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Former-Client Conflicts

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The law governing former-client conflicts of lawyers seems far too familiar and fixed to require extended attention. Its most famous and durable feature, the so-called "substantial relationship" standard,[1] or something very much like it, is used by every jurisdiction in the United States[2] to test for former-client conflicts. The textual origin of the substantial relationship standard can be traced confidently to the opinion of Judge Edward Weinfeld in *T.C. Theatre Corp. v. Warner Brothers Pictures*,[3] (*TC Theatre*), a federal district court decision in 1953. The opinion continues to be cited constantly for the standard. With no offense intended to its status as legal canon, *T.C. Theatre* staked out new ground only in a verbal sense. In only slightly altered formulation, clear precursors of the standard can be found in much earlier decisions.[4] The substantial relationship standard has

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An earlier version of this Article was the basis for a talk at the Hofstra University School of Law on March 11, 1996. See Charles W. Wolfram, *The Vaporous and the Real in Former-Client Conflicts*, 1 J. INSTIT. FOR STUDY OF LEGAL ETHICS 133 (1996), for an earlier version. Richard Zitrin gave a useful critique of the earlier version.

1. My article, *The Substantial-Relationship Concept in Former-Client Conflicts of Interest*, *in* FIDUCIARY DUTIES/CONFLICTS OF INTEREST at 163-95 (A. MacInnes & B. Hamilton eds., 1994), was an expanded version of a lecture given to the Law Society of Manitoba in November, 1993. The exercise was quite useful as a preliminary sorting of some of the themes developed here. Because the publication in which it appears is not widely available in the United States, I do not hereafter cite it.

2. On arguable local variations from the substantial-relationship standard, see *infra* text accompanying note 16.

3. 113 F. Supp. 265, 268 (S.D.N.Y. 1953) ("[T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client.").

4. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.4.3(b), at 368 n.99 (1986); *see also, e.g.*, WILLIAM H. FORTUNE, RICHARD H. UNDERWOOD & EDWARD J. IMWINKELRIED, MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK § 3.6.1, at 111-12 (2d ed. 1996) [hereinafter FORTUNE, UNDERWOOD & IMWINKELRIED] (citing Brown v. Miller, 286 F. 994 (D.C. Cir. 1923)); Alandra Funderburk and Ursula Odiaga, Comment, *Conflicts of Interest: Subsequent Adverse Representation*, 3 GEO. J. LEGAL ETHICS 177, 177-78 (1989) (discussing nineteenth century cases).

The history of legal regulation of conflicts in Anglo-American law is quite ancient. *See* PAUL BRAND, THE ORIGINS OF THE ENGLISH LEGAL PROFESSION 123-24 (1992). One of the earliest cases, which has distant echoes of several modern professional rules, involved a charge of naked side-switching. *Id.* at 123. Professor Paul Brand has written about a pleading filed in 1282 against one William of Wells who had acted as "serjeant" for

become one of the most widely accepted staples of the modern law governing lawyers. Although it was quite surprisingly missing from the American Bar Association's (ABA) *Model Code of Professional Responsibility*,[5] as was, for that matter, any other statement of a former-client conflict rule,[6] the ABA explicitly adopted the substantial relationship formulation to state the former-client rule at the core of *Model Rule* 1.9(a) in the 1983 *ABA Model Rules of Professional Conduct*.[7] Even otherwise-renegade jurisdictions like New York[8] and Texas,[9] which have to some significant extent refused to follow the *Model Code*, have copied the substantial relationship formulation in their lawyer codes. California, true to its non-conformist tradition in drafting lawyer codes, struggles (rather clumsily) to avoid stating the formulation in its 1990 lawyer code rule on former-client conflicts.[10] But California decisions, some even citing *T.C. The-*

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the plaintiffs in earlier proceedings in King's Bench against the lord of the plaintiffs' manor. *Id.* The plaintiffs alleged that, after they had paid Wells part of his fee, he failed to perform the agreed-upon legal services and went over to the opposition without their permission. *Id.* at 124. The fragment of the report does not indicate the disposition of the case, in which lawyer Wells defended on the factual grounds that he had withdrawn because of nonpayment of his fee and that he had not assisted the other side. *Id.*

5. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE]

6. In one of its most glaring omissions, the 1969 ABA *Model Code of Professional Responsibility* said nothing about former-client conflict issues. *See* Thomas D. Morgan, *Conflicts of Interest and the Former Client in the Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RES. J. 993, 995 ("The problem of representation contrary to the interest of a former client is one of the major omissions in the present Code of Professional Responsibility."). Lawyers and courts were left to tease rules out of a melange of sources — *Canon* 4 on confidentiality, *Canon* 5 on conflicts generally, and *Canon* 9 on the appearances of impropriety. The courts had the *T.C. Theatre* formulation, 113 F. Supp. at 268, ready on hand and continued to apply it, notwithstanding its notable omission from the 1969 *Model Code*. *See* WOLFRAM *supra* note 4, 7.4(c), at 363-64 § 7.4.2(c), *supra* note 4, at 363-64 (noting that although the *Model Code* overlooked the "former client conflict situation... [c]ourts nonetheless have managed to find, sometimes with astonishing sleight of hand, the necessary Code basis by which to prohibit disloyalty to a former client in a substantially related matter, even in a misuse of confidences or secrets."). On the continuing confusion produced by the *Canon* 9 "appearance of impropriety" notion, see *infra* note 35.

7. MODEL RULES OF PROFESSIONAL CONDUCT (1983); *see also* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (3d ed. 1996) [hereinafter MODEL RULES ANN.].

8. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-108 (1990) ("Except with the consent of a former client after full disclosure, a lawyer who has represented the former client in a matter shall not: (1) [t]hereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.").

9. TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, RULE 1.09(a)(3) (1996) (stating that a lawyer shall not represent another person in matter adverse to personally represented former client "if it is the same or a substantially related matter"). Confusingly, Texas *Rule* 1.09(a)(2) precludes representation of another person if "the representation in reasonable probability will involve a violation of" Texas *Rule* 1.05 on confidentiality. *Id.* The obviously large overlap between the two subsections is not satisfactorily worked out in the comments to Texas *Rule* 1.09, and has left their respective scopes indeterminate. Robert P. Schuwerk & John F. Sutton, *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUST. L. REV. 1, 152 (1990).

10. CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-310(E) (1990) ("A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."). The commentary to the rule does not touch upon what standard is to be employed under the rule. California is currently in the process of studying whether to amend its professional rules on conflict of interest, an exercise sorely needed in that jurisdiction.

atre,[11] nonetheless continue their own tradition of using the substantial relationship formulation explicitly.[12] The *Restatement of the Law Governing Lawyers*, true to its normal compass of following prevailing law in the absence of a significant reason and at least minimally supportive authority to deviate from it, has also restated the substantial relationship test in its section 213, albeit in somewhat altered terms.[13]

One startling indication of wide acceptance of the substantial relationship standard is that there have been few scholarly attempts to understand and explain it[14] — as if its theoretical grounding and appropriate areas of application were transparent. Yet, as with such durable formulations as the "reasonable person"

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11. 113 F. Supp. 265.

12. *E.g.*, Flatt v. Superior Court, 885 P.2d 950, 954-55 (Cal. 1994) ("[T]he courts have recognized that the chief fiduciary value jeopardized is that of client *confidentiality*. Thus, where a former client seeks to have a previous attorney disqualified from serving as counsel to a successive client in litigation adverse to the interests of the first client, the governing test requires that the client demonstrate a '*substantial relationship*' between the subjects of the antecedent and current representations.") (emphasis in original), (citing *T.C. Theatre Corp.*, 113 F. Supp. 265 (S.D.N.Y. 1953)); Zador Corp. v. Kwan, 37 Cal. Rptr. 2d 754, 758 (Cal. Ct. App. 1995); Civil Serv. Comm'n v. Superior Court, 209 Cal. Rptr. 159, 165-66 (Cal. Ct. App. 1984).

13. *See* RESTATEMENT 1996 DRAFT § 213 (stating that a current matter is substantially related if either "the current matter involves the work the lawyer performed for the former client" or "there is a substantial risk that the representation of the present client will involve the use of information acquired in the course of representing the former client, unless the information has become generally known").

14. *See* Ronald I. Mirvis, *Conflict of Interest Disqualifications: Former Client Contact — A Selective Bibliography*, 47 REC. ASS'N. B. CITY N.Y. 108 (1992) (focusing on special "revolving door" issues affecting former government lawyers and on screening issues generally); *see also, e.g.*, GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, 1 THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.9:100 et seq. (2d ed. 1990) [hereinafter HAZARD & HODES] (discussing much more common problem of former-client conflicts in private practice); *Malpractice, Law. Man. on Prof. Conduct* (ABA/BNA) § SCE 51:201 *et seq.* (September 23, 1992) [hereinafter ABA/BNA LAWYERS MANUAL] (discussing substantial relationship test); FORTUNE, UNDERWOOD & IMWINKELRIED, *supra* note 4, § 3.6 (discussing subsequent representation); WOLFRAM, *supra* note 4, § 7.4 (discussing former clients and the substantial relationship standard); Development Note, *Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1315-34 (1981) (discussing various thresholds of the substantial relationship standard); Gary Lowenthal, *Successive Representation by Criminal Lawyers*, 93 YALE L.J. 1 (1983) (providing a specialized analysis of former-client problems for criminal-defense lawyers); Morgan, *supra* note 6, at 995-96 (giving a short and summary discussion of the *Model Rule* provision); Alex W. Jackson, *Attorney Disqualification: Application of the Substantial Relationship Test*, 50 ALA. LAW. 261-62 (1989) (discussing the substantial relationship test and noting that, although the prohibition against representing interests adverse to former clients is not absolute, lawyers should exercise wisdom before entering into such representation); FUNDERBURK AND ODIAGA, *supra* note 4, at 177 (discussing the substantial relationship test and other rules governing subsequent representation); Blake P. Loebs, Note, *Representation of Interests Adverse to a Former Client: A Suggested Approach for the Tenth Circuit*, 1989 UTAH L. REV. 935 (1989) (recommending "a more lenient approach to disqualification," including using the substantial relationship test only to "determine whether the similarity of the issues in the two relationships is patently clear"); Carl J. Silverstein, Comment, *Former Client Conflicts: The Substantial Relationship Test and the Presumption of Divulgence*, 12 J. LEGAL PROF. 219, 232 (1987) (discussing the substantial relationship test as adopted by the Alabama Supreme Court and noting that, although parties may prove the elements of the substantial relationship test, courts will not always permit disqualification); Note, *Disqualification of Attorneys for Representing Interests Adverse to Former Clients*, 64 YALE L.J. 917, 918 (1955) (examining "the scope of the duty owed by an attorney to his former client"). For one treatise/practice guide that mentions former-client conflicts only in passing, see CHARLES P. KINDREGAN, JR., PRACTICAL ISSUES OF PROFESSIONAL RESPONSIBILITY IN THE PRACTICE OF LAW § 9.13 (2d ed. 1995).

standard of traditional tort law,[15] the substantial relationship standard has sometimes proved much easier to recite than to describe accurately or to apply confidently.[16] Those difficulties, together with the theoretical and practical importance of the standard, make critical examination of the standard long overdue. I here attempt that examination, hoping to advance understanding of what lies behind the standard and how it should be applied in everyday law practice. A motif will be the effort of the *Restatement of the Law Governing Lawyers* to reformulate the standard.[17]

My main theoretical concerns are two. First, I examine the obvious and important confidentiality basis of the standard. I then ask whether concern to protect confidential information of the former client exhausts its relevant policy objectives. I conclude that the substantial relationship standard aims to protect confidentiality, but that confidentiality does not exhaust the relevant concerns informing the standard and former-client conflicts law generally.

Second, I consider the extent to which considerations of loyalty unrelated to confidentiality should independently limit future representations against a former client. I conclude that, while loyalty is an important consideration, the duty of loyalty owed to a former client is quite limited. Although some decisions and commentators proceed on a different assumption, which I critically analyze, loyalty considerations should have no separate role in extending the substantial relationship standard beyond the area defined by confidentiality considerations — with two important but theoretically irrelevant exceptions. One exception accepted in the *Restatement* holds it appropriate to extend the former-client conflict prohibition to situations in which the lawyer's diligent representation for the second client would entail an attack on the lawyer's own work for the former client, even in a case in which confidentiality is not at risk. Examination of the attack-own-work variety of former-client conflict reveals that the concern, in the end, is with loyalty after all. Often the concern will be with the lawyer's loyalty to

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15. RESTATEMENT (SECOND) OF TORTS § 283 (1965).

16. *E.g.*, Berkowitz v. Estate of Roubicek, 471 N.Y.S.2d 208, 212 (N.Y. Sup. Ct. 1983) (opining that substantial relationship test has been variously interpreted and has proven difficult for courts to apply). More commonly, courts have been beguiled by the simplicity of its statement and have even praised the test as stating a "bright line rule [that] provides a clear test that is easy to apply, thereby allowing self-enforcement among members of the Bar." Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663, 667 (N.Y. 1996).

17. Section 213 was first published in RESTATEMENT OF THE LAW GOVERNING LAWYERS § 213 (Am. Law Inst. Tent. Draft No. 3, 1990). Discussion at the 1990 meeting did not progress to that section. The section was published again in RESTATEMENT OF THE LAW GOVERNING LAWYERS § 213 (Am. Law Inst. Tent. Draft No. 4, 1991), in substantially the same form. For the main part of the discussion of the section at the 1991 annual meeting of the Institute, see 68 A.L.I. PROC. 559-68 (1992). The 1991 annual meeting discussion of the *Restatement* ended in the midst of debate on the section, where it resumed at the 1992 annual meeting, again employing the text of RESTATEMENT OF THE LAW GOVERNING LAWYERS § 213 (Am. Law Inst. Tent. Draft No. 4, 1992). For the 1992 discussion, see 69 A.L.I. PROC. 464-78 (1993). The section was eventually tentatively approved at the 1992 meeting as formulated in RESTATEMENT OF THE LAW GOVERNING LAWYERS § 213 (Am. Law Inst. Tent. Draft No. 4, 1992). It was published again, substantially unchanged, in *Restatement 1996 Draft* section 213. For further discussion of section 213, see *infra* text accompanying note 27-33.

the present client, but concern may potentially extend to the former client as well. Coincidentally, that examination also reveals some perhaps counter-intuitive lessons about such matters as standing to assert a conflict as well as some troubling and general questions about the narrow rule of the ABA's *Model Rules of Professional Conduct* on client consent to a former-client conflict. The *Restatement* states an appropriately broader consent rule.

While therefore irrelevant in general to former-client problems, loyalty considerations nonetheless are primarily responsible for two of the most important rules used in implementing the substantial relationship standard. Those considerations inform the rules determining when a representation ends — what I call the "sunset" problem. The problem is critical because resolving it determines when a representation has been transformed into one involving only a former client, thus allowing for application of much more relaxed conflict rules. Loyalty considerations also undergird the "hot-potato" doctrine, which sharply limits the ability of a lawyer to withdraw prematurely from a representation in order to take on the representation of an adversary of the now-former client. I then look briefly at another narrow area in which courts have applied the loyalty concept in former-client cases — when the complaining former client was a co-client with the person whom the lawyer is now representing. I conclude that loyalty legitimately plays a role here, but again in ways limited to this particular sub-type of former-client situation.

Once the respective realms of confidentiality and loyalty are set, I show how those doctrines can be employed to flesh out the specifics of an appropriate test for application of the substantial relationship standard. I briefly survey the various alternative tests put forward by courts for that purpose. As will be seen, the array of competing tests is great, but all are flawed. I argue that a properly calibrated test for the substantial relationship standard should focus sharply on protecting the original client's legitimate expectations of confidentiality. That focus requires a fact-specific inquiry aimed at reconstructing the original representation as well as the latter one. Among other considerations, that factual reconstruction test best respects the oft-repeated injunction that the inquiry be conducted at a level of abstraction sufficient to protect against improper exposure of a former client's confidential information in the course of attempting to determine whether to protect it. In the other direction, the article critiques the so-called "playbook" view of former-client protection, concluding that only in unusual instances specifically threatening a client's confidential information should a lawyer's exposure to a former client's general information — such as that relating to a client's approach to settlement, trial and other litigation strategy, financial information or business practices — constitute an adequate basis for finding a substantial relationship.

Finally, I turn to some practical objections that might be made to applying the substantial relationship standard in the way entailed in the factual reconstruction test. I first note that the factual reconstruction test favored here and in the

decisions — precisely because it is fact specific and relies on a necessarily suppositional reconstruction of representations — carries a price tag of limiting the extent to which computer-driven programs can be employed effectively to determine the presence of conflicts in large law firms. I argue that the cost imposed by complying with the factual reconstruction rule is both easily exaggerated and, to the extent it exists, is an appropriate cost of conducting a law practice. Nonetheless, the risk that former-client prohibition may sweep too widely is legitimate. I conclude with some thoughts about future directions that former-client conflict law might appropriately take in order to limit what may otherwise prove to be over-application of the standard, particularly with respect to former-client representations that have a "shelf-life" aspect in that they occurred long in the past. Along the way, I applaud such developments as the creation of special rules for conflicts created or mitigated by the lateral moves of in-migrating and out-migrating lawyers, again in the interest of appropriately limiting former-client doctrine to situations in which the threats it is designed to alleviate are present in significant measure. I also explore briefly the extent to which limitations on the scope of the old or the new representation might suffice to eliminate or limit a former-client conflict.

I. FORMER-CLIENT CONFLICT LAW: IN GENERAL

As background for discussion of the substantial relationship standard, it is well to start with some important general parameters. It is hornbook law that, for a court to conclude that former-client rules prohibit a subsequent representation, four additional elements must be shown beyond the fundamental showing of a substantial relationship:[18] (1) A client-lawyer relationship must have existed in the earlier representation.[19] Perhaps it will do that the lawyer stood in one of several "quasi" client-lawyer relationships — those in which the courts have imposed something like the special duties of confidentiality that lawyers owe their clients. Included are former relationships with a prospective client,[20]

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18. *See, e.g.*, ABA/BNA LAWYERS' MANUAL, *supra* note 14, at 51:207 (discussing seven questions from useful former-client checklists, from which the following is extracted); FORTUNE, UNDERWOOD & IMWINKELRIED, *supra* note 4, at 112 (discussing six such questions).

19. *E.g.*, Cole v. Ruidoso Mun. Schools, 43 F.3d 1373, 1384 (10th Cir. 1994) (holding disqualification denied where no showing of former client-lawyer relationship); First Hawaiian Bank v. Russell & Bolkening, Inc., 861 F. Supp. 233, 238-39 (S.D.N.Y. 1994) (holding same); Richers v. Marsh & McLennan Group Assoc., 459 N.W.2d 478, 482 (Iowa 1990) (finding same under *Canon* 4); *see generally* MODEL RULES ANN., *supra* note 7, Rule 1.9 commentary, at 146-48 (discussing formation of attorney-client relationship).

20. Protection similar to that afforded former clients guards the more limited needs for confidentiality of a former prospective client — a person who made preliminary revelations to a lawyer during an initial consultation, but who did not thereafter enter into an ongoing client-lawyer relationship. *See generally* RESTATEMENT 1996 DRAFT § 27 cmt. c (discussing confidential information of prospective clients); FORTUNE, UNDERWOOD & IMWINKELRIED, *supra* note 4, § 3.6.3 (discussing the "Rejected Case"); *see, e.g.*, Callas v. Pappas, 907 F. Supp. 1257, 1262 (E.D. Wis. 1995) (finding implied professional relationship created when attorney reviewed confidential material of prospective client); Green v. Montgomery County, 784 F. Supp. 841,

persons in a close business or other relationship with a former client,[21] or, in certain situations, former members of a "joint defense" or "common interest" arrangement for sharing confidential information[22]; (2) the present interests of

844-48 (M.D. Ala. 1992) (holding that reasonable belief of prospective client based on preliminary telephone call sufficed to establish fiduciary relationship); Bays v. Theran, 639 N.E.2d 720, 723-24 (Mass. 1994) (holding that preliminary consultation established relationship); Seeley v. Seeley, 514 N.Y.S.2d 110, 112 (N.Y. App. Div. 1987) (finding same); *cf., e.g.*, Bennett Silvershein Assoc. v. Furman, 776 F. Supp. 800, 804 (S.D.N.Y. 1991) (holding brief consultation ten years earlier insufficient). *But see* United States v. Abbell, 900 F. Supp. 449, 452-53 (S.D. Fla. 1995) (finding that one-hour consultation, during which lawyer learned confidential information, does not suffice as basis for disqualification).

21. Those are third persons in close business or other relationships with a former client, with whom the lawyer did not form a client-lawyer relationship, but who reasonably relied on the lawyer's implicit undertaking of confidentiality in providing information to the lawyer that is relevant in the lawyer's later representation of a client with interests adverse to those of the former disclosing person. *E.g.*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978) (deciding case of non-client member of trade association); Al-Yusr Townsend & Bottum Co. v. United Mid East Co., No. 95-1168, 1995 U.S. Dist. Lexis 14622 (E.D. Pa. 1995) (deciding case of individual members of joint venture); Otaka, Inc. v. Klein, 791 P.2d 713 (Haw. 1990) (holding lawyer liable where lawyer acted as non-client's broker in real estate transactions, but provided non-client extensive legal advice on law firm letterhead); Carlson v. Langdon, 751 P.2d 344 (Wyo. 1988) (holding lawyer liable to husband of client); Burkes v. Hales, 478 N.W.2d 37 (Wis. Ct. App. 1991) (holding lawyer liable where client of former law firm client). A disabling quasi-client relationship may also arise because of a lawyer's connections through another lawyer, as where a lawyer informally consults with a lawyer in another firm and thereby gains confidential information about the second lawyer's client but without forming a client-lawyer relationship with that person. *See* Janis v. Castle Apartments, Inc., 628 N.E.2d 149 (Ohio 1993) (affirming trial court ruling that discussion between attorneys involved matters of great substance and resulted in knowledge of confidential information that would be highly prejudicial to client's own case). Of course, the concept does not extend to non-client employees or other constituents of a corporate or similar entity client. *See* Dalrymple v. National Bank & Trust, 615 F. Supp. 979 (W.D. Mich. 1985) (holding that lawyer owed no former-client duties to non-client officer of bank, where bank officer could not reasonably have perceived that lawyer retained by bank to investigate officer's activities was providing personal representation to officer).

22. Non-client co-parties of a lawyer's former client may have actually shared information with the lawyer pursuant to a so-called "joint-defense" or "common-interest" arrangement for sharing privileged information. Such a party's reasonable expectation of confidentiality is protected in subsequent adverse proceedings by a former lawyer-participant in the joint-defense arrangement. *See generally* RESTATEMENT 1996 DRAFT § 213 cmt. g(ii) ("[L]awyer may have obligations to persons who were not the lawyer's clients but about whom information was revealed to the lawyer under circumstances obligating the lawyer not to use or disclose the information."); *see also, e.g.*, Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977) ("[A]n attorney should also not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of information took place between the various co-defendants in preparation of a joint defense."); Nemours Found. v. Gilbane, 632 F. Supp. 418, 424 (D. Del. 1986) ("Although there was no express attorney-client relationship, a fiduciary obligation, or 'implied professional relation' existed nevertheless because Nemours disclosed information acting on the belief and expectation that such submission was made in order for Berg to render legal service to Nemours in furtherance of Nemours' interests."); Trinity Ambulance Serv., Inc. v. G & L Ambulance Serv., Inc., 578 F. Supp. 1280, 1282-1284 (D. Conn. 1984) (holding that if there was an interaction between the two parties' counsel that bore a "sufficient resemblance to an attorney-client relationship" and if there was a substantial relationship between the successive matters, the requirement that the attorney keep former confidences would keep him from taking the case); National Medical Enters., Inc. v. Godbey, 924 S.W.2d 123, 124 (Tex. 1996) (finding that an attorney who received confidential information about a corporation while representing a former employee of that corporation is obligated to keep the information confidential and is disqualified from representing a party opposite that corporation in a subsequent lawsuit); ABA Comm. On Ethics and Professional Responsibility, Formal Op. 95-395 (1995) (stressing the attorney's ethical duty to protect privileged information obtained while

the lawyer's later client and those of the lawyer's former client must be "adverse"[23]; (3) the affected client has not effectively consented to the lawyer's subsequent representation[24]; and (4) a court would have to find that the objecting person satisfied whatever standing requirements were imposed by the jurisdiction as a condition to raising the former-client issue,[25] and that other procedural conditions have been satisfied.

