Recent Decisions

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RECENT DECISIONS

EVIDENCE: HYPNOTICALLY ENHANCED TESTIMONY—A QUESTION OF ADMISSIBILITY OR CREDIBILITY FOR CRIMINAL COURTS?

On October 1, 1982, a young female was raped. She could neither recall the details of the incident nor her attacker’s identity. After being hypnotized, however, she identified Mr. Green as her assailant. Under what conditions will the courts accept hypnotically enhanced testimony into evidence against Mr. Green?

One recent decision, *Chapman v. State*, has held that hypnotically enhanced testimony is *per se* admissible. *State v. Hurd*, on the other hand, admitted the testimony into evidence only with safeguards. A third decision, *State ex rel. Collins v. Superior Court*, excluded the testimony under the *Frye* test.

This note explores the legal and practical aspects of using hypnotically enhanced testimony in criminal trials. Part I introduces the reader to hypnotically enhanced testimony. Part II discusses judicial history, noting the early tendency to admit hypnotically enhanced testimony. Parts III, IV, and V present and criticize the three approaches that courts have recently used to analyze hypnotically enhanced testimony’s admissibility. Part VI suggests a future trend toward excluding post-hypnotic statements while continuing to admit pre-hypnotic statements.

I. Introduction

Hypnosis has been defined as “a state of half-sleep or trance, in which an individual (the subject) is induced to function at an unconscious level of awareness in response to verbal instruction from another individual (the hypnotist).” The present controversy surrounding the use of hypnotically enhanced testimony results from two factors: hypnosis’s recognition as a valuable investigative tool and increased judicial awareness of the many problems inherent in its use.

By using hypnosis during criminal investigations, law enforce-
ment officials can stimulate the memories of victims and witnesses.\(^5\)
While under hypnosis, one can recall even traumatic events that he had forgotten or suppressed.\(^6\)

Although courts are aware of hypnosis's investigative worth, they have also recognized hypnosis's reliability problems as an evidence-gathering device. Though hypnosis has been a valuable therapeutic technique for years, recent decisions warn of the risks in relying upon it for forensic purposes.\(^7\) Psychologists criticize the theory that the memory records information capable of "videotaped replay."\(^8\) Many variables alter the information that is "refreshed" or incorporated into the subject's memory.

Most recent decisions mention a hypnotized subject's hypersuggestivity and hypercompliance.\(^9\) Hypnosis induces increased suggestiveness.\(^10\) The hypnotist's suggestions are not always explicit, but are often unintended cues he transmits through his questions, nonverbal conduct, or demeanor.\(^11\) Hypersuggestivity is coupled with hypercompliance—the subject's desire to please the hypnotist.\(^12\) Hypercompliance results from the subject's trust or confidence in the

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8 See, e.g., 31 Cal. 3d at 31 & 62 n.43, 181 Cal. Rptr. at 250 & 270 n.43 (citing Orne, The Use and Misuse of Hypnosis in Court, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 321 (1979) [hereinafter cited as Orne]).
9 See, e.g., 31 Cal. 3d at 64-65, 181 Cal. Rptr. at 271; 452 N.Y.S.2d at 930.
10 See, e.g., Diamond, Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness, 68 CALIF. L. REV. 313, 316 (1980) [hereinafter cited as Diamond] (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY 563 (1976) as follows: "[a] state that resembles sleep but is induced by a hypnotizer whose suggestions are readily accepted by the subject.").
11 31 Cal. 3d at 64, 181 Cal. Rptr. at 271; Diamond, supra note 10, at 333.
12 31 Cal. 3d at 64, 181 Cal. Rptr. at 271.
hypnotist, which the hypnotist promotes to ensure cooperation. The potential for hypercompliance and hypersuggestivity increases when the subject knows the hypnotic session's purpose is to help him remember facts.

The desire to please the hypnotist causes what scientists call confabulation. Confabulation occurs when the subjects cannot recall details and therefore fill these memory gaps with fantasy. Accordingly, hypnotically enhanced memories combine actual events, both relevant and irrelevant to the case in question, with fantasized details that the subjects unconsciously create to form a "logical whole." The memories may be replete with detail, but the caution is to avoid no way guarantees their accuracy. When the subjects awaken, they cannot disassociate their pre-hypnotic memories from their present memories. Moreover, subjects have firm, albeit unwarranted, convictions regarding their enhanced recollections.

II. Historical Analysis

A. Early Case Law

Attempts to introduce hypnotic evidence in criminal trials began with an 1897 California case, People v. Ebanks, in which the defendant called a hypnotist to testify as an expert witness. The defendant made exculpatory statements while under hypnosis, and his attorney sought to introduce these statements through the hypnotist's testimony. The California Supreme Court refused, curtly stating that American law does not recognize hypnotism as a reliable memory-enhancing technique.

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15 Safeguards, supra note 13, at 200 n.23 (quoting E. Monaghan, Hypnosis in Criminal Investigations 86 (1980)). A subject can be hypnotized progressively as well as regressively, and thus induced to foretell future events. Studies show that subjects will go to great lengths to comply with the hypnotist's request for details. Following hypnosis, the subject reports his progressive "memories" with the same conviction as those of actual past events. 31 Cal. 3d at 65, 181 Cal. Rptr. at 272. See also note 142 infra.
16 496 Pa. at 105, 436 A.2d at 174 (quoting Diamond, supra note 10, at 335).
17 31 Cal. 3d at 65, 181 Cal. Rptr. at 272.
18 31 Cal. 3d at 65-66, 181 Cal. Rptr. at 272. See also note 142 infra.
19 496 Pa. at 105, 436 A.2d at 174. See also Diamond, supra note 10, at 339-340.
20 117 Cal. 652, 49 P. 1049 (1897).
21 Id. at 665, 49 P. at 1053.
22 Id. The court did not specifically state why it did not recognize hypnotism, only that it would be an illegal defense. The case implies that the court regarded hypnosis as a mystical
Until relatively recently, courts have not had to decide whether a witness may testify about events recalled after hypnosis. In 1968, the Maryland Court of Appeals first addressed hypnotically enhanced testimony's admissibility in Harding v. State. The Maryland court allowed a rape victim to testify about the attack, even though her memory was hypnotically enhanced during the initial investigation. The victim could not recall details of the attack prior to hypnosis, but gave an identification after hypnosis; the court found that these circumstances raised a credibility issue for the jury.

Despite Harding's failure to address its perceived lack of an admissibility problem, other courts quickly adopted its approach.

B. Use of the Frye Test

Courts followed the Harding approach quite consistently for twelve years. As hypnosis's investigative use intensified, however, courts began to re-examine Harding's analysis. The courts became increasingly aware of hypnosis's suggestive nature and questioned its reliability as an evidence-gathering process rather than a reliable memory-recollection technique. Given the date of the case, 1897, such an interpretation appears sound.

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23 Diamond, supra note 10, at 313. Courts have not had to decide this issue simply because hypnosis had not been used extensively by law enforcement personnel.


25 5 Md. App. at 234-235, 246 A.2d at 305.

26 Id. at 236, 246 A.2d at 306.

27 In rendering its decision on the admissibility of the victim's testimony, the Harding court stated that it found no difficulty with admitting hypnotically enhanced testimony. 5 Md. App. at 236, 246 A.2d at 306.


30 See, e.g., State v. Mack, 292 N.W.2d 764, 765 (Minn. 1980); 31 Cal. 3d at 36, 181 Cal. Rptr. at 253.
Consequently, some courts have recently applied the "general acceptance" test, a test used extensively with other scientific evidence. The general acceptance test first received judicial recognition in Frye v. United States.\textsuperscript{31} Frye enunciates the standard of admissibility for expert testimony based on scientific techniques or principles.\textsuperscript{32} The Frye test asks whether a given technique or principle has gained general acceptance in the scientific community as a reliable evidence-gathering tool.\textsuperscript{33} The test thus prevents unproven or unsound scientific methods from misleading the jury.\textsuperscript{34} Prior to the Frye test, an expert's scientific opinion regarding hypnosis was essential to the evidence's admissibility. The jury determined the expert opinion's weight on a case-by-case basis.\textsuperscript{35} Although the opinion's foundation had to be generally accepted as reliable within the scientific community,\textsuperscript{36} this foundation required less than scientific certainty.\textsuperscript{37} Frye attempts to distinguish opinion from "scientific evidence," which juries often regard as synonymous with truth.\textsuperscript{38} Using the Frye test in criminal trials, where the defendant faces possible imprisonment, guarantees that guilt or innocence will not be based upon insufficiently tested or verified premises.\textsuperscript{39}

Until 1980, courts had not consistently applied the Frye test to hypnotically enhanced testimony.\textsuperscript{40} Courts had previously applied Frye only to results obtained from mechanical devices, such as the polygraph.\textsuperscript{41} Since hypnosis lacks such mechanical testing procedures, the early courts did not use Frye to test its admissibility.

The Minnesota Supreme Court first clearly articulated the basis for applying the Frye test to hypnotically enhanced testimony in State
Despite recognizing that one cannot compare hypnotically enhanced testimony and mechanical testing results, the Minnesota court rejected the state's argument that Frye did not apply. The court followed Frye's analysis because none of the five expert witnesses could testify with certainty during the trial whether memories retrieved by hypnosis were truth, falsehood, or confabulation. The experts' uncertainty, according to the Minnesota court, proved hypnosis's lack of general recognition as a reliable investigative tool.

III. The Three Current Approaches to Hypnotically Enhanced Testimony

A. Chapman: Per Se Admissibility

After re-examining hypnosis's use and effects, state courts have formulated three distinct approaches to hypnotically enhanced testimony's admissibility problem. One approach, exemplified by Chapman v. State, finds hypnotically enhanced testimony per se admissible. The Chapman court characterized hypnotically enhanced testimony as any other refreshed recollection and analogized hypnotically refreshed testimony to testimony refreshed by reading documents or letters. The court stated that the issue was the testimony's credibility rather than its admissibility.

The Chapman approach does not ignore the dangers inherent in using hypnotically enhanced testimony. It recognizes that hypnosis may distort the subject's memory and supply additional facts to his recollection beyond those mentally stored. The Chapman analysis leaves hypnosis's problems to the factfinder as credibility questions. The testimony's value is determined by attacking its credibility through cross-examination. The jury is left to evaluate hypnosis's effect on the witness and his testimony's credibility.

42 292 N.W.2d 764 (Minn. 1980).
43 Id. at 769.
44 Id. at 768.
45 Id.
46 638 P.2d 1280 (Wyo. 1982). In Chapman, the defendant, during a burglary, struck the owner of the residence with a hammer. On appeal, the defendant claimed that the victim's testimony was inadmissible because such testimony was hypnotically refreshed. Id. at 1281.
47 Id. at 1284.
48 Id. (quoting Kline v. Ford Motor Co., 523 F.2d 1067, 1069-1070 (9th Cir. 1975)).
49 Id.
50 Id. at 1283-1284.
51 Id. at 1284.
B. Hurd: Admissibility with Safeguards

Recent cases such as *State v. Hurd* adopt a more detailed approach. Recognizing the problems that hypnosis raises, courts have recently admitted hypnotically enhanced testimony into evidence, subject to stringent safeguards. The safeguards attempt to balance hypnotically enhanced testimony’s value against the dangers inherent in its use. Parties seeking to introduce hypnotically enhanced testimony must prove by clear and convincing evidence that the safeguards were satisfied. The burden is a heavy one, requiring strict compliance. This middle-of-the-road approach avoids the problems with both *per se* admissibility and total exclusion.

In *Hurd*, the New Jersey Supreme Court found that hypnosis can be considered reasonably reliable if it yields recollections as accurate as those of an ordinary witness. Thus, the court accepted hypnosis as a reasonably reliable method of restoring a person’s memory if conducted properly and used only in “appropriate cases.” *Hurd* stated that appropriate cases include those where pathological conditions such as traumatic neurosis impair the witness’s memory. Inappropriate cases include those where hypnosis is used simply to gather details or to check a witness’s inconsistent statements.

The hypnotic session is properly conducted, according to the New Jersey court, when the procedures involved are reasonably reliable. To ensure procedural reliability the *Hurd* court imposed six safeguards. First, a psychiatrist or psychologist experienced in using hypnosis must conduct the session. Second, the professional should be independent of, and not regularly employed by, the prosecutor, investigator, or defense. Third, any information that law enforcement personnel or the defendant gives to the hypnotist prior to the

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52 86 N.J. 525, 432 A.2d 86 (1981). In *Hurd*, the defendant allegedly attacked and assaulted a woman while she was sleeping in the bedroom of her ground floor apartment. After undergoing hypnosis, the woman identified the defendant as her attacker. *Id.* at 532, 432 A.2d at 89.

53 *See* note 66 *infra* and accompanying text.

54 86 N.J. at 546, 432 A.2d at 97.

55 *Id.* at 538, 432 A.2d at 92.

56 *Id.*

57 *Id.* at 544, 432 A.2d at 95.

58 *Id.* at 544, 432 A.2d at 96.

59 *Id.*

60 *Id.* at 545, 432 A.2d at 96.

61 *Id.*
hypnotic session must be recorded. Fourth, before inducing hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them. The hypnotist should carefully avoid influencing the subject by either asking suggestive questions or adding new details. Fifth, all contacts between the hypnotist and the subject must be recorded. Finally, only the hypnotist and the subject should be present during any part of the hypnotic session, including pre-hypnotic testing and the post-hypnotic interview.

The court in *Hurd* believed that the above six safeguards would protect the evidence from possible distortion without excluding trustworthy evidence. Once the testimony is admitted, the opponent may challenge only the reliability of the particular procedures employed. He may not challenge the reliability of hypnosis in general.

C. Collins, Shirley, and Hughes: *Admissibility and the Frye Test*

The most recent approach to hypnotically enhanced testimony, adopted in *State ex rel Collins v. Superior Court*, discusses the testimony in terms of admissibility rather than credibility. The *Collins* court treated hypnosis as a scientific procedure and conditioned ad-

62 *Id.* at 546, 432 A.2d at 96.
63 *Id.*
64 *Id.*
65 *Id.* at 546, 432 A.2d at 97.
66 *Id.* These safeguards were suggested by Dr. Martin T. Orne, a prominent psychologist specializing in hypnosis. An earlier case, *People v. McDowell*, 103 Misc. 2d 831, 427 N.Y.S.2d 181 (1980), had set forth nine safeguards similar to those in *Hurd*. The *McDowell* safeguards include: (1) the person conducting the hypnotic session should be a qualified professional (psychiatrist or psychologist) with training in hypnosis; (2) the professional should be independent of the prosecution, defense, or investigator; (3) the professional should be given only essential information and only in written form; (4) all contact between the professional and the subject should be videotaped; (5) neither the police, prosecutor, defense, nor any of their representatives should be present at the hypnotic session; (6) the hypnotist should hold an extensive pre-hypnotic interview, which includes exploring the subject's judgment and intelligence; (7) prior to hypnosis, the professional should record a description of the subjects recollection of the facts; (8) the professional should exercise extreme caution to avoid adding any new elements to the subject's memory or giving implicit or explicit cues during his contact with the subject; and (9) all facts resulting from the hypnotic session should be independently corroborated to the extent possible. 103 Misc. 2d at 834-835, 427 N.Y.S.2d at 182-184.
67 86 N.J. at 537, 432 A.2d at 92.
68 *Id.* at 543, 432 A.2d at 95.
69 *Id.*
70 644 P.2d 1266 (Ariz. 1982). In *Collins*, the defendant was charged with forty counts, including kidnapping, sexual assault, and rape. Seven victims testified against the defendant after having had their memories hypnotically refreshed. *Id.* at 1269.
missibility upon satisfying the *Frye* test. The *Collins* court held that hypnotically enhanced testimony was inadmissible because it did not meet the *Frye* test. The court concluded that the scientific community had not yet verified that hypnosis produces reliable results. The *Collins* court rejected the notion that the courts should be free to decide both reliability and foundational questions concerning hypnosis on a case-by-case basis and instead opted for the *Frye* standard. The *Collins* court noted that a case-by-case analysis consumes valuable trial resources and might yield conflicting decisions. More importantly, the jury may give undue weight to evidence produced by a scientific procedure. *Frye* serves the "salutary purpose of preventing the jury from being misled by unproven and ultimately unsound scientific methods."

