any respect in such matter nor shall the matter be discussed with him in any manner by any partner or legal or business associate." Any violation of this Rule can only have occurred on or before November 16, 1979, because Mr. Dolan's only subsequent activity relating to this proceeding has involved resolution of the disqualification issue, activity that the Commission plainly did not intend to proscribe.

The primary objective of Rule 4.1(b)(4) is to require a law firm to adopt screening measures sufficient to prevent any discussion with the disqualified attorney that would aid the firm's participating attorneys in their legal representation. Pettit & Martin has done so, and the record is clear that Pettit & Martin has not utilized Mr. Dolan's services in their representation of Yamaha.⁹

The record also indicates, however, that it is unlikely that Pettit & Martin would have been retained by Yamaha had it not been for Mr. Dolan's actions. Indeed, we believe that, taken together, Mr. Dolan's course of conduct here constituted solicitation of the business in question. He "broached" to Mr. Mori the possibility of Pettit & Martin handling some of Mori and Ota's Washington legal business—though we note that this was a reference to legal business in general, and not to the particular matter from which Mr. Dolan was and is disqualified. When Mr. Mori responded that the only Washington antitrust business then being handled by his firm was the *Brunswick* matter and that Mr. Dolan could not participate in that matter because of his prior involvement as a Commission employee, Mr. Dolan explained that Pettit & Martin could handle the matter so long as he personally was screened, and he went on to suggest a particular Pettit & Martin partner for the job and to describe the partner's qualifications. At the same meeting, Mr. Mori asked Mr. Dolan whether he knew if the Commission would soon issue its decision in *Brunswick*. Mr. Dolan replied that he did not know, but would inform Mr. Mori if he heard anything. A few days later Mr. Mori called Mr. Dolan to ask again

⁸ We also conclude that even if Mr. Dolan's actions prior to November 21, 1979, contravened Rule 4.1(b)(1), we would reach the same determination set forth below with respect to disqualification of the firms.

⁹ We note that Mori and Ota could not be viewed as "legal or business associates" of Mr. Dolan, as that phrase is used in Rule 4.1(b)(4), before they retained Pettit & Martin as co-counsel on November 20, 1979.

whether he knew if the publication of the decision was imminent, and Mr. Dolan replied that "rumor had it that the Commission would soon reverse the Administrative Law Judge's Initial Decision, but that this rumor had surfaced in the past and [had] proven to be unfounded." Mr. Dolan then telephoned Mr. Ota shortly after the Commission decision in *Brunswick* was issued, and subsequently sent a copy of the previously mentioned partner's resume to Mori and Ota.

Given the likelihood that Pettit & Martin obtained the business in question as a result of Mr. Dolan's activities, the question under Rule 4.1(b)(4) is whether Mr. Dolan's solicitation of Mori and Ota constituted "services" which Pettit & Martin "utilized in any respect" in the *Brunswick* matter. The quoted language is ambiguous. The most apparent meaning is that when an attorney is disqualified from participating in a matter, he may not aid his firm in any manner in its provision of legal representation in that matter. It is not clear whether the language also means that an attorney who is disqualified in a matter is prohibited from seeking to obtain that matter for his firm. The Commission has not previously construed the language, and the "legislative history" of the rule provides no guidance.¹⁰

We decline to find, therefore, that Pettit & Martin violated Rule 4.1(b)(4)—as the rule would reasonably have been understood—when it obtained the *Brunswick* matter as a result of Mr. Dolan's solicitations on the firm's behalf. We do so because the vague language of the rule, together with the absence of any interpretation of it, fails to provide adequate notice that conduct of the kind under consideration here constitutes a violation. In addition, we note that our decision not to disqualify Pettit & Martin rests on a finding that Mr. Dolan's conduct has resulted in no actual impropriety. Mr. Dolan has provided no aid to Pettit & Martin in its representation of Yamaha in this proceeding. And Movants do not state, nor do we discern, how Mr. Dolan's conduct has itself affected the course of this proceeding in any way or how it has injured them. See *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979); *Board of Education v. Nyquist, supra*, 590 F.2d at 1246. Moreover, there is no allegation that Mr. Dolan has received additional compensation for having brought this business to his firm, or that he pursued his responsibilities at the Commission with anything less than the customary vigor of complaint counsel.

¹⁰ When Rule 4.1(b)(4) was originally adopted, it contained a procedure for Commission approval of law firm participation in a matter only after review of an affidavit showing no use by the law firm of the disqualified attorney's services in any respect in such matter and no fee-splitting, and only after a Commission finding that the firm's participation would entail no "actual or apparent impropriety." 32 FR 8456 (June 13, 1967). When the present language of the rule was adopted in 1975, the Federal Register notice simply stated that the revision "eliminate[d] the requirement for filing affidavits in a case in which a former Commission member or employee is prohibited from appearing or participating in a Commission proceeding or investigation, and his partner(s) or associate(s) desire to appear or participate therein without utilizing his services." 40 FR 15235 (April 4, 1975).