In further discussion, we will finesse those important issues by assuming that a court would find that the other elements and procedural requirements have been satisfied, so that the critical, remaining question is whether a substantial relationship exists between the former and the present representations. Similarly, there is a set of fascinating imputed-conflict questions concerning the extent to which a lawyer's exposure to confidential information of a former client affects other lawyers presently or formerly affiliated with the lawyer. I touch upon those below,[26] not exhaustively by any means, but merely by way of illustrating one limitation on application of the substantial relationship standard.

II. FORMER-CLIENT CONFLICTS IN THE *RESTATEMENT*: An Overview

The *Restatement*'s implementation of the former-client conflict rule is contained in section 213. Although it varies from earlier versions in prior editions of

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representing a member of a joint defense consortium where the attorney later is involved in litigation opposing a member of the consortium).

23. *See* RESTATEMENT 1996 DRAFT § 213 (mandating that for former-client conflict to exist, "the interests of the former client [must be] materially adverse" to those of the lawyer's present client); *id.*, cmt. e (discussing section 213's adversity requirement); *see e.g.*, Arteaga v. Texas Dept. of Protective and Regulatory Servs., 924 S.W.2d 756, 763-64 (Tex. Ct. App. 1996) (finding a lawyer was not disqualified from representing father in parental-termination proceeding due to former representation of mother in arguably related matter, where there was no present custody dispute between them, and father's interests were not otherwise adverse to mother). On occasion, the concept of adverseness is stated in language susceptible of a quite broad reading. *E.g.*, *In re* Dayco Corp. Derivative Sec. Litig., 102 F.R.D. 624, 628 (S.D. Ohio 1984) ("Generally the test of adversity is premised on whether or not the interests of the former and current clients are differing.") (citation omitted); *In re* Blinder, Robinson & Co., 123 B.R. 900, 909 (Bankr. D. Colo. 1991) ("There is no requirement that the subsequent representation strike a totally adversarial posture. It should be enough that the two positions are not exactly aligned."). On the whole, however, at least in their actual holdings, courts have been reluctant to find a former-client conflict in the absence of significant adversity between the positions of the subsequent represented person and the lawyer's former client.

24. RESTATEMENT 1996 DRAFT § 213; Elliott v. McFarland Unified School Dist., 211 Cal. Rptr. 802 (Cal. Ct. App. 1985). The lawyer, not the former client, has the burden of persuasion on issues relating to client consent. *In re* Corn Derivatives Antitrust Litig., 748 F.2d 157, 162 (3d Cir. 1984); IBM v. Levin, 579 F.2d 271, 281-82 (3d Cir. 1978); Civil Service Comm'n v. Superior Court, 209 Cal. Rptr. 159, 161 (Cal. Ct. App. 1984). On whether the consent needs to come only from the former client, from both the former client and the present client, or from only one or the other depending on the circumstances, see *infra* text accompanying notes 94-97.

25. *E.g.*, *In re* Infotechnology Inc., 582 A.2d 215 (Del. 1990) (discussing litigant who was non-client lacks standing to assert conflict in law firm's representation of present client that would entail possibly hostile examination of employee of former client on issues arguably substantially related to law firm's former representation of employer). *But see, e.g.*, Kevlik v. Goldstein, 724 F.2d 844, 847 (1st Cir. 1984) (holding opposing counsel may always bring to court's attention violation of ethical rules).

26. *See infra* text accompanying notes 211-67 for a discussion of imputation.

the *Restatement*,[27] it employs a formulation that struck us at the time (and strikes me still)[28] as a straightforward way of capturing the essential point behind the *T.C. Theatre.*[29] formulation:

> § 213. Representation Adverse to Interest of Former Client
> Unless both the affected present and former clients consent to the representation under the limitations and conditions provided in § 202, a lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the interests of the former client are materially adverse. The current matter is substantially related to the earlier matter if:
>
> (1) the current matter involves the work the lawyer performed for the former client; or
>
> (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.[30]

The substantial relationship standard is expressed in section 213(2), which I will discuss in depth presently.[31] Subsection (1), stated in obviously disjunctive form and thus standing as an independent basis for disqualification, expresses an alternative ground for finding an impermissible conflict: that the lawyer's work in the earlier representation is also involved in the present, adverse representation as a prominent point of the former lawyer's attack. Given the requirement that the current representation be "materially adverse"[32] to the former client, of course, that work would be involved in the specific sense that the lawyer was attempting in some material way to undercut, foreshorten, emasculate, diminish, or otherwise to attack the lawyer's prior work. That general concept will hereafter be termed the "attack one's own work" variation on former-client conflicts, leaving the substantial relationship concept to deal with the analytically different concept referred to in subsection (2). As will be later discussed,[33] the subsection (1) category of cases, thought of as distinct from subsection (2) conflicts, is hardly large. But situations may exist in which at least the existence of a conflict is more readily apparent through the type of analysis that subsection (1) stimulates.

III. THE CENTRALITY OF CONFIDENTIALITY IN FORMER-CLIENT LAW

On what fundamental principle is the prohibition against former-client con-

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27. *See supra* note 17 (discussing the history of section 213 in various drafts).

28. The version cited is from the most recent, authoritative edition dealing with Chapter 8 of the *Restatement*, the chapter dealing with conflicts, in *Restatement 1996 Draft*.

29. 113 F. Supp. at 268.

30. RESTATEMENT 1996 DRAFT § 213. On the meaning of the concluding "unless" clause, see *infra* text accompanying note 171.

31. *See infra* text accompanying notes 158-83 (discussing the substantial relationship test).

32. RESTATEMENT 1996 DRAFT § 213.

33. *See infra* text accompanying notes 80-101 (discussing "a special case for protecting against disloyalty").

flicts based? Reported decisions round up all the usual suspects — invoking considerations of confidentiality as well as those of loyalty, with an occasional decision relying on the creaky "appearance of impropriety" aphorism. A recent decision of the New York Court of Appeals, Proteus-like, purported to rely on them all: "The [former-client] rule fully implements attorneys' fiduciary duties of loyalty and confidentiality to their clients and their ethical obligation to avoid the appearance of impropriety."[34] The opinion is perhaps extreme in its doctrinal catholicity, and particularly in its reliance upon the antiquated "appearances" concept, which has been discarded almost everywhere. I forego the opportunity to flail, yet again, the mostly dead dog of appearance of impropriety,[35] for it is

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34. Sulow v. W.R. Grace & Co., 632 N.E.2d 437, 438 (N.Y. 1994). Despite its flirtation with the "appearance of impropriety" concept, it appears that nothing in the *Sulow* opinion turns on the court's choice of rationale. The court again invoked and purported to apply the "appearance" notion in reaching its holding, and at that the court appears confused about what "appearance" it was dealing with. *See Sulow* 632 N.E.2d at 440 (invoking "appearance of impropriety" standard as explanation for rule that objecting client who shows substantial relationship need not also demonstrate that lawyer actually acquired confidential information). New York courts continue to be over-exposed to the appearance rationale because of the state's increasingly lonely status as one of the few states that has retained much of the old *Model Code of Professional Responsibility* (1969). The old *Model Code* employed the "appearances" term in its *Canon* 9 and this formulation is still found in the New York lawyer code. *See* N.Y. CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9 (1990) (stating in the title that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety"). In any event, all is well. The *Sulow* court concluded that, in an out-migrating lawyer situation, a law firm could rebut the normally irrebuttable presumption of acquisition of confidential information by successfully demonstrating that the lawyer who actually provided legal services had left the firm and that no lawyer who remained at the firm possessed confidential documents or other information about the former client. *Sulow* 632 N.E.2d at 442-43. Strenuous analytical effort to reach that conclusion was required of the court because New York's Code lacks the equivalent of the present *Model Rule* 1.10(b), which states a rule precisely the same as the rule announced in *Sulow*. Strangely, the court's opinion in *Sulow* fails to note that New York is simply following the rule already well-established by rule and decision in almost every other jurisdiction, state and federal, in the United States.

35. While its demise has frequently been reported, the "appearance of impropriety" standard occasionally shows spasmodic signs of life. The standard is explicitly rejected for the purposes of former-client conflicts in the *Model Rules*. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 cmt. ¶ [5] (1983) [hereinafter MODEL RULES]. We attempt to drive a stake through its heart in the *Restatement*, although heavy subsequent editing dulled the point somewhat. *Compare* RESTATEMENT § 201 cmt. c(iv) (Am. Law Inst. Tent. Draft No. 4 1991) [hereinafter RESTATEMENT 1991 DRAFT], *with* RESTATEMENT 1996 DRAFT § 201. Almost every scholarly analysis of the "appearance" standard has disapproved of its use as an independent basis for finding conflict. *See generally* WOLFRAM, *supra* note 4, § 7.1.4 (noting that *Model Rules* avoid the "Canon 9 term 'appeareance of impropriety' because it is too vague a standard of discipline"); *see also, e.g.*, HAZARD & HODES, *supra* note 14, at 298-99 (noting that "appearence of impropriety" is too vague a phrase); FORTUNE, UNDERWOOD & IMWINKELRIED, *supra* note 4, at § 3.6.5 ("[B]oth academic commentators and appellate courts have become critical of the 'rule.' They point out that its application has led to 'wrong' results and has served as a 'substitute for analyses,' ultimately leading to unnecessary hardship and disruption.") (footnotes omitted). Most recent decisions spurn it as an inappropriate standard if used independently and an otiose one if employed conjunctively with more robust tests for former-client conflicts. *E.g.*, *In re* Maritime Aragua, S.A., 847 F. Supp. 1177, 1180 (S.D.N.Y. 1994); United States v. Pacific Constr. Corp., 637 F. Supp. 1556, 1567 (W.D. Wash. 1986); Bergeron v. Mackler, 623 A.2d 489, 494 (Conn. 1993); Wellman v. Willis, 509 N.E.2d 1185, 1190 (Mass. 1987).

Nonetheless, the appearances formula persists in opinions in some jurisdictions. *See supra* note 34 (listing some of these jurisdictions). New Jersey is a special case. Its version of the *Model Rules* specifically includes an appearance-of-impropriety standard as a separate basis for finding a former-client conflict, but the test is whether "an ordinary knowledgeable citizen acquainted with the facts" would find such an appearance — a

clear that it plays only a minor, if irritating and potentially distorting, role in modern conflicts opinions. Loyalty, as will be further discussed, is a harder and more complex nut to crack.[36]

Whatever else the decisions may discuss, all agree with the proposition that former-client jurisprudence is centrally concerned with confidentiality. While confidentiality occupies much if not all of the stage, it nonetheless deserves sufficient further elaboration to assess what light policy considerations might shed on follow-on questions, such as the appropriate test for applying the standard.[37] Elaboration also helps to put limits on the possible implications of confidentiality. Were confidentiality given limitless weight, it is at least theoretically conceivable that courts would demand protective steps that are much more extreme than those in fact required under the substantial relationship standard. In that vein, one can imagine, for example, a rule precluding lawyers from proceeding adversely to all former clients in all subsequent matters, whether substantially related or not. That, of course, would protect the former clients' confidential information without question, but at an unacceptably high price.[38]

The first important borderline to mark is that there is no such rule. Specifically, if a subsequent representation does *not* involve a substantially related matter, there is no general prohibition against proceeding adversely to a former client. Always assuming the absence of such a matter, a lawyer may do many things that are plainly antagonistic to a former client. A lawyer can negotiate directly against a former client or otherwise represent the later client in hostile transactional maneuvers, no matter how threatening to the present interests of the former client.[39] Apparently no case so holds, but it would appear that a lawyer can mount

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formulation that seems to add little to the substantial relationship test itself. Dewey v. R.J. Reynolds Tobacco Co., 536 A.2d 243, 250 (N.J. 1988); *In re* Opinion 569 of Advisory Comm. on Professional Ethics, 511 A.2d 119, 124 (N.J. 1986). Decisions in other jurisdictions fan sparks of life into appearances as a general conflicts standard. *E.g.*, F.D.I.C. v. U.S. Fire Ins. Co., 50 F.3d 1304, 1315-17 (5th Cir. 1995); McPartland v. ISI Inv. Servs., Inc., 890 F. Supp. 1029, 1030-31 (M.D. Fla. 1995) (under Florida law); Monon Corp. v. Wabash Nat'l Corp., 764 F. Supp. 1320, 1323 (N.D. Ind. 1991); Crawford W. Long Memorial Hosp. v. Yerby, 373 S.E.2d 749, 751 (Ga. 1988).

36. *See infra* text accompanying notes 61-142 (discussing attorney loyalty).

37. *See infra* text accompanying notes 143-216 (discussing different tests).

38. On the costs that would be imposed by such a draconian rule, see *infra* text accompanying notes 47-53.

39. *E.g.*, Crystal Homes, Inc. v. Radetsky, 895 P.2d 1179 (Colo. Ct. App. 1995). For obvious procedural reasons, there are far fewer decisions dealing with transactional (non-litigation) former-client conflicts than those dealing with litigation conflicts. Litigation conflicts, by definition, involve settings in which an aggrieved client has both a lawyer available and a pending court action to facilitate a motion to disqualify or similar procedural move to raise the issue. Transactional and other sorts of non-litigation conflicts, which may be as common in office law practice as are conflicts affecting only litigators, often require much more strenuous procedural arrangements to obtain relief from a court. We were alert when drafting the *Restatement* that litigation-based concerns about conflicts not be automatically extended (or not be automatically extended in the same way) to transactional situations when there were meaningful differences between the settings. Although alert for possible major differences, we found none in the ground that we covered. The contexts in which conflicts arise are, of course, different and must be well taken into account in each conflict analysis, but the same general rules seemed equally applicable with respect to all.

a hostile takeover of a former client.[40] Ample authority holds that a lawyer may sue a former client,[41] including filing a suit charging the former client with outrageous conduct[42] or seeking enormous damages or those that are punitive in nature.[43] Conversely, one can defend a present client against a claim brought by a former client, regardless of the importance of the present suit to the former client.[44] Perhaps the most graphic illustration of the borderline is that a former criminal-defense lawyer now turned prosecutor may attempt to have a former client thrown into jail, or even hung.[45] Rather clearly, the type of threat to the present interests of the former client is not even a relevant consideration in determining the legitimacy of a subsequent adverse representation. Everything turns on the existence of a substantial relationship. That conclusion has rather apparent implications for our future discussion of loyalty.[46] A first proposition, therefore, is that confidentiality (or some other value) must be significantly threatened before a former-client conflict will be found to exist.

The reason for refusing to extend the former-client prohibition beyond substantially related representations is clear: as with other conflict rules, and even if the substantial relationship standard is extended no further than to protect confidenti-

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40. If well-founded, the example may be particularly telling. A hostile takeover representation is the paradigm of an "adverse" relationship in the civil arena. We so portray it in the *Restatement*. *See* RESTATEMENT 1996 DRAFT § 201 cmt. c(ii), illus. 2 (portraying it as definition of element of "adverse" representation); *see also id.* §§ 204 cmt. d(iii) (using an example of a firm advising about a possible takeover), 212 cmt. h (discussing challenge to incumbent management for control of organizations); *In re* King Resources Co., 20 B.R. 191, 202 (Bankr. D. Colo. 1982) (rejecting lawyer's argument that adverse representation in hostile takeover not adverse, as "absurd"). Of course, due to the multitude of issues open in a hostile takeover, many former representations would bear a substantial relationship to such a later representation.

41. *E.g.*, T.C. Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954); McKane v. City of Lansing, 861 F. Supp. 47 (W.D. Mich. 1994); Brice v. Hess Oil Virgin Islands Corp., 769 F. Supp. 193 (D.V.I. 1990); United States v. Standard Oil Co., 136 F. Supp. 345 (S.D.N.Y. 1955); Masiello v. Perini Corp., 477 N.E.2d 1020 (Mass. 1985); Finch v. Wallberg Dredging Co., 322 P.2d 701 (Idaho 1958); Madison v. Graffix Fabrix, Inc., 404 S.E.2d 37 (S.C. Ct. Apps. 1991); Nichols v. Village Voice, Inc., 417 N.Y.S.2d 415, 419 (N.Y. Sup. Ct. 1979). *But cf.*, *e.g.*, ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1233 (1972) (opining that lawyer in legal services organization that had formerly represented Indian tribe in boundary litigation precluded from later representing individual members of tribe in unrelated litigation against it).

42. *E.g.*, Gaumer v. McDaniel, 811 F. Supp. 1113 (D. Md. 1991) (discussing fraud and conspiracy claim); United Food & Commercial Workers v. Darwing Lynch, 781 F. Supp. 1067 (M.D. Pa. 1991) (considering ERISA claim of breach of fiduciary duty).

43. *E.g.*, Medicine Shoppe Int'l, Inc. v. Rebs Co., 737 F. Supp. 70 (E.D. Mo. 1990); Universal Servs. Co. v. Ung, 882 S.W.2d 460 (Tex. Ct. Apps. 1994).

44. *E.g.*, Clark v. Bank of New York, 801 F. Supp. 1182 (S.D.N.Y. 1992) (holding that in absence of substantial relationship, law firm that had on three prior occasions represented former bank employee in personal real estate transactions could defend bank against former employee's suit for wrongful termination); Kirk Corp. v. First American Title Co., 270 Cal. Rptr. 24 (Cal. Ct. App. 1990) (discussing present suit by former client against law firm's present client to recover damages for breach of contract and breach of fiduciary duty).

45. *E.g.*, Gajewski v. United States, 321 F.2d 261 (8th Cir. 1963) (finding no disqualification of prosecutor, who had previously served as defendant's defense counsel in unrelated case); State v. Camacho, 406 S.E.2d 868 (N.C. 1991) (holding that in absence of substantial relationship, lawyer who formerly represented person as criminal-defense counsel and who is now in prosecutor's office can participate in prosecution of subsequent capital murder charges).

46. *See infra* text accompanying note 61 (commencing this article's discussion of loyalty).

ality, the former-client rule seriously restricts the ability of clients to secure counsel. On some occasions, the rule will deprive clients of the right to resort to lawyers whom they trust from prior representations. A lawyer may have performed all of the extensive legal services required by a client over decades, but the client will be precluded from resorting to that lawyer if the new matter would require the lawyer to proceed adversely to any former client of the lawyer. By reason of the earlier representation, the lawyer may already possess highly useful knowledge of the present client's business or other operations. Representation of a now-former client with presently adverse interests will preclude continued representation of the long-standing client if a substantial relationship is present.[47] The magnitude of the matter involved in the affected former client's representation does not matter (so long as it is substantially related), nor does the rule require any showing that the threat to the former client's confidential information is in some sense "greater" than the cost to the present client who is deprived of counsel. There is, in short, no limiting concept of proportionality. Thus, and particularly when discovered late, a conflict can lead to inefficiency and delay because of the need to replace counsel, the expense and delay of bringing successor counsel up to speed, and the risks, and perhaps great disappointment, involved in developing a relationship of trust and confidence with new counsel.[48] Moreover, as with other conflict rules, former-client conflict rules provide opportunities for their burdensome and even predatory use in disqualification motions or damage actions that, could the facts be better known,[49] are hardly necessary to protect the confidentiality of client information.[50]

The former-client rules also impose costs on lawyers. A lawyer with a former-client conflict is deprived of a fee that a prospective client is presumably willing to pay. More generally, the rule restricts the practice and income opportunities of lawyers. While this restriction probably does not misshape

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47. *See* G.F. Indus., Inc. v. American Brands, Inc., 583 A.2d 765 (N.J. Super. App. Div. 1990) (disqualifying representation despite client-lawyer relationship exceeding fifty years); *cf., e.g.*, Fisons Corp. v. Atochem North America, Inc., No. 90-CIV-1080, 1990 WL 180551 (S.D.N.Y. Nov. 14, 1990) (finding consent permits firm to continue to represent client of decades' standing on challenge by intervening client based on former-client objection).

48. *E.g., In re* Agent Orange Prod. Liability Litig., 800 F.2d 14, 18-19 (2d Cir. 1986) (denying motion for disqualification among other things, because of costs to client class of finding new counsel and time needed for new counsel to familiarize with complex case); Government of India v. Cook Indus., 569 F.2d 737, 739 (2d Cir. 1978) (finding conflict while sympathizing with the need for client whose lawyer is disqualified to suffer the loss of time and money in finding new counsel and with client's potential loss of "[t]he benefit of its longtime counsel's specialized knowledge of its operations").

49. *See infra* text accompanying note 167 (discussing sound reasons for limiting the extent of inquiry into whether in fact the former client's confidential information is at risk).

50. On general warnings against the inappropriate use of disqualification motions as a litigation tactic, see, for example, MODEL RULES Scope ¶ 6 ("The purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons."); Optyl Eyewear Fashion Int'l Corp. v. Style Cos., Ltd., 760 F.2d 1045, 1050-51 (9th Cir. 1985) (imposing sanctions for bringing groundless motion to disqualify solely to harass); Vegetable Kingdom, Inc. v. Katzen, 653 F. Supp. 917, 923-27 (N.D.N.Y. 1987) (discussing same).

careers in many instances, it at least imposes quite significant constraints on lawyers and law firm practice, particularly in the case of lawyers who specialize.[51] The client may later be quite reluctant to compensate the lawyer when a conflict is discovered after the lawyer has already incurred costs in representing the client. In fact, fees already paid the lawyer may be forfeited because of the lawyer's failure to detect the conflict earlier.[52] Macro effects on law firms are also undoubtedly significant. Perhaps more than any other factor, and together with restrictions on simultaneous representation, the former-client rules effectively restrict law firm growth and impose a practical upper limit on the size that any firm can attain,[53] a limit that would be regretted at least by a large firm whose desired future growth is thus restricted.

Why, then, incur those costs when confidentiality is placed at risk in a subsequent representation? The answer, of course, is that confidentiality interests require protection as extensive as that provided by the substantial relationship standard. Confidentiality bears upon the substantial relationship standard with respect to two related interests, private and public. In those respects, the standard performs functions in ways complementary to those of the attorney-client privilege (the confidentiality-based rule of evidence excluding from admission at a hearing direct evidence of protected client-lawyer communications)[54] and the broader agency rule of confidentiality (under which a lawyer is legally prohibited from adverse use or revelation of confidential information concerning a client, regardless of its source).[55] First, the substantial relationship standard seeks to protect the private rights of clients by assuring them that their divulgence of confidential information to their lawyers will not carry the risk that it may be employed against them by an adversary in a future representation by the same lawyer or law firm.[56] That zone of comfort reassures clients who might otherwise

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51. *E.g.*, Laker Airways Ltd. v. Pan American World Airways, 103 F.R.D. 22, 28 (D.D.C. 1984) (noting that restrictions may particularly affect lawyers who specialize their practice).

52. RESTATEMENT 1996 DRAFT §§ 49, 201 cmt. f. Other consequences — although not "costs" whose imposition is socially undesirable — are that a conflict of interest can lead to professional discipline, legal-malpractice recovery, and similar remedies. *Id.* § 201 cmt. f.