In *People v. Shirley*, the California Supreme Court adopted the *Frye* test for determining hypnotically enhanced testimony's admissibility. The court concluded that hypnotic evidence failed to meet the *Frye* standard and ruled that the testimony of a witness who had undergone hypnosis to restore her memory of the events in issue was inadmissible. The inadmissibility applied to all matters regarding the events in issue from the time of the hypnotic session forward.

The court explained its reliance on *Frye* as follows. *Frye* applies to evidence produced by scientific techniques. Although the hypnotic technique is scientific, administering the technique produces the witness's testimony. The witness's induced recall depends upon, and cannot be disassociated from, the underlying scientific method. Accordingly, the testimony is only as reliable as the hypnotic process.

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71 Id. at 1282-1285.
72 Id. at 1294.
73 Id. at 1287.
74 Id. at 1282.
75 Id. at 1285.
76 Id. at 1284 (citing Commonwealth v. Nazarovitch, 496 Pa. 97, 102, 436 A.2d 170, 173 (1981)).
77 544 P.2d at 1285 (quoting People v. Shirley, 31 Cal. 3d 18, 53, 181 Cal. Rptr. 243, 264 (1982)).
78 31 Cal. 3d 18, 181 Cal. Rptr. 248 (1982). In *Shirley*, the defendant was convicted of rape and unlawfully entering the complaining witness's apartment. Before trial the prosecution hypnotized the victim to fill gaps in her story. Id. at 23, 181 Cal. Rptr. at 245.
79 Id. at 67, 181 Cal. Rptr. at 273.
80 Id.
81 Id. at 53, 181 Cal. Rptr. at 264 (quoting People v. Kelly, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976)). See text accompanying notes 31-39 supra.
82 31 Cal. 3d at 53, 181 Cal. Rptr. at 264.
83 Id. See text accompanying note 18 supra.
itself, and must be judged by Frye’s admissibility standards. The court in Shirley concluded that hypnotically enhanced testimony will not be admissible until the relevant scientific community accepts hypnosis as a reliable technique for memory retrieval.

Both Collins and Shirley rejected proposals to adopt the Hurd standards. The Shirley court expressed doubt that the safeguards would adequately alleviate all possible dangers. The safeguards fail to account for the witness’s unwarranted confidence in his enhanced testimony, his commingling of confabulation with actual recall, and the injection of undue delay and confusion into the judicial process. Even if the safeguards were adequate, strict compliance would be difficult to ensure. The safeguards would spawn new litigation, for both sides would demand exhaustive discovery, need numerous expert witnesses, and necessitate additional pretrial hearings. The court in Shirley concludes that trial courts would be expected to answer scientific questions that the experts could not.

Both Collins and Shirley justify their exclusion rules on constitutional grounds. The court in Collins noted that the defendant’s sixth amendment right to confrontation also allows the trier of fact to observe the witness’s demeanor and weigh his credibility. The court in Shirley explained that a witness’s credibility is shielded from effective attack because of confabulation, confusion of pre- with post-hypnotic memory, and the increased conviction regarding the en-

84 31 Cal. 3d at 49, 181 Cal. Rptr. at 261.
85 Id. at 54, 181 Cal. Rptr. at 265.
87 31 Cal. 3d at 39, 181 Cal. Rptr. at 255. The court examined the Hurd safeguards and, regarding the suggested use of videotaped sessions, notes that even Hurd recognizes that experts examining videotape would find it difficult to identify possible cues. The court in Shirley concludes, “If even an expert cannot confidently make that identification, it is vain to believe that a layman such as a trial judge can do so.” Id. at 39 n.24, 181 Cal. Rptr. at 255 n.24.
88 Id. at 39, 181 Cal. Rptr. at 255. The court cites these risks as having been recognized in Hurd, but maintains that even the Hurd safeguards fail to confront them. Id. See also Collins, 644 P.2d at 1285.
89 31 Cal. 3d at 39-40, 181 Cal. Rptr. at 255.
90 Id. at 40, 181 Cal. Rptr. at 255. See also Collins, 644 P.2d at 1294; (quoting People v. Shirley, 31 Cal. 3d at 39, 181 Cal. Rptr. at 254-255).
91 31 Cal. 3d at 40, 181 Cal. Rptr. at 255.
92 644 P.2d at 1274-1275, 1292; 31 Cal. 3d at 43-44, 50-51, 181 Cal. Rptr. at 257-258, 262.
93 644 P.2d at 1274 (quoting State v. Thomas, 110 Ariz. 120, 125, 515 P.2d 865, 870 (1973)).
hanced memory. Hypnosis transforms the witness into a "new" witness. Under these conditions, any meaningful cross-examination would be severely restricted, if not eliminated.

The admissibility of statements made prior to hypnotic sessions is a pending controversy. In Collins, the court initially held a hypnotized witness incompetent to testify to both his pre- and post-hypnotic statements. The court found hypnosis too unreliable for forensic purposes. Upon a motion for rehearing, however, the court concluded that hypnosis had received the scientific community's general acceptance as an investigative tool. The court recognized that the total exclusion rule would deprive the police of a valuable source of leads. The court noted that applying the rule literally would produce harsh results. For example, a rape victim, once hypnotized, could not even testify to the fact that she was raped. Employing a cost-benefit analysis, the Collins court, upon rehearing, found the witness competent to testify to facts remembered and related prior to the hypnotic session.

Collins adopted a series of safeguards to minimize the risks attendant to hypnotically enhanced testimony. The court required preserving the hypnotic recall in written, tape-recorded, or preferably videotaped form. A record of the hypnotic session must be kept to minimize commingling pre- with post-hypnotic recall. Finally, the proponent must give timely notice to opposing counsel of

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94 31 Cal. 3d at 63-66, 181 Cal. Rptr. at 271-272.
95 644 P.2d at 1274.
96 644 P.2d at 1292 (citing State v. Mena, 128 Ariz. 226, 232, 624 P.2d 1274, 1280 (1980)).
97 31 Cal. 3d at 44, 181 Cal. Rptr. at 258 (quoting State v. Mack, 292 N.W.2d 764, 769 (Minn. 1980)).
98 644 P.2d at 1269.
99 Id.
100 Id. at 1295.
101 Id. Respondents opposed the rehearing motion, arguing that it was designed to take advantage of the Arizona Supreme Court's recent reconstruction. Prior to the rehearing motion, a justice in the prior majority opinion retired. After replacing the retired justice, the court granted the rehearing, because of important public policy issues.
102 Id.
103 Id. at 1296. The Shirley court modified its decision on June 4, 1982, and omitted a previous statement which left open the possible use of procedural devices to preserve pre-hypnotic testimony. See 641 P.2d at 805. The court upon rehearing, however, appears to adopt a total incompetency rule regarding the viability of pre-hypnotic statements. See 31 Cal. 3d at 48 n.29, 67-68, 181 Cal. Rptr. at 260 n.29, 272-73.
104 644 P.2d at 1296.
105 Id.
his intent to offer hypnotically enhanced testimony.\textsuperscript{106}

Recent decisions evince a judicial trend toward admitting prehypnotic testimony. The Nebraska Supreme Court,\textsuperscript{107} though adopting a \textit{per se} inadmissibility rule, stated that it would allow testimony as to pre-hypnotic facts. In order to do so, the court must be able to reliably determine that the witness remembered the facts prior to and independent of the hypnotic session.\textsuperscript{108} Both Michigan\textsuperscript{109} and Minnesota\textsuperscript{110} have reached similar decisions despite recently adopting \textit{per se} exclusion rules.\textsuperscript{111} In Pennsylvania, a lower state court recently interpreted a state supreme court decision excluding testimony as a \textit{pro se} inadmissibility rule, which allowed pre-hypnotic statements.\textsuperscript{112}

\textit{People v. Hughes}\textsuperscript{113} confirms the trend. In \textit{Hughes}, the New York Supreme Court, Appellate Division, considered for the first time the \textit{admissibility} of hypnotically enhanced recall.\textsuperscript{114} The court adopted the \textit{Frye} standard and held hypnotically enhanced testimony inadmissible as a matter of law.\textsuperscript{115} The court noted that even the Maryland Supreme Court, which created the \textit{Harding} analysis, had forsaken the \textit{Harding} approach for that of \textit{Frye}.\textsuperscript{116} Moreover, \textit{Hughes} ruled that testimony recalled prior to hypnosis was admissible, citing \textit{Collins} as authority.\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} State v. Palmer, 313 N.W.2d 648 (Neb. 1981).
\item \textsuperscript{108} \textit{Id.} at 655 (Clinton, J., concurring).
\item \textsuperscript{110} State v. Koehler, 312 N.W.2d 108 (Minn. 1981).
\item \textsuperscript{111} The Michigan court had adopted its \textit{per se} exclusion rule in People v. Gonzales, 108 Mich. App. 145, 310 N.W.2d 306 (1981), while the Minnesota court had adopted a similar rule in State v. Mack, 292 N.W.2d 764 (Minn. 1980).
\item \textsuperscript{112} Commonwealth v. Taylor, 439 A.2d 805 (Pa. Super. 1982). The court interpreted Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981), as adopting what the court termed a \textit{pro se} rule of inadmissibility regarding hypnotically enhanced testimony in criminal cases where the witness had absolutely no recall of pre-hypnotic facts. The court distinguished \textit{Taylor}, in which the witness had demonstrated a present recall of pre-hypnotic facts. 439 A.2d at 807.
\item \textsuperscript{113} 452 N.Y.S.2d 929 (N.Y. App. Div. 1982). In \textit{Hughes}, the defendant appealed his conviction for rape, burglary, and assault. The victim had testified at trial after having had her memory hypnotically refreshed (and possibly drug-induced with sodium pentothal).
\item \textsuperscript{114} Earlier New York cases had defined the issue as one of credibility, not admissibility. \textit{See}, e.g., People v. McDowell, 103 Misc. 2d 831, 427 N.Y.S.2d 181 (1980).
\item \textsuperscript{115} 452 N.Y.S.2d at 929 and 931.
\item \textsuperscript{116} \textit{Id.} at 930-931. \textit{See} note 29 \textit{supra}.
\item \textsuperscript{117} 452 N.Y.S.2d at 932.
IV. Critical Analysis of the Three Approaches

A. Chapman: Per Se Admissibility

The Chapman court held that hypnotically enhanced testimony was admissible per se and relegated questions regarding hypnosis's reliability to the jury as credibility issues. Rigid cross-examination theoretically enables the jury to evaluate hypnosis's effects on the witness's credibility.

The per se admissibility approach, however, ignores hypnosis's overall reliability in producing accurate recall. The attack before the jury determines only the credibility of particular witnesses and procedures. Hypnosis in general is never questioned because the court readily admits the hypnotically enhanced testimony. Contrary to Chapman's reasoning, cross-examination cannot effectively assist the jury in evaluating hypnosis's effects. Dr. Martin T. Orne, a prominent psychiatrist, states that hypnosis bolsters a witness's conviction in his version of the story, making his credibility impervious to cross-examination.

This analysis says little, if anything, about hypnosis's acceptance by the scientific community. The courts assume that jurors can evaluate hypnotic procedures' reliability. Such an assumption is unfounded, however, since even prominent psychologists specializing in hypnotically enhanced testimony disagree as to its reliability. The analysis simply adopts a rule of per se admissibility, and all problems with hypnosis's use go merely to the weight of the evidence. The court does not participate in any way, but instead avoids involvement.

Chapman's analogy of hypnotically enhanced testimony to testimony refreshed by reading letters is overly simplistic. The two approaches clearly differ in their effect. The letter represents concrete

118 638 P.2d at 1282.
119 86 N.J. at 535, 432 A.2d at 91.
120 In Chapman, a police officer, rather than a psychiatrist or a psychologist, conducted the hypnotic session. 638 P.2d at 1281.
121 Orne, supra note 8, at 332.
122 See text accompanying notes 47-51 supra.
123 Compare Diamond, supra note 10, at 348-349 (emphatically stating that hypnotically enhanced testimony is not and cannot be reliable), with Spector & Foster, Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?, 38 Ohio State L.J. 567, 591 (1977) (stating that hypnotically enhanced testimony is no more inaccurate than any witness's testimony) and Orne, The Use and Misuse of Hypnosis in Court, 3 Crime and Justice: An Annual Review of Research 61, 98-99 (1981) (stating that circumstances exist when hypnosis can be applied if certain safeguards are followed).
124 See text accompanying notes 47-49 supra.
evidence; the jury watches as the witness reads and remembers. After hypnosis, however, the jury sees only the effects—the results of procedures performed earlier. Moreover, a jury may interpret hypnosis to be more reliable merely because it is scientific in nature.

B. Hurd: Admissibility with Safeguards

The approach established in Hurd admits hypnotically enhanced testimony when certain procedural safeguards are present. The court attempts to balance hypnosis's inherent problems with the possibility of losing trustworthy evidence.

Hurd first requires that hypnosis be used only in appropriate circumstances, i.e., where a pathological condition prevented the subject from remembering. Hypnosis, according to Hurd, is less reliable when used solely to gather more details from a witness. This distinction is shattered as soon as it is digested, because the Hurd court itself states that in either case, a significant possibility of creating self-serving fantasy exists.

Next, Hurd establishes procedural safeguards. Each proposed standard safeguards against abuse in particular instances. But, as in Chapman, hypnosis's general reliability is neither questioned nor opened to the opponent's attack.

While the Hurd court articulates its fears about using hypnosis, it states that the safeguards eliminate cases where hypnosis is unlikely to produce reasonably reliable recall. The New York Supreme Court's Appellate Division has stated that hypnosis should be used rarely and under the best possible conditions since, absent extreme caution, the subject's true memory may be contaminated.