However, our conclusion here—that disqualification would be unfair given the ambiguous and previously uninterpreted language of Rule 4.1(b)(4)—should not be perceived as approval of Mr. Dolan's behavior and Pettit & Martin's acquiescence in it. To the contrary, serious ethical concerns arise from affirmative actions by a disqualified attorney designed to bring to his firm new business directly related to a matter from which the attorney is disqualified.

The appearance of impropriety in such a situation might manifest itself in two ways. An observer might suppose that the attorney had been unwarrantedly solicitous to a potential client while still with the government, to inspire gratitude or good feelings in that client and thereby pave the way toward bringing the client's business to the attorney's new firm. Or, the observer might surmise that if the client retained the disqualified attorney's new firm at the behest of the attorney, it would do so to obtain that attorney's services surreptitiously, notwithstanding supposed screening devices.

There is no countervailing policy reason in support of a law firm obtaining business from the active solicitation of an attorney who is disqualified from such business. We do not believe firms should expect that government lawyers will bring into the firm business from which the former government lawyer is personally disqualified. Similarly, our concern for the rights of clients to counsel of their choice is greatly diminished where they are led to retain a firm to represent them through the intercession of a former government attorney who is personally disqualified from representing them.

The Securities and Exchange Commission has adopted a specific rule dealing with this situation. 17 CFR 200.735-8. At such time as we conclude our rulemaking on comprehensive revisions of Rule 4.1(b),¹¹ we will adopt a comparable rule. In the interim, we shall make the applicability of the current rule clear: If a private party asks a former Commission attorney to provide legal representation in a matter from which the attorney is disqualified, the disqualified attorney may state that he is disqualified and recommend another attorney, even an attorney in his or her own firm. In such a situation, the disqualified attorney is a mere passive recipient of an inquiry, and we see no ethical problem in referring the matter on to someone else. But henceforth, any firm which obtains a matter through the active solicitation of an attorney who is disqualified from that matter, will be considered to have utilized that attorney's services in the matter in violation of Rule 4.1(b)(4).

For the foregoing reasons, *it is ordered*, That the petition of

¹¹ 43 FR 35947 (Aug. 14, 1978); 44 FR 45179 (Aug. 1, 1979).

respondents Brunswick Corporation and Mariner Corp. to disqualify the firms of Mori and Ota and Pettit & Martin is hereby denied.

Interlocutory Order

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

Docket 9074. Interlocutory Order, Feb. 25, 1980.

DENIAL OF INTERVENOR'S MOTION FOR ACCESS TO CONSENT ORDER

By motion filed February 12, 1980, intervenor, the National Automobile Dealers Association ("NADA") has requested that the Commission (1) grant NADA access to the consent order signed by General Motors Corporation and General Motors Acceptance Corporation ("the GM Respondents"), including all supporting documents; (2) vacate the Commission order dated January 23, 1980, withdrawing this matter from adjudication as to the GM respondents and remand the matter to the administrative law judge; and (3) if the order is not vacated, grant NADA thirty days within which to comment on the proposed consent order before the Commission determines whether or not to accept the order pursuant to Section 3.25(f) of its Rules of Practice. Complaint counsel have opposed the motion.

In support of its motion, NADA observes that it was not served with the joint motion of complaint counsel and the GM Respondents, dated December 28, 1979, to withdraw this matter from adjudication, and that it was, thereby, precluded from objecting to or otherwise taking action on the motion.

It does appear that NADA was not served with the joint motion. However, because of the unusual nature of the motion involved, it does not appear that there has been any prejudice to NADA from the failure to make service, and, accordingly, there is no need, nor would any purpose be served, by restoring this matter to adjudication.

The Commission's Rules of Practice, Section 3.25(c), prescribe that where both complaint counsel (including the appropriate Bureau Director) and any respondent to an adjudication have executed a consent agreement, the Secretary *shall* issue an order withdrawing the matter from adjudication with respect to such respondent(s). Withdrawal is not discretionary on the Secretary's part, and, accordingly, no objection that NADA might have raised could possibly have altered the outcome of the motion. Similarly, restoration of this matter to adjudication would simply result in the matter again being withdrawn therefrom, regardless of what objection NADA might interpose.¹

¹ It should be noted that inasmuch as the Secretary is *required* to withdraw from adjudication as to consenting respondents any matter as to which the requisite consent has been signed, the issuance of an order to withdraw will often occur almost *simultaneously* with the filing of the motion to withdraw. In most cases, therefore, parties to a matter other than the joint movants (complaint counsel and the consenting respondent) will receive service of the joint motion to withdraw at the same time they receive the order granting it. In this case, it appears that the motion to withdraw was filed prior to the time the Bureau Director signed the consent agreement, and several weeks elapsed