53. While the matter is complex, conflict rules will differentially affect firms depending on whether the firm's practice consists dominantly of many smaller matters or a few larger ones. To an extent that is probably slight, firm size may also be affected by such things as the jurisdiction's tolerance of conflict-avoidance devices such as screening in its many possible manifestations. In addition to conflict restrictions, firm size is also severely restricted by the inability to satisfy capital demands for expansion through equity participation by outsiders. *See generally* WOLFRAM, *supra* note 4, § 16.2.1, at 878-79 (commenting on "The Rise of the Multilawyer Law Practice").

54. RESTATEMENT 1996 DRAFT §§ 118-35.

55. *Id.* §§ 111-17A.

56. *E.g.*, *In re* Corn Derivatives Antitrust Litigation, 748 F.2d 157, 162 (3d Cir. 1984) (finding clients must be given assurance that information imparted to lawyer will not later be used against client's interests, without which clients would be reluctant to confide completely in their lawyers); Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1266 (7th Cir. 1983); Clark v. Bank of New York, 801 F. Supp. 1182, 1197 (S.D.N.Y. 1992); Satellite Fin. Planning Corp. v. First Nat'l Bank, 652 F. Supp. 1281, 1283 (D. Del. 1987); Tekni-Plex, Inc. v.

feel the relationship, and their willingness to communicate within it, chilled by concern about future adverse consequences. Confidentiality thereby enhances the value of lawyers' services, because, to the extent assurance of confidentiality leads to more complete factual disclosure by the client, the lawyer will presumably be better able to assist the client. Second, confidentiality has a related public dimension, a broader social utility. Concomitantly with protecting individuals, the substantial relationship standard assures all persons that lawyers will not betray client confidential information, making potential clients more willing to resort to lawyers for legal advice and other socially useful services and more willing to trust the workings of public institutions such as the courts.[57]

Similar policy objectives inform the attorney-client privilege[58] as well as the agency rule of confidentiality.[59] The three legal rules, including the former-client conflict rule, operate in complementary ways to effectuate the same core objectives. However, as with the privilege and the agency rule, the utility and importance of confidentiality-protecting policies can be exaggerated in the case of the former-client doctrine, or the speculative empirical assumptions on which they rest can be hardened into unquestionable facts, which of course they are not.[60]

IV. THE LIMITED RELEVANCE OF LOYALTY CONSIDERATIONS IN FORMER-CLIENT JURISPRUDENCE

As central as confidentiality may be, some courts and commentators also take the position that an analytically separate and important consideration in determining the scope of the former-client conflict rules is that of loyalty. Taken at face value, those claims would extend the reach of former-client conflict rules to, presumably, whatever additional coverage is necessary in order to protect this beyond-confidentiality[61] interest in loyalty. As will be seen, however, any legitimate claim of that sort gives rise only to one rare, but theoretically

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Meyner & Landis, 674 N.E.2d 663, 667 (N.Y. 1996) ("This prophylactic measure thus frees clients from apprehension that information imparted in confidence might later be used to their detriment, which, in turn, 'fosters the open dialogue between lawyer and client that is deemed essential to effective representation.' ") (quoting Spectrum Sys. Int'l Corp. v. Chemical Bank, 581 N.E.2d 1055, 1059 (N.Y. 1991)).

57. *E.g.*, Brennan's Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 172 (5th Cir. 1979) (holding lawyer's adverse use of client confidential information in subsequent representation of adversary would cause clients to feel abused by legal system and undermine public confidence in it as a system for adjudicating disputes); Analytica, Inc., 708 F.2d at 1266; Islander East Rental Program v. Ferguson, 917 F. Supp. 504, 508 (S.D. Tex. 1996); *see In re* American Airlines Corp., 972 F.2d 605, 618 (5th Cir. 1992) (invoking similar concerns).

58. RESTATEMENT 1996 DRAFT § 118 cmt. c.

59. *Id.* § 112 cmt. b.

60. *See* Wolfram, *The U.S. Law of Client Confidentiality: Framework for an International Perspective*, 15 FORDHAM INT'L L.J. 529, 532-40 (1992) (analyzing extravagant claims of the importance of confidentiality)

61. On a possibly loose sense of loyalty, which conflates it with confidentiality, see *infra* text accompanying notes 72-75.

interesting, extension of former-client conflict rules, and several interesting doctrinal turns. But any broad claim for a separate and general role for loyalty in defining the scope of the substantial relationship standard is misplaced.

A. AMERICAN AIRLINES

Until relatively recently, expression of anxiety about an over-exuberant reach to a claim of loyalty in former-client situations would have seemed alarmist. But the Fifth Circuit has recently given a striking illustration of such unruly loyalty notions in action. The *American Airlines*[62] court relied upon the client's expectation of loyalty in a way that, if widely followed, would considerably, although indeterminately, expand the reach of the substantial relationship standard. The district court had refused to disqualify the law firm in question from representing plaintiff Northwest Airlines in a large antitrust suit against American Airlines. Northwest charged American with monopolistic price setting through American's control of the computer network over which a large percentage of airline reservations for all carriers were made by travel agents. Before the firm began to represent Northwest in its antitrust claim, American had consulted a lawyer in the firm different from the lawyer later contacted by Northwest. American's inquiry concerned an antitrust issue that had arisen in connection with its plan to acquire Continental Airlines (then in bankruptcy). The issue concerned whether the proposed merger would violate Justice Department merger guidelines. The lawyer advised American to delay the acquisition for at least a year to minimize the possibility of an antitrust attack by Justice. The firm's representation of American ended in January 1991, when American decided not to pursue the Continental merger at all. The firm's representation of Northwest adverse to American began a year and one half later, in June 1992.[63]

The district court's cursory opinion, which was skimpy on findings of supporting facts, simply concluded that there was no substantial relationship between the earlier antitrust-advice representation of American and the later antitrust suit by Northwest against American. The Fifth Circuit granted mandamus and ordered the trial court to disqualify the firm. Among other arguments, Northwest asserted that earlier Fifth Circuit cases that supported disqualification by referring to the "appearance of impropriety" language of former *Canon* 9 were no longer relevant because that phrase had been purposefully omitted from modern lawyer

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62. *American Airlines*, 972 F.2d at 605. In addition, the Fifth Circuit, employing more traditional substantial relationship analysis, alternatively found such a connection between the earlier and later representations. In the interest of full disclosure, I mention that, following the Fifth Circuit's decision in *American Airlines*, I was retained by the losing respondent for the customarily thankless task of submitting a petition for rehearing in the Fifth Circuit. The petition focused on some of the same elements discussed here.

63. On whether the court could have correctly analyzed the case as involving simultaneous representation (it did not do so), see *infra* text accompanying notes 97-111.

codes.[64] In the course of a lengthy opinion, the court responded as follows:

> We reject . . . Northwest's arguments. A party seeking to disqualify counsel under the substantial relationship test need not prove that the past and present matters are so similar that a lawyer's continued involvement threatens to taint the trial.[[65]] Rather, the former client must demonstrate that the two matters are substantially related. Second, we adhere to our precedents in refusing to reduce the concerns underlying the substantial relationship test to a client's interest in preserving his confidential information. *The second fundamental concern protected by the test* is not the public interest in lawyers avoiding "even the appearance of impropriety," but *the client's interest in the loyalty of his attorney.*[66]

Later in the opinion, in emphatically confirming its two-step rendering of the substantial relationship standard (first step confidentiality; second step loyalty), the court explained what was entailed by its "loyalty" interest analysis:

> The substantial relationship test aims to protect the adversary process but also, or as part of this concern, seeks to provide conditions for the attorney-client relationship. What credence, for example, might American have attached to [the law firm's] December 1990 counsel that the airline's interests would be better served by postponing the acquisition of Continental for at least a year if it even suspected that [the same law firm] might soon be representing one of its competitors in a suit against American, charging that it had abused its market power to the detriment of competition in the airline passenger service markets?[67]

Problematical references to loyalty apart from confidentiality have occasionally been dropped in other decisions, including at least one prior decision of the Fifth Circuit itself.[68] Unlike *American Airlines*, those references almost always

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64. The argument, of course, is sound. The 1983 *Model Rules* and most state lawyer codes based on them, has purposefully omitted reference to the "appearance of impropriety" standard because of its vacuousness and thus, its indeterminacy. *See* MODEL RULES Rule 1.9 cmt. 5 (rejecting the test because the test "can be taken to include any new client-lawyer relationship that might make a former client feel anxious" and because "appearance of impropriety" is question-begging); *see also supra* text accompanying note 34 (discussing further the rejection of the 'appearance of impropriety' test).

65. [Author.] The court was here rejecting Northwest's argument that a "taint the trial" test for conflicts developed in the Second Circuit was the proper test. *See infra* text accompanying note 226 (citing Board of Education v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979)). As the sentence following suggests, Northwest and the court seem to have been talking past each other. The "taint the trial" test seeks to assess whether the remedy of disqualification is appropriate, even if a conflict is shown, not whether a conflict exists. The latter is the function of the substantial relationship standard.

66. *American Airlines*, 972 F.2d at 616 (emphasis added); *see also id.* at 616-20 (discussing a lawyer's duty of loyalty).

67. *Id.* at 620.

68. *E.g.*, Brennan's Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 172 (5th Cir. 1979). The point of *Brennan's*, a favorite of teaching texts, is, appropriately for Socratic practitioners, obtuse. The lawyer principally in question had formerly represented several members of the Brennan family and their corporations in the family's restaurant business. After a falling out, one family group set up a competing restaurant and proceeded to employ trade insignia earlier employed in common. The Fifth Circuit disqualified the lawyer from

occur in contexts not indicating whether loyalty was simply a long-hand reference to confidentiality.[69] Some scholarly and commentator discussions of the former-client rules also hint at acceptance of an expansive and general role for loyalty in former-client analysis.[70] But the *American Airlines* notion that loyalty might play such a role is erroneous. Most obviously, it ignores the universe of adverse representations that former-client conflict law has always accepted — a realm that starts just where that of substantial relationship ends.[71]

The only specifically articulated explication of how a loyalty interest might play a role in *American Airlines*[72] is itself highly problematical. Recall the court's reference to what American would have thought about a lawyer's advice had it known that other lawyers in the same firm would sue it over a year and a half later.[73] Surely the reference cannot correctly be intimating that the substantial relationship test should pay attention to the subjective reactions of former clients on learning that they have been sued by a former lawyer. Presumably most former clients don't enjoy being sued, and it must pour the salt of betrayal on the litigational wound to know that the agent of one's misery is a former trusted

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representing the breakaway group against the others in ensuing litigation over the insignia. The lawyer argued that, because all players understood that he was freely sharing confidential information during the original representation, there was no expectation of confidentiality that prevented him from proceeding in the substantially related later representation. Invoking the broad rule of confidentiality of DR 4-101(A) of the 1969 *Model Code of Professional Responsibility*, with its all-encompassing concept of "secrets," the court first commented that the ethical duty was broader than the evidentiary privilege. *Brennan's*, 590 F.2d at 172. The court then noted that the ethical duty applied on the facts of the case to prevent the lawyer's work

> without regard to whether someone else was privy to it. The obligation of an attorney not to misuse information acquired in the course of representation serves to vindicate the trust and reliance that clients place in their attorneys. A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the client in the same matter. . . . The need to safeguard the attorney-client relationship is not diminished by the fact that the prior representation was joint with the attorney's present client.

Id. (citation omitted); *see also, e.g.*, Prisco v. Westgate Entertainment, Inc., 799 F. Supp. 266, 271 (D. Conn. 1992) ("Model Rule 1.9 is designed to address not only the narrow need to protect a client's confidences, but also to establish broader standards of attorney loyalty and to maintain public confidence in the legal system.").

69. *See infra* text accompanying notes 72-75, for a discussion of the *American Airlines* court's treatment of loyalty.

70. *E.g.*, GEOFFREY C. HAZARD, JR., ET AL., THE LAW AND ETHICS OF LAWYERING 703 (2d ed. 1994) (interpreting *Brennan's*, as referring to the "two underlying concerns of the substantial relationship test: the duty to preserve confidences and the duty of loyalty to a former client" and apparently criticizing decisions that "seem to reduce the substantial relationship test to one designed solely to protect the former client's confidences"); MODEL RULES ANN., *supra* note 7, at 146) ("A lawyer's duties of loyalty and confidentiality regarding a matter in which the lawyer has represented the client continue after the termination of the client-lawyer relationship. Discharge does not free the lawyer from these duties to a former client."). The *American Airlines* court cited and relied upon the "duty of loyalty" language from an earlier edition of the Hazard-Koniak-Cramton teaching text. *American Airlines*, 972 F.2d at 618.

71. *See supra* text accompanying notes 39-46 (discussing cases refusing to disqualify lawyers for suits against former clients because no substantial relationship existed between present and former litigation).

72. *See supra* text accompanying note 65 for an articulation of that standard.

73. *American Airlines*, 972 F.2d at 620.

lawyer.[74] Thus, most of us would stipulate that many former clients' subjective reaction to being sued will be to feel hostility and to mark the former lawyer's involvement as personal betrayal to some degree. But surely such subjective feelings are irrelevant. Respecting them, as *American Airlines* seems to do, would logically lead to a rule precluding any suit against a former client. But that, of course, is not the law,[75] and *American Airlines* does not in any other way suggest that the court wished to reconsider that boundary marker. If subjective feelings of betrayal are to be given a more modest office, it is difficult to see what that might be. If the court were to require that the former client's sense of outrage must be reasonable, then one would need criteria for determining the legitimacy of outrage. What, beyond being sued, was enough in *American Airlines* itself, for example? We are told nothing of this.

One possible justification for the court's concern with loyalty amounts to a chase after a false scent, but one worth a short detour. References in some other opinions — but not in *American Airlines*, in view of the court's obvious care in separating confidentiality and loyalty — may come from conflating the two. In one meaningful sense, the duty of confidentiality may be viewed as simply a part of the duty of loyalty. (Indeed, in an even broader sense, one can reduce much of the law of the client-lawyer relationship to considerations of loyalty.[76]) Loyalty in this sense speaks the common conception of a sense of faithfully adhering to the objectives of the client and doing nothing to undercut those objectives. A part of that fidelity consists of where one stands. One who is loyal stands with the client, not with those opposing her. Surely one relevant test of such loyalty is whether the lawyer later places the former client's entrusted confidences at risk by representing an adversary against the former client in a matter in which those confidences might be used, treacherously enough, against the former client.[77] That, as has been argued,[78] is precisely the proper protective role of the substantial relationship standard. But, note that this is simply saying confidentiality in another way. Loyalty in this usage is perhaps coterminous with confidentiality, but it goes no farther. It would also be disloyal, of course, to oppose a client

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74. *See* FORTUNE, UNDERWOOD & IMWINKELRIED, *supra* note 4, § 3.6.4, at 119 ("No rule in the Code or Model Rules prohibits subsequent adverse representation in an unrelated matter. Absent some substantial relationship between the new matter and the representation of the former client, the former client's consent is unnecessary. This is not an academic point because clients, like lovers, all too frequently assume that once is forever.") (footnote omitted).

75. *See supra* text accompanying notes 39-46 (noting that prohibition against former-client conflicts has not been extended beyond substantially related litigation).

76. While I owe this insight to a thought dropped in conversation by Professor Geoffrey C. Hazard, Jr., I find nothing in his writings memorializing it.

77. That, in my opinion, is how to understand the reference to client loyalty in Brennan's Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168 (5th Cir. 1979). See *infra* text accompanying note 135 for further discussion of that case.

78. *See supra* text accompanying notes 54-60 (noting *inter alia* that one purpose of the substantially related test is to protect clients from the risk that confidences will later be used against them).

even if no confidential information of the client is thus put at risk. But, again, that is precisely what, in the absence of a substantial relationship, the former-client rules do permit. We started with the unassailable and universally supported proposition that it is permissible for lawyers to sue their former clients, including suits in which the most personally denigrating and threatening charges are made the most destructive and detested remedies are sought.[79] Surely all such clients could more than plausibly respond with enthusiasm to the call of the Fifth Circuit to complain if they felt their trust dishonored by the later suit. Clearly, if loyalty is to play any part consistent with the broad and general permission to sue one's former client (again and always: in the absence of a substantial relationship), then that role must be modest.

B. A SPECIAL CASE FOR PROTECTING AGAINST DISLOYALTY THROUGH ATTACKING ONE'S OWN WORK

The obligation of loyalty is significantly diminished following the effective end of the representation. But there is at least one instance in which the end of the representation does not necessarily mean that courts should relax all vigilance to protect clients against disloyal lawyers.[80] Suppose a case in which Lawyer, an intellectual-property practitioner, had obtained for Client One a patent on a valuable product. A few years after the end of that representation, Lawyer now appears as trial counsel for Client Two, seeking in a declaratory judgment action to invalidate the patent on the ground that it was based on prior art. Further, entertain the perhaps strenuous assumption that the "prior art" attack is so framed that it does not involve any issues as to which the confidential information of Client One, which Lawyer learned during the former representation, would be relevant. Instead, the attack asserts only that, at the time of the original patent application, other unpatented products were being marketed with features and functions that were the same as those of Client One's product. In other words, assume that the court will first find, in ruling on Client One's motion to disqualify Lawyer, that, although Lawyer certainly acquired confidential information in the course of the prior representation, a reasonable factual reconstruction[81] of the original and succeeding representations makes it evident that none of Client One's confidential information will be relevant to Lawyer's later work.[82] If the

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79. *See supra* text accompanying notes 50 (discussing situations in which lawyer may sue former client).

80. The attack-own-work concept was not invoked by the court in *In re* American Airlines, 972 F.2d 605 (5th Cir. 1992). The facts also indicate that the lawyers in question were not attacking their own work in the sense employed here.

81. On the factual-reconstruction concept, see *infra* text accompanying notes 148-57.

82. Such a case is Alchemy II, Inc. v. Yes! Entertainment Corp., 844 F. Supp. 560 (C.D. Cal. 1994), on which the facts of the hypothetical are only loosely based. The court there first found that the confidential information obtained by the lawyer in the earlier representation was not relevant to the later representation. *Id.* at 564 n. 3. Note that the sort of distinction in *Alchemy II* will be drawn much more confidently in subsequent representations involving litigation as compared with subsequent representations involving transactions, which

court is prepared so to find, that, of course, eliminates the possibility of finding a substantial relationship.[83] Does it follow that no legitimate ground exists for disqualifying Lawyer?

Consider the consequences. If no conflict precludes the later representation, then Lawyer is free in the later representation to attack the patent that Lawyer was earlier retained and paid by Client One to obtain. Such a representation would raise two problems — affecting both Client One and Client Two. First, consider the interests of Client One, the former client. Presumably, Client One sought to obtain a patent, by means of Lawyer's work, that was immune from such later attack that could be avoided through diligent representation. If it were permissible for Lawyer now to shoot at the same target that Lawyer earlier had set up, we well might also be concerned that Lawyer had done less than Lawyer might have done during the course of the earlier representation to protect Client One's interests against just such an attack. The former client's position would be akin to that of the United States with its ill-fated embassy in Moscow during the height of the Cold War. Construction of the embassy as a secure diplomatic facility was doomed because Soviet workers imbedded in the structure eavesdropping devices that proved to be undetectable once the structure was complete. Similarly with the work of lawyers, we don't want the builders of legal edifices to be in a position later to lay effective siege to their own work by exploiting weak spots planted within it, whether intentionally or artlessly. The reason, again, is simple concern with the vagaries of human nature — the instinct to disloyalty — in a

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are often more open-ended in terms of the options available to prospective parties to a transaction being negotiated. On the other hand, it is also true that it will be less likely in a transactional representation to encounter the sort of attack-own-work effort that extends the loyalty principle into certain former-client cases. The court in *Alchemy II* rejected the argument of the patent holder that the same lawyers who had defended the patent in several cases could not now attack its validity, but on grounds clearly distinguishable from the present discussion. Pivotal there was the court's finding that the patent holder had never been a client of the lawyer; instead the lawyer had prosecuted patent claims only on behalf of a licensee (whose licensing agreement gave the licensee the right to do so). *Alchemy II*, 844 F. Supp. at 564-65.

In fact, the decision that comes closest on its facts to the patent illustration in the text is Telectronics Proprietary, Ltd. v. Medtronic, Inc., 836 F.2d 1332, 1338 (Fed. Cir. 1988) (noting party's concession that lawyer's work in impeaching patent obtained through own efforts was "unusual," and concluding no such attack here where lawyer's attack was limited to claim of existence of prior art not known at time of patent application; further basing refusal to disqualify on absence of client-lawyer relationship between present patent holder and lawyer in question). The court there, in what is plainly *dicta*, seems to take a more limited stance than is taken in the text.

83. A similar, and simpler, case would be one in which a property developer asks a lawyer to prepare a standard form of sales agreement that the developer might use when selling lots. If no other information were provided by the client, it is difficult to see what confidentiality basis would exist for disqualifying the lawyer should she later appear as counsel for a lot purchaser seeking rescission or damages on the ground that the sales agreement was fatally defective. But there would clearly exist an attack-own-work basis for objection. Interestingly, the comment to *Model Rule* 1.9 explicitly finds a former-client conflict in such a setting, although without analysis. MODEL RULES Rule 1.9 cmt. [1] ("Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client."). Another simple illustration is disqualification of a lawyer from attacking the effect of a document that has become public and thus arguably non-confidential. *E.g.*, Sullivan County Reg'l Refuse Disposal Dist. v. Town of Acworth, 686 A.2d 755, 758 (N.H. 1996).

context in which the threat may be not inconsiderable that the unfortunate consequences of those vagaries will be visited on the former client. An allied consideration is that Lawyer's attack on her own work would deprive Client One of significant value (the patent) for which Client One paid Lawyer substantial fees. At the simple level of fair exchanges, it would seem perverse and wasteful to permit Lawyer to destroy the very value that Lawyer was paid to create. For reasons such as those, the *Restatement*, agreeing with the decisions,[84] independently and explicitly precludes later adverse representation by a lawyer, even in the absence of a substantial relationship, when the later representation would entail an attack on the lawyer's own work.[85]

A reverse twist illustrates another possible aspect of the attack-own-work prohibition. Client Two also has a potential problem. Client Two, after being fully informed, might conclude that it would be risky to retain Lawyer. Successful attack would make Lawyer appear incompetent in the earlier representation, or even treacherous. To avoid such an appearance, Lawyer may be less than diligent in aiding Client Two. That indeed might be a problem, but it is probably one that can be resolved, at least in many such cases, by adequately disclosing to Client Two (the later client) and by securing Client Two's consent.[86] The consent of

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84. *E.g.*, *In re* Breen, 830 P.2d 462 (Ariz. 1992) (disciplining lawyer for filing bankruptcy petition for debtor in effort to prevent foreclosure for benefit of creditors for whom same lawyer had negotiated loan in question); Lane v. Sarfarti, 676 So. 2d 475 (Fla. Dist. Ct. App. 1996) (disqualifying lawyer from representing plaintiff in declaratory judgment action for construction of document, lifted from form book, that lawyer had earlier prepared for defendant); *In re* Schaumann, 252 S.E.2d 627, 628 (Ga. 1979) (disbarring attorney for, among other violations, attacking self-drafted note from lawyer to former client); *In re* Williams, 309 N.E.2d 579 (Ill. 1974) (disciplining lawyer for representing wife in attempting to collect on life insurance policy where lawyer had previously represented deceased husband in divorce action in which lawyer successfully had court order that proceeds were to be paid to children); *In re* Banks, 584 P.2d 284, 292-94 (Or. 1978) (barring lawyer who represented corporation and constituent in drafting contract between them from later representing constituent against corporation in suit involving interpretation of contract); *see generally, e.g.*, FORTUNE, UNDERWOOD & IMWINKELRIED, *supra* note 4, at 111 ("[A] lawyer owes a duty of loyalty, as well as a duty of confidentiality, to a former client. Thus, a lawyer cannot attack a contract he has written, even though attacking the contract would not reveal confidential information."); WOLFRAM, *supra* note 4, at 362 (discussing reasons why lawyers are prohibited from attacking their own work). Many decisions that could rest on the attack-own-work ground have been decided only on the alternative ground of the lawyer's exposure to confidential information. *E.g.*, NCK Org., Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976) (disqualifying lawyer from attacking contract that lawyer had drafted for former client).