Hurd's conclusion that the safeguards guarantee reliable testimony is tenuous. The Hurd opinion discusses at length the problems with hypnosis and its resulting inaccuracies, but the court insists that hypnosis is as reliable as normal recall. The court does not address the confabulation problem, a phenomenon incapable of de-

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125 86 N.J. 525, 545, 432 A.2d 86, 96. See notes 60-66 supra and accompanying text.
126 See notes 54-58 supra and accompanying text.
127 86 N.J. at 544, 432 A.2d at 95. See text accompanying notes 56-57 supra.
128 86 N.J. at 544, 432 A.2d at 96. See text accompanying note 58 supra.
129 86 N.J. at 544, 432 A.2d at 96.
130 Id. at 545-546, 432 A.2d at 96-97. See notes 60-66 supra and accompanying text.
131 86 N.J. at 543, 432 A.2d at 95.
132 Id. at 546-47, 432 A.2d at 97.
133 People v. McDowell, 103 Misc. 2d 831, 837, 427 N.Y.S.2d 181, 184 (1980).
134 See 86 N.J. at 539-543, 432 A.2d at 93-95.
135 Id. at 538, 432 A.2d at 92.
Therefore, even if the session complies with all safeguards, confabulation negates any predictable accuracy level. Rigid cross-examination can expose consciously contrived facts, but unconscious fabrications and distortions become part of the subject's recall, which he vehemently believes and defends.  

_Hurd_ tells us that the human memory's fallibility fundamentally challenges our system of justice. Placing this determination with jurors not only subjects them to conflicting scientific testimony regarding hypnosis, but it requires them to understand the human mind's intricacies. Because experts cannot agree on hypnotically enhanced testimony's reliability, the court's expectation that jurors will intelligently handle the issue is unrealistic. Compliance with the proposed safeguards fails to eliminate the danger that the testimony's prejudicial effect could outweigh probative value.

C. Collins, Shirley and Hughes: _Admissibility and the Frye Test_

While the most recent judicial trend adopts _Frye_ and allows testimony regarding pre-hypnotic facts, it strays from logic. Courts adopting _Frye_ have done so to confront the problems hypnosis presents: hypercompliance, hypersuggestivity, confabulation, a hypnotized witness's inability to separate pre-hypnotic from post-hypnotic recall, and his unshakable conviction that his new "memory" is correct. These problems significantly increase the possibility of tainting the witness's testimony, and ought to induce courts to hold all previously hypnotized witnesses incompetent to testify. A witness cannot possibly disassociate his pre-hypnotic from his post-hypnotic memory. As the court in _Shirley_ stated, it would be irrational to allow a witness to judge which portions of his testimony were produced by the hypnotic session.

The recent trend ignores the problem of restricted cross-examination of previously hypnotized witnesses. A hypnotic session pro-

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136 See notes 15-18 _supra_ and accompanying text.  
137 See text accompanying note 19 _supra_.  
138 86 N.J. at 542, 432 A.2d at 95.  
139 _Id._  
140 See note 123 _supra_ and accompanying text.  
141 496 Pa. at 104, 436 A.2d at 174.  
142 See Diamond, _supra_ note 10, at 336-338. Diamond recognizes that subjects may experience "post hypnotic source amnesia," the inability to discern that certain facts were learned under hypnosis. After the hypnotic session, the subject believes these facts to be his own prior thought. _Id._ at 336.  
143 31 Cal. 3d at 68-69, 181 Cal. Rptr. at 274.  
144 Justice Doerr, dissenting in _Hughes_, explained that the majority justifies excluding hyp-
duces a "new" memory bolstered by a confidence and conviction formerly absent.\textsuperscript{145} When cross-examining a witness, counsel risks eliciting additional, unreliable recall contaminated by hypnosis.\textsuperscript{146} Even the majority in \textit{Collins} recognized this dilemma, stating that the high mix of fact and fancy irreversibly alters a witness's demeanor.\textsuperscript{147} The post-hypnotic witness provides consistent and sincere testimony and deprives the factfinder of his most valuable tool to challenge credibility—cross-examination.\textsuperscript{148} Even the best trained expert or jury cannot separate the witnesses' actual from pseudo-memory.\textsuperscript{149}

Under the rule announced in \textit{Collins}, the Arizona Supreme Court would admit pre-hypnotic testimony only if certain safeguards were instituted. The court requires a record of the hypnotic session, yet fails to impose any procedural standards.\textsuperscript{150} The court suggested adopting "some if not all of the Orne standards" presented in \textit{Hurd}. The litigant is left guessing which or how many standards will suffice.\textsuperscript{152} A forceful dissent in \textit{Collins} contends that the drawbacks to adopting or rejecting standards clearly outweigh the numerous foreseeable appeals concerning which safeguards, if any, are sufficient.\textsuperscript{153}

V. Practical Effects of the Three Approaches

Under the \textit{Chapman} approach, hypnotically enhanced testimony is admitted without question. The \textit{Chapman} approach thus admits possibly misleading and irrelevant evidence.

The \textit{Hurd} approach admits the testimony subject to stringent safeguards. But the safeguards protect against only particular problems and ignore hypnosis's reliability in general. As in \textit{Chapman}, possibly tainted and irrelevant evidence is admitted.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{146} 644 P.2d at 1292 (citing State v. Mena, 128 Ariz. 226, 232, 624 P.2d 1274, 1280 (1980)).
\item \textsuperscript{147} 644 P.2d at 1299 (citing State v. Mena, 128 Ariz. 226, 232, 624 P.2d 1274, 1280 (1980)).
\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} 644 P.2d at 1296. Courts should require adoption of all the Orne safeguards in \textit{Hurd}.\textit{See note 155 infra and accompanying text.}
\item \textsuperscript{151} 644 P.2d at 1296.
\item \textsuperscript{152} 644 P.2d at 1299 (Gordon, Vice C.J., specially concurring in part and dissenting in part).
\item \textsuperscript{153} \textit{Id.}
\end{enumerate}
\end{footnotesize}
The Collins/Hughes approach excludes testimony from the time of the hypnotic session forward, but admits evidence regarding pre-hypnotic testimony. Such an approach serves two functions: first, rejecting post-hypnotic testimony excludes evidence tainted by hypnosis; and second, admitting preserved pre-hypnotic testimony allows the jury to hear possibly vital evidence not tainted by the hypnotic procedure. As a result, the witness can be hypnotized for investigative purposes and his pre-hypnotic statements will be preserved. Of course, safeguards are necessary to preserve such pre-hypnotic statements. Part VI therefore proposes the safeguards that a court should require.

VI. Conclusion

Hypnosis's increased use as an investigative tool and the widespread recognition of the problems inherent in its use will force courts to adopt an approach similar to that of the Arizona Supreme Court in Collins.154 In future cases, courts will totally exclude all post-hypnotic testimony but will allow statements remembered and related prior to the hypnotic session.

Such an approach reflects pragmatism rather than logic. Courts can no longer punish the party using hypnotic techniques by declaring the previously hypnotized witness mute for trial purposes, while professing to recognize hypnosis's investigative worth. To ensure pre-hypnotic statements' reliability, such statements must be properly preserved in written and tape-recorded or preferably videotaped form, the hypnotic session must comply with the Hurd safeguards, and counsel must give his opponent timely notice of intent to use hypnotically enhanced testimony.155

The dangers inherent in tampering with human memory clearly justify such an exacting approach in criminal cases. Until the scientific community recognizes that hypnosis produces reliable results, these safeguards must be strictly enforced.

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154 See notes 70-77 & 98-106 supra and accompanying text.
155 These requirements are essentially the same as those in Collins, but they additionally require the hypnotic session to comply with the Hurd safeguards. See notes 104-106 supra and accompanying text.
LABOR LAW—DUAL MOTIVE DISCHARGE

An employer fires an employee. The employee claims his union involvement motivated the discharge and sues for a violation of section 8(a)(3) of the National Labor Relations Act (NLRA). The employer argues that it dismissed the employee for legitimate business reasons. In fact, the employer may have had a dual motive to dismiss the employee: a legitimate business reason and an illegitimate anti-union animus. The National Labor Relations Board (Board) and various United States Courts of Appeal have reached different conclusions on how to deal with these "dual motive" cases.

The confusion concerns two issues: (1) the degree of anti-union animus necessary to find an NLRA violation and (2) which party bears the burden of proving the existence or non-existence of the violation. A court's view on these issues can have a significant effect on the outcome of a case.

I. The Degree Question

In initially determining what degree of anti-union animus the NLRA required, the Board and several circuit courts of appeal

1 The National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976) provides that, "(a) It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1976) provides the remedy for a § 8(a)(3) violation. It states that the Board shall order a person violating the statute "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

2 The Supreme Court will resolve the burden of proof question if it accepts the petition of certiorari filed in Pettibone Corp. v. NLRB, 679 F.2d 894 (7th Cir. 1982) (unpublished opinion), cert. filed, 51 U.S.L.W. 3019 (U.S. May 17, 1982) (No. 81-2116). In Pettibone, the Board found a violation of section 8(a)(1). The Seventh Circuit affirmed. The petition for certiorari squarely asks: Whether the Seventh Circuit erred in adopting the National Labor Relations Board's Wright Line standard, which provides that once the Board's General Counsel makes a prima facie showing that conduct protected by the National Labor Relations Act was a motivating factor in an employer's decision the employer must prove that it would have made the same decision in the absence of the protected conduct. Pettibone Corp. v. NLRB, Petition for certiorari at i.

This question is crucial to Pettibone since "[t]here is no direct evidence that . . . the persons who made the decision not to rehire, were aware of the keypunchers' protected, concerted activities." Pettibone Corp. v. NLRB, Petition for certiorari at A2. The allocation of the burden of proof determines the case's outcome.

3 See, Behring Int'l, Inc. v. NLRB, 675 F.2d 83, 90 (3d Cir. 1982).
RECENT DECISIONS

adopted the "in part" test. The test states that if protected activities played any part in causing the dismissal, the employer committed an unfair labor practice. The presence of an accompanying legitimate reason is irrelevant. For example, in Carraway Geriatric Centers, Inc., the employer allegedly discharged the employee, Fletta Gills, for threatening picket line violence. However, the Board found that the employer also knew of Gills's protected union activities. Thus, it inferred from the circumstances that the discharge was at least partially motivated by an anti-union bias. The Board held that even a partially discriminatory motivation made the discharge unlawful.

As early as 1953 the United States Court of Appeals for the First Circuit criticized the "in part" test. In 1963, that court proposed the "dominant motive" test. This test states that where there is both a permissible and an impermissible motive for discharge, the improper motive must be dominant for an unlawful discharge to be found.

In Wright Line, A Division of Wright Line, Inc., the NLRB rejected both the "in part" and "dominant motive" tests. Instead, the Board adopted the "but for" analysis that the Supreme Court enunciated in Mt. Healthy City Board of Education v. Doyle.

Mt. Healthy, although not a labor case, did involve an employee discharge partly based on the employer's animus towards the employee's protected conduct. In Mt. Healthy the Supreme Court of the United States reversed lower court rulings that ordered the employee's reinstatement because his protected conduct, free speech,

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4 E.g., NLRB v. Milco, Inc., 388 F.2d 133, 138 (2d Cir. 1968); NLRB v. West Side Carpet Cleaning Co., 329 F.2d 758, 761 (6th Cir. 1964); NLRB v. Jamestown Sterling Corp., 211 F.2d 725, 726 (2d Cir. 1954).
6 Id. at 549.
7 NLRB v. Whitin Machine Works, 204 F.2d 883 (1st Cir. 1953).
8 NLRB v. Lowell Sun Publishing Company, 320 F.2d 835, 842 (1st Cir. 1963) (Aldrich, J., concurring).
9 251 N.L.R.B. 1083 (1980). Bernard Lamoureux, a shop inspector, alleged that Wright Line fired him because of union activities. Id. at 1089. Wright Line asserted that Lamoureux's failure to keep accurate work records cost him his job. Id. at 1090. The Board ordered Wright Line to reinstate Lamoureux. Id. at 1091.
10 The NLRB criticized the "in part" test because it "ignores the legitimate business motive of the employer and places the union activist in an almost impregnable position once union animus has been established." Id. at 1084.
11 Id. at 1087.
12 429 U.S. 274 (1977). In Mt. Healthy, the local school board fired a teacher for telling a radio disk jockey about a newly created dress code for teachers and for using obscene language and gestures in the school cafeteria. Id. at 281-83. The radio comment was protected under the first and fourteenth amendments of the Constitution. Id. at 284. The obscenity was not protected.
played a "substantial part" in the dismissal. The Court rejected the "in part" test and remanded the case to give the employer the opportunity to prove it would have dismissed the employee even absent the protected activity. The Court noted that "[t]he difficulty with the ["in part"] rule . . . is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision — even if the same decision would have been reached had the incident not occurred."

In rejecting the "in part" test, however, the Supreme Court did not apply the "dominant motive" test. Rather, as the above quotation suggests, the Court adopted a "but for" test, which focuses on whether the dismissal would have occurred had the protected activity not taken place.

In *Wright Line*, then, the Board applied this constitutional "but for" test to a section 8(a)(3) "dual motive" case. While this test affects the degree question, it also has a significant effect on the burden of proof question.

II. The Burden of Proof

Under the "in part" test and the "dominant motive" test, the employee (through the Board) had the burden of proving the violation. Under the "in part" test, the employee met the burden simply by showing "some evidence of improper motive." The "dominant motive" test required a showing of "an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one" — but the burden remained with the employee.

In adopting the *Mt. Healthy* "but for" test, the Board also adopted its shifting burden of proof standard. Essentially, *Mt. Healthy* provides that once the employee shows his conduct was a

13 *Id.* at 285.
14 *Id.* at 287.
15 *Id.* at 285.
16 *Id.*
17 "[I]n labor cases, as in constitutional cases, we think the 'but for' test is the correct substantive standard for evaluating the propriety of a reinstatement order." NLRB v. Wright Line, 662 F.2d 899, 903 (1st Cir. 1981).
18 The Board's General Counsel represents the employee in § 8(a)(3) cases. 29 C.F.R. §§ 101.6-101.8 (1981).
19 29 C.F.R. § 101.10(b) (1981) provides that "[t]he Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act."
20 NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1968).
21 *Id.*
"substantial" or "motivating" factor in the discharge, the burden shifts to the employer to satisfy the "but for" test.\textsuperscript{22}

Although \textit{Mt. Healthy} involved a constitutional, rather than a statutory violation, the Board in \textit{Wright Line} adopted it totally and promoted the following two-part test.\textsuperscript{23}

First, we shall require that the General Counsel [representing the employee] make a \textit{prima facie} showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.\textsuperscript{24}

Despite its unequivocal adoption of \textit{Mt. Healthy}, the Board maintains that the Board's General Counsel must still prove, by a preponderance of the evidence, that an unfair labor practice took place. The Board claims that the "shifting burden" test only requires that the employer rebut the \textit{prima facie} case by making out an affirmative defense. This requirement, according to the Board, does not shift the ultimate burden of proof.\textsuperscript{25}

The issue remaining after \textit{Wright Line} is who bears the ultimate burden of proof. Despite the Board's assertion, its \textit{Wright Line} decision, at least arguably, places the ultimate burden of proof on the employer. This interpretation, however, has not been uniformly adopted by the circuit courts.

\textsuperscript{22} 429 U.S. at 287.

\textsuperscript{23} The Board first distinguished true dual motive from pretext. The distinction centers on whether or not the employer relied upon the asserted business justification for the dismissals. 251 N.L.R.B. at 1083-84.

The Board admitted that this distinction was helpful but irrelevant for implementing the \textit{Mt. Healthy} test. \textit{Id.} at 1083. The Board attempted to clear the "blurred distinction" between pretext and true dual motive by calling the employer's justification an affirmative defense.

\textit{Id.} at 1084.

In a pretext situation, the employer's affirmative defense of business justification is wholly without merit. If, however, the affirmative defense has at least some merit a "dual motive" may exist and the issue becomes one of the sufficiency of proof necessary for the employer's affirmative defense to be sustained. Treating the employer's pleas of a legitimate business reason for discipline as an affirmative defense is consistent with the Board's method of deciding such cases.

\textit{Id.} at 1089.

It is difficult to explain how a meritorious affirmative defense can be shown without considering the evidence. The Board's process seems the same conceptually as the pretext/dual motive process. The Board just chooses not to use the traditional nomenclature.

\textsuperscript{24} \textit{Id.} at 1089.

\textsuperscript{25} \textit{Id.} at 1088.
III. Reaction of the Circuits

A review of the reaction of the various circuits to the Board’s Wright Line decision reveals an acute lack of the decisional uniformity and analytical clarity which the Board had hoped to effectuate through its Wright Line decision. While the Second, Seventh, Eighth, and Ninth Circuits have adopted the Board’s “shifting burden” test to be applied in dual motive cases. Thus, the Board stated that

26 In Wright Line, the Board noted the confusion then existing with regard to the proper test to be applied in dual motive cases. Thus, the Board stated that enunciation of the Mt. Healthy test will alleviate the confusion which now exists at various levels of the decisional process and do so in a manner that, we conclude, accords proper weight to the legitimate conflicting interests in this area, thereby advancing the fundamental objectives of the Act.

251 N.L.R.B. at 1083.

The Second Circuit first enunciated its support of the Wright Line test in NLRB v. Charles Batchelder Co., 646 F.2d 33 (2d Cir. 1981). Although the court in that case never reached the “dual motivation” issue, Judge Newman, in his concurring opinion, indicated the court’s acceptance of the Wright Line rationale. Judge Newman did not, however, accept the Wright Line decision in its entirety. While accepting the “shifting burden” test outlined in Wright Line, he firmly rejected the Board’s elimination of the distinction between “but for” and “pretext” analysis.

The point is that the Mt. Healthy formula does not always eliminate the distinction between “pretext” and “dual motivation” cases. The further point is that analysis of any § 8(a)(3) case can begin with either the “pretext” inquiry as to what actually happened or the “but for” inquiry as to what would have happened. Whichever inquiry is first made, a no answer ends the case, and the employer loses; a yes answer obliges the Board to move on to the other inquiry, or implicitly to have considered it.

Id. at 43. Thus, this support of Wright Line was less than unequivocal.

The Second Circuit confirmed its support of the Wright Line “shifting burden” test in Consolidated Edison Co. v. Donovan, 673 F.2d 61 (2d Cir. 1982). Although that case did not specifically involve a § 8(a)(3) violation, it presented a similar dual motivation issue based upon a violation of the Energy Reorganization Act, 42 U.S.C. § 5851 (Supp. 1978). Thus, the court in Consolidated Edison analogized to the § 8(a)(3) cases and stated that it was adopting the Mt. Healthy rule in dual motivation cases.

28 The Seventh Circuit has undauntedly supported the Board’s Wright Line decision. The court adopted the shifting burden of proof test in the first dual motivation case that came before it after the Board’s Wright Line decision. Peavey Co. v. NLRB, 648 F.2d 460 (7th Cir. 1982). In Peavey, the court followed the First Circuit’s lead and adopted the Mt. Healthy test with little discussion. Even after the First Circuit abandoned its support of the Mt. Healthy rule in Wright Line, see text accompanying note 46 supra, the Seventh Circuit continued to apply the shifting burden analysis. NLRB v. Town & Country LP Gas Service Co., No. 81-2182 (7th Cir. Aug. 16, 1982). See also Pettibone Corp. v. NLRB, 679 F.2d 894 (7th Cir. 1982); Justak Brothers & Co. v. NLRB, 664 F.2d 1074, 1077 (7th Cir. 1981).

29 In the only dual motivation case which it has decided since the advent of Wright Line, the Eighth Circuit held that “there is a ‘reasonable basis in law’ for the Board’s use of the Wright Line test, and that it may therefore be applied.” NLRB v. Fixtures Mfg. Corp., 669 F.2d 547, 550 (8th Cir. 1982) (citation omitted). Thus, the court in Fixtures adopted the Wright Line test and pointed to several other circuits which had also adopted Wright Line. Id. at 550 n.4.

30 The Ninth Circuit outlined its reasons for adopting the Wright Line test in NLRB v.
burden” test in its entirety, the First, Third, Fourth, and Fifth Circuits have rejected this test. Furthermore, of those courts which have discussed the *Wright Line* decision, few have analyzed the burden of proof issue in detail. Consequently, considerable confusion still exists over the proper burden of proof to be applied in section 8(a)(3) cases.

A. The Sixth Circuit

This confusion is most clearly exemplified by the Sixth Circuit’s decision in *Nevis Indus., Inc.*, 647 F.2d 905, 909 (9th Cir. 1981). The court stated that the Board’s decision was consistent with the legislative history of the Act, consistent with the reality that the employer has the best access to proof of motivation, and that it “strikes an acceptable balance between protection of employees’ rights and preservation of employers’ rights to discharge employees for valid business reasons.” Id. Thus, the court concluded that “[t]he rule articulated by the Board in *Wright Line* is a reasonably defensible interpretation of the Act, and is entitled to acceptance by this Court.” Id.

Although the court in *Nevis Indus.* outlined its own reasons for adopting the *Wright Line* “shifting burden” test, it never discussed the rationale underlying the *Wright Line* decision in any detail. Thus, like the majority of the circuits, the Ninth Circuit has never thoroughly analyzed the *Wright Line* rule. Moreover, while subsequent decisions in the Ninth Circuit have supported the *Nevis Indus.* adoption of *Wright Line*, none of those decisions have attempted to analyze the “shifting burden” test any more than the court did in *Nevis Indus.* See *Doug Harley, Inc. v. NLRB*, 669 F.2d 579, 580 (9th Cir. 1982); *Lippincott Indus., Inc. v. NLRB*, 661 F.2d 112 (9th Cir. 1981).

31 See text accompanying notes 45-63 infra.
32 See text accompanying notes 64-79 infra.
33 The Fourth Circuit specifically rejected the Board’s shifting burden of proof test in *NLRB v. Burns Motor Freight, Inc.*, 635 F.2d 312 (4th Cir. 1980). The court in *Burns Motor Freight* placed the burden of proving improper motive on the NLRB.

Even when there is evidence of anti-union animus the Board must still affirmatively show that the discharges were improperly motivated. . . . If in fact there was no cause for discharge, there may well be an inference that the assigned reason was pretextual. But when cause exists, the Board must show an “affirmative and persuasive reason why the employer rejected the good cause and chose the bad one.”

Id. at 314. See also, *NLRB v. Patrick Plaza Dodge, Inc.*, 522 F.2d 804, 807 (4th Cir. 1975). *Burns Motor Freight* was later upheld in *Jeffrey Manufacturing Div. v. NLRB*, 654 F.2d 944 (4th Cir. 1981). See also *Cedar Coal Co. v. NLRB*, 678 F.2d 1197, 1199 n.4 (4th Cir. 1982).

34 The Fifth Circuit has never specifically rejected the *Wright Line* decision. However, in *TRW, Inc. v. NLRB*, 654 F.2d 307 (5th Cir. 1981), the court indicated that, “once the employer has articulated a legitimate business reason for his action the burden is upon the General Counsel to present substantial evidence that anti-union animus was the ‘moving cause’ of the disciplinary measures.” Id. at 310. Thus, the court appears to have implicitly rejected the *Wright Line* rule.

Because the court has never clearly articulated its position on this issue, however, and further, because it has never articulated the reasoning underlying its decision in *TRW*, some confusion as to the proper burden of proof in mixed motivation cases still exits in the Fifth Circuit. See *De Anda v. St. Joseph Hospital*, 671 F.2d 850, 857 n.12 (5th Cir. 1982).
decisions. Different panels of the Sixth Circuit have decided dual motivation cases in different ways. Furthermore, the Sixth Circuit's overall failure to formally adopt any particular causality test in dual motivation cases indicates that there is some confusion within the circuit as to the precise state of the law on this issue.

In *NLRB v. Lloyd A. Fry Roofing Co.*, one Sixth Circuit panel applied the shifting burden analysis, yet never specifically adopted the *Wright Line* test. Thus, although this panel held that the employee would not have been discharged "but for" his protected activity, the court also stated that a discharge motivated "in part" by an employee's protected activities violates section 8(a)(1) of the Act.

The Sixth Circuit's confusion was again apparent in *Charge Card Association v. NLRB*. In that case, the court's language seemed to indicate that the Sixth Circuit applied the "dominant motive" test in dual motive discharge cases. However, the court then discussed the *Wright Line* rule, but neither adopted nor rejected it. Finally, the court concluded by stating that its holding would have been the same under either the "dominant motive" or the "shifting burden" test. Overall, the court's consideration of both tests indicates that it has not firmly adopted *Wright Line*.

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35 See also Consolidated Edison Co. v. Donovan, 673 F.2d 61 (2d Cir. 1982); *NLRB v. Charles Batchelder Co.*, 646 F.2d 33 (2d Cir. 1981).
36 Sitting on this panel were Martin and Jones, Circuit Judges, and Reed, District Judge.
37 *NLRB v. Lloyd A. Fry Roofing Co.*, 651 F.2d 442 (6th Cir. 1981). In holding that discharging employee James Varney in part for his filing several complaints regarding the safety of company equipment constituted an unfair labor practice, the court said, "[S]ubstantial evidence supports the Board's finding that Fry has failed to demonstrate that it would have discharged Varney in the absence of his engaging in the protected concerted activities." Id. at 446.
39 *Charge Card Ass'n v. NLRB*, 653 F.2d 272, 275 (6th Cir. 1981). Sitting on the panel were Engel and Merritt, Circuit Judges, and Porter, Senior District Judge.
40 The court stated that [t]he proper test for evaluating mixed motive cases is whether punishment of protected activity or anti-union animus was a dominant motive in the employer's actions. The burden has been placed on the General Counsel to demonstrate that absent protected activities the suspension or discharge would not have taken place.
41 The court noted, "Under either the dominant motive test or the shifting burden as established in *Wright Line*, we conclude that the reason for disciplining the employees was to punish them for engaging in a protected walk-out." Id. at 275.
The Sixth Circuit’s reluctance to specifically adopt the “shifting burden” test was also evident in its decision in *NLRB v. ComGeneral Corp.* Although the court there found it unnecessary to address the dual motivation issue, it questioned the validity of the *Wright Line* rule, noting that the “shifting burden” test was in apparent conflict with the tests applied in Title VII discrimination cases. Thus, the court expressed uncertainty as to the proper analysis of mixed motivation discharge cases.

Overall, therefore, some doubt exists as to which test will prevail when the Sixth Circuit decides future dual motivation cases. Although one Sixth Circuit panel has in fact applied the “shifting burden” test, it is not clear whether a different panel would presently apply that test.

Not all of the circuits, however, are as unclear on this issue as the Sixth Circuit. The First and Third Circuits, in rejecting the *Wright Line* rule, have given a clear and detailed analysis of the burden of proof issue.

### B. The First Circuit

The First Circuit originally embraced the Board’s *Wright Line* analysis of mixed motive discharge cases in its opinion in *Statler Industries, Inc. v. NLRB*. Later the same year, however, this circuit modified the Board’s *Wright Line* decision in *NLRB v. Wright Line, A*

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42 *NLRB v. ComGeneral Corp.*, 684 F.2d 367 (6th Cir. 1982). The court here held that substantial evidence existed to support the NLRB’s finding that the discharge of ten employees was motivated by the desire to discourage union activities in one of ComGeneral’s plants. *Id.* at 370. Sitting on the panel were Engel and Contie, Circuit Judges; Weick, Senior Circuit Judge.

43 The court noted that the “shifting burden” test used by the Board in *Wright Line* relies on the Supreme Court’s decision in *Mt. Healthy*. It further noted that this shifting burden test is in apparent conflict with the Supreme Court’s decision under Title VII of the Civil Rights Act as outlined in *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The court did not state, however, whether analysis of mixed motive cases should proceed under *Mt. Healthy* or *Burdine*. Under the facts of this case, however, this Court found it unnecessary to address this issue. *Id.* at 370.


45 644 F.2d 902 (1st Cir. 1981). In *Statler*, the employer’s justifications for discharge were weak, and the General Counsel’s prima facie case was strong and not rebutted by substantial proof. After the *Statler* decision, various circuits claimed that the First Circuit had accepted the shifting burden of proof test of *Wright Line*. This contention, however, is not necessarily true, for the *Statler* decision could be interpreted as accepting only the Board’s replacement of its “in part” test with the Supreme Court test in *Mt. Healthy*. The First Circuit did not mention, let alone sanction, the Board’s interpretation of *Mt. Healthy* requiring the employer to carry the burden of persuasion.
The court held that once the General Counsel has made a prima facie showing that the protected conduct was a motivating or substantial factor in the decision to discharge the employee, the burden shifts to the employer to demonstrate the discharge would have resulted even in the absence of the union activity. This burden, however, is merely the burden of going forward to meet a prima facie case, not the burden of persuasion on the ultimate issue of liability. The latter burden rests exclusively with the General Counsel.

The First Circuit did accept the Board's adoption of the "but for" test to determine whether union activity caused the discharge. The court noted that its panel had, in fact, used this test since the Mt. Healthy decision. The court likewise accepted the Board's position that some type of burden faces the employer once a prima facie 8(a)(3) violation is presented. Unlike the Board, however, the court could not shift the entire burden of proof to the employer. Rather, the court shifted to the employer only the burden of rebutting the prima facie case.

The court cited section 10(c) of the National Labor Relations Act, the Board's regulation 101.10(b), Professor Wigmore, rule

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46 662 F.2d 899 (1st Cir. 1981). In Wright Line, employee Lamoureux, a Teamster activist, was discharged from Wright Line for submitting inaccurate records of the times at which he performed inspections. Id. at 900. The Board ordered Wright Line to reinstate Lamoureux with back pay. Id. The First Circuit, although modifying the Board's burden of proof standard, id. at 904-07, agreed that the employer was discharged in violation of § 8(a)(3), and granted the petition for enforcement of the order accordingly. Id. at 904. See note 1 supra.

47 662 F.2d at 904, 905.

48 Id.

49 Before Wright Line, the Board ordered reinstatement whenever it concluded the discharge was motivated by anti-union sentiments. The court noted that the Board's Wright Line test improved upon its earlier practice. 662 F.2d at 904.