85. RESTATEMENT 1996 DRAFT § 213(1), quoted *supra* text accompanying note 30; *see also id.* cmt. d(ii) ("For example, a lawyer may not on behalf of a later client attack the validity of a document that the lawyer drafted if doing so would materially and adversely affect the former client. Similarly, a lawyer may not represent a debtor in bankruptcy in seeking to set aside a security interest of a creditor that is embodied in a document that the lawyer previously drafted for the creditor."). Texas has a special definition of former-client conflict that specifically includes the attack-own-work situation. TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.09(a)(2) (1990) (stating that without consent, lawyer may not represent present client in a matter "in which such other person questions the validity of the lawyer's services or work product for the former client"); *see also id.* cmt.¶ 3 ("[F]or example, a lawyer who drew a will leaving a substantial portion of the testator's property to a designated beneficiary would violate paragraph (a) by representing the testator's heirs at law in an action seeking to overturn the will.").

86. The problem is one of a conflict between a personal interest of the lawyer in question (due to the instinct

Client One to that aspect of the conflict would be irrelevant and unnecessary. The Seventh Circuit case of *United States v. Ziegenhagen*[87] involved such a situation, and the court analyzed the problem with the same result. Ziegenhagen's defense lawyer — some twenty years earlier[88] and while serving in an earlier career as prosecutor — had obtained a conviction against Ziegenhagen in a factually unrelated case.[89] In the later prosecution, the (new) prosecutor wished to use the earlier conviction as the basis for enhanced sentence. If Ziegenhagen could show that the prior conviction was seriously defective, it could not be so used. However, such an attack would place Ziegenhagen's defense lawyer in the position of assailing the validity of a conviction that he had earlier obtained as prosecutor. While the prohibition against attacking one's own work might have formed the basis for objection by the government,[90] here the objecting client was Ziegenhagen, the present client. Perhaps for that reason, the trial court refused to disqualify his lawyer. According to the appellate court, however, the conflict under which his lawyer labored deprived Ziegenhagen of his Sixth Amendment right to a lawyer free of an "actual conflict of interest"[91] and thus required reversal of his conviction. While the ground of decision in *Ziegenhagen* was announced in very broad form,[92] it is much more comfortably understood as a case in which the lawyer's attack on his or her own work will be suspiciously

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to protect the lawyer's reputation) and a personal interest of the client (winning the patent challenge). Such personal-interest conflicts are curable through informed consent of the client. *See* RESTATEMENT 1996 DRAFT § 206 ("Unless the affected client consents to the representation under the limitations and conditions provided in § 202, a lawyer may not represent a client if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's financial or other personal interests.").

87. 890 F.2d 937 (7th Cir. 1989).

88. The court said nothing about the great age of the former representation. *Cf. infra* text accompanying notes 218-26.

89. Whether indeed there would ever, or at least typically, be such a factual disconnect is doubtful. A prosecutor may know much more about a case than anything the case file may still reveal. Nonetheless, assume a lack of any factual connection for purposes of further discussion of the case.

90. The government might also have objected on more standard substantial relationship grounds. Success in such an attack would have turned on the nature of the lawyer's attack on the earlier conviction. If, for example, the conviction was defective on its face, no confidential government information might be at risk. On the other hand, most grounds of attack on the conviction would entail some exposition of such information, and the former prosecutor's later work would have been objectionable, on motion by the government, on confidentiality grounds.

91. Such a showing of actual conflict is required to make a Sixth Amendment attack on a conviction on the ground of ineffective assistance produced by a former-client conflict under the doctrine of Strickland v. Washington, 466 U.S. 668 (1984).

92. The court went far beyond the facts in announcing that "government employment in a prosecutorial role against one defendant and subsequent representation of that defendant in a defense capacity is not proper." United States v. Ziegenhagen, 890 F.2d 937, 940 (7th Cir. 1989). As the Ninth Circuit subsequently pointed out, *Ziegenhagen* must be applied "with a particular eye to whether the attorney will, in the present case, be required to undermine, criticize or attack his or her own work product from the previous case." Maiden v. Bunnell, 35 F.3d 477, 481 (9th Cir. 1994). In the absence of such circumstances, and assuming no substantial relationship problem, there would be no independent basis for a rule as broad as that announced in the *Ziegenhagen* dicta.

under-motivated, for obvious reasons of professional pride in having acted competently to obtain the conviction in the first instance.[93]

The issue of lawyer under-motivation in representing the later client is unwisely ignored in the ABA's rule on consent in former-client cases. *Model Rule* 1.9(a) states a requirement of consent by the former client, in a way that might suggest that consent of the later client were never relevant.[94] In the broad array of former client cases (whether or not involving an attack on the lawyer's own work), under-motivation can work in either or both of two ways. When the situation involves an attack on the lawyer's own work, as in *Ziegenhagen*, the concern is palpable. It is no less so when, as in the more typical case, the concern is with confidentiality. A lawyer proceeding against a former client in a substantially related matter, if otherwise a lawyer of appropriate moral instincts, would, as is said in classroom critiques of the *Model Rules*, bend over backwards to avoid use of confidential information, thus depriving the present client of avenues of attack or defense that a different lawyer well might exploit.[95] Because of

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93. Such an alternative analysis would fit most former-client cases, including all former-client cases where the concern is confidentiality. Similar clashes of interest may exist between the interests of the lawyer in representing the present client in the most effective manner and the interest of the lawyer (based on the lawyer's duty to do so) to protect confidential client information of the former client.

94. *See* MODEL RULES Rule 1.9(a) (precluding later representation adverse to former client "unless the former client consents after consultation"). While this defect in the *Model Rules* was pointed out three years after the *Model Rules* were adopted by the ABA, *see* WOLFRAM, *supra* note 4, § 7.4.2(b), at 362 n.73 ("[T]he *Model Rules* do not require the consent of the second client, but only of the former client in former-client conflict situations.") (citation omitted), apparently no jurisdiction that has adopted rules modeled on the *Model Rules* has expanded the consent requirements stated in *Model Rule* 1.9 itself to include consent of the present client as well. Texas, which studiously avoided adopting several of the *Model Rules*, provides in its former-client conflict rule that "prior consent" cures the conflict, but without specifying which client must consent. TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 109(a) (1990). The comment to the rule, in ¶ 10, suggests, but again does not state, that both clients must consent. In any event, the omission of an explicit requirement for consent by the later client may be irrelevant in light of *Model Rule* 1.7(b). *See* MODEL RULES Rule 1.7(b) (stating that a "lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless . . . the client consents after consultation."); *see also infra* note 97 (discussing *Model Rule* 1.7(b)(2)'s requirement of client consent when present client representation will be affected by lawyer's past representation).

A useful refinement in consent in former-client conflict rules was introduced by *Model Rule* 1.9. Unlike concurrent-representation conflict rules, MODEL RULES 1.7-1.8, former-client conflicts are always consentable by the affected former client. This follows no matter how sharp and substantial the conflict between the interests of the former and present clients.

95. The incentive of a lawyer to "soft pedal" an attack on a former client in a substantially related matter was prominently discussed in the decisions long before the *Model Rules* were formulated. *See, e.g.*, Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973) ("Even the most rigorous self-discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in the earlier representation . . . . Or, out of excess of good faith, a lawyer might bend too far in the opposite direction, refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety. In neither event would the litigant's or the public's interest be well served."); Estates Theatres, Inc. v. Columbia Pictures Indus., Inc., 345 F. Supp. 93, 99 (S.D.N.Y. 1972) ("A lawyer should not be permitted to put himself in a position where,

concern with under-motivation in representing the current client, the former-client rule in the *Restatement* properly insists that "both the affected present and former clients" must consent to waive a former client conflict.[96] The requirement is based on the presence of the lawyer's personal-interest conflict, a situation calling into play *Model Rule* 1.7(b).[97]

In the final analysis, the prohibition against attacking one's own work does not amount to a general repudiation of the point that the end of the representation releases a lawyer from most of the obligations of loyalty. Unlike confidentiality-based former-client restrictions, the attack-own-work concept — in cases where it alone is of concern — does not require presumptions, either irrebuttable or not, to be deployed as prophylaxis to protect loyalty. The scope of the prohibition is limitable, and is limited in the cases, specifically to the work product that the lawyer actually generated for the former client. It is not and should not be expanded further by including work that is factually related if, for example, performed by another lawyer or if, for whatever reason, the work did not come within the actual scope of work performed by the lawyer for the former client. Thus, in a West Virginia case,[98] the court refused to order disqualification of a lawyer who was attacking the interest of purchasers whom the lawyer had formerly represented in their purchase of a piece of property. The purchasers claimed an interest in an oil and gas leasehold on property immediately adjoining land that the purchasers had bought in the transaction.[99] In the earlier representation, the lawyer had provided a title examination of the purchased property, but the lawyer's work did not, of course, extend to an opinion concerning the adjoining tract.[100] The purchasers' claim of a leasehold interest arose out of a transaction subsequent to the lawyer's work on the original purchase.

As a practical matter, the attack-own-work concept extends the reach of

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even unconsciously he will be tempted to 'soft pedal' his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another, at least in the absence of the express consent of both clients.") (footnotes omitted); *In re* Asbestos Cases, 514 F. Supp. 914, 920-21 (E.D. Va. 1981) (citing and quoting *Patentex*, 478 F.2d at 571); Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 270 (D. Del. 1980) ("[O]ut of an excess of good faith, a lawyer might bend too far in the opposite direction, refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety.")

96. RESTATEMENT 1996 DRAFT § 213 cmt. a, *quoted in supra* text accompanying note 30.

97. The *Restatement* requirement that all affected clients consent follows, among other things, from the implication of *Model Rule* 1.7(b), which, in this context, requires the consent of the present client to the extent that "the representation of [the present] client may be materially limited by the lawyer's responsibilities to another client [the former] client." MODEL RULES Rule 1.9(c). For an analogous reading of *Model Rule* 1.7(b) see 1 HAZARD & HODES, *supra* note 14, § 1.9:204, at 308 ("If the lawyer fears that even asking the permission of the former client will embarrass the future client, or that the former client will unjustifiably cause trouble, or that the lawyer himself will have trouble shifting gears after a long association with the former client, he is in effect having doubts about the integrity of the *future* representation. These kinds of problems must be analyzed under Rule 1.7(b).") (emphasis in original).

98. West Virginia Canine College v. Rexroad, 444 S.E.2d 566 (W. Va. 1994).

99. *Id.* at 569.

100. *Id.*

former-client conflict prohibitions only quite modestly. Indeed, in most of the arguable situations covered by the rule reflected in actual decisions, a relatively comfortable alternative basis exists for finding a conflict because of the lawyer's prior probable exposure to confidential information of the first client that would be directly relevant in attacking the former client. The modest reach of the attack-own-work limitation should be carefully borne in mind when applying it. In particular, it is important to avoid confusion between it and the quite different, and potentially quite expansive, "playbook" concept of confidentiality-based conflict, which is explored at a later point.[101]

V. APPROPRIATE IMPLEMENTAL ROLES FOR LOYALTY CONSIDERATIONS IN DEFINING FORMER-CLIENT REPRESENTATIONS: "SUNSETS," "HOT POTATOES," AND FORMER CO-CLIENTS

While loyalty considerations, if considered generally and apart from confidentiality, should properly play no role in shaping the substantial relationship standard beyond the attack-own-work situation, considerations of loyalty have played a properly robust role in determining certain implemental rules for former conflict law. One important area is that of the rules governing the general question of when a representation has come to an end, and thus may properly be considered "former," such that the much more restrictive rules on simultaneous representations give way to the much more forgiving rules governing former-client conflicts.[102] The shift from one set of rules to another is important because, speaking broadly, simultaneous-representation conflicts exist whenever there is the required degree of adverseness, while former-client conflicts require a showing of substantial relationship in addition to adverse representation. The decisions have dealt with two related questions. First, in the absence of formal lawyer withdrawal, what determines whether and when representation has run its natural course and is thus properly considered "former"? Second, short of such an end, may a lawyer precipitate an end to the first representation by an otherwise proper withdrawal from the representation in order to proceed adversely to the now-former client? Sunset concepts answer the first question, while the hot-potato doctrine controls the second. There is also a third area in which loyalty considerations play a major part — where a lawyer appears in a later representation adverse to the interests of a former co-client.

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101. *See infra* text accompanying notes 184-86 (discussing the "playbook" concept of confidentiality based conflict).

102. On the much narrower reach of former-client rules as compared to those applicable to simultaneous-representation conflicts, see generally RESTATEMENT 1996 DRAFT § 213 cmt. c; WOLFRAM, *supra* note 4, § 7.4.1; Clark v. Bank of New York, 801 F. Supp. 1182, 1196-1200 (S.D.N.Y. 1992).

A. PROTECTING LOYALTY I: DELIMITING THE MUTUALLY CONTEMPLATED END OF REPRESENTATIONS

1. Sunset Concepts in General

Some representations have a more or less precisely defined end point. A lawyer is retained to draft a will, does so, presides at the ceremony of signing it, and sends a statement identified as the final bill.[103] A lawyer representing a tort plaintiff obtains a settlement, disburses the funds, and has the court dismiss the case.[104] Even if the lawyer does not formally announce withdrawal or otherwise indicate that the representation is at an end, the contemplated scope of the lawyer's work for the client is clearly completed. Occasionally, the client will take unambiguous action that sufficiently indicates the client's understanding that the client-lawyer relationship is at an end. A common instance occurs when the client takes the matter to new counsel, not merely for a second opinion but as successor counsel.[105] The point here, of course, is not disapprovingly to treat the client as faithless — for clients are entitled at any point to take their legal business elsewhere.[106] Instead, the point is that the act of retaining a new lawyer to take over the matter will in most situations indicate unambiguously that the client considers the earlier representation to have ended.[107]

Other representations, for one reason or another, will have less clarity about their endpoints. A client, considering whether to acquire a business, first comes to a lawyer for advice about legal implications of the purchase, receives the advice, and leaves saying that the client will get back to the lawyer if and when the client decides to proceed. The lawyer smiles and gives an ambiguous farewell. If the lawyer hears nothing further from the client for several months, is the representation over? When, precisely, did it end? Prudent lawyers may send a termination letter.[108] Alternatively, the lawyer may have specified with clarity in an initial

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103. A difficulty in many such scenarios is that the lawyer will often offer to keep the original of the will in the lawyer's office safe, on the pretense of safekeeping the document, but with the rather more obvious motive of inducing the client to deal with the lawyer should the client wish further work done on the instrument. A lawyer who has retained the will usually will also express an open-ended invitation for the client to keep in touch with the lawyer about estate-planning matters, further muddying the question of endpoint.

104. Significantly different may be situations in which the trial court enters a final judgment, but there is a clear prospect that there will be an appeal. *See infra* text accompanying note 117 (discussing whether litigation ends if there significant grounds for appeal).

105. *E.g.*, Artromick Int'l, Inc. v. Drustar, Inc., 134 F.R.D. 226 (S.D. Ohio 1991).

106. *See generally* RESTATEMENT 1996 DRAFT § 44(1) cmt. b (discussing general rule allowing clients to terminate representation for any reason).

107. Occasionally, however, it will sufficiently appear that new counsel was to supplement, and not replace, the efforts of the lawyer originally retained. Here again, the issue is one of what the facts indicate about the client's reasonable contemplations of service.

108. *E.g.*, ABA Section of Business Law Task Force on Conflicts of Interest, *Conflicts of Interest Issues*, 50 BUS. LAW. 1381, 1385-87 (August 1995) [hereinafter ABA Task Force]. On reasons why even prudent lawyers may not send unambiguous termination letters, see *infra* text accompanying note 115.

retention letter the date or event that would bring the lawyer's responsibilities to an end. Either method, if agreed to by the client, will serve as adequate indication of the end of the representation. Speaking in formal legal terms, the point of such mutually accepted indications is to specify more precisely the agreement of lawyer and client on when the representation is at an end, and thus, whether stated or not, the point after which the lawyer may take up any adverse representation that does not offend the former-client conflict rules. Because the client-lawyer relationship (aside, perhaps, from a representation based on court appointment[109]) is founded on mutual consent,[110] the occurrence of the agreed-upon event is properly regarded as ending the representation. So long as the conditions for application of the hot-potato rule[111] are not present, the lawyer is thereafter free to treat the client as a former client.[112]

But few lawyers send termination letters in ambiguously continuing representations. And, because they do not, there is no bright shining moment or event that can unambiguously serve as the endpoint of the representation. Because the client's reasonable contemplation about the scope of the lawyer's service is and should be the core issue,[113] this is hardly a realm in which per se rules can operate sensibly.[114] The motives of even prudent lawyers for leaving matters in such an

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109. RESTATEMENT 1996 DRAFT § 26 cmt. g.

110. *Id.* § 26 cmt. b.

111. *See infra* text accompanying notes 128-30 (discussing elements for application of "hot-potato" rule).

112. A representation so terminated, and in which the hot-potato rule is inapplicable, should be treated as promptly ending the protection of the simultaneous-representation rules and thereafter providing the now-former client with protection only under the former-client rules. *See* ABA Task Force, *supra* note 108, at 1386-87 ("To avoid uncertainty whether a client that has been represented by a law firm in multiple matters is a current or former client, a law firm desiring to be free to take on conflicting representation can avoid ambiguity by furnishing the client with written notice that the lawyer-client relationship has been terminated. In the absence of such notice, a client that has retained a law firm for numerous discrete matters over time should be entitled to assume that the lawyer-client relationship continues for a reasonable period . . . ."). I am aware of no case precisely on point. There is at least the possibility that some courts would insist upon a kind of fiduciary bereavement — a "decent interval" period of time during which loyalty considerations would require that the lawyer not (immediately) turn against the recent client. *E.g.*, *In re* Gant, 645 P.2d 23, 26, *modified on other grounds*, 647 P.2d 933 (Or. 1982) (suspending lawyer for 30 days where lawyer represented husband in investigation against wife only one month after representing wife, a longstanding client, in real estate transaction). Because of the hot-potato rule, such an issue would arise only in the statistically rare case in which, by happenstance, the new client with the adverse matter approaches the lawyer shortly after the prior representation was ended by means of a termination letter or other precise signal.

113. While it seems clear that the scope of the contemplated services is the issue, the *Restatement* leaves this somewhat unclear. *Cf.* RESTATEMENT 1996 DRAFT § 213 cmt. c ("Withdrawal is effective to render a representation 'former' for the purposes of this Section [dealing with former-client conflicts] if it occurs at a point that the client and lawyer contemplated as the end of the representation . . . ."). The comment goes on to include as other possible endpoints situations in which the client discharges the lawyer or the lawyer withdraws, other than in hot-potato situations. While the reference is somewhat oblique, the *Restatement* clearly focuses upon the contemplation of the parties in fact as the central inquiry for purposes of defining the end of the representation. Moreover, under the general rule of construction of client-lawyer fee contracts, emphasis would be given to what would be reasonably contemplated by a person in the client's circumstances. *Id.* § 29A cmt. h.

114. Courts occasionally have attempted to draw bright-line rules for when representations end, such as the rule seen in some decisions that a representation at trial ends with entry of judgment, exonerating the lawyer

untidy state will often palpably revolve around marketing. They wish to hold on to the possibility that representation of the client will resuscitate, with more work to be done on the quiescent matter or on something new.[115] Until another client requests the lawyer to begin a representation adverse to the old client, most lawyers probably do not consider, or at least take sufficiently seriously, the risk that being required to turn away new business may prove to be more costly than the loss of the possible future business of a client who has already found her way at least once through the lawyer's door. For many lawyers, there is probably an associated sentiment that the lawyer is something like a public utility, or at least like a common-law inn, and should remain available to help whenever needed by clients regardless of season — an instinct somewhat at war with termination letters. In any event, suppose that, for whatever motive (including inertia or inattention), the lawyer takes no formal and permissible step to terminate. When does the representation end?

In determining such open-ended questions, attention should focus upon the nature and scope of the lawyer's undertaking reasonably contemplated by the client. While the relationship is assuredly contractual, the lawyer's end of it is rightly freighted with the special burdens of a fiduciary — the legal rubric under which duties of loyalty are enforced. In defining undertakings, as in so much else in the client-lawyer relationship, lawyers have great advantages over clients. Lawyers repeatedly engage in new representations, define the scope of their undertakings, and bring matters to a close — or at least they have the skill and training to do so. Even inattentive or busy lawyers are certainly in a better position than most clients to think through the implications of taking on new business, or retaining old business, and to act accordingly to protect their own interests with respect to future former-client conflict problems. For such reasons, the *Restatement* insists that all terms of the client-lawyer contract, which would certainly include definition of the scope and duration of the representation, should be assessed from the point of view of a reasonable client.[116] Suppose, for example, that the representation began with a personal injury claim handled by the lawyer on a contingent-fee basis. After investigation and unsuccessful negotiation, the lawyer tries the case but loses. Is the representation over if there are significant grounds for the client to appeal? Or, suppose the client prevails,

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from responsibility for collecting the judgment or for pursuing an appeal. *E.g.*, Mizrahi v. Miscione, 252 Cal. App. 2d 673, 678, 60 Cal. Rptr. 680, 683 (Cal. Ct. App. 1967) (holding that in absence of undertaking to do so, trial lawyer has neither authority nor duty to enforce collection of judgment); Franke v. Zimmerman, 526 S.W.2d 257, 258 (Tex. Civ. App. 1975) (finding no duty to handle appeal). In some contexts, those decisions may be sensible. If read to announce a "rule" about what lawyer and client in fact contemplated, the decisions obviously over-simplify and over-generalize. *cf.* RESTATEMENT 1996 DRAFT § 43 cmt. h (stating that end of lawyer's authority as client's agent occurs with completion of contemplated services).

115. *See* ABA Task Force, *supra* note 108, at 1385 ("[L]awyers are understandably loath to send termination letters to clients since [sic] typically there is hope of new business from the client.").

116. *See* RESTATEMENT 1996 DRAFT § 29A cmt. h ("Under this Section, agreements between clients and lawyers are to be construed from the standpoint of a reasonable person in the client's circumstances.")

but the opposing party files a notice of appeal. Several decisions have addressed such issues in the context of determining the scope of a lawyer's duties to a client under a contingent fee agreement, with the usual ruling being that, in the absence of explicit contractual language to the contrary, the lawyer is required to represent the client through any appeal.[117] A similar approach should control all sunset issues. In the absence of a clearly agreed-upon termination point, resolution of the issue should assure that the client will have received all that the client reasonably expected to receive by way of the lawyer's services.

2. Sunset Concepts and Outside General Counsel[118]

In determining the natural end of a representation, courts have occasionally dealt with the situation of a lawyer providing a wide range of services to a client, extending over several matters and over a sustained period of time. Such a lawyer may provide legal services in discrete matters, each coming to a relatively fixed point of termination. The representations are recurring, so that it may appropriately be said that the lawyer is providing more-or-less continuing services on an ongoing basis. The representations may average one or more a year, or even less, but the salient characteristic is that there is a sustained course of representations. Such relationships usually arise in the context of a business; the demands of most individuals for legal services are too modest to support the concept of a general counsel.[119] The course of representation will be ongoing over an extended period of time, if irregular in frequency, importance, and income-producing value for the lawyer. Again, at what point does such an indeterminate[120] representation end for former-client conflict purposes? The answer given by the Third Circuit in *IBM v.*

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117. *Id.*

118. I employ the term "outside general counsel" here in a loose sense. Some such relationships are established with a great deal of formality and include all matters that the company sends outside. *E.g.*, Thompson U.S., Inc. v. Gosnell, 581 N.Y.S.2d 764 (N.Y. App. Div. 1992) (discussing law firm's service as corporation's outside general counsel for half century). Other general-counsel relationships are much less long-standing or formal, but may be inferable from the course of dealings of the client and lawyer. In either type of relationship, as discussed in the text, defining the end of the relationship may be difficult. On application of the substantial relationship standard to inside general counsel, see *infra* text accompanying notes 197-207.

119. Many individuals, of course, will take their very occasional legal business — a house closing, will preparation, minor scrapes with the civil or criminal law — to the same lawyer. But such representations will be interrupted by many years, even decades. Such long-interrupted relationships are not within the concept recognized in the cases as creating special loyalty obligations. On the other hand, the difference is not inherently a matter of business versus non-business legal matters, but rather a matter of actual relationships. In unusual situations, a person who frequently resorts to the same lawyer for a wide range of services of a personal, non-business nature would seem equally entitled to the special loyalty protection extended to those with extensive business-connected legal matters.

120. As usual, we deal here with the cases in which the course of the contemplated relationship has been left indeterminate. In some instances, of course, client and lawyer will have made explicit arrangements, such as a retainer agreement in which the relationship is to last for a stated period, perhaps with language governing its renewal. Those explicit arrangements should, of course, be respected. *See also supra* text accompanying notes 102-118 (outlining arrangements defining the endpoint in a single-matter representation).

Levin[121] may distress some lawyers, but it has been followed in comparable cases.[122] The court held that even a relatively extensive period of inactivity (there, over a year) did not convert the client into a former client. Note that considerations of confidentiality had nothing to do with the finding of conflict. The representations were not factually linked, and thus the decision rests solely on considerations of loyalty — in effect elevating the reasonable expectation of the client about future availability of the lawyer into an indeterminably time-bounded commitment on the part of the lawyer to avoid additional representations that, by force of the concurrent-representation rule, involve proceeding adversely against the client. Important to the *Levin* court was both the extensive and intensive nature of the representations. While some matters involved relatively minor inquiries, the representations indicated a pattern of reliance upon the firm (a mid-sized firm in an important regional center, and in which IBM retained no other outside counsel) and an expectation on the part of the client that it could and would return with similar matters as needed.[123] In such circumstances, loyalty required that the lawyer either continue to hold the office door open or take clear and timely steps to end the relationship.

Levin is not, of course, a decision holding that loyalty requires that the lawyer wait into late old age for a possibly faithless client to return, simply because the lawyer had represented the client in the past. The notion instead is that an implicit relationship has been set up by both lawyer and client over a period of time that extends far beyond a year and over a pattern of prior representations that are both recurring, at least as frequent as once every two years (or so, one must add), and involving matters of importance to the client and that have produced significant income for the lawyer.[124] In another way of looking at them, *Levin* and cases like it treat the relationship as one of an implied retainer of indefinite duration. The lawyer, presumably, remains free to sever the relationship by reasonable notice to the client (as always, on the assumption that the lawyer complies with the hot-potato limitation[125]). But in the absence of notice, and in the absence of the

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121. 579 F.2d 271 (3d Cir. 1978).

122. *E.g.*, Shearing v. Allergan, Inc., No. CV-S-93-866, 1994 WL 396139 (D. Nev. May 31, 1994) (barring firm from representing thirteen-year client, despite fact that second client had not engaged firm for more than a year and lawyer had not formally ended relationship with first client); SWS Fin. Fund A v. Salomon Bros., Inc., 790 F. Supp. 1392 (N.D. Ill. 1992) (finding ongoing relationship where only two months' lapse after last billable project and no termination letter by lawyer or client); Manoir-Electroalloys Corp. v. Amalloy Corp., 711 F. Supp. 188 (D.N.J. 1989) (holding that four years of inactivity did not convert client into former client).

123. *Levin*, 579 F.2d at 281.

124. In conversation, many lawyers express the fear that some clients or prospective clients "conflict shop" — hiring a firm for a minor legal matter that is interminably protracted for the purpose of placing the client in the position of the successful client in *Levin*. The *Restatement 1996 Draft* addresses the problem only in the context of prospective clients. *See* RESTATEMENT 1996 DRAFT § 27 cmt. c ("Prospective Clients"). Our main emphasis to lawyers is to guard against such occurrences by pre-agreement with the or prospective client that the initial interview or minor retention does not conflict out other lawyers in the firm. Another protective measure, of course, is to decline the proffered representation.

125. *See infra* text accompanying notes 126-32 (discussing the hot-potato limitation).

passage of a period of time sufficiently lengthy to indicate unambiguously that the client no longer looks to the lawyer for recurring legal services, the representation will be treated as ongoing.

B. PROTECTING LOYALTY II: THE PROHIBITION AGAINST HOT-POTATO LAWYERING

Until relatively recent years, there was considerable doubt and debate over the relationship between the new, more lenient withdrawal rules that came in with the ABA's 1983 *Model Rules of Professional Conduct* and the former-client rules. Some argued that the *Model Rules*, particularly the new rule permitting withdrawal when withdrawal could be accomplished without material adverse effect on the client,[126] permitted a lawyer to withdraw from representing a client in order to sue the client on behalf of another client, including a new client with a matter more lucrative for the lawyer. The argument had little but arguably consistent language in the *Model Rules* to support it. The most obvious problem is a moral[127] one: the lawyer's motivation is patently base and disloyal to the abandoned client. Courts, obviously motivated by concern over the lawyer's disloyalty, have spoken with one voice. The now widely accepted rule[128] is that a lawyer who withdraws — whether otherwise in conformity with the lawyer code rules or not — from representing a current client for the purpose of proceeding adversely to the client on behalf of another client does not thereby convert the representation into that of a former client.[129] Based on the outraged expression of one of the early cases in this line,[130] the doctrine is now universally known as the "hot-potato" rule.

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126. *See* MODEL RULES Rule 1.16(b) ("[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client . . . ."). Application of the withdrawal rule in order to sue the now-former client is problematical on its own terms. It is not at all clear that the prospect of the lawyer's participation in suing the client is not itself a "material adverse effect on the interests of the client." On permissive withdrawal generally, see RESTATEMENT 1996 DRAFT § 44(3).

127. The hot-potato decisions might also be motivated by fairness considerations or, for that matter, concern that the permissive withdrawal rule itself is extreme in apparently ignoring the lawyer's non-disciplinary contractual duty to the client to see the representation through to the end that both lawyer as well as client originally contemplated.

128. *E.g.*, Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1345 n.4 (9th Cir. 1981); ILA, Local Union 1332 v. ILA, 909 F. Supp. 287, 293 (E.D. Pa. 1995) ("Although the Third Circuit has never explicitly adopted the 'hot potato' rule, it is clear that attorneys before this court have a strong duty of loyalty."); Strategem Dev. Corp. v. Heron Int'l N.V., 756 F. Supp. 789, 794 (S.D.N.Y. 1991), *aff'd*, 869 F.2d 578 (Fed. Cir. 1989); Picker Int'l, Inc. v. Varian Assocs., Inc., 670 F. Supp. 1363, 1365 (N.D. Ohio 1987); Harte Biltmore Ltd. v. First Pennsylvania Bank, 655 F. Supp. 419 (S.D. Fla. 1987); Flatt v. Superior Court, 885 P.2d 950, 957 (Cal. 1994) ("So inviolate is the duty of loyalty to an existing client that not even by withdrawing from the relationship can an attorney evade it."); *see generally* MODEL RULES ANN., at 149-50 ("At times, law firms have hastily sought to withdraw from one client's representation to take on the other — sometimes more lucrative — client . . . . The Practice has been rather soundly disapproved.") (citations omitted).

129. *See* RESTATEMENT 1996 DRAFT § 213 cmt. c ("If a lawyer is approached by a prospective client seeking representation in a matter adverse to an existing client, the present-client conflict may not be transformed into a former-client conflict by the lawyer's withdrawing from the representation of the existing client.")

130. Picker Int'l, Inc. v. Varian Assocs., Inc., 670 F. Supp. 1363, 1365 ("A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client.").

The hot-potato rule, because it is based on considerations of loyalty, cannot be affected by devices such as screening. That is, other lawyers in a law firm could not continue with adverse representation of the new client against the recently discarded and now former client on the justification that the lawyer who had personally represented the former client and who had now withdrawn was screened from participation in the new matter. Screening is curative, when it is that,[131] only for conflicts created by confidentiality problems, not for conflicts based on considerations of loyalty such as those confronted in hot-potato cases.

The hot-potato rule has been carefully applied by courts only when withdrawal has occurred or has been attempted unilaterally by the lawyer in question for the purpose of representing another client in a new matter adverse to the discarded client. Where withdrawal was independently justified or required, less rigor has naturally been shown. Several decisions, for example, have held that a lawyer confronted with a conflict because of the merger activities of a client can, in effect, choose which client to continue to represent and which to cease representing.[132]

C. PROTECTING LOYALTY III: LIMITS ON REPRESENTATIONS ADVERSE TO FORMER CO-CLIENTS

A possible role for loyalty considerations, separate and apart from those of confidentiality, can also be seen in "co-client cases" — decisions attempting to determine whether a lawyer who formerly represented two or more co-clients together may subsequently represent one co-client against another in a substantially related matter. The decisions, although few, take widely variant approaches. The chief factor that largely neutralizes confidentiality considerations is the rule

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131. One of the most controversial positions of the *Restatement* has been that of giving only limited recognition to the efficacy of screening in former-client situations not involving a former government lawyer. *See* RESTATEMENT 1996 DRAFT § 204 (2) (allowing screening where "there is no reasonably apparent risk that confidential information of the former client will be used with material adverse affect"); 68 A.L.I. PROC. 426-34 (1992) (documenting narrow defeat of motion to enlarge screening in former-client cases). The present version of the *Restatement* emerged from earlier drafts that recognized screening only in former government lawyer situations. *Compare* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 204 (Am. Law Inst. Prelim. Draft No. 4, January 25, 1989), *with* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 204 (Am. Law Inst. Prelim. Draft No. 4A, June 1, 1989) (accepting screening in cases not involving former government lawyer only when "the underlying basis for prohibition of representation or action by the personally prohibited lawyer is not substantially related to protection of confidential client information"). The *Restatement* recognizes relatively routine screening for former government lawyer situations. *See* RESTATEMENT 1996 Draft § 204(3) cmt. e (allowing screening of former government lawyer where lawyer receives no direct financial benefit from representation and where written notice is sent to "appropriate agency"). That was provided in early drafts as well. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 204 (Am. Law Inst. Prelim. Draft No. 3, May 25, 1988), for an early draft allowing screening.

132. *E.g.*, *In re* Sandahl, 980 F.2d 1118 (7th Cir. 1992); Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121 (N.D. Ohio 1990); *see generally* RESTATEMENT 1996 DRAFT § 213 cmt. j (allowing lawyer to withdraw "in order to continue adverse representation against a theretofore existing client when the matter giving rise to the conflict and requiring withdrawal comes about through initiative of clients").

that the attorney-client privilege is inapplicable to co-clients in subsequent litigation between them.[133] Thus, according to decisions at one extreme, because co-clients cannot reasonably expect that their common lawyer will withhold information from other co-clients, there is no expectation of confidentiality among the co-clients. Hence, these cases hold, the lawyer may later represent one co-client against the others in a substantially related matter.[134] A radically different stance was taken by the Fifth Circuit in the leading case of *Brennan's v. Brennan's Restaurants*.[135] The *Brennan's* decision and several subsequent cases[136] concede that considerations of confidentiality apply weakly or not at all to former

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133. RESTATEMENT 1996 DRAFT § 125(2) cmt. d (outlining co-client exception to attorney-client privilege); WOLFRAM, *supra* note 4, § 6.4.8.

134. *E.g.*, Croce v. Superior Court, 68 P.2d 369 (Cal. Dist. Ct. App. 1937) (allowing lawyer who formerly represented business associates as co-clients in litigation in which they denied they were partners to represent one associate against others in subsequent litigation where reverse proposition was urged); Meyerland Community Improvement Ass'n v. Temple, 700 S.W.2d 263, 267-68 (Tex. Ct. Apps. 1985) (allowing lawyer who formerly represented all members of homeowners association in drafting deed restrictions and bringing actions to enforce them to represent breakaway group of homeowners in resisting suit by association's remaining members to restrain alleged violation of same deed; former co-clients "could have had no expectation of privacy in any information given to [their common lawyer] during the previous attorney-client relationship"); *cf. also, e.g.*, Christensen v. United States District Court, 844 F.2d 694, 698 (9th Cir. 1988) (holding substantial relationship test not relevant where former client could not reasonably have assumed that lawyer would withhold information from firm's present client); United States Football League v. National Football League, 605 F. Supp. 1448, 1452 n. 7 (S.D.N.Y. 1985) (stating in dicta that receipt of confidential information "becomes an issue especially in cases where a partnership, joint venture or other cooperative effort breaks up, or where two former co-parties to a litigation later sue each other. If counsel for the combined effort then represents one of the former co-venturers in the ensuing litigation," authority in Second Circuit indicates that disqualification motion "must fail").

Some decisions that in one view fit this category are arguably different. For example, in the well-known decision in C.A.M. s.p.a. v. E.B. Marks Music, Inc., 558 F. Supp. 57 (S.D.N.Y. 1983), the court refused to disqualify a lawyer for a former co-client, and did indeed invoke the concept that there were no secrets between co-clients. *Id.* at 59. But the main ground of decision was that of the accommodation client notion of Allegaert v. Perot, 565 F.2d 246 (2d Cir. 1977).

135. 590 F.2d 168 (5th Cir. 1979). *See supra* text accompanying note 77 (understanding *Brennan's Restaurant* to be concerned with whether "the lawyer later places the former client's entrusted confidences at risk by representing an adversary against the former client in a matter in which those confidences might be used, treacherous enough, against the former client").

136. *E.g.*, United States v. Moscony, 927 F.2d 742 (3d Cir. 1991); Anchor Packing Co. v. Pro-Seal, Inc., 688 F. Supp. 1215 (E.D. Mich. 1988); St. Alban's Fin. Co. v. Blair, 539 F. Supp. 523 (E.D. Pa. 1983); Zador Corp. v. Kwan, 37 Cal. Rptr. 2d 754, 759 (Cal. Ct. App. 1995). The leading decision prior to *Brennan's* was undoubtedly E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 394 (S.D. Tex. 1969) (holding that lawyers who formerly represented both employer and employee in appearance before administrative agency could not later represent employer in suit against employee on substantially related matter). The Court noted that

> The duty not to represent conflicting interests [in contrast to the attorney-client privilege relating to co-clients], on the other hand, is an outgrowth of the attorney client relationship itself, which is confidential, or fiduciary, in a broader sense. Not only do clients at times disclose confidential information to their attorneys; they also repose confidence in them. The privilege is bottomed only on the first of these attributes, the conflicting-interests rule, on both.

Id. Accord In re Evans, 556 P.2d 792 (Ariz. 1976); *see* MODERN LEGAL ETHICS, *supra* note 4, at 373-74 (supporting the *Brennan's* line of co-client decisions); STEPHEN GILLERS, REGULATION OF LAWYERS 293-94 (4th ed. 1995) (suggesting socratically agreement with the "Loyalist" line of cases).

co-clients because of the presumed access of all co-clients to all confidential information involved in the matter of common representation. Nonetheless, these cases hold, with the concurrence of the *Restatement*,[137] that considerations of loyalty preclude the later representation. Why loyalty, independently of confidentiality, compels that result is not elaborately explained in those decisions; some of them merely refer obliquely to avoiding situations in which the client-lawyer relationship would be undermined.[138] What those courts are driving at, however, is clear enough — lawyer treachery in the original co-client representation. To put it bluntly, a lawyer free to proceed adversely to one co-client on behalf of another after a period of time in which the lawyer represented both would, during the common representation and particularly near its end, be in a position, and often would have strong incentives, to manage affairs to the significant advantage of the favored co-client, whom the lawyer would continue to represent, and to the disadvantage of the disfavored co-client.[139] As with the analogous situation of attacking one's own legal work,[140] so here nothing but a prohibition against the subsequent adverse representation can neutralize that risk.

Factually different are situations in which the co-client representation occurred in a more guarded atmosphere, and thus in which the risk of lawyer treachery is significantly less or non-existent. In the leading case of *Allegaert v. Perot*,[141] for

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137. *See* RESTATEMENT 1996 DRAFT § 201 cmt. e(i) ("The fact that neither joint client would assert the attorney-client privilege in subsequent litigation between them does not by itself negate the lawyer's more extensive obligations of confidentiality under § 112 and loyalty under § 28(1).").

138. *E.g.*, Cornish v. Superior Court, 257 Cal. Rptr. 383, 388 (Cal. Ct. App. 1989) (dictum) ("[W]e can easily envision situations where such action would seriously undermine the integrity of the attorney-client relationship . . . .").

139. For example, in *Moscony*, 927 F.2d at 747, 751-52, the lawyer had extracted affidavits from two individual co-clients that the lawyer, now representing only an organizational co-client, planned to employ to cross-examine them when they testified for the government against their former co-client. The court upheld disqualification of the lawyer, also holding that, while the lawyer planned public disclosure of the affidavits, he had never communicated that intent to the individual clients, so that they did not waive the attorney-client privilege by signing a document intending it to be made public. *Moscony*, 927 F.2d at 749. On the general problem of "set up" temptations that might arise in former-client conflict situations, see WOLFRAM, *supra* note 4, § 7.4.2(b)

140. *See supra* text accompanying notes 80-101 (discussing the protection against disloyalty through attacking one's own work).

141. 565 F.2d 246 (2d Cir. 1977). Debate continues over the extent to which *Allegaert* should be read to permit a lawyer to represent one former co-client against another. The *Restatement* takes the position that cases like *Allegaert* are limited to so-called accommodation and similarly secondary clients — those add-on clients who should have been aware from the circumstances that the lawyer's primary allegiance (properly) was with another client (often a client of long standing) and that the lawyer's services are being extended to the second client as an accommodation. RESTATEMENT 1996 DRAFT § 213 cmt. e(iv) & illus. 8; WOLFRAM, *supra* note 4, at 374; *see also, e.g.*, Christensen v. United States District Court, 844 F.2d 694 (9th Cir. 1988) (following *Allegaert* where named partner in law firm was member of board of directors of objecting former client, and thus in position to learn all relevant confidential information shared with lawyer's firm as counsel); Banque Worms, S.A. v. Messrs. Worms et Cie, 689 F. Supp. 241 (S.D.N.Y. 1987) (discussing situation where all of client B's communications were channeled through client A, who directed representation and paid 97 percent of fee); Zador Corp. v. Kwan, 37 Cal. Rptr. 2d 754 (Cal. Ct. App. 1995) (discussing case where corporation's long-standing attorney agreed to represent corporation's real estate agent in real estate litigation).

example, the former co-client against whom the lawyer later proceeded was additionally represented by independent counsel during the co-client representation, the potential for antagonism in the positions of the co-clients was evident from the beginning of the common representation, and the situation was such at the outset of the co-client representation that the accommodation client must have realized that the common lawyer would both share all information with the lawyer's long-standing client and would continue to represent that client in the event that the differing interests of the co-clients caused the co-client relationship to break down, as it did. Because of the co-clients' known potential differences and because of independent representation of the accommodation client, *Allegaert* is not a factual setting in which the accommodation client could claim either to have bestowed unquestioning trust in the lawyer or to have been misled by the lawyer in favor of the lawyer's primary client.

D. LOYALTY IN THE LAST ANALYSIS

The concept of loyalty is of obvious importance in defining the point at which a simultaneous-representation problem properly becomes a former-client problem — in either the sunset or hot-potato setting — or in limiting the representation of former co-clients. However, together with the prohibition against attacking one's own work, those situations should exhaust the role of non-confidentiality-based loyalty. As earlier discussed,[142] attempts to extend former-client conflict jurisprudence with an unanchored loyalty concept would lead to needlessly extravagant protection of former clients and correspondingly needless restriction of the rights of lawyers and future clients to form client-lawyer relationships.

VI. IMPLEMENTING SUBSTANTIAL RELATIONSHIP DOCTRINE: TEASING OUT THE APPROPRIATE TEST

With loyalty considerations to one side, we may now more fruitfully investigate the appropriate steps that a lawyer — or a court, disciplinary agency, or anyone else properly second-guessing the lawyer's representation of the latter client — should take in assessing whether a new matter falls afoul of the substantial relationship standard. As will be seen, courts have used numerous and confusing tests to flesh out substantial relationship into an operative test. One formulation focuses on a probability-based factual reconstruction of the former and later representations. This formulation stands out because it responds appropriately both to the confidentiality basis for the former-client rules and to the needs of lawyers, former clients, and courts for a workable test. Other formulations do little to aid analysis.

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142. *See supra* text accompanying notes 61-101 (discussing the limited relevance of loyalty considerations in former-client jurisprudence).

A. THE VARIETY OF POSSIBLE MEANINGS OF "SUBSTANTIAL RELATIONSHIP": IN GENERAL

Most modern decisions indicate that the core concept behind the substantial relationship rule is concern to protect the original client's legitimate expectation in the confidentiality of information imparted to the lawyer, the lawyer's consequent duty to protect that information, and implications of those expectations and duties with respect to the latter representation. So general is the agreement on that confidentiality-based approach (and so sensible, even obvious, that focus) that I will take that as common ground. But that, of course, only narrows the field somewhat. More is required before one can confidently apply the test. "Substantial relationship" itself, as a bare verbal formula (as with all others) is subject to varying misuses or peripheral uses.[143]

Clearly the substantial relationship standard requires a comparison of the former and the latter representations. But what is to be compared? One way of doing the comparison, typical of faltering efforts in other state and federal courts, is suggested by the decision of a New York court in *Lightning Park v. Wise Lerman & Katz*.[144] The test purportedly employed consists of two steps. First, the substantial relationship test, while employed, is markedly more strict than is typical of other jurisdictions — at least in its formulation. According to *Lightning Park*, "[i]n order to meet the 'substantial relationship' test, the issues in the present litigation must be 'identical to' or 'essentially the same as' those in the prior case before disqualification will be granted . . . ."[145] But, second, even absent a substantial relationship, disqualification (the remedy sought in *Lightning Park*) would be warranted "upon a showing that in the prior action [the lawyer]

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143. In WOLFRAM, *supra* note 4, § 7.4.3(b), at 369-70, I list several ways in which the comments to the *Model Rules* and occasional opinions of courts have so misapplied the concept.

144. 609 N.Y.S. 2d 904 (N.Y. App. Div. 1994); *see also, e.g., In re* Lichtenstein, 652 N.Y.S. 2d 682, 686 (N.Y. Sup. Ct. 1996) ("In order to meet the "substantial relationship" test, the issues in the present litigation must be "identical to" or 'essentially the same as' those in the prior case before disqualification will be granted. . . .") (quoting *Lightening Park*, 609 N.Y.S. 2d at 906). However, the most recent decision of New York's highest court on former-client conflicts seems to have impliedly rejected the formulation used in the earlier lower-court opinions, instead employing standard substantial relationship terminology. Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663 (N.Y. 1996). The older New York test, although stated in strict terms, was often tempered by such apparently contradictory statements as that doubts about the existence of a former-client conflict should be resolved in favor of disqualification or that where even the possibility of such a conflict exists disqualification should be ordered. *E.g., Lichtenstein*, 652 N.Y.S. 2d at 686-87.