50 Cf. Statler Indus., Inc. v. NLRB, 644 F.2d 902 (1st Cir. 1981); NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 671 (1st Cir. 1979); Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292 (1st Cir. 1977). "The existence of anti-union 'discrimination in regard to hire or tenure of employment' [the language of 29 U.S.C. § 158(a)(3)] was most accurately determined by asking whether the discharge would have occurred 'but-for' the protected activity." 662 F.2d at 903.

51 The court admitted to approving "the general causation analysis in the Board's Wright Line opinion" in its Statler Indus. decision. 662 F.2d at 904.

52 "We think the only burden which may be accepted on the employer is a 'burden of production,' that is a burden of coming forward with credible evidence to rebut or meet the general counsel's prima facie case." 662 F.2d at 904.

53 The employer has "[a] burden of going forward to meet a prima facie case, not a burden of persuasion on the ultimate issue of the existence of a violation." Id. at 905.

54 The National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1976) provides in part:
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301 of the Federal Rules of Evidence,\textsuperscript{57} and the Supreme Court Title VII discrimination holdings\textsuperscript{58} as convincing authority for its refusal to shift the burden of proof to the employer.

The First Circuit recently had the opportunity to reconsider its \textit{Wright Line} position in \textit{NLRB v. Transportation Management Corp.}\textsuperscript{59} The court emphatically declined this opportunity, stating that while it could support the Board's requirement that the employer meet the prima facie test, it could not shift a heavier burden.\textsuperscript{60} In refusing to transfer the burden of proof to the employer, the court noted that it had repeatedly rejected the Board's attempts to require a greater burden,\textsuperscript{61} as beyond the Board's "statutory authority."\textsuperscript{362} In remanding for reconsideration, the court ignored recent criticism of its \textit{Wright Line} decision.\textsuperscript{63}

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If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

\textsuperscript{55} See note 14 \textit{supra}. The court emphatically stated, "Section 10(c), as well as the Board's own regulation [29 C.F.R. \S 101.10(b)\textsuperscript{1}], make clear that the general counsel must prove the employer's guilt by a preponderance of the evidence. . . ." 662 F.2d at 904.

\textsuperscript{56} Professor Wigmore asserts:

\textquote[9 WIGMORE ON EVIDENCE \S 2487 (3d ed. 1940).]{[A] prima facie case need not be overcome by a preponderance of the evidence, or by evidence of a greater weight; but the evidence needs only to be balanced, put in equipoise, by some evidence worthy of credence; and if this be done, the burden of the evidence is met and the duty to producing further evidence shifts back to the party having the burden of proof. . . ."}

\textsuperscript{57} The court stated:

Rule 301 of the Federal Rules of Evidence very aptly describes the scope of the duty involved in rebutting presumptions in civil cases as 'the burden of going forward with evidence to rebut or meet the presumption,' and distinguishes this duty from 'the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.' 662 F.2d at 904; see \textit{Fed. R. Evid.} 301.

\textsuperscript{58} The court cited \textit{Texas Dep't of Community Affairs v. Burdine}, 450 U.S. 248 (1981), which held the burden of persuasion on the issue of discriminatory intent in Title VII cases always remains with the plaintiff. 662 F.2d at 907. See note 75 \textit{infra}.

\textsuperscript{59} 674 F.2d 130 (1st Cir. 1982). In this case, decided April 1, 1982, the Board found a \$ 8(a)(3) violation because the company "failed to meet its burden of \textit{overcoming} the General Counsel's \textit{prima facie} case. . . ." \textit{Id.} at 131. (emphasis in original).

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981) (explicit rejection); NLRB v. Amber Delivery Service, Inc., 651 F.2d 57, 69 (1st Cir. 1981) (implicit rejection); NLRB v. Cablevision, 660 F.2d 1, 8 (1st Cir. 1981) (implicit rejection); NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 66, 67 n.12 (1st Cir. 1977) (implicit rejection).

\textsuperscript{62} 674 F.2d at 131.

\textsuperscript{63} Remar, \textit{Climbing Mt. Healthy: In Search of the "Wright-Line" on Mixed-Motive Discharges Under Section 8(a)(3),} \textit{4 Indus. L.J.} 636 (1981). Remar believes, "[T]he First Circuit's reliance on interpretation of section 10(c) and the Board's own regulations is unpersuasive. . . ."
C. The Third Circuit

In another recent decision, the Third Circuit confronted the Wright Line burden of proof issue. In Behring International Inc. v. NLRB, the court accepted and elaborated upon the views of the First Circuit. In a well-reasoned opinion, the court held the Board in error for shifting the burden of proof to the employer. The court held that once the Company articulated a legitimate business reason for the discharge, the General Counsel should have been required to prove, by a preponderance of the evidence, that the Company's real motive was anti-union animus.

The court initially noticed that the Wright Line test includes both substantive and procedural components, which operate in conflict with each other. The substantive, but-for component was characterized as "[a] welcome development which should reduce the confusion in this controversial area of labor law." The procedural, Mt. Healthy, shifting burden of proof component was rejected, however, because "[t]he Board is bound by statutory [and regulatory] limitations which foreclose the issue." The court aptly observed and "the court's conclusion is simply inconsistent with Mt. Healthy" because the First Circuit misunderstands "the nature of a prima facie case." Id. at 677-78. Philip C. Lederer, in his article "Wright Line or Spur Track?, 33 LABOR L.J. 67 (1982) disagrees. He concluded the First Circuit's Wright Line decision was correct in its application of Title VII burden-placing rationale. Id. at 80.

Behring submitted an economic rationale, urging it layed off employees of the warehouse and subcontracted their work because of a severe decline in business. Id. at 85.

The Board could rule a section 8(a)(3) violation was proved when it had never determined which of two causes, one legitimate and one illegal, with neither outweighing the other, was the "real" cause prompting the discharge. General Counsel was required to prove only that antiunion animus was "a" motivating factor, not "the" motivating factor. "As such, the procedural aspect of the rule is plainly at odds with the 'but for' test." 675 F.2d at 88.

Id. at 87. The "but for" test satisfied the Third Circuit's mandate that the Board seek the "real motive" or "real cause" of a discharge. For example, in Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363 (3d Cir. 1978), the court held:

[I]f the employee would have been fired for cause irrespective of the employer's attitude toward the union, the real reason is nondiscriminatory. In that circumstance there is no causal connection of any anti-union bias and the loss of the job. Id. at 368. See also, NLRB v. General Warehouse Corp., 643 F.2d 965 (3d Cir. 1981); Gould Inc. v. NLRB, 612 F.2d 728 (3d Cir.), cert. denied, 449 U.S. 890 (1980).

Mt. Healthy is inapposite in its burden-shifting phase, however, because the Board is bound by statutory limitations which foreclose the issue." 675 F.2d at 88. These statutory and regulatory limitations include § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) (1976); 29 C.F.R. § 101.10(b) (1981); and § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d) (1976). § 7(c) reads, "[E]xcept as otherwise provided by statute, the proponent of a rule of order has the burden of proof."
that there were no such limitations restraining the Supreme Court in *Mt. Healthy*.[70] There, the Court could freely shift the burden of proof. But because of the restrictions, the Board has no authority to transfer the burden to the employer.[71] The Third Circuit thus rejected the *Wright Line* test.

The court did find "more appropriate precedent"[72] in recent Supreme Court decisions regarding the burden of proof in Title VII employment discrimination cases.[73] In these cases, the Supreme Court left no doubt that the plaintiff always has the ultimate burden of proving discrimination.[74] The defendant need only present some legitimate, nondiscriminatory reason for its actions. The burden remains on the plaintiff to prove by a preponderance of the evidence that the reasons proffered by the defendant were not its "real" reasons.[75]

In summary, the court noted that anti-union discrimination is substantially similar to discrimination caused by race, religion, and nationality biases.[76] The Supreme Court recognized proof problems in its *Burdine* line of holdings, and decided that only the burden of production, not persuasion, shifts to the defendant.[77] Given the similarity between Title VII and anti-union discrimination, the Board should follow the *Burdine* procedure as well.[78] The Third Circuit joined the First Circuit in challenging the Board's shifting burden of proof.

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[70] 675 F.2d at 88.
[71] *Id.*. The court stated: "Since none of these statutory or regulatory provisions were applicable in *Mt. Healthy*, the Supreme Court was free to allocate the burden of proof. The Board, on the other hand, has no power to shift that burden onto the employer." *Id.*
[72] *Id.*
[74] 675 F.2d at 88.
[75] *Id.* at 88, 89. The *Burdine* court stated: "In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." 450 U.S. at 255 n.8. The Third Circuit repeated this Supreme Court language, then added: "Since the employer presumably is most likely to be in possession of evidence showing the real reason for its action, it must produce that evidence to rebut plaintiff's prima facie showing of discrimination. Nevertheless, the ultimate burden of proof remains on the discriminatee." 675 F.2d at 89 n.4.

The Third Circuit also applied the *Burdine* logic in a Title VII context, in NAACP v. Medical Center, Inc., 657 F.2d 1322, 1333 (3d Cir. 1981).
[76] 675 F.2d at 89.
[77] *Id.*
[78] The Third Circuit reaffirmed *Behring* in NLRB v. Blackstone Co., No. 81-3132, slip op. (3d Cir. Aug. 11, 1982). The court remanded the case when it concluded the ALJ applied an improper *Wright Line* burden of proof, stating:
proof test.\textsuperscript{79}

The Third Circuit's \textit{Behring} decision thoroughly and intelligently analyzes the burden of proof dilemma currently dividing the United States Courts of Appeal. The Supreme Court's Title VII holdings are indeed excellent precedent to govern mixed-motive discharge cases because similar types of discrimination characterize each. In contrast, the \textit{Mt. Healthy} decision involved the discharge of an employee for asserting a constitutional right.\textsuperscript{80} The \textit{Behring} decision, because of its complete discussion of the problem and use of sound logic in reaching a solution, is likely to be influential among the circuits. By applying the \textit{Behring} rationale, circuit courts should be able to reach fair results in dual motive cases.

\textbf{IV. Conclusion}

The Board's decision in \textit{Wright Line, A Division of Wright Line, Inc.} represented a marked departure from its previous decisions in dual motive cases. In an attempt to clarify a confusing area of the law, and to meet the mounting criticism over its "in part" test, the Board adopted the shifting burden of proof test enunciated in \textit{Mt. Healthy School District Board of Education v. Doyle}. Unfortunately, the Board

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The ultimate burden of proof does not shift from the General Counsel and does not devolve upon the employer at any stage. Therefore, no violation may be found unless the Board determines that the General Counsel has proved by a preponderance of the evidence that the employer's antiunion animus was the real cause of the discharge. No. 81-3132, slip op. at 7 (3d Cir. Aug. 11, 1982).

\textsuperscript{79} The court stated, "We agree with the First Circuit, and believe that the Board failed to take into account the General Counsel's statutory burden to prove the unfair labor practice." 675 F.2d at 89.

The Board, before both the First and Third Circuits, relied on NLRB v. Great Dane Trailors, Inc., 388 U.S. 26 (1967), where the employer discriminated between strikers and nonstrikers with respect to vacation pay. The Supreme Court said: "Once it has been proved that the employers engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." \textit{Id.} at 34.

Both circuits distinguished \textit{Great Dane} because it involved "a challenge to an overall policy of an employer rather than to a single discharge." 662 F.2d at 904 n.8; 675 F.2d at 89. Additionally, \textit{Great Dane} was not primarily concerned "with the difference between the burden of production and the burden of persuasion, and terms applicable to both are used somewhat interchangeably throughout the opinion." 675 F.2d at 89. Notably lacking in the \textit{Great Dane} opinion is "the precision the Court later applied in \textit{Burdine} when it addressed the specific issues of the burdens of production and persuasion." \textit{Id.}

succeeded neither in clarifying the issue nor in overcoming the criticism of its standard of proof.

The reaction of the circuits to the Board's decision has been diverse. While some courts have adopted the Wright Line rule, others have rejected it, and still others are unsure of their position on the issue. Moreover, few circuits have attempted to analyze the Board's Wright Line decision.

In those courts where Wright Line has been meticulously analyzed, it has been rejected as being contrary to the Federal Rules of Evidence and to the Board's own rules. Thus, both the First and the Third Circuits, after carefully considering the Board's Wright Line rule, discarded that rule and adopted instead a shifting burden of production test. This test places the burden of persuasion on the employee and only a burden of production on the employer.

Regardless of which test is adopted, however, the need for uniformity is evident. The circuits are split in their decisions on this issue, and several courts are confused as to the state of the law within their own circuit. Moreover, the Board's attempt to achieve this uniformity through its Wright Line decision has only added to the confusion.

It is vitally important that the Supreme Court grant certiorari to decide this issue in Pettibone Corp. v. NLRB. While at this point there is no definite indication of which way the Court will decide in Pettibone, the finality of the Court's decision, and the clarity which it will bring to this area of the law, will undoubtedly benefit all of the circuits. Ultimately, only clarity and uniformity will insure that the NLRB and the various circuits will finally be able to put Wright Line to rest.

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81 See note 2 supra and accompanying text.
Insider Trading—The Extension of the Duty to Disclose Material Inside Information

The duty to disclose material inside information when trading in securities, or refrain from trading (disclose-or-refrain duty/rule), is based on Securities and Exchange Commission (SEC) rule 10b-5. The rule does not, however, explicitly prohibit trading on inside information. Rather, the disclose-or-refrain duty results from judicial construction of the general antifraud provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and SEC rule 10b-5.

1. Rule 10b-5 states:
   It shall be unlawful for any person, directly or indirectly, . . .
   (a) To employ any device, scheme, or artifice to defraud,
   (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
   (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.


2. Rule 10b-5 is an SEC regulation. It is based on two statutory provisions: § 17(a) of the Securities Act of 1933 and § 10(b) of the Securities Exchange Act of 1934. Section 17(a) is a general antifraud provision. It states:
   It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly,
   (1) to employ any device, scheme, or artifice to defraud,
   (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
   (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a) (1976). Section 10(b) authorizes the SEC to promulgate regulations. It states in part:
   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange, . . .
   (b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
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The early cases based the duty to disclose on the ideal of informational parity among all traders.\(^3\) These cases left the way open for a broad extension of the rule. The Supreme Court limited this extension in *Chiarella v. United States*.\(^4\) *Chiarella* based the duty not on the ideal of informational parity, but on a relationship of trust between the parties to a transaction.\(^5\) This piece discusses district and circuit courts' expansion of the duty in three cases subsequent to *Chiarella*: *United States v. Newman*,\(^6\) *O’Conner & Associates v. Dean Witter Reynolds, Inc.*,\(^7\) and *Dirks v. SEC*.\(^8\)

I. The Duty to Disclose or Refrain

A. The Early Development of the Duty Under Rule 10b-5

The disclose-or-refrain duty under rule 10b-5 originated in *In re Cady, Roberts & Co.*\(^9\) In this case, a stockbroker, while serving as a director of a corporation, learned that it planned to reduce its dividend.\(^10\) The director informed his brokerage firm of the dividend reduction, and the firm then sold some of its stock in the corporation without disclosing the inside information to the purchasers.\(^11\) The SEC, in suspending the broker, adopted an ideal of informational parity in the marketplace. The SEC held that when a corporate "insider," such as an officer, director, or controlling stockholder, trades in securities on information obtained through his position, he must disclose material information that is unavailable to the person with whom he is dealing. If he does not disclose, then he must not trade.\(^12\)

The SEC adopted the disclose-or-refrain rule for two reasons. First, information obtained through a relationship intended for a corporate purpose should not be used for anyone's personal benefit.\(^13\) Second, using information which is unavailable to others is inher-

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\(^9\) 40 S.E.C. 907 (1961). Prior to the modern securities regulations, see note 2 *supra*, the common law developed the "special facts" doctrine to deal with insider trading. See note 24 *infra*.