145. *Lightning Park*, 609 N.Y.S. 2d at 906, quoting Dinger v. Gulino, 661 F. Supp. 438, 444 (E.D.N.Y. 1987). The apparently strict test may have originated in language in an early decision of the Second Circuit on former-client conflicts. Government of India v. Cook Indus., Inc., 569 F.2d 737, 739-40 (2d Cir. 1978) (holding conflict will not be found unless shown that "the issues . . . were substantially the same," "essentially the same," or "identical"). The Second Circuit seems to have softened its formulation somewhat. Evans v. Artek Sys. Corp., 715 F.2d 788, 791 (2d Cir. 1983) ("[A]n attorney may be disqualified from representing a client in a particular case if . . . there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit."); *see also* Ullrich v. Hearst Corp., 809 F. Supp. 229, 238 (S.D.N.Y. 1992) (quoting RESTATEMENT (THIRD) OF THE LAW, THE LAW GOVERNING LAWYERS § 213 (Tentative Draft No. 4, Apr. 10, 1991)).

had received specific confidential information substantially related to the present litigation. . . ."[146] Thus, while the first test focuses on "issues," the second focuses on "facts." While it may appear that the New York formulation is inconsistent with the formulation of the substantial relationship test employed in other jurisdictions, there is sound reason to conclude that the differences are merely in semantics and not in outcomes. A review of New York cases dealing with former-client issues indicates no lack of cases in which disqualification has been ordered on substantial relationship grounds.[147] The second step may in fact be the factual-reconstruction test commonly found in other jurisdictions and adopted as the test in the *Restatement.*[148] There is no empirical basis for concluding, aside from the somewhat more stringent statement of the test, that New York judges are refusing to find substantial relationships where judges in other jurisdictions would do so.[149]

Confusion in the courts reflects similar confusion in the lawyer codes, or at least uncertainty on how to proceed in elaborating the substantial relationship standard. While the *Model Rules* usefully adopted the substantial relationship test, its meaning and scope are not elaborated upon helpfully. In *Model Rule* 1.9(a), the prohibition is stated only in the most general terms, merely by quotation of the "substantial relationship" standard itself, with its comment saying little more.[150] For example, comment paragraph [2] states that "[t]he

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146. 609 N.Y.S. 2d at 906, citing Safler v. Governmental Employees Ins. Co., 465 N.Y.S.2d 20 (N.Y. App. Div. 1983).

147. *E.g.*, Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663 (N.Y. 1996); Cardinale v. Golinello, 372 N.E.2d 26 (N.Y. 1977).

148. *See* RESTATEMENT 1996 DRAFT § 213 cmt. f (discussing subsequent use of confidential information).

149. The same can also be said of the Second Circuit, where decisions (on which New York state cases often rely) seem to have originated the "identical . . . or substantially the same" terminology. *E.g.*, Government of India v. Cook Indus., Inc., 569 F.2d 737, 739-40 (2d Cir. 1978); Rogers v. Pittston Co., 800 F. Supp. 350, 354 (W.D. Va. 1992) (using test of *Government of India* decision, substantial relationship nonetheless found).

150. The relevant *Model Rule* comments state either obvious cases, without indicating why they are obvious, or deal with peripheral matters:

> [1] After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in *Model Rule* 1.7 determine whether the interests of the present and former clients are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.
>
> [2] The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior [sic] client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions with in the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

MODEL RULES Rule 1.9(a) cmts. 1, 2.

underlying question" involved in applying the substantial relationship test "is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question."[151] A more under-inclusive description of the standard would be difficult to formulate. Read literally, the ABA's stated test would apply only in the most blatant of former-client situations, that of "naked" side-switching; but, of course, the rule extends much farther.[152] Thankfully, the ABA's comment has played little significant role in subsequent decisions attempting to understand what is involved in a substantial relationship analysis. The only additional light shed by the comment to *Model Rule* 1.9 are the general words later offered in its comment paragraph [6] to the effect that

> [p]reserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about the firm's clients. . . .[153]

As can be seen, the focus of that portion of the comment (as is true of most of the commentary to *Model Rule* 1.9) is on the migratory-lawyer situation. While important, that situation is surely subordinate to the core question of how to define properly the substantial relationship standard itself. And, while the comment helpfully notes that the proper inquiry must focus on "particular circumstances," no guidance is provided on how to do that.

Several jurisdictions in post-1983 formulations have shown commendable independence from the ABA model in attempting to improve upon the formulation of the substantial relationship test. Each has made more explicit the connection between the facts in the representations and the concerns that drive the former-client rule. For a prominent example, California's 1990 amendment to its Rules of Professional Conduct states the former-client conflict prohibition as follows: "[A lawyer is prohibited from later accepting employment] without the informed consent of . . . the former client where, by reason of the representation . . . of the former client, the [lawyer] has obtained confidential information material[[154]] to the [later] employment."[155]

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151. *Id.* Rule 1.9(a) cmt. 2.

152. *See* RESTATEMENT 1996 DRAFT § 213 cmt. d(i) (discussing switching sides in same matter). As subsequent comments in the *Restatement* go on to elaborate, the former-client concept covers much else, including much else relating to protecting confidentiality of the prior client's information. *Id.* cmt. d(iii).

153. MODEL RULES Rule 1.9 cmt. 6.

154. [Author.] The word "material" seems ill-advised as a drafting choice. Nonetheless, it seems fairly evident that *Rule* 3-310(E) is to be understood here as if it read "material in significance because directly relevant to the later representation."

155. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-310(E).

Similar stress on the facts has been made in Utah Rules of Professional Conduct, which explicitly provides that a lawyer may not appear adversely to a former client "in the same or a substantially factually related matter . . . ."[156] The rule has rightly been interpreted as a more precise formulation of the general substantial relationship standard.[157] While those formulations are modest improvements, they at least bring our focus more sharply to the need to protect confidential client information.

B. DELINEATING WHEN A RELATIONSHIP IS "SUBSTANTIAL": FACTUAL RECONSTRUCTION TO ASSESS RISKS

What, in the end, should it mean to say "substantial relationship"? Just as a federal district court decision in 1953, *T.C. Theatre,*[158] set out the basic statement of the "substantial relationship" test for former-client conflicts, so a 1992 decision of a federal district court has become quite commonly quoted and cited as the source for what I would urge as the most apt delineation of how "substantial relationship" should be determined. In *Koch v. Koch Industries,*[159] the federal district court in Kansas described the burden that must be carried by a party seeking to disqualify a former counsel under the substantial relationship standard as follows:

> [The party's proof must enable] the court . . . to reconstruct the attorney's representation of the former client, to infer what confidential information could have been imparted in that representation, and to decide whether that information has any relevance to the attorney's representation of the current client. What confidential information could have been imparted involves considering what information and facts ought to have been or would typically be disclosed in such a relationship. Consequently, the representations are substantially related if they involve the same client and the matters or transactions in question are relevantly interconnected or reveal the client's pattern of conduct.[160]

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156. UTAH RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1993) (emphasis added).

157. *See* SLC Ltd. V v. Bradford Group West, Inc., 999 F.2d 464, 467 (10th Cir. 1993) ("We understand this variation from the ABA model code to be a codification of our existing definition of substantiality by focusing on the factual nexus between the prior and current representations rather than the narrower identity of legal issues."). The Maine Supreme Court treated a 1993 amendment to the Maine lawyer code in a different fashion. Adam v. MacDonald Page & Co., 644 A.2d 461, 464 (Me. 1994). Relying solely on canons of statutory construction, the court held that Maine's amended former-client conflict rule, which referred disjunctively to either substantially related current representations or a later representation that "may involve the use of confidential information obtained through such former representation" extended the former-client rule beyond former, substantially related representations. *Id.*

158. 113 F. Supp. 265 (S.D.N.Y. 1953).

159. 798 F. Supp. 1525 (D. Kan. 1992).

160. *Id.* at 1536 (citations omitted). Aside from its last clause, the *Koch* court's formulation readily can be endorsed as a succinct and satisfactory elaboration of the substantial relationship test. While the meaning of the

The *Koch* formulation was, as the *Koch* court indicated, drawn in large part from a line of decisions in the Seventh Circuit, primarily from *Analytica v. NDP Research.*[161] Other courts and authorities have repeated much the same test.[162] It has the ring both of common sense and of fidelity to the *T.C. Theatre* concept.[163] The *Koch/Analytica* courts seem to agree that the appropriate way to assess substantial relationship can best be explained as a process of factual reconstruction. That process consists of two steps: (1) First, one must assess the likelihood that, given the "matter" on which the lawyer worked for the former client, the lawyer would likely have been exposed to confidential client information relevant to that matter. (2) Second, with the results of the first determination in hand, one then assesses the likelihood that significant portions of the confidential information thus gained will be relevant in the later representation. In performing both of the preceding assessments, the court will assume that the lawyer conducted the representation with an appropriate degree of diligence and single-minded purpose to advance the interests of the relevant client. Throughout, presumptions are employed to protect any likely source of confidential information.[164]

D. PROTECTING CONFIDENTIALITY IN THE FACE OF UNCERTAIN FACTS: THE ROLE OF IRREBUTTABLE AND REBUTTABLE PRESUMPTIONS

In generally stating the substantial relationship test, courts often will assert that the test proceeds on the basis of two presumptions with respect to the situation of a personally disqualified lawyer.[165] First, once a substantial relationship is

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last clause is unclear, in one reading it may be thought to include the "playbook" concept, critically examined *infra* text accompanying notes 143-96.

161. 708 F.2d 1263 (7th Cir. 1983).

162. Prominent among them and frequently cited for its formulation of the substantial relationship standard is Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980) ("If there is a reasonable probability that confidences were disclosed which [sic] could be used against the client in later, adverse representation, a substantial relation between the two cases is presumed."); *see also, e.g.*, Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985) ("Substantiality is present if the factual contexts of the two representations are similar or related.") (citation and quotation omitted); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1233 (Aug. 24, 1972) ("One recognized test as to whether a lawyer will be held to be disqualified is whether the subject matter of the second representation is so closely connected with the subject matter of the earlier representation that confidences might be involved? [sic]" (quoting T.C. Theatre Corp. v. Warner Brothers Pictures 113 F. Supp. 265, 268 (S.D.N.Y. 1953); ABA Comm. on Ethics and Professional Responsibility, Informal Ops. 478, 479 (1975) ("One recognized test as to whether a lawyer will be held to be disqualified is whether the subject matter of the second representation is so closely connected with the subject matter of the earlier representation that confidences *might* be involved[.]") (citing, among others, *T.C. Theatre*, 113 F. Supp. at 268. I originally urged the factual-reconstruction approach in *Modern Legal Ethics,* and I urge it again here, as the best means of accommodating the purposes of the substantial relationship test. WOLFRAM, *supra* note 4, § 7.4.3(b), at 370.

163. *See T.C. Theatre*, 113 F. Supp. at 268 (defining substantial relationship test).

164. *See infra* text accompanying notes 165-183 (discussing role of irrebuttable and rebuttable presumptions).

165. Courts and some commentators would also formerly speak of presumptions when referring to the older

found,[166] it then will be presumed that the lawyer acquired confidential information in the earlier representation with respect to the matter involved in it.[167] That presumption is commonly described as irrebuttable,[168] although some decisions sensibly recognize exceptions for particularly appealing situations,[169] and a few have proceeded as if rebuttal were routinely possible.[170] For similar reasons,

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rules that imputed all conflicts within a firm on the basis of assumed firm-wide sharing of confidential information. *See, e.g.*, ENDA SELAN EPSTEIN, C. TIMOTHY CORCORAN, JAMES I. KEANE & RICHARD C. SPENCER, CONFLICTS OF INTEREST: A TRIAL LAWYER'S GUIDE 35-36 & 55-62 (1984). Particularly after adoption of the *Model Rules*, discrete treatment of such issues is now customarily given, depending on whether the issue is firm-wide imputation of conflicts burdening the personally disqualified lawyer — where imputation is the general rule, *Model Rule* 1.10(a) — or whether the issue involves migratory lawyers, either a personally disqualified lawyer who leaves a firm and the issue concerns the possible disqualification by imputation of lawyers who remain at the firm, MODEL RULES Rule 1.10(b), or a lawyer who has left the firm of a personally disqualified lawyer and the issue is possible disqualification of that lawyer and other lawyers in the lawyer's new firm. MODEL RULES Rule 1.9(b); *see also* RESTATEMENT 1996 DRAFT § 203 (canvassing same issues).

166. As the court noted in Rogers v. Pittston Co., 800 F. Supp. 350, 354 n.5 (W.D. Va. 1992), some courts have — incorrectly and probably inadvertently — misstated the rule when they state that an irrebuttable presumption that confidential information was exchanged arises from the former-client-lawyer relationship alone. *E.g.*, *In re* Chantilly Constr. Corp., 39 B.R. 466, 469, 472 (Bankr. E.D. Va. 1984).

167. The point was made in the opinion that originated the substantial relationship test. *T.C. Theatre*, 113 F. Supp. at 268 ("The court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation."); *see also, e.g.*, Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985) ("Once a substantial relationship has been found, a presumption arises that a client has indeed revealed facts to the attorney that require his disqualification. The majority of circuits that have considered the issue have held this presumption to be irrebuttable."); Amgen, Inc. v. Elaxes Pharmaceuticals, Inc., 160 F.R.D. 134, 141 (W.D. Wash. 1994) ("[A] court may presume that confidences have been shared if the scope of representation of the former client encompasses issues raised in litigation with the current client.").

168. *E.g.*, United States v. Provenzano, 620 F.2d 985, 1005 (3d Cir. 1980); Chugach Elec. Ass'n v. United States District Court, 370 F.2d 441, 443-44 (9th Cir. 1966); Rogers v. Pittston Co., 800 F. Supp. 350, 354 (W.D. Va. 1992) ("Where the matters are determined to be substantially related, and there was a reasonable chance that the attorney received confidences in the first matter, an irrebuttable presumption arises that confidences were exchanged.") (citation omitted); Prisco v. Westgate Entertainment, Inc., 799 F. Supp. 266, 271 (D. Conn. 1992); Koch v. Koch Indus., 798 F. Supp. 1525, 1536 (D. Kan. 1992); *T.C. Theatre*, 113 F. Supp. at 265; Flatt v. Superior Court, 885 P.2d 950, 954 (Cal. 1995); Sullivan County Reg'l Refuse Disposal Dist. v. Town of Acworth, 686 A.2d 755, 757-58 (N.H. 1996). A common occasion for invoking the irrebuttable presumption rule is when a lawyer attempts to avoid the former-client rule by claiming total non-recall of any confidence. *E.g.*, *Rogers*, 800 F. Supp. at 355.

169. *E.g.*, Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977) (determining extent of information-sharing between separately represented clients under joint-defense arrangement). Courts may also impose a burden of showing that specific factual information was given to a lawyer, where the former client's attempted showing of substantial relationship has been unconvincing. *E.g.*, Church of Scientology of California v. McLean, 615 F.2d 691 (5th Cir. 1980). When a lawyer is permitted to rebut the presumption of conferred confidential information, courts understandably require a clear and unequivocal showing. *E.g.*, Carbo Ceramics, Inc. v. Norton-Alcoa Proppants, 155 F.R.D. 158 (N.D. Tex. 1994) (finding that even if presumption were rebuttable, law firm cannot successfully do so by attempted showing that associate's work was "generic" and constituted only seven percent of hours billed).

170. *E.g.*, City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 209 (N.D. Ohio 1976), *aff'd mem.*, 573 F.2d 1310 (6th Cir. 1977) ("[E]quity demands, and the pragmatics of emerging specialization inherent in contemporary legal practice dictates, that this presumption be rebuttable."); *see also, e.g.*, Decora, Inc. v. DW Wallcovering, Inc., 899 F. Supp. 132, 138 (S.D.N.Y. 1995) ("In sum, although a party seeking disqualification of an attorney on the basis of the substantial relationship test is not required to present evidence

courts have resisted attempts by lawyers to show that the only information learned during the challenged earlier representation was a matter of public knowledge.[171] Second, it will be presumed that the lawyer would be in a position to misuse the first client's confidential information in the second representation, if the latter is found to be substantially related to the former.[172] Some, but not all, courts hold that the second presumption is rebuttable by the lawyer or the new client.[173] Those presumptions and their irrebuttable or rebuttable nature have

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that the attorney possesses actual confidences as a result of the prior representation, the Court has discretion to consider evidence proving either that confidences were or were not communicated in the prior representation and to do so in a manner designed to protect confidential evidence from disclosure [through *in camera* submission or submission under seal]."). Most such decisions cite and rely upon the concurring opinion of Judge Mansfield, urging such an approach, in Government of India v. Cook Indus., Inc., 569 F.2d 737, 741 (2d Cir. 1978). A common occurrence in disqualification cases is for the lawyer to submit attempted proof that the lawyer was not in a position in the earlier representation, perhaps because of the lawyer's peripheral involvement in it, to obtain significant confidential information relevant to the later representation. *See* Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751, 756-57 (2d Cir. 1975) (refusing to disqualify law firm where summer associate at previous firm caused no "realistic chance" that confidences would be disclosed). Courts will then often, in effect, require the client to produce non-confidential information readily available, such as billing records of the lawyer (possibly in redacted form), to disprove, if possible, the lawyer's version of events. *See id.* at 757 (stating that Chrysler could have submitted proof that lawyer was in a position to reveal confidences). It was that approach that Judge Mansfield cited in his concurrence in *Government of India*, 569 F.2d at 741.

Distinguishable are situations of migratory lawyers, where the question of imputed disqualification of lawyers who remain at the old firm or of lawyers at the new firm turns on actual exposure to confidential information, necessitating in each instance an examination, in fact, of such exposure. *See infra* text accompanying notes 210-16 (discussing confidentiality and migratory workers).

171. *E.g.*, *In re* American Airlines, Inc., 972 F.2d 605, 620-21 (5th Cir. 1992); Brennan's, Inc. v. Brennan's Restaurants, 590 F.2d 168, 172 (5th Cir. 1979) (finding information acquired by lawyer in representation of former client "is sheltered from use by the attorney against his client by virtue of the existence of the attorney-client relationship. This is true without regard to whether someone else may be privy to it.") (citation omitted); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 572-73 (2d Cir. 1973) ("[T]he client's privilege in confidential information disclosed to his attorney is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources.") (internal quotations and citations omitted); Buckley v. Arishield Corp., 908 F. Supp. 299, 306 (D. Md. 1995); *In re* Airport Car Rental Antitrust Litig., 470 F. Supp. 495, 501 (N.D. Cal. 1979); Doe v. A Corp., 330 F. Supp. 1352, 1355 (S.D.N.Y. 1971). As the court noted in *American Airlines*, the statement in *Model Rule* 1.9(b), allowing a lawyer to "use" information about a former client after it has become "generally known," is not repeated in *Model Rule* 1.9(a), with its statement of the substantial relationship standard. *American Airlines*, 972 F.2d at 621; *see also* WOLFRAM, *supra* note 4, at 360, 365 (noting both that *Model Rule* 1.9(a) is intended to protect against disclosure of forme client's protected information and that *Model Rule* 1.9(b) "only obscures" obscures the meaning of *Model Rule* 1.9(a)). *Compare* RESTATEMENT 1996 DRAFT § 111 cmt. d (commenting on the *Restatement*'s general exclusion of generally known information about a current or former client from the definition of confidential client information) *with id.* § 213 cmt. d(iii) ("Information that is confidential for some purposes under § 111 (so that, for example, a lawyer would not be free to discuss it publicly) might nonetheless be so general, readily observable, or of little value in the subsequent litigation that it should not by itself result in a substantial relationship. . . ."). *See also* text accompanying note 189 (discussing "generally known" information).

172. *E.g.*, Koch, 798 F. Supp. at 1536; Prisco, 799 F. Supp. at 271.

173. No rebuttal can be made, for example, by the lawyer's swearing that neither the lawyer nor the new client would use the information adversely to the objecting former client. But some courts have accepted efforts by the lawyer and new client to limit the new representation in such a way as to avoid the conflict. *See infra* text

seemed to many lawyers, judges, and law students on first encountering the doctrine as the mysteries of the initiated. In fact, their point is quite simple.

Courts have recognized very generally that the substantial relationship test must be implemented pragmatically so that courts do not end up destroying confidentiality in the course of protecting it.[174] That could occur should the test impose unbearable disclosure duties on the objecting former client. If, for example, the former client were required to show that, in fact, the lawyer gained confidential information in the earlier representation by specifying that information, the lawyer's new client would have access to it through the former client's own showing. Similar considerations warrant the second presumption. The new client's interest in confidentiality also would be compromised if the new client were forced to permit inspection of the lawyer's intended work for the new client in testing the fit of the prior-representation confidential information into the second representation. (On the other hand, of course, the former client would be unfairly disadvantaged if that client were denied any means of making the required connection to the new client, including through aid of a presumption.)

While the presumptions are thus laudably designed to prevent over-exposure of confidential information in the course of seeking to protect it, it is by no means clear that irrebuttable presumptions are required. There often will be readily available methods of permitting meaningful hearings without routine threat of disclosure. One common device in disqualification hearings[175] is the examination of documents or even witnesses by the court *in camera*, without the presence of the later client or that client's counsel.[176] Similarly, documents, including the

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accompanying notes 237-46 ("Limiting Scope of Old or New Representations to Avoid Former Client Conflicts"). Some courts now generally accept screening as a cure for migratory lawyers who have brought the personal disqualification of a former-client conflict to a new firm. *E.g.*, Cromley v. Board of Education of Lockport Township High School Dist. 205, 17 F.3d 1059 (7th Cir. 1994); Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988); Del-Val Fin. Corp. Secs. Litig., 158 F.R.D. 270 (S.D.N.Y. 1994); Carbo Ceramics, Inc. v. Norton-Alcoa Proppants, 155 F.R.D. 158 (N.D. Tex. 1994); Nemours Found. v. Gilbane, 632 F. Supp. 418 (D. Del. 1986). It is now generally accepted that if the migratory lawyer can be shown not to be personally disqualified, that showing will by itself avoid the need to impute a former firm's former-client conflict to the new firm. *See infra* text accompanying notes 210-16 (discussing confidentiality and migratory workers).

174. Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980) ("The test does not require the former client to show that actual confidences were disclosed. That inquiry would be improper as requiring the very disclosure the rule is intended to protect.") (citation omitted); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973) ("Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the Code, for the client's ultimate and compelled response to an attorney's claim of non-access would necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved.").

175. Of course, in other types of hearings, such as in a jury trial of a damage claim based on a former-client conflict of interest, devices such as *in camera* submission or sealing a record may be less or even clearly not feasible.

176. "[B]ecause the moving party is not required to publicly reveal actual confidences, *in camera* submission of documents is a recognized way of establishing that the two matters are substantially related," and the disqualified lawyer is not entitled to examine such documents in order to rebut them. Rogers v. Pittston Co., 800 F. Supp. 350, 355 (W.D. Va. 1992), citing Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d

transcript of testimony in a hearing before the court, can be submitted under seal — preventing the later client from exposure to confidential information of the former client.[177] Submittal under seal seems particularly appropriate when the former lawyer in question is conducting the hearing and arguing the absence of substantial relationship. While the matter is pending, the sealing order prevents communication of information to that lawyer's new client. Should a substantial relationship be found, the lawyer can be disqualified, with the sealing order made permanent. A third, related device is that of permitting submission of redacted documents, often under circumstances in which an unredacted version of the document is submitted for *in camera* review in order to ascertain that the redaction has fairly retained the purported essence of the document.[178]

Resolution of the question of how much flexibility is appropriate in dealing with presumptions for former-client conflict purposes need not be left to indeterminate, case-by-case analysis alone. In the course of determining the facts that might have been revealed in the former-client representation and those that might be relevant to the later representation, it is appropriate to consider the extent to which the scope of representations and the divulgence and relevance of confidential information may be interdependent elements in the test. Representations are not, as some formulations of the substantial relationship test might suggest, cookie-cutter affairs that come predetermined as to the issues they involve and the facts that are relevant and disclosed. Measured by the normal practices of lawyers, the wit and diligence of a particular lawyer may enlarge the exploration of legal options and facts in either the former or the latter representation. Particular needs or interests of one or the other client may also take either representation in unusual directions at the client's initiative. By their nature, some types of representations may be greatly expanded;[179] others may be significantly limited.[180] Similar observations could also be made about the divulgence and relevance of confidential information. Again, there are few

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221, 224 n.3 (7th Cir. 1978). *See also, e.g.,* Government of India v. Cook Indus., Inc., 569 F.2d 737, 741 (2d Cir. 1978) (stating that the"court will devise appropriate means, including use of in camera or other protective devices, to safeguard the interests of the former client"); United States Football League v. National Football League, 605 F. Supp. 1448, 1462 (S.D.N.Y. 1985) ("I have issued a confidentiality order directing that all submissions to the Court for purposes of this motion be filed under seal. This has enabled the parties to reveal to me in camera the full scope of the attorney-client relationship."); Decora, Inc. v. DW Wallcovering, Inc., 899 F. Supp. 132, 137-38 (S.D.N.Y. 1995) (quoting *United States Football League*, 605 F. Supp. at 1462); *cf.*, United States v. Uzzi, 549 F. Supp. 979, 982 (S.D.N.Y. 1982) (refusing *in camera* testimony where all relevant facts undisputed). The use of *in camera* procedure is also assumed in the *Restatement 1996 Draft. See* RESTATEMENT 1996 DRAFT § 213 cmt. d(iii) ("Substantial relationship and protection of confidential information of former client).

177. *E.g., Decora*, 899 F. Supp. at 138; *United States Football League*, 605 F. Supp. at 1462.

178. Redaction is also assumed by the RESTATEMENT 1996 DRAFT § 213 cmt. d(iii) ("[I]nformation obtained by the lawyer might also be proved by inferences from redacted documents.").

179. *See infra* text accompanying note 240 (discussing potential for expansion of new representation).

180. *See infra* 238-45 (discussing the limitation of the scope of prior representation).

cookie-cutter situations. Some representations will involve extensive divulgence and compelling relevance; others may involve much less.

In fact, the task of assessing the scope of representations and the extent of divulgence and relevance can be graphed in a way that may aid analysis in unclear instances. (In clear cases, both the scope of the representations and the bearing of facts learned in the first representation on the lawyer's work in the second will be evident and require no further analysis.) Scope and divulgence or relevance both have a role to play in the analysis, but one is not independent of the other. Instead, the substantial relationship test should be applied so that: (1) the more extensive the apparent scope of tasks or exposure to areas of relevant information that are involved in the earlier and later representations, the less should it be required that specific factual matters be shown to be material and relevant in the later representation; but (2) the less overlap there is between legal issues or areas of apparent factual relevance in the former and latter representations, the more should it be required that specific factual exposure be shown.

Noticing scope-divulgence/relevance interdependence does much to explain what otherwise often appear to be inconsistent attitudes of courts toward former-client conflicts. Some courts insist on what may at first appear to be a rigorous demonstration of divulgence of confidential information; other decisions will find conflict on little actual evidence of relevant factual disclosures. Yet, there well might be less difference in overall approach, depending on the degree of interdependence. As an example of the first category (great identity of issues), take the situation where a lawyer performs estate-planning functions for a client-spouse and then appears to represent the other spouse against the former-client spouse in a subsequent divorce action in which assets are to be divided. Courts will routinely find a former-client conflict without very elaborate inquiry into what facts were conveyed to the lawyer in the estate-planning work.[181] Similarly, in the corporate realm, if a law firm performs legal services that involve extensive exposure to the business practices of a corporate client, the firm will almost certainly be disqualified from later representing an opponent who raises extensive questions about the corporation's business practices.[182] Similarly, if a lawyer representing a client adversely to a corporation formerly served as inside legal counsel to the corporation and the current representation relates to the period of time during which the lawyer so served, courts will find a conflict without minute examination of the matters involved in the earlier and later representations.[183]

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181. *E.g.*, Mathias v. Mathias, 525 N.W.2d 81 (Wis. 1994); Buntrock v. Buntrock, 419 So. 2d 402 (Fla. Dist. Ct. App. 1982).

182. *E.g.*, Koch v. Koch Indus., 798 F. Supp. 1525, 1537-38 (D. Kan. 1992).

183. *See infra* text accompanying notes 197-203 (examining the reasons for special stricture in the case of inside legal counsel).

VII. CONFIDENTIAL INFORMATION: THE "PLAYBOOK" PROBLEM AND ITS IMPLICATIONS

A. REJECTION OF A BROAD ROLE FOR PLAYBOOK

One persistently problematical variation on the question of what counts as a "matter" when attempting to determine the subject of the earlier representation has involved the "playbook" problem — a claim by a former client that the lawyer learned confidential information of a very general kind. Common variants on the claim are assertions that the lawyer learned the former client's settlement strategy and philosophy, or what sequence of demands or other tactics the former client uses in negotiating business deals, how the former client generally conducts its business, how the client deals with the stresses of litigation, what quirks of personality the client possesses or suffers from,[184] or, in general, what "hot buttons" can be pushed to cause panic or confusion to the former client.[185] Confidential information about any one of those elements, it is claimed, would give the lawyer significant advantage if it were permissible to represent an adversary against the former client, regardless of the factual dissimilarities between the two representations in other respects. Hence, it is claimed, confidential information protected by the substantial relationship test should include such playbook information.

How seriously should such claims be taken? While the claims have a ring of surface plausibility, at least in some representations, the considerations that drive them, if generalized, would require a rule very much like the opposite of the rule that a lawyer is free to proceed adversely to a former client unless a substantial relationship is shown.[186] Such playbook information would, presumably, equally benefit the new client in *any* sort of proceeding, whether (otherwise) substantially related or not.[187] That would portend both over-application of the substantial relationship test and a large increase in the number of motions to disqualify.

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184. *But see, e.g., In re* Chantilly Constr. Corp., 39 B.R. 466, 470-71 (Bankr. E.D. Va. 1984) ("[F]amiliarity with the workings of a corporation or the personalities of its representatives . . . is totally insufficient as a basis for disqualification.").

185. In Adam v. MacDonald Page & Co., 644 A.2d 461, 464 (Me. 1994), the court, referring to a 1993 amendment to the Maine lawyer code, interpreted the code to create a former-client barrier where the former representation exposed the lawyer to "information concerning a client's ability to deal with the stress of litigation, or serious financial difficulties that could affect the client's ability to litigate." The court expressly noted that the amended Maine rule was "more stringent" than either the *Model Rules* (1983) or the *Model Code of Professional Responsibility* (1969). *Id.* That interpretation of the *Model Rules* seems clearly correct. The court's interpretation of the Maine rule seems unfounded.

186. *See supra* text accompanying notes 34-45 for a general discussion of this rule.

187. Occasionally, a claim of the "playbook" kind can be rejected outright on the ground that the scope of the lawyer's representation of the former client was shown to be sufficiently limited that it was improbable that the lawyer in fact acquired confidential information about the asserted master strategy. *E.g.*, English Feedlot, Inc. v. Norden Labs., Inc., 833 F. Supp. 1498 (D. Colo. 1993) (rejecting former client's claim that lawyer acquired "background information" about the former client's "settlement strategy and philosophy" on grounds that former client's own documentation indicated that lawyer's work was limited to conducting lien searches to

Claims of the great strategic value of general information also assume that it frequently will be of real utility in the subsequent representation, such as in cross-examining the former client in litigation. Whether that is so will depend in the end on one's beliefs about what is of strategic value in litigation and negotiation, matters on which there is little hard data or other confident proof. For such reasons, the *Restatement*, wisely I believe, has rejected a sweeping general-information basis for finding former-client conflict:

> A lawyer might also have learned a former client's preferred approach to bargaining in settlement discussions or negotiating business points in a transaction, willingness or unwillingness to be deposed by an adversary, and financial ability to withstand extended litigation or contract negotiations. Only when such information will be directly in issue or of unusual value in the subsequent matter will it be independently relevant in assessing a substantial relationship.[188]

It is in that above sense that one should also understand the qualification in the black-letter statement of the *Restatement*'s former-client rule for "information [that] has become generally known."[189] The section, by referring to information of the former client, necessarily echoes the basic sections in the *Restatement* noting the general duty of lawyers to protect confidential information of a client, including a former client,[190] and defining what that information includes.[191] Because of the breadth of the definitional section and the wide sweep of the duty of protection (which, in turn, reflect the breadth of *Model Rule* 1.6), it was necessary in the former-client material to except information that was encompassed within at least the literal terms of those foundational sections. A comment to section 213 attempts that accommodation as follows:

> Information that is confidential for some purposes under § 111[[192]] (so that, for example, a lawyer would not be free to discuss it publicly) might nonetheless be so general, readily observable, or of little value in the subsequent litigation that it should not by itself result in a substantial relationship. Thus, a lawyer may master a particular substantive area of the law while representing a client,

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implement settlement that client had reached without lawyer's assistance). On the extent to which a limited earlier representation affects the substantial-relationship analysis, see *infra* text accompanying notes 244-46.

188. RESTATEMENT 1996 DRAFT § 213 cmt. d(iii). *Accord* Brice v. Hess Oil Virgin Islands Corp., 769 F. Supp. 193, 196 (D.V.I. 1990) (finding no significance in lawyer's acquisition of knowledge in otherwise unrelated former representation of former client's accident investigation procedures, record-keeping systems, contractor indemnity agreements, and policies concerning worker safety); Robbins v. Gillock, 862 P.2d 1195, 1197 (Nev. 1993) (finding former-client representation of doctor in factually unrelated medical malpractice defense did not disqualify lawyer from representing current client in suing former client for medical malpractice).

189. RESTATEMENT 1996 DRAFT § 213(2) (*quoted in full supra* text accompanying note 30).

190. *See* RESTATEMENT 1996 DRAFT § 112 ("Lawyer's Duty to Safeguard Confidential Client Information").

191. *See id.* § 111 ("Confidential client information consists of information relating to that client, acquired by a lawyer or agent of the lawyer in the course of or as the result of representing the client, other than information that is generally known.").

192. [Author.] In further editing, the reference will be corrected to section 112.

> but that does not preclude the lawyer from later representing another client adversely to the first in a matter involving the same legal issue, if the matters factually are not substantially related. . . .[193]

It is only in that limited sense that the section's exception for "generally known" information should be understood.

Some decisions have been read to give playbook claims uncritical, and evidently exaggerated, acceptance. Frankly, that is the way in which I initially read the Georgia decision in *Crawford General Hospital v. Yerby*.[194] The court there disqualified a lawyer appearing on behalf of a medical malpractice claimant against a hospital on the ground that the lawyer had defended a number of medical malpractice claims against the same hospital. To that point, the decision indeed appears to accept the playbook notion. So read, the decision would also be difficult to square with the only veiled reference to the playbook problem in the comment to *Model Rule* 1.9:[195] "On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. . . ." But, on a closer look at the facts in *Yerby*, it appears that indeed the representation of the hospital was not "wholly distinct" as required under the substantial relationship test. The *Yerby* plaintiff's medical incident occurred during the time when the lawyer was still representing the hospital in medical malpractice cases.[196] Thus, the case does present the specific and identifiable risk that the lawyer might have learned of hospital practices or policies that directly related to that claim during the earlier representations — a situation more comfortably fitting within traditional substantial relationship analysis.

B. IMPERMISSIBLE PLAYBOOK INFORMATION IN THE HANDS OF FORMER INSIDE LEGAL COUNSEL

Another area in which playbook considerations may play a legitimate role are situations in which the lawyer's representation of the former client was so prolonged and extended to so many issues that the lawyer fairly can be viewed as knowing the client inside out. Such a situation is typified by the facts in a decision that is sometimes cited as accepting the playbook concept in a much more vigorous (and potentially insidious) form, *Chugach Electric*.[197] For several

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193. *Id.* § 213 cmt. d(iii). Material immediately following the excerpt quoted concerns the playbook issue and is quoted *supra* text accompanying note 188.

194. 373 S.E.2d 749 (Ga. 1988); *see also* Cardona v. General Motors Corp., Nos. 95-2973, 95-1476, 1996 WL 454986 (D.N.J. Sept. 20, 1996) (disqualifying plaintiff's law firm in suit against automobile manufacturer because of its recent hiring of lawyer who had formerly defended same manufacturer in similar lawsuits).

195. MODEL RULES Rule 1.9 cmt. 2.

196. *Yerby*, 373 S.E.2d at 720-21.

197. Chugach Elec. Ass'n v. United States District Court, 370 F.2d 441 (9th Cir. 1966); *see also, e.g., In re*

years, the lawyer in question served as general counsel of Chugach Electric Association. He left the company and shortly thereafter appeared as counsel in an antitrust case challenging practices of the company that occurred during many of the years while the lawyer served as general counsel. The court ordered the lawyer disqualified[198] in what another court of appeals would later call a "patently clear" case of a former-client conflict.[199] The conflict in *Chugach Electric* was compounded because it may have been an instance of attacking one's own work.[200] The lawyer's scope of responsibility while at the company extended to antitrust matters. Given that the challenged practice also occurred on that lawyer's watch, it is troubling to an equal degree whether the lawyer gave advice about the matter (the advice would presumably be based on confidential information about the very matter[201]) or failed to give advice, thus raising the worrisome possibility that the lawyer is now aiding an adversary in attacking a practice that the lawyer was in a position to prevent but did not. Had the challenged conduct occurred after the general counsel departed, and particularly if it did not strongly implicate general company policies and practices with which the former general counsel would have gained familiarity, disqualification should not be required.[202] Similarly, *Chugach Electric* is not properly considered to be based on a rule inherent in the title of "general counsel" for an organization,[203]

Corrugated Container Antitrust Litig., 659 F.2d 1341, 1346 (5th Cir. 1981) (disqualifying defendant's lawyer where lawyer in antitrust action had been long-time counsel to one of plaintiffs and firm had provided antitrust counseling and knew great deal about plaintiff's purchasing practices that would be relevant to antitrust suit); Consolidated Theatres Corp. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954) (disqualifying lawyer formerly employed for eight years at firm representing present defendant and who worked on defense of cases with similar factual contentions and legal issues); Webb v. E. I. Dupont de Nemours & Co., 811 F. Supp. 158 (D. Del. 1992) (disqualifying attorney who had been employed by defendant for twenty-seven years); Prisco v. Westgage Entertainment, Inc., 799 F. Supp. 266 (D. Conn. 1992) (disqualifying attorney where attorney, formerly general counsel of partnership, later sued the general partner); Global Van Lines, Inc. v. Superior Court, 192 Cal. Rptr. 609 (Cal. Ct. App. 1983) (disqualifying one party's attorney where attorney served as general counsel to the other party for sixteen years); *see generally* Development Note, *Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1335 (1981) (discussing representation of entity by corporate client).

198. *Chugach*, 370 F.2d at 444.

199. Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751, 755 (2d Cir. 1975).

200. For a discussion of this concept, see *supra* text accompanying notes 80-101; *see also, e.g.*, NCK Org. Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976) (disqualifying former inside legal counsel from representing former employee against corporation with respect to contract rights under contract lawyer had drafted for corporation; holding abuse of actual confidences not required).

201. It would, of course, be particularly egregious if the lawyer's advice had been that the practice was permissible under the antitrust laws, but even advice consistent with the lawyer's later claim on behalf of the new client would entail extensive exposure to confidential information.

202. *E.g.*, Emm Ess Metals Co. v. Triumph Alloys Int'l, Inc., No. 78-CIV-1325, 1979-1 Trade Cas. (CCH) ¶ 62,680, at 77,839-40 (S.D.N.Y. 1979).

203. Thus, and clearly, the fact that a lawyer bore the title of general counsel for Parent Corporation did not entail that the lawyer had the same scope of acquaintanceship with Subsidiary Corporation, for whom the lawyer had performed only occasional legal work. U.S. Indus., Inc. v. Goldman, 421 F. Supp. 7 (S.D.N.Y. 1976).

but the decision is properly considered to be an approach often warranted in situations in which a person performing those functions has general and extensive responsibility and exposure.

C. LEGITIMATE ROLES FOR PLAYBOOK CONSIDERATIONS

The foregoing analysis does not necessarily preclude consideration of playbook-like issues in all former-client conflict challenges. Consideration may be legitimate, for example, when the showing of substantial relationship based on confidentiality concerns is equivocal, and in which significant playbook considerations play an important, but limited, tie-breaker role. An example is the decision of the Tenth Circuit in *SLC Limited V v. Bradford Group West.*[204] In that bankruptcy case, the court determined that confidential information acquired by the lawyer in question from a general partner in the prior representation related to its financial ability to satisfy debts in general and to issues in the present debt-restructuring case in particular.[205] Beyond that, however, the court also noted that the confidential information related to the strategy the general partner might employ in dealing with a creditor, such as the lawyer's present client.

SLC Limited V and similar cases also reflect a more general point: even general information can have important and pointed relevance in a later representation, given peculiar characteristics of the later representation. For example, in *SLC Limited V*, acquisition of information about a client's financial situation in the earlier representation was highly relevant and material in the later representation because the same financial information was directly germane to issues raised in the debt-restructuring litigation.[206] So long as appropriate heed is paid to questions about the current relevance and materiality of such financial information,[207] it is sound to treat possession of such financial data as disqualifying confidential information.

VIII. THE SUBSTANTIAL RELATIONSHIP TEST AT WORK: PRACTICAL PROBLEMS IN ITS APPLICATION

While the factual-reconstruction test for applying the substantial relationship standard provides the best fit with the confidentiality concerns that impel the former-client rule in most of its applications, complaints have been raised against that test based on difficulties with its administration. It is true that, given its

204. 999 F.2d 464 (10th Cir. 1993).

205. *Id.* at 467 n.4.

206. *Id.* at 468.

207. Appropriate heed should include the age of the information, and thus its possible lack of material relevance in the later representation. *See infra* text accompanying notes 218-25 (discussing "shelf-life limitations" for former-client conflicts).

fact-specific nature, the factual-reconstruction test cannot be completely worked into computer programs for identifying conflicts problems of a large firm. As a result, large firms must do what small firms do for lack of a computer: once "hits" are detected in the names of present adversaries and former clients, the scope of the new and old representations must be examined "by hand."[208] Undoubtedly, that entails expense and delay in proceeding with the new representation while files are retrieved from storage, lawyers acquainted with the old representation are interviewed,[209] the possible course of the new representation is projected, often uncertainly, into the future, and a determination is reached. Addressing such problems may occupy the time of several specialized conflict-checking lawyers on a part-time basis in larger firms. Clearly, the exercise of conflict-checking imposes measurable cost in lost billing time and other internal expenses such as those for paralegal assistance, resulting in pressure for higher fee charges to clients, as well as delay in commencing representation and, for the new client, possible delay in securing new counsel. Such costs are both undoubted and not to be dismissed as trivial costs of doing legal business. If they were avoidable through adoption of a reasonable alternative to the factual reconstruction test, the alternative would have obvious attraction.

But there seems to be no better mechanism. Any of the competing formulations of a test[210] are either equally fact-specific, and thus would prove equally costly to implement, or so vacuous and otherwise indeterminate that even more costly and uncertain office procedures would be required to comply with them. Moreover, as will next be discussed, modern decisions and case law are developing concepts to mitigate the effects of what may otherwise be over-application of the substantial relationship standard.

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208. While general claims in legal publications might attempt to create a different impression, there is no computer program on the market that can operate completely without substantial hand sorting and assessment of results of computer searches. Barbara E. Corrigan, *New Conflicts Systems Handle Complex Tasks*, NAT'L L.J., Dec. 4, 1989, at 22; Brad W. Robbins & Martin L. Stalnaker, *Large Firms Polled: Trend Toward Conflict-System Automation*, NAT'L L.J., Oct. 12, 1987, at 17. Most available programs are more or less sophisticated dictionaries of names of clients, opposing parties, and corporate or other constituents of either. A name entered into the system will generate a "hit" — identifying an existing name in the database if there is one. The resulting match then must be further assessed by a lawyer to determine whether a conflict indeed exists. Often, firms will complement such a system with a short list of names of companies or individuals whose representation might create difficulties of another kind — perhaps because they have been identified by a present client as a prospective target of the client's takeover efforts. The nature of the matter is not, of course, made available to an inquiring lawyer. Instead, the lawyer simply is referred to the lawyer who asked that the name be listed who then will make an assessment of whether a proposed new representation is appropriate, with possible involvement of senior executive committees of the firm to resolve remaining differences.

209. To preserve the option of screening to limit the effect of any imputed conflict that may be found, firms commonly designate an intermediary lawyer other than any lawyer who may be involved in representing the new client to discuss representation of the former client with lawyers who worked on the matter, when such discussions are thought desirable.

210. *See supra* text accompanying notes 143-56 (discussing the appropriate substantial relationship test).

IX. RELIEF FROM THE RIGORS OF SUBSTANTIAL RELATIONSHIP: CONFIDENTIALITY AND MIGRATORY LAWYERS

From first glimmers of such a notion in decisions in the 1970's[211] through codification of the point in the 1983 *Model Rules of Professional Conduct*,[212] it is now fairly well-settled across the country that lateral moves of lawyers into and out of firms may have confidentiality-based implications. Analytically, the problem directly involves former-client conflicts in most situations, since the question arises either because a client follows a migrating lawyer, leaving a former-client issue behind at the old firm, or the client stays with the old firm, leaving a former-client issue for the migrating lawyer, or the representation ended before the lateral move, leaving a former-client issue for both the old firm and the migrating lawyer. Unlike the situation of same-firm, former-client conflicts, the question here involves actual exposure to confidential information. Thus, presumptions — rebuttable or otherwise — about access to confidential information are not warranted, except as a means of expressing who has the burden of persuasion on the issue. That burden is invariably held to rest with the migratory lawyer and her new firm.[213] The now universally accepted rules are that departure of a personally prohibited lawyer may remove the imputed (firm-wide) prohibition against representation imposed by the former-client rules when no remaining lawyer is either subject to a similar personal prohibition (based on active participation in the representation in question) or subject to prohibition because the lawyer, while not actually involved in the representation, nonetheless acquired confidential information about the former client in another way. Similarly, a lawyer at a firm who knows nothing about a case formerly handled by another firm lawyer will nonetheless be subject to prohibition by imputation so long as both lawyers remain at the same firm.[214] But, under *Model Rule* 1.9(b), when

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211. *E.g.*, Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Labs., Inc., 607 F.2d 186 (7th Cir. 1979) (holding that disqualification was unwarranted where firm sufficiently demonstrated that no lawyer remaining in firm had any information about work performed by now-departed lawyer who spent 2.25 hours reviewing legal authorities and conferring with an outside lawyer on issues substantially related to those in which other firm lawyers now represented adverse party); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982) (finding disqualification not required on in-migration of new lawyer if firm could sustain burden of demonstrating that lawyer did not learn confidential information about case at former firm, now representing opponent in litigation against firm client); Gas-A-Tron v. Union Oil Co., 534 F.2d 1322 (9th Cir. 1976) (discussing similar situation).