\(^10\) 40 S.E.C. at 909.

\(^11\) Id.

\(^12\) Id. at 911.

\(^13\) Id. at 912.
ently unfair. In *Cady, Roberts*, the SEC refused to limit rule 10b-5 to transactions with stockholders. The insiders were held liable for selling stock to purchasers in the general market. According to the SEC, the common law based the duty to disclose material inside information on the relationship between corporate officials and stockholders. But, the SEC stated, the antifraud provisions in the securities regulations are much broader and are intended to protect the investing public. Given this interpretation of Congress’s intent, the SEC saw no reason why purchasers in the general market should not expect the same protection as stockholders.

The SEC saw a possible conflict between a stockbroker’s duty to protect the interests of his customers and his duty to disclose confidential inside information to the market. The SEC, however, clearly placed the duty to the investing public above the duty to the customer.

*Cady, Roberts* held that a stockbroker owed to all purchasers a duty to disclose material inside information obtained as a member of a corporation’s board of directors. In *SEC v. Texas Gulf Sulphur Corp.*, the United States Court of Appeals for the Second Circuit extended this duty to corporate officers and employees. The court held that corporate insiders could not profit at stockholders’ expense simply because the insiders possessed information not available to the stockholders. It refrained from explicitly basing the duty either on traditional fiduciary concepts or on the common law “special facts” doctrine. It did state, however, that all investors trading in the

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14 *Id.*
15 *Id.* at 913-14 n.15.
16 *Id.*
17 *Id.* at 913.
18 *Id.* at 916.
19 *Id.*
20 *Id.* at 917.
22 But unlike the broker in *Cady, Roberts*, the insiders at Texas Gulf Sulphur purchased stock from stockholders. The court, therefore, did not have to decide whether officers and employees, in addition to directors, owed a disclose-or-refrain duty to purchasers in the marketplace.
23 *Id.* at 839-43.
24 *Id.* The court cited Strong v. Repide, 213 U.S. 419 (1909), as an example of the “spe-
marketplace should have "relatively equal access to material information." This reasoning, in effect, extended the duty beyond those in confidential relationships with a corporation to anyone possessing material inside information.

In Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., the Second Circuit further extended the disclose-or-refrain duty. The court held that brokers acquiring inside information through work on a securities issue, and the outside parties tipped by the brokers, were all liable to purchasers in the marketplace. Furthermore, the court held the brokers liable even though they did not trade their own securities but simply informed third parties who did trade.

In Strong, the doctrine supported a director's duty to disclose inside information to a stockholder. According to the Supreme Court, the relationship between a director and a stockholder is not a traditional fiduciary relationship and cannot alone support a duty to disclose. But when the director knows "special facts" he must disclose them before trading with the stockholder. The court did not define "special facts" but simply discussed the facts peculiar to Strong.

Later decisions have referred to the relationship between corporate insiders and stockholders as a fiduciary relationship. Thus the Chiarella Court announced in a footnote that "[the decision in Strong v. Repide was premised upon the fiduciary duty between the corporate insider and the shareholder." 445 U.S. at 228 n.10 (citing Pepper v. Litton, 308 U.S. 295, 307 (1939)). In the body of the opinion, however, the Chiarella Court spoke instead of a duty to disclose growing out of a "relationship of trust and confidence." 445 U.S. at 230. The Court presumably meant to include some non-fiduciary as well as fiduciary sources for the duty, but it did not elaborate on the relationships giving rise to one kind of duty or the other. See note 56 infra and accompanying text. The District Court for the Southern District of New York, also citing Pepper, asserted that "[c]orporate officers and directors owe fiduciary duties to the corporation and its shareholders to administer their duties for the common good of all the shareholders." O'Connor & Associates v. Dean Witter Reynolds, Inc., 529 F. Supp. at 1182-83. See notes 79-87 infra and accompanying text.

For the purposes of the present discussion, it is largely a question of terminology whether to label the relationship between a corporate insider and a stockholder a "fiduciary relationship" or a "relationship of trust and confidence." No matter what the label, the law is settled that such a relationship gives rise to a duty to the stockholder to disclose material nonpublic information before trading. See notes 39-42 infra and accompanying text. To follow the decisions interpreting rule 10b-5, it is important to recognize that different courts may use different terminology without necessarily intending a different theoretical foundation. Thus when the O'Connor court used the term "fiduciary duty," it did not mean to contrast fiduciary duty with the Chiarella concept of duty arising from a "relationship of trust and confidence." See notes 82, 86, and 87 infra and accompanying text.

The court's language in Texas Gulf Sulphur clearly extended the duty to all persons having inside information: "Thus, anyone in possession of material inside information must either disclose it to the investing public, or . . . must abstain from trading . . . ." Id. at 848 (emphasis added).

Shapiro v. Merrill Lynch involved a motion to dismiss a complaint based on rule 10b-5 for failure to state a cause of action. Douglas Aircraft Corporation hired Merrill Lynch as the
The court began by saying that the purpose of the securities laws was to protect the investing public by promoting a fully informed investment decision through disclosure of inside information.\textsuperscript{30} Citing \textit{Texas Gulf Sulphur}, the court said that anyone in possession of material inside information must disclose it to the public or refrain from trading.\textsuperscript{31} The court also found the “tippees,” who had no confidential relationship with the corporation, liable for violating the disclose-or-refrain rule.\textsuperscript{32} Tippees could violate the rule if they acted with actual or constructive knowledge that the information was nonpublic.\textsuperscript{33} If the tippees chose not to disclose the information, then they were bound to refrain from trading.\textsuperscript{34}

B. \textit{Theoretical Bases of the Duty: The Fiduciary Theory and the Information Theory}

The disclose-or-refrain duty requires a person trading in securities to disclose any material\textsuperscript{35} inside\textsuperscript{36} information, or refrain from trading. Early case law did not make clear, however, the circumstance managing underwriter for a large issue of debentures. During the course of this work, Merrill Lynch learned that Douglas Corporation’s earnings had taken a sharp drop from what Douglas Corporation anticipated. Before Douglas published this information, Merrill Lynch informed some of its clients who sold their Douglas stock to uninformed purchasers. After these sales the price of Douglas’s stock dropped. Five individual purchasers brought a class action on behalf of themselves and all others who had purchased stock during the period the information remained undisclosed. They sued both Merrill Lynch and Merrill Lynch’s “tippees.” The defendants moved to dismiss the complaint, and the district court denied the motion. The Second Circuit affirmed. \textit{Id.} at 231-34.

\textsuperscript{30} \textit{Id.} at 235.
\textsuperscript{31} \textit{Id.} at 236.
\textsuperscript{32} \textit{Id.} at 237.
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} Material information is information that a reasonable investor would consider important in making his decision to buy or sell. In \textit{TSC Indus., Inc. v. Northway, Inc.}, 426 U.S. 438 (1976), the Supreme Court dealt with false or misleading proxy statements under SEC rule 14a-9, 17 C.F.R. \textsection 240.14a-9 (1975), and addressed the issue of materiality: “An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.” 426 U.S. at 449. Other cases have discussed materiality in terms of an investor’s reliance on a representation or omission. \textit{Compare List v. Fashion Park, Inc.}, 340 F.2d 457, 462-63 (2d Cir.), \textit{cert. denied}, 382 U.S. 811 (1965) (requiring reliance in order to establish liability under rule 10b-5); \textit{with Cohen v. Franchord Corp.}, 478 F.2d 115, 124 (2d Cir.), \textit{cert. denied}, 414 U.S. 857 (1973) (questioning the need for reliance); \textit{and Jackson v. Oppenheim}, 411 F. Supp. 659, 667-68 (S.D.N.Y. 1974), \textit{modified}, 533 F.2d 826 (2d Cir. 1976) (also questioning the need for reliance).

\textsuperscript{36} Inside information is information unavailable to an outside investor. Information that an investor should reasonably be aware of need not be disclosed. \textit{See Seibert v. Sperry Rand Corp.}, 586 F.2d 949, 952 (2d Cir. 1978); \textit{Klamberg v. Roth}, 473 F. Supp. 544, 552 (S.D.N.Y. 1979).
stances under which an investor who possesses material inside information owes this duty. Judge Wright, in \textit{Dirks v. SEC},\textsuperscript{37} stated that the decisions creating and extending the duty did not clearly describe these circumstances. However, he identified two theories which appear in the cases: 1) the "fiduciary" theory, and 2) the "information" theory.\textsuperscript{38}

The fiduciary theory protects the relationship of trust between an insider and a corporation.\textsuperscript{39} The insider has an interest in his own profit and loss, but he must also protect the stockholders’ interests. When these interests conflict, this theory places the stockholders’ interests above the insider’s own interests.\textsuperscript{40} If the insider uses information intended for the stockholders’ benefit to the stockholders’ detriment, he has breached this trust and committed a fraud. The law protects the relationship between the insider and the stockholder by requiring the insider to disclose nonpublic information to the stockholder before trading. To protect this trust, the courts have extended the duty to tippees because their trading would, in effect, violate the trust between the corporate insiders and the stockholders.\textsuperscript{41} Insiders also have a duty to purchasers in the market since the purchasers, as future stockholders, would also rely on corporate insiders to protect their interests.\textsuperscript{42}

The information theory protects investors who have no access to


\textsuperscript{38} \textit{Id.} at 834-35.

\textsuperscript{39} The relationship of trust need not be a fiduciary relationship. The class of relationships of trust, where one party has a duty to disclose, is more inclusive than the class of fiduciary relationships. The common law recognized this distinction and imposed the duty to disclose in three different situations: 1) in a fiduciary relationship, 2) in a non-fiduciary relationship where one party expressly puts his trust in another, and 3) in a contract which necessarily requires good faith and full disclosure but which falls in neither the first or second class. See 3 \textit{POMEROY, EQUITY JURISPRUDENCE} § 902 (5th ed. 1941). The law concerning fiduciary relationships was relatively clear. On the other hand, the law concerning non-fiduciary relationships which required disclosure was not as clear. Pomeroy said: "The nature of the transaction is not the test in this class. Each case must depend on its own circumstances." \textit{Id.} Thus the courts promulgated no clear principles but made ad hoc determinations of liability. Modern securities law inherits this difficulty. For example, Judge Wright did not clearly define the limits of non-fiduciary relationships which require disclosure. \textit{Dirks v. SEC}, 681 F.2d at 839 (paraphrasing Justice Cardozo in \textit{Steward Machine Co. v. Davis}, 301 U.S. 548, 591 (1937)) ("With respect to imposition of the disclose-or-refrain rule where fiduciary obligations are not violated, we do not fix the outermost line. Wherever the line may be, this case is within it."). See also notes 56, 120, and 121 \textit{infra} and accompanying text.

\textsuperscript{40} See \textit{In re Cady, Roberts}, 40 S.E.C. at 916.

\textsuperscript{41} See note 58 \textit{infra} and accompanying text. See also \textit{Shapiro v. Merrill Lynch}, 495 F.2d at 237.

\textsuperscript{42} See text accompanying note 60 \textit{infra}.
inside information. According to this theory, an investor who possesses inside information should not benefit at the expense of others who do not have access to nonpublic information. The ideal situation is informational parity: all investors should have equal access to material investment information. When information is available to all investors, no disclosure is necessary. But when an outside investor is unable to discover the information through his own efforts, the law should protect him by requiring the person who possesses inside information to disclose it. Investors entering the market should have the government’s assurance that they will not suffer a loss because another investor takes advantage of information which is not available to the general public.

The theory chosen determines the extent of the duty. A court choosing the fiduciary theory will extend the duty only to traders in a relationship of trust with the corporation. A person outside this relationship, but who possesses inside information, can thus trade freely. A court choosing the information theory will prohibit the same person from trading without disclosing. The duty will extend to all traders with inside information whether or not they have a relationship of trust with the corporation.

C. Chiarella v. United States: Supreme Court Guidance on the Reach of Rule 10b-5

Supreme Court securities decisions since 1974 have consistently refused to expand the scope of rule 10b-5. The Court continued to interpret rule 10b-5 narrowly when it addressed theories of liability

43 The SEC in Cady, Roberts said the use of inside information unavailable to others was “inherently unfair.” 40 S.E.C. at 912.

44 For a discussion of the practicality of this approach, see Herman, Equity Funding, Inside Information, and the Regulators, 21 UCLA L. Rev. 1, 17-28 (1973) (stating that the market is so full of arbitrary advantage that an investor cannot expect equality of information).

45 See note 36 supra.

46 See Brudney, Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws, 93 Harv. L. Rev. 322, 353-67 (1979) (arguing that the policy behind the antifraud provisions is similar to the information theory).

47 See Teamsters v. Daniel, 439 U.S. 551 (1979) (Securities Act and Securities Exchange Act do not apply to a noncontributory, compulsory pension plan, and therefore alleged fraud in connection with sale of interests does not violate § 10(b) or rule 10b-5); Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) (short form Delaware merger with subsequent disclosure to shareholders was neither deceptive nor manipulative, and therefore did not violate § 10(b) or rule 10b-5 despite alleged undervaluation of minority stockholders’ shares); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (private cause of action for damages under § 10(b) and rule 10b-5 requires allegation of scienter); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (proper plaintiffs in civil suit under § 10(b) and rule 10(b)-5 limited to purchasers and sellers of stock, and do not include persons who refrained from purchasing because of misrep-
for nondisclosure in *Chiarella v. United States.*

Chiarella worked for a financial printer which printed tender offer documents for certain companies planning takeover bids. The acquiring and target companies’ names were left blank until the final printing. On five occasions, however, Chiarella deduced the identities of the target companies, bought target stock before the public announcements, and sold the stock for large profits after the announcements of the takeover attempts. The government brought a criminal action, and the district court convicted Chiarella of violating section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5.

In affirming the district court, the Second Circuit suggested that a workable test of whether one had a duty to disclose or refrain would be whether he had regular access to material nonpublic information. This test, it suggested, would make the disclose-or-refrain rule applicable to “those who occupy . . . strategic places in the market mechanism.” The Second Circuit thus applied a modified form of the information theory.

The Supreme Court reversed. The Court explicitly rejected the information theory, including the “regular access to market information” test proposed by the Second Circuit. It held that “a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information.”

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50 “Anyone—corporate insider or not—who regularly receives material nonpublic information may not use that information to trade in securities without incurring an affirmative duty to disclose. And if he cannot disclose, he must abstain from buying or selling.” United States v. Chiarella, 588 F.2d 1358, 1365 (2d Cir. 1978) (emphasis in original).
51 588 F.2d at 1365-66, quoted in 445 U.S. at 231 n.14.
52 445 U.S. at 225.
54 *Id.* at 235. The Court seemed to attach significance to the fact that Chiarella traded on nonpublic market, as opposed to corporate, information. Corporate information is information about a company’s earning power or assets; market information is information about other circumstances that affect the price of its securities, such as impending investment recommendations, tender offers, or stock splits. *See* Fleischer, Mundheim & Murphy, *An Initial Inquiry into the Responsibility to Disclose Market Information,* 121 U. PA. L. REV. 798, 799 (1973). The Court noted that the SEC limits but does not completely disallow trading on unequal market information in other contexts, such as a tender offeror’s purchase of target corporation stock before publicly announcing the offer. The Court apparently found Chiarella’s situation analogous. 445 U.S. at 233. The holding in *Chiarella* might thus be limited to market information situations. The Court’s rationale in reversing Chiarella’s conviction, however, was that silence cannot act as fraud absent a duty to speak based on a relationship between buyer
According to Chiarella, the crucial factor in previous decisions finding a disclose-or-refrain duty was "a relationship of trust and confidence between parties to a transaction."\textsuperscript{55} The Court, however, did not provide any criteria for determining when a relationship of trust and confidence exists.\textsuperscript{56} Instead, it gave examples of relationships which had been held in the past to give rise to a disclose-or-refrain duty under rule 10b-5. One example the Court clearly endorsed was the relationship of corporate insiders to stockholders.\textsuperscript{57} The Court also appeared to endorse the view that tippees of corporate insiders have a duty to disclose or refrain from trading with stockholders.\textsuperscript{58} In this situation, the relationship between transacting parties is at best indirect. The Court left unclear whether the relationship creating the duty need exist prior to the transaction. It implied that it must,\textsuperscript{59} but at least where corporate insiders are selling stock to new purchasers, it indicated that the relationship created by the transaction itself gives rise to a duty to disclose.\textsuperscript{60} Thus, while the Court emphasized that a 10b-5 duty to disclose arises from a relationship of trust and confidence between parties to a transaction, it did not make explicit the circumstances giving rise to such a relationship.

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\textsuperscript{55} 445 U.S. at 230.

\textsuperscript{56} The Court cited the \textit{Restatement (Second) of Torts} § 551(2)(a) (1976) to the effect that silence about facts material to a transaction constitutes fraud if one party has information "that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." 445 U.S. at 228. The Comment on this section of the \textit{Restatement} gives several examples of relations of trust and confidence, but says that "[i]t is not within the scope of this Restatement to state the rules that determine the duty of disclosure which under the law of business associations the directors of a company owe to its shareholders." \textit{See} note 39 supra.

\textsuperscript{57} 445 U.S. at 230.

\textsuperscript{58} \textit{Id.} at 230 n.12. Citing Shapiro v. Merrill Lynch, 495 F.2d at 237-38, the Court reported that "[t]ippees' of corporate insiders have been held liable under § 10(b) because they have a duty not to profit from the use of inside information that they know is confidential and know or should know came from a corporate insider." The Court then observed that "[t]he tippee's obligation has been viewed as arising from his role as a participant after the fact in the insider's breach of a fiduciary duty" (citing \textit{ABA Comment Letter on Material, Non-Public Information, [Jan.-June] SEC. REG. & L. REP. (BNA) No. 233, at D-1, D-2 (Oct. 15, 1973)})). In this situation, of course, the relationship between the tippee and stockholder exists only via the relationship of each to a corporate insider. Since the Court cited without criticism the position that such an attenuated relationship entails a disclose-or-refrain duty, one can assume it agrees.

\textsuperscript{59} 445 U.S. at 232. Thus in maintaining that Chiarella owed no duty to the sellers from whom he purchased stock, the Court said that "[n]o duty could arise from petitioner's relationship with the sellers of the target company's securities, for petitioner had no prior dealings with them." \textit{Id.}

\textsuperscript{60} \textit{Id.} at 227 n.8 (citing \textit{Cady, Roberts}).
how attenuated the relationship might be, or when it must come into existence in order to support a duty under rule 10b-5.

Finally, the Court left unclear whether a relationship of trust and confidence between parties to a transaction is the only source of a disclose-or-refrain duty under rule 10b-5. The Court did not reach the government’s principal argument in Chiarella, in which the government developed a new theory of 10b-5 liability: the “misappropriation” theory. Under this theory, Chiarella breached a duty to the acquiring corporation by using information he obtained while working for a printer employed by the corporation. His actions therefore constituted a “fraud or deceit upon any person, in connection with the sale of any security.” The Court explicitly declined to “speculate upon whether such a duty exists, whether it has been breached, or whether such a breach constitutes a violation of § 10(b).” In not rejecting the government’s rationale, however, the Court implied that the misappropriation of information in connection with a securities transaction might be another source of 10b-5 liability.

By focusing on the concept of duty, the Supreme Court in Chiarella cut back significantly on the reach of rule 10b-5 as interpreted, at least in dicta, in earlier cases. According to Chiarella, trading without disclosing material nonpublic information does not violate rule 10b-5 absent a fiduciary or similar duty owed to the other party to the transaction. A relationship of trust and confidence gives rise to a disclose-or-refrain duty. The Court discussed a few situations where a relationship of trust and confidence exists. However, it left to future litigation the question of how far beyond these examples one might expand the sources of the disclose-or-refrain duty, the class of persons owing the duty, and the class of persons to whom it is owed.

61 The Court did not reach this argument because it was not adequately presented to the jury. 445 U.S. at 236.
62 The theory was so labeled by Justice Blackmun. Id. at 245 (Blackmun, J., dissenting).
63 See note 1 supra.
64 445 U.S. at 236-37 (footnote omitted).
65 Thus the Chief Justice noted that the Court’s opinion, as he read it, left open “the question whether § 10(b) and rule 10b-5 prohibit trading on misappropriated nonpublic information.” Id. at 243 (Burger, C.J., dissenting). The Chief Justice in his dissent argued that the misappropriation theory was both adequately presented to the jury and correct, though he seemed to focus less on Chiarella’s breach of duty as an employee than on the fact that he “stole” the information. Id. at 243-45 (Burger, C.J., dissenting).
66 See notes 14, 25, 26, 30, and 31 supra and accompanying text.
II. Recent Decisions: The Re-expansion of 10b-5 Liability after Chiarella

In three recent cases, United States v. Newman,67 O'Conner & Associates v. Dean Witter Reynolds, Inc., 68 and Dirks v. SEC,69 courts have interpreted the concept of duty broadly so as to support 10b-5 liability. These courts have viewed a relationship of trust and confidence between the trader and some particular person as limiting acceptable conduct by the trader toward all investors in the marketplace, even those with whom he had no prior relationship. The Newman, O'Conner, and Dirks courts collectively enunciate a theory of liability almost as inclusive as the information theory rejected by Chiarella. Under the new theory, however, persons who are both corporate outsiders and outsiders to the securities industry70 have a duty to disclose only "tainted" information. Tainted information is information obtained through a breach of duty, either the duty of the person dispensing the information, or the duty of the person obtaining it.71

A. Newman and O'Conner: The Misappropriation Theory Applied

In Newman, investment bank employees passed on confidential information about clients' merger and takeover bids to securities traders. The securities traders purchased stock in the target companies before the mergers and sold it afterwards at a profit. The government indicted one of the bank employees on the misappropriation theory advanced in Chiarella, and the securities traders on a theory of aiding and abetting the misappropriation.72

The Newman court noted that the Supreme Court in Chiarella left the issue of the misappropriation theory "for another day."73 It then explicitly undertook to decide the issue, stating that "[f]or this Court, that day has now come."74 The court found that because the bank employees' misappropriation involved both fraud75 and a con-

67 664 F.2d 12 (2d Cir. 1981).
70 "Securities industry insider," as used in this discussion, includes registered stockbrokers and their employees. "Securities industry outsider" means anyone who is not a securities industry insider.
71 See note 89 infra and accompanying text.
73 445 U.S. at 238 (Stevens, J., concurring), quoted in 664 F.2d at 16.
74 664 F.2d at 16.
75 "By sulllying the reputations of Courtois' and Antoniu's employers as safe repositories of client confidences, appellee and his cohorts defrauded those employers as surely as if they
connection to a securities transaction under rule 10b-5, it therefore violated the rule. That is, the conduct of Newman and his cohorts violated rule 10b-5 even though they had no direct or indirect relationship of trust and confidence with the persons from whom they bought stock. 

A possible extension of this decision would be that one owes a general duty to the marketplace not to trade on nonpublic information obtained through a breach of duty.

This conclusion was drawn soon after by the United States District Court for the Southern District of New York in *O'Connor & Associates v. Dean Witter Reynolds, Inc.* O'Connor, an options trading firm, sued two corporations (in lieu of alleged unknown inside tipplers) and alleged first- and second-order tippees for trading in call options on inside tips. The court agreed with the defendants that corporate insiders and their tippees owe no fiduciary duty to options traders. However, it held that insiders and their tippees could still be liable under rule 10b-5 to options traders. Citing *Newman*, it

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76 "[S]ince appellee's sole purpose in participating in the misappropriation of confidential takeover information was to purchase shares of the target companies, we find little merit in his disavowal of a connection between the fraud and the purchase." *Id.* at 18.

77 "We hold that appellee's conduct as alleged in the indictment could be found to constitute a criminal violation of section 10(b) and rule 10b-5 despite the fact that neither [the investment banking firms] nor their clients was at the time a purchaser or seller of the target company securities in any transaction with any of the defendants." *Id.* at 16 (footnote omitted).

78 See Langevoort, *Insider Trading and the Fiduciary Principle: A Post-Chiarella Restatement*, 70 CAL. L. REV. 1, 49 (1982). The court did imply, however, that persons from whom Newman purchased stock might not have standing to sue. Thus in upholding the right of the United States to bring the action, it noted that when the SEC or the United States Attorney institutes litigation under rule 10b-5, "the court's concern must be with the scope of the Rule, not plaintiff's standing to sue." *Id.* at 17.

79 The corporations sued were Amax, Inc. and Standard Oil Company of California (Socal). 529 F. Supp. at 1179.

80 The tippees sued were Dean Witter Reynolds, Inc., A.G. Becker, Inc., and some of their customers.

81 O'Connor alleged that registered representatives of Dean Witter Reynolds and Becker had received inside information from unknown insiders at Amax or Socal regarding a Socal bid to take over Amax. These representatives and their customers then allegedly purchased call options on Amax stock at the same time that O'Connor was selling its options. Several of the defendants moved to dismiss the complaint for failure to state a claim under either § 10(b) of the Securities Exchange Act or § 14 of the Williams Act. They argued that the complaint did not state a claim because it did not allege any fiduciary duty between themselves and O'Connor. 529 F. Supp. at 1182-83.

82 For the *O'Connor* court's use of the term "fiduciary," see note 24 *supra*.

83 529 F. Supp. at 1184-85.

84 *Id.* at 1185.
said that a breach of fiduciary duty owed to any party\textsuperscript{85} constitutes a fraudulent practice under rule 10b-5.\textsuperscript{86} More significantly, it held that O'Conner had standing to sue for breach of a derivative duty which corporate insiders and their tippees owe to the marketplace:

\begin{quote}
[B]y virtue of their fiduciary duty to the corporation and its shareholders, corporate insiders become subject to the separate duty to either 'abstain or disclose.' Unlike the fiduciary duty, which is owed only to the corporation and its shareholders, this additional duty to disclose is owed 'to the investing public,' . . . 'to those investors trading contemporaneously with the insider . . . .'
\end{quote}

Thus, by virtue of the corporate insiders' duties to the corporation, they, and by derivation their tippees, indirectly came under a duty to O'Conner to 'abstain or disclose' if they possessed material nonpublic information. Under traditional tort principles, O'Conner has standing to sue for injuries resulting from the alleged breach of this duty to it.\textsuperscript{87}

From O'Conner and Newman the general principle emerges that two categories of persons owe a disclose-or-refrain duty to the investing public at large: 1) corporate insiders, and 2) corporate outsiders who possess tainted inside information.\textsuperscript{88} Inside information held by outsiders is tainted if obtained by a breach of an insider's duty, as

\textsuperscript{85} In this case, the duty breached was the duty of the Amax or Socal insiders to their respective corporations and the corporations' stockholders.

\textsuperscript{86} Just as the insiders owed no fiduciary duty to the persons with whom they traded in Newman, the insiders here may have owed no fiduciary duty to the writers of call options. Nevertheless, under the Newman rationale, because their trading or tipping breached fiduciary duties owed to other parties, the alleged conduct constituted a fraudulent practice within the meaning of the securities laws.

529 F. Supp. at 1185.

\textsuperscript{87} \textit{Id.} at 1187 (emphasis in original) (quoting Shapiro v. Merrill Lynch, 495 F.2d at 240, and Wilson v. Comtech Telecommunications Corp., 648 F.2d 88, 94 (2d Cir. 1981)). Wilson held that an insider owes a disclose-or-refrain duty only to those investors trading contemporaneously with the insider. The court denied the plaintiff standing to sue because he had purchased stock a month after the insider's trading, even though no disclosure had ever been made.

\textsuperscript{88} Under this formulation of the principle, Chiarella and Newman could be held liable to the stockholders from whom they purchased stock without disclosing. One might argue that this is too broad a reading of O'Conner. The O'Conner court seemed to attach some importance to the fact that "[i]n the present case, in contrast to Chiarella, it is alleged that corporate insiders were the source of the material, inside information." 529 F. Supp. at 1187. On the other hand, the O'Conner court referred to the conduct of Newman and his associates as constituting "a breach of fiduciary duties owed to the tippers' employers, their employers' clients, and their stockholders." \textit{Id.} at 1185 (emphasis added). One can assume, then, that it also would view Chiarella's behavior as violating a "fiduciary" duty. Unless the court intended a crucial distinction between various sorts of duties it labeled "fiduciary," Chiarella's duty to his employer, and Newman's informants' duty to their employers, should also create a separate disclose-or-refrain duty to the marketplace. See note 87 supra and accompanying text. Though the precise question was not addressed by the O'Conner court, this conclusion is con-
with the tippees in *O'Conner*, or if obtained by a breach of one's own duty, as in *Newman*.89 This principle emerging from *Newman* and *O'Conner* retains Chiarella's emphasis on duty. However, it expands both the sources of the duty90 and the class of persons to whom it is owed.91

**B. Dirks v. SEC: An Expanded Duty to the Public and the SEC**

In *Dirks v. SEC*,92 the D.C. Circuit used an analysis similar to that of *Newman* and *O'Conner*, but extended the disclose-or-refrain duty even further. It enunciated two grounds upon which it held Dirks liable for violating rule 10b-5. It first said, in effect, that Dirks's information was tainted, even though it was obtained without a breach of fiduciary or quasi-fiduciary duty by anyone. It then said that because Dirks worked for a registered broker, he owed a non-fiduciary duty to the entire investing public to disclose or refrain. It thus created a new category of person with duties similar to those of the corporate insider: the securities industry insider.93

Raymond L. Dirks was a securities analyst who, with the help of leads given him by former employees of Equity Funding Corporation of America (EFCA) and its subsidiaries, uncovered "one of the most infamous frauds in recent memory."94 Before revealing his discoveries to the SEC, Dirks informed several of his firm's institutional clients, who then sold their EFCA stock.95 On appeal from two SEC
hearings, the D.C. Circuit upheld a censure of Dirks for violating rule 10b-5.

The court declined to rest its opinion on the argument raised by the SEC below that Dirks had benefitted from his possession of non-public corporate information. While the court discussed the misappropriation theory raised by the Chief Justice and Justices Brennan and Blackmun in Chiarella, it did not conclude that Dirks had misappropriated the information concerning EFCA. Instead, the court reasoned that Dirks had violated rule 10b-5 by committing a constructive breach of a non-fiduciary duty. Alternatively, it held that Dirks had an obligation to the SEC and the public which he breached by passing his legally obtained information to his firm’s clients before making it known to the SEC.

Sketching in the analytical grounds underlying rule 10b-5, the court in Dirks noted the two theories on which the duty to disclose or refrain historically had been found to rest: 1) a breach of a “traditional fiduciary relationship . . . or similar relationship of trust,” and

Journal published its first story on the scandal, “based largely on information assembled by Dirks,” only the day after the SEC brought a complaint against EFCA. The reporter who covered the story was nominated for a Pulitzer Prize. Id. at 831-32.

Far from being hailed as a guardian of the securities marketplace, Dirks and five of his firm’s clients were brought before the SEC for a hearing. The administrative law judge in the Boston Co. hearing found that the companies had violated rule 10b-5 by using nonpublic, inside information without disclosing it to the purchasers to whom they sold their EFCA stock. He found Dirks liable as an aider and abettor. The five institutional investors were censured, and Dirks was suspended for sixty days from association with registered securities dealers. Boston Co., [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,705 (Sept. 1, 1978); and Raymond L. Dirks, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,812 (Jan. 22, 1981).

Both Dirks and the Division of Enforcement of the SEC appealed the initial decision. In a second hearing, the Commission upheld the administrative law judge’s theory of Dirks’s liability as an aider and abettor of tippees who had traded on inside information. In order not to discourage other securities analysts from investigating corporations and following up suggestions of fraud, and in light of Dirks’s “otherwise unblemished twenty year record in the securities industry,” the Commission reduced his penalty from suspension to censure. Raymond L. Dirks, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,812, at 83,950.

681 F.2d at 829. The court also upheld the SEC’s interpretation of rule 10b-5 and affirmed its reduction of Dirks’s penalty. See note 96 supra.


98 681 F.2d at 835-36. See notes 62-65 supra and accompanying text.

99 The term constructive breach is not used by the Dirks court. See Langevoort, supra note 78.

100 Id. at 839.

101 Id. at 841.
2) a duty "based on the nature of the undisclosed information." Dirks attempted to show that his actions did not render him liable under either theory. He argued first that his three primary informants, all former employees of EFCA or a subsidiary, did not breach any duty cognizable under state law when they told him that they suspected the company of committing fraud. The court adopted this view, which undercuts the first of the two rationales advanced in previous cases for extending rule 10b-5 to persons trading on insiders' tips: Dirks did not participate in any breach of a fiduciary or similar duty.

Second, liability based on the misappropriation theory could not be sustained on the unusual facts of this case. Dirks argued that the informants had no legal duty under state law to keep information about corporate fraud confidential, so he could not be found to have misappropriated the information he obtained from EFCA's present and former employees. The court did not dispute this argument.

Unable to sustain Dirks's censure on either the fiduciary or the misappropriation theory, the court looked to Chiarella to fashion a modification of the fiduciary theory broad enough to encompass the facts before it. Focusing on the majority opinion in Chiarella and lower court cases, the Dirks court argued that neither the Supreme Court nor the circuits intended to limit rule 10b-5 to the states' standards of fiduciary responsibility. That is, an actual prior breach of fiduciary duty punishable under state law was not needed to trigger the disclose-or-refrain mandate of rule 10b-5. The court declined to interpret Shapiro v. Merrill Lynch and Chiarella as requiring "that

103 Id. at 835.
104 Id. at 838.
105 Id. Dirks argued that his informants had not violated any state law when they told him what they knew about fraud at EFCA. The court did not appear to be convinced that the informants had "no duty under California law to maintain confidentiality." Id. at 838 n. 15. However, the SEC on appeal did not contest Dirks's interpretation of state law. Id. at 838. The court thus was bound by the presumption that Dirks did not learn of EFCA's misdoings as a result of a corporate insider's tortious act.
106 See notes 37-42 and 55-60 supra and accompanying text.
107 See notes 62-65 supra and accompanying text.
108 See note 105 supra.
109 681 F.2d at 838 & n.15.
110 Id. at 839 & n.16.
111 Id. at 837, 839.
112 Id. at 838-39.
113 Id.
114 See note 27 supra.
a breach by insiders is necessary to make their 'tippees' answerable for acts that would have constituted a breach had they been committed by insiders." Instead, the court applied a constructive breach theory. It found that because Dirks's informants would have been subject to the disclose-or-refrain constraints of rule 10b-5 had they attempted to trade on their information, Dirks and his tippees were subject to the same liability. Thus, even though the court did not find that the informants had in fact breached any duty, the court held that Dirks, and by extension the five investors, became liable when they traded in a way that would have been forbidden to their informants.

Although the court cited recent cases and secondary authorities to support its proposition that an actual breach of a fiduciary duty is not needed to trigger the disclose-or-refrain rule, it did not set out particularly helpful guidelines for applying its constructive breach theory. Two important questions remain open. First, the court explicitly declined to "fix the outermost line" of its theory of liability under rule 10b-5 without a breach of fiduciary or other state-recognized duty. With little direct analysis of the facts or policies which define the bounds of this liability, the court only noted of Dirks, "[w]herever the line may be, this case is within it." Second, it is far from clear whether this theory of constructive breach of duty may be put forth by the SEC only, or whether it is generally available to plaintiffs in support of a private action.

As an alternative to the theory of constructive breach, the court put forward a second, more novel theory on which to uphold the SEC's decision. Under this theory, "registered broker-dealers . . . and those associated with them, like Dirks," owe a non-fiduciary duty to the SEC and the public. Earlier in its opinion, the court, looking to Chiarella, recognized that "[b]ecause the disclose-or-refrain duty is extraordinary, it attaches only when a party has legal obligations other than a mere duty to comply with the general antifraud proscriptions in the federal securities laws." The court then found

115 681 F.2d at 839 n.16.
116 Id. at 839.
117 Id.
118 Id.
119 Id. at 839 & nn.16, 18.
120 Id. at 839; see also note 39 supra.
121 Id. at 839 n.19. "Our deference to an administrative construction [of rule 10b-5] in this case does not imply that we would hold Dirks liable in a private action for damages." Id.
122 Id. at 840.
123 Id. at 837.
wellsprings of just such "legal obligations," owed to the SEC and the public at large, arising from the licensing procedures and high ethical standards required of broker-dealers.  

This second theory, in effect, views registered broker-dealers and their employees as a species of insider, and imposes on them the same obligations articulated so explicitly in *O’Conner* for corporate insiders. Because they are licensed by the SEC, they owe a legal duty to the SEC. By virtue of this duty, they are subject to a separate duty under rule 10b-5 to the entire contemporaneously trading public.

This rationale raises the obvious policy question of whether registered broker-dealers should be subject to the same duties as corporate insiders. Their job, after all, is to collect information and pass it

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While the court cited authority from the language of the Securities Exchange Act of 1934, its legislative history, and prior cases, 681 F.2d at 840-41, it left unclear the persons and entities on which this duty to the SEC and the public falls.

The route by which Dirks acquired the duty, and its applicability to others along that route, remained ill-defined. The court held Dirks liable for a breach of legal obligations incumbent on registered broker-dealers. Yet the court placed Dirks in the class of "private securities analysts," *id.* at 829, and there is no evidence that he was licensed by the SEC. One would reasonably assume that the liability had descended to him through the obligations of his employer, Delafield Childs, a registered brokerage firm. Yet the firm was not charged by the SEC with any violations, and the court did not discuss the firm's possible involvement, even in dicta. In fact, neither the court nor the SEC suggested that Delafield Childs may have been implicated in Dirks's violations, either by imputation from Dirks's actions, for failing to supervise him properly, or for aiding and abetting its five censured clients. Nor does the court hint that Dirks may have been acting outside the scope of his employment by investigating EFCA or passing his findings along to the firm's clients.

In light of the development of the law until this point, it is hard to understand why Delafield Childs should not have been censured with Dirks for breaching its ethical obligations to the SEC and the public. Rule 10b-5 itself is a broad, catch-all antifraud measure, and liability under it has been extended from corporate insiders to tippees and second-order tippees. See SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963); Shapiro v. Merrill Lynch, 495 F.2d 228; SEC v. Texas Gulf Sulphur, 401 F.2d 833; Investors Management Co., 44 S.E.C. 633 (1971). In addition, the securities laws place a duty on registered broker-dealers to supervise their employees. 15 U.S.C. § 78o(b)(5)(E) (1970). See also Jacobs, *supra*, at 963-66. Thus the failure of the court and the SEC to consider the involvement of Delafield Childs in Dirks's wrongdoing makes the underlying duty to the SEC and the public difficult to conceptualize and apply in subsequent cases.

The *Dirks* court also failed to address any conflict of interest which may be raised by a registered broker-dealer's duty to disclose under its ruling. See Jacobs, *supra*, at 871-81. Jacobs suggests that if a conflict of interest arises between a broker-dealer's duty to his clients and his duty to the public, the latter takes precedence. See Jacobs, *supra*, at 969 & n.577. See also 1 BROMBERG & LOWENFELS, *supra* note 47, at § 5.6. See text accompanying note 19 *supra*.

125 681 F.2d at 840. See note 87 *supra* and accompanying text.

126 For a comparison with the language of *O’Conner*, see text accompanying note 87 *supra*. 
on to clients. In this respect they are ordinarily the agents of corporate and securities industry outsiders. Under Chiarella, broker-dealers are already forbidden to use information obtained through a breach of a corporate insider’s fiduciary duty. Under Newman, they may not use information which they have misappropriated in any other way. These two prohibitions cover nearly every situation in which broker-dealers or their employees might profit from inside information. In the light of the unusual facts of the case, one wonders why the Dirks court created such a broad rule of a securities industry insider’s duty to the SEC and the public on such an unprecedented foundation.

The first case, and only case to date to rely on Dirks is SEC v. Cayman Islands Reinsurance Corp. This decision illustrates the problems which may attend an unchecked application of the Dirks theory of 10b-5 liability predicated on the breach of a generalized, undefined duty to the SEC and the public. In this case, the court used Dirks to sustain the sufficiency of an SEC complaint against a corporate director who had helped prepare a misleading prospectus. The SEC failed to allege a particular duty under which the director was required to disclose his information. Holding that the complaint stated a claim, the court cited only Dirks in support of the proposition that a duty to disclose “for one with the knowledge and involvement alleged here . . . is inherent in the securities law.”

The case is disturbing because in it the court apparently sanctioned the SEC’s use of a relatively blunt legal instrument, an amorphous duty to the SEC and the public, when the securities laws provide more precisely defined restrictions on acts of a director or other controlling person.

If future courts find the Dirks rule too broad, the facts of the case may limit its holding. The information that the Supreme Court found Chiarella free to use to his own advantage concerned normal, lawful business activity. In contrast, the D.C. Circuit held that Dirks was not free to profit, however indirectly, from his undisclosed

127 The five clients to whom Dirks passed information about EFCA, however, were registered investment advisors, Boston Co., [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,705, at 80,820-23, and presumably would share the duties of securities industry insiders with Dirks and his employer.
128 [Current Vol.] FED. SEC. L. REP. (CCH) ¶ 98,717 (S.D.N.Y. June 17, 1982).
129 Id., ¶ 98,717, at 93,591.
130 Id. at 93,592.
131 Id. at 93,593. Thus the court in Cayman Islands, without explaining its action, extended the Dirks theory of a general duty to the public and the SEC from securities industry insiders like Dirks to corporate insiders.
awareness of criminal activity. Despite Dirks's role in exposing the fraud at EFCA, the court found that the equities weighed against him because he had concealed his knowledge of criminal activities so that his clients might profit, or at least avoid otherwise inevitable losses. The emotional center of Dirks is that "private analysts may not keep information they have discovered from the SEC, while their clients dump fraudulent securities on the uninformed public." The court accepted the proposition that the nature of the information the informants revealed about EFCA released them from their duty of confidentiality. Future courts may read Dirks to mean that the nature of the information—criminal activity—imposes a positive duty of disclosure on licensed broker-dealers and those like Dirks who share in their obligations.

III. Conclusion

Dirks has petitioned the Supreme Court for certiorari. A review would provide the Court an opportunity to clarify questions about the reach of rule 10b-5 which have arisen since Chiarella.

Newman, O'Connor, and Dirks, in enunciating a broad reading of duty under section 10(b), seem to throw off the restraint which the Supreme Court exhibited in Chiarella. If the Court thinks that rule 10b-5 is being distorted beyond its intent, it may wish to limit the rule's application in the Dirks case and leave any further extension to Congress or the SEC.

If, on the other hand, the Supreme Court declines to grant certiorari, the lower courts would still be free to interpret Dirks narrowly.

132 681 F.2d at 829, 841.
133 Id. at 829 (emphasis added). The court may also have reacted to the fact that the clients, who profited at the expense of the "public," were all large investment firms, also registered and therefore subject to market insiders' ethical responsibilities. See note 127 supra.
134 681 F.2d at 838. Like the question of the informants' breach of a fiduciary duty, see note 105 supra, the SEC did not contest this issue on appeal. The court thus had to base its decision on Dirks's assertion that the informants had no duty of confidentiality with regard to EFCA's criminal activities.
136 This appears to be the Justice Department's position. In a footnote to the SEC's brief to the Supreme Court, the solicitor general notes that Dirks "was subject to no fiduciary relationship with other traders." N.Y. Times, Nov. 2, 1982, at 32, col. 1. It also states that "there was no element of misappropriation or other misconduct in obtaining or transferring the information, and the information was legally available to others through the exercise of diligence and acumen." Id. Finally, the solicitor general suggests that the D.C. Circuit's decision might have an adverse effect on criminal law enforcement. Id. See also Justice Dept. Breaks with SEC on Dirks' Equity Funding Censure [Current Vol.] SEC. REG. & L. REP. (BNA) No. 42, at 1843 (Oct. 29, 1982).
Limiting the case to its facts, they could find that market insiders need disclose to the SEC (or refrain from trading) lawfully obtained, material, inside information only if it concerns a corporation's criminal misconduct. The courts should not follow Cayman Islands and use Dirks as an all-purpose dragnet with which to catch corporate insiders whose permitted range of activities Congress intended to regulate with specific provisions of the federal securities laws.

Addendum

As this piece was going to press, the Supreme Court granted certiorari in Dirks.137

137 51 U.S.L.W. — (U.S. Nov. 15, 1982).