212. On out-migrating lawyers, see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(b) (1994 ed.) (reflecting 1987 amendment rewording and reordering sub-rules; discussing restoration of old firm to non-prohibited status following departure of personally prohibited out-migrating lawyer when no "lawyer in the firm has information protected" as confidential). On in-migrating lawyers, see MODEL RULES Rule 1.9(b) (stating that new firm is not prohibited by imputation by arrival of in-migrating lawyer when lawyer had not, at old firm, "acquired information protected" as confidential). See generally RESTATEMENT 1996 DRAFT § 20(1) & cmts. c(i)-(ii), for a discussion of its approach to out-migrating and in-migrating lawyers.

213. *E.g.*, Jones & Henry, Eng'rs, Ltd. v. Town of Orland, 942 F. Supp. 1202, 1207 (N.D. Ind. 1996).

214. *See* MODEL RULES Rule 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so. . . .").

such a lawyer, innocent of knowledge of disqualifying confidential information, leaves the old firm and arrives at the new firm, neither that lawyer nor the lawyer's new firm by imputation[215] is disqualified. In the latter case, either the in-migrating lawyer or any other lawyer in the new firm may proceed adversely to a client of another lawyer in the old firm, even if the matters are the same or substantially related. Conversely, should the in-migrating lawyer fail the test of *Model Rule* 1.9(b) and, contrary to our assumptions to this point, the lawyer possesses material confidential information of the former (old firm) client, then both the in-migrating lawyer and the new firm (by imputation) are prohibited from proceeding adversely to the former client.

While the rules on migratory lawyers at first glance have something of the intricacy of a minuet, on examination they make sense in terms of confidentiality considerations explored above. Note that the prohibitions carried about by the migratory lawyer are entirely based on confidentiality. If, for example, an in-migrating lawyer possessed no confidential information (through either representation or water-cooler conversation at the old firm), there would be no additional prohibition against that lawyer at the new firm from attacking work performed by other old firm lawyers. Both in the lawyer code formulations and in the decisions, the concern is always and only with protecting confidentiality. There are no loyalty kickers. That is sensible, because a migratory lawyer who escapes personal prohibition under the migratory-lawyer rules was, by proven fact, never involved in the earlier representation in such a way that the lawyer could have disloyally planted the seeds of the former client's destruction in the work product.[216] Nor should we be concerned that the in-migrating lawyer will have some interest in avoiding attack on the work product because of professional loyalties or other attachments to lawyers at the former firm (unless those are affirmatively shown to exist, perhaps through an unusual arrangement on departure that has the migratory lawyer's ongoing financial rewards from the old firm tied to success of the former client's matter). Thus, in the usual case, we need not fear diminution of vigor in representation of the new client.[217]

X. FLEX IN SUBSTANTIAL RELATIONSHIP JOINTS: "SHELF LIFE," "PERIPHERAL REPRESENTATION," AND "LIMITED REPRESENTATION" LIMITATIONS ON FORMER-CLIENT CONFLICTS

As important as are recent developments in the lawyer codes and cases affecting migratory lawyers, at least two troubling dimensions remain in the core definition of former-client cases. Another lies relatively unexplored at its periph-

215. The in-migrating lawyer is not disqualified under *Model Rule* 1.9(b) (or any other portion of *Model Rule* 1.9). Thus, under *Model Rule* 1.10(a), there is no basis for imputed disqualification of the new firm.

216. *Cf. supra* text accompanying notes 80-101 (discussing protection against a lawyer's attacking own work).

217. *Cf. supra* text accompanying notes 95-97 (discussing "soft-pedaling").

ery. The first two notions are complementary; at least in cases in which either element is present, a compelling argument can be made that no former-client conflict should be found. The third notion, that of limited representation, can apply to either or both of the old and new representations. It suggests a method by which lawyers can sometimes arrange with a former or later client to control over-inclusiveness of the former-client rule. All three of these dimensions should be worked into standardized exceptions to the substantial relationship standard. And ways of doing so have already been suggested in the implementation of the standard through the factual-reconstruction test.

A. SHELF-LIFE LIMITATIONS FOR FORMER CLIENT CONFLICTS

In virtually every general description of the substantial relationship standard, no specific mention is made of the time interval between the earlier and the later representations.[218] The risk of disclosure of confidential information would thus appear to be equally great with respect to a former representation that ended only a week ago as in the case of one that ended decades earlier. Some decisions intimate the relevance of the fact that a representation occurred long ago, and thus of shelf-life considerations.[219] But other decisions proceed as if the passage of significant time had no bearing on the substantial relationship question.[220] Treating all former representations equally in the latter way clearly threatens over-inclusive application of the substantial relationship standard, because we can be fully confident in some instances that the presumed threat[221] of disclosure of material and confidential information gained in that representation is factually

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218. For example, that is true of both *Model Rule* 1.9(a) and *Restatement* section 213. See *supra* text accompanying note 30 for the full text of section 213.

219. *E.g.*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1322 (7th Cir. 1978) (holding that vaguely related representation occurring ten years earlier did not warrant disqualification); Bennett Silvershein Assocs. v. Furman, 776 F. Supp. 800 (S.D.N.Y. 1991) (holding that matters disclosed by prospective client in brief consultation ten years earlier could not have been relevant to later adverse representation in which plaintiff pleaded fraudulent concealment concerning only matters that had then not yet occurred); State ex rel. DeFrances v. Bedell, 446 S.E.2d 906, 911 (W. Va. 1994) (stating that one-hour consultation with prospective estate-planning client — during which particulars of estate were not discussed, for which no fee was charged, followed by no other work, and occurring "several" years earlier — was too "remote, isolated, [and] non-productive" to create former-client conflict); Messina v. Messina, 573 N.Y.S.2d 709, 710 (N.Y. App. Div. 1991) (finding "the representation in the routine purchase of the marital residence some six years prior to the present action" insufficient ground to warrant disqualification of husband's present lawyer in divorce action involving division of property). Similarly, if a prior representation, even if recent, largely involved facts that occurred long in the past, that backward-looking aspect to the former-client representation may make the information of little relevance in the later representation. *E.g.*, *In re* Allied Artists Pictures Corp., 5 Bankr. Ct. Dec. 636, 640 (Bankr. S.D.N.Y. 1979) (holding that representation five years earlier relating to events occurring from 20 to 25 years previous did not, in light of different facts relevant in subsequent representation, warrant disqualification).

220. *E.g.*, Motor Mart, Inc. v. Saab Motors, Inc., 359 F. Supp. 156, 158 (S.D.N.Y. 1973) (holding that representation occurring eight years before accepting new client was no bar to qualification).

221. On the presumption of acquired confidential information, see *supra* text accompanying note 167.

unfounded. And often such lack of materiality could be demonstrated without forcing undue intrusion into the former client's confidential information.[222]

For two reasons, courts should recognize that there comes a time when what a lawyer learned is no longer factually important in the latter representation. First, even if facts are remembered with acute and abundant detail (perhaps because they are contained in surviving documents), the passage of time often will decrease or destroy the relevance of those facts in the latter representation. Intervening happenings and other facts will slowly erode whatever salience might originally have attached even to the former client's inner-most secrets. As a prominent example, while some kinds of detailed knowledge about a former client's financial affairs might be vitally important in a later adverse representation claiming punitive damages against the former client, if that knowledge relates to information gathered for a public offering a decade earlier, it assuredly cannot be probative of the client's current financial condition, the only relevant wealth issue for punitive damages purposes. Such old information may continue to be secret and thus subject to a broad duty on the part of the lawyer not to reveal or use it adversely.[223] But if the old information is not realistically relevant to the later representation, its presumed possession should not lead to a finding of substantial relationship sufficient to bar the later representation. For most mortals, among whom many lawyers are to be found, a second consideration also will apply. When the lawyer is alleged to possess confidential information in non-documentary or similar form — such information gained through conversation or observation that was not notably remarkable at the time and not subsequently recorded — the plausibility that the lawyer will be able to recall the information in useful detail will have faded over time, for all but those with a certain kind of genius for memory. That will particularly be true over the time of a practice crowded in the intervening years with information about many other representations.

Recognition of the soundness of a shelf-life limitation would be particularly apt as one factor that the court could prudentially consider in determining whether to exercise discretion. For example, the court, in determining whether to accept screening as a defense to a disqualification motion,[224] might consider whether an objection to a subsequent representation has been lost through waiver

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222. *Cf. supra* notes 165-72 (discussing presumptions the purpose of which is to prevent intrusion into confidential information).

223. *See generally* MODEL RULES Rule 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . ."); RESTATEMENT 1996 DRAFT § 112 (prohibiting the use or disclosure of confidential client information if the client so instructs the lawyer or if "there is a reasonable prospect that doing so will adversely affect a material interest of the client").

224. The *Restatement* implicitly has embraced the shelf-life concept for such a purpose. RESTATEMENT 1996 DRAFT § 204 cmt. d & illuss. 4, 5.

or estoppel[225] or, under the standard employed in the Second Circuit and other courts, whether a former-client conflict threatens to taint the present proceedings.[226] Those usages of the lapse of time should be generalized into an exception or defense to a former-client objection such as is outlined here, even in situations in which discretion is not otherwise relevant.

B. PERIPHERAL EARLIER REPRESENTATIONS

A different consideration is suggested by thinking about lawyer work that often is performed by young associates in typical large-firm practices.[227] The concept of "representation" is highly attenuated; the young associate never sees the client, much less gains deep secrets through extensive probing during a face-to-face interview with important client personnel or other witnesses. Partners and other senior lawyers often will act prudently in keeping truly important information secret, exposing junior lawyers only to barebones facts necessary for them to conduct their library research. Often the "facts" provided in order to enable a young associate to work are as canned as a law professor's classroom hypothetical. For example, a senior associate or partner says to the associate, "what's the statute of limitations in New Mexico for a products liability action?" Often such perfunctory "facts" are deemed sufficient to send the associate off to research and write a memorandum on the arid proposition of law. While the matter may be quite important, research about it may have been informed by few truly secret facts. I do not, of course, assert that all work, even all library work, of young associates at large firms can be so characterized.[228] But much of it can. And work that, in the particular circumstances of the case, fits that description should be suspect when brought forward to justify a former client's conflict objection.

Drawing upon admittedly sparse authority, the *Restatement* has taken the position that peripheral involvement in a client's matters should not count as a representation for former-client conflict purposes.[229] So held the courts in the

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225. On those doctrines, see generally WOLFRAM, *supra* note 4, at 338-39.

226. *E.g.*, Board of Education v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) (employing test of "taint the trial" when determining when to disqualify lawyer); Premium Products Sales Corp. v. Chipwich, Inc., 539 F. Supp. 427, 435 (S.D.N.Y. 1982) ("[U]nless the integrity of the action currently before the court is threatened . . . , the courts must refrain from imposing the burdens of an attorney disqualification on a client and leave the matter to state or federal disciplinary proceedings.").

227. The description here matches much work that I performed as a junior associate in what then passed for a large law firm (of just over one hundred lawyers) thirty-five years ago. While one must resist the temptation to universalize personal experiences, conversation with many present and former associates in large firms (and with several partners) indicates that the picture remains accurate as a portrayal of a high percentage of the hours worked by modern-day associates in large firms.

228. Much legal research, even relatively casual research, will be founded on exposure to confidential information. *See infra* text accompanying note 234 (stating that involvement over even a short period of time may involve exposure to highly confidential information).

229. Lawyer with only minor role in prior representation. The specific tasks in which a lawyer was engaged might make the access to confidential client information insignificant. The lawyer bears the burden of

Silver Chrysler decision.[230] The young associate there had, true to the above picture, performed several hours of library research[231] and had written legal briefs but had not been extensively exposed to confidential information of the former client. Both trial and appellate courts held that such limited exposure did not require disqualification of the young lawyer or another lawyer with whom he was now associated.[232] Both lawyers were representing a current client adverse to the interests of the former client on a substantially related matter. Importantly, the *Silver Chrysler* decision dealt with the personal participation of the former associate, now a partner in a two-person firm, and not only a question of imputed disqualification.[233] To repeat, it is not being asserted that limited tasks are necessarily peripheral and thus immaterial to a later former-client challenge. Involvement in a client's matter even by a young associate for a short period of time may involve exposure to highly confidential information, and the lawyer should accordingly be barred from a later substantially related adverse representation.[234] There should, of course, be no presumption that young associates are invariably engaged only in peripheral activities of a kind that do not implicate confidentiality.[235] By the same token, *Silver Chrysler* should not be read as a decision whose liberality is limited to young associates at a firm. As the court of appeals intimated, its point about peripheral representation could be generalized even to a senior lawyer if it were shown that the lawyer performed solely legal work of a kind that involved no exposure to confidential information.[236]

The point can be extended, with care, beyond presentations involving library

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persuasion as to that issue and as to the absence of opportunity to acquire confidential information. When such a burden has been met, the lawyer is not precluded from proceeding adversely to the former client.

RESTATEMENT 1996 DRAFT § 213 cmt. h.

230. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581 (E.D.N.Y. 1973) [hereinafter *Silver Chrysler I*], *aff'd*, 518 F.2d 751 (2d Cir. 1975) [hereinafter *Silver Chrysler II*].

231. It proved important to the district court that Chrysler, the objecting former client, and Chrysler's law firm (the employer of the former associate) did not produce time records that would have contemporaneously indicated the nature of the work the young associate in fact performed. The district court indicated that it was drawing a negative inference from the failure to produce records in the law firm's exclusive control. *Silver Chrysler I*, 370 F. Supp. at 585. The same point was emphasized in the majority and concurring opinions on appeal. *Silver Chrysler II*, 518 F.2d at 757, 759.

232. *Silver Chrysler I*, 370 F. Supp. at 591; *Silver Chrysler II*, 518 F.2d at 757.

233. *See Silver Chrysler I*, 370 F. Supp. at 586 (describing the former associate as "the lawyer now sought to be disqualified").

234. *E.g.*, Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Lab., Inc., 607 F.2d 186 (7th Cir. 1979) (en banc) (disqualifying lawyer who performed only 2.25 hours of legal research on matter, where research was both highly relevant and confidential information might have been necessary to conduct it); Decora, Inc. v. DW Wallcovering, Inc., 899 F. Supp. 132 (S.D.N.Y. 1995) (disqualifying lawyer based on 1.25 hours of research on patent matter).

235. *E.g.*, Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1385 (3d Cir. 1972) (finding that there is a strong suggestion of extensive exposure to confidential information where involvement by young associate in large firm was extensive in time and involved participation in work such as expert witness preparation and strategy sessions).

236. *Silver Chrysler II*, 518 F.2d at 756-57.

research. Some legal work — even by senior lawyers and over an extended period of time — may involve no, or very little, exposure to confidential information. A candidate for treatment similar to that in *Silver Chrysler* may be some representations of clients by appellate specialists. So long as the representation consisted entirely of exposure to facts in a trial record and library research relating to possible issues raised in it, there is little basis for a confidentiality-based disqualification in a later adverse and substantially related representation of another client.[237] On the other hand, disqualification would be called for if there were any significant indication that an appellate specialist participated with the client or with the client's trial counsel in strategy sessions that looked to further proceedings on remand or other elements of strategy that would have probably entailed the revelation of confidential information beyond what the trial transcript or other parts of the record on appeal might have revealed.[238]

C. LIMITING THE SCOPE OF OLD OR NEW REPRESENTATIONS TO AVOID FORMER-CLIENT CONFLICTS

Finally, in some representations there may be methods of restricting the scope of either old or new representation that legitimately can avoid the need for former-client disqualification.[239] Different problems in application attend each type of restriction.

With respect to limitations in the new representation, a central problem is that of monitoring the representation to assure that the restriction is real and not feigned. The blunt question is whether a court should, in effect, force the former client to trust a former lawyer, now aligned with an adversary against the former client, not to abuse the lawyer's admitted store of relevant confidential information that may not be directly germane to the lawyer's restricted work, but that

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237. *E.g.*, Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602 (8th Cir. 1977) (finding that lawyer was not per se barred from later adverse representation where earlier representation of present opponent concerned only legal, not factual, issues); People v. Jones, 435 N.E.2d 823 (Ill. App. Ct. 1982) (finding no prejudice to defendant where state defender's office had previously represented co-defendant); *cf.* Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 479 F. Supp. 465, 468 (E.D. La. 1979) (holding that where lawyer did not even have client-lawyer relationship with objecting party, fact that lawyer's prior services involved only appellate work considered as additional factor indicating no need to disqualify).

238. *E.g.*, Amgen, Inc. v. Elanex Pharmaceuticals, Inc., 160 F.R.D. 134 (W.D. Wash. 1994) (stating that while lawyers in firm presently opposing former client in substantially related matter only handled preparation of certiorari petition to Supreme Court, affidavits of client's trial counsel claimed extensive conversations concerning trial and appellate strategies).

239. The possibility of such limitations is mentioned, with guarded approval, in the *Restatement 1996 Draft.* RESTATEMENT 1996 DRAFT § 201 cmt. c(iii) ("Some conflicts can be eliminated by an agreement limiting the scope of the lawyer's representation if the limitation can be given effect without rendering the remaining representation objectively inadequate [referring to sections dealing generally with limiting representations and non-consentable conflicts]."). The problem of conflict with a present client can be seen, for example, in the court's rejection of limiting the subsequent representation in Manoir-Electroalloys Corp. v. Amalloy Corp., 711 F. Supp. 189, 196 (D.N.J. 1989) (holding that lawyer could not cure conflict by amending complaint to drop claim against former client).

may be relevant and important with respect to the new client's overall legal situation?[240] Some will find the only acceptable answer to be negative, but that may be too extreme for all such instances. For example, if tasks in the new representation are assigned to different law firms and so long as the insulation between the task the lawyer is performing and those being performed by other lawyers[241] is sufficiently strong and leak-proof,[242] carefully constructed and executed restrictions would seem to hold legitimate promise of limiting some former-client conflicts. That seems particularly true in situations that arise after a subsequent representation has already been substantially undertaken, and where disqualification would have significant detrimental effect on the later client. The easiest case in which to accept such limited representation is in litigation representation, when the opposing party can more readily monitor compliance with the limitation. Some courts have permitted self-imposed limitations of the latter kind in rejecting disqualification.[243]

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240. In contrast, it is not controversial that a new representation is readily subject to *expansion* by the new client and lawyer for substantial relationship purposes. Whatever its merit, for example, a complaint filed by the new client that seeks to litigate a vast array of past history and practices will be the properly expansive field on which the court will assess the substantial relationship standard. *E.g.*, Koch v. Koch Indus., 798 F. Supp. 1525, 1537-38 (D. Kan. 1992) (addressing new client's expansive efforts to present "theories seriatim" in attempt to conduct open-ended discovery of all business practices of former client over 20-year period).

241. Obviously, if there are other, conflicted tasks to be performed, it would be best if they were performed by lawyers in another firm. Buysse v. Baumann-Furrie & Co., 448 N.W.2d 865, 869 (Minn. 1989) (holding that best practice would have been to submit separate briefs, rather than, as was done, single brief; but still accepting preparation of section of brief presenting conflict for lawyer delegated to other law firm); *see also, e.g.*, ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-367 (1992) (stating that lawyer could cure conflict with prospective adverse witness by retaining another law firm to conduct cross-examination). A second-best choice would be to install an effective screen between the affected lawyer and other lawyers in the same firm who will perform those tasks.

242. On the kind of careful scrutiny of such arrangements that is appropriate, see, for example, Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 232 (2d Cir. 1977) (rejecting solution of having another law firm file suit against existing client of disqualified firm). For decisions rejecting claimed limitations on subsequent representation because of their ineffectiveness, see, for example, United States v. Stout, 723 F. Supp. 297, 311 (E.D. Pa. 1989) (lawyer could not avoid conflict inherent in cross-examining former client merely by avoiding certain areas of inquiry in doing so); Summerlin v. Johnson, 335 S.E.2d 879, 883-84 (Ga. Ct. App. 1985) (finding separate representation on severed count of punitive damages ineffective where confidentiality concerns extended beyond that count); Hoggard v. Snodgrass, 770 S.W.2d 577, 583 (Tex. Ct. App. 1989) (finding lawyer who formerly represented mother of son injured in swimming pool accident in negotiating with pool company could not avoid conflict in subsequent suit by child against mother arising out of same incident by referring question of mother's negligence to co-counsel).

243. *E.g.*, Hilleby v. FMC Corp., 25 U.S.P.Q. 2d 1413 (N.D. Cal. 1992) (allowing law firm to which personally disqualified lawyer had moved to represent client adverse to lawyer's former client so long as representation did not involve attack of lawyer's work for former client); CITC Indus., Inc. v. Manow Int'l Corp., No. 3935, 1978 WL 1317 (S.D.N.Y. 1978) (ignoring earlier representation so long as new client did not in present litigation expand present, narrow antitrust claim to include broader claim concerning former client's general trade practices, which were partially involved in former representation); Oliver v. Kalamazoo Bd. of Educ., 346 F. Supp. 766, 789 (W.D. Mich. 1972) (opining that in view of past and present client-lawyer relationship with witnesses, other lawyers should conduct depositions while firm continues with remainder of representation). A common illustration of limited representation is appointment of a lawyer as special counsel to a trustee in bankruptcy to pursue a limited task, in circumstances such that a broader representation by the

With old-representation restrictions, the problem of monitoring observance of the restriction is comparatively much more manageable. The limitation on the earlier representation should be agreed to by both lawyer and the original client, either as part of the process of defining the scope of the lawyer's representation[244] or, when appropriate consultation occurs, as part of the client's consent to a future, substantially related representation of a new client.[245] In some circumstances, it may be enough that the lawyer's proof of limited role is unrefuted with proof to the contrary available to the former client but not produced.[246] If those conditions are satisfied, the former client will have motivation during the representation to monitor and shape the representation to assure that the restriction is honored.

XI. CONCLUSION

The substantial relationship standard reigns supreme in resolving former-client conflict problems. Other standards are, of course, theoretically imaginable. At one extreme, one could state a rule that a lawyer could never proceed in representing a client when the representation would be adverse to a former client. Such a rule would soon strangle modern law practice and would, in each application of it, deprive a later client of chosen counsel. At the other extreme, one can imagine a rule that would prohibit only actual adverse revelation or use of a former client's confidential information, leaving it to the good faith of lawyers to comply. Again, the rule would be unworkably subjective and largely non-reviewable; further it would seriously chill the willingness of at least sophisticated clients to entrust their lawyers with complete information about their problems. The rule also probably would prove invidious, perversely restricting only those lawyers of rectitude who would need no such professional rule because they would observe its dictate in any event, and leaving without

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counsel would constitute a conflict of interest. *E.g.*, Stoumbos v. Kilimnik, 988 F.2d 949, 964 (9th Cir. 1993). When the remedial arrangement involves use of a different law firm, the law firm with the disqualification burden must avoid any extensive or entangling relationship with the other firm so as to avoid an attack on the ground that the separation between them is insufficient, or even a sham. *E.g.*, Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977).

244. *E.g.*, English Feedlot, Inc. v. Norden Labs., Inc., 833 F. Supp. 1498 (D. Colo. 1993) (stating that because lawyer's work was limited to conducting lien searches to implement settlement that client had reached without lawyer's assistance, lawyer was not in position to learn information relevant to settlement itself). With respect to the general issue of limiting the scope of a representation, for a variety of purposes including that discussed here, see RESTATEMENT *1996* DRAFT § *30(1)* cmt. c.

245. On such advance consents, see RESTATEMENT 1996 DRAFT § 202 cmt. d.

246. For example, where it is sufficiently shown that a lawyer's earlier representation of a client was limited to a narrow procedural or jurisdictional issue, courts have recognized that a later representation that is substantially related only to the merits is not prohibited. *E.g.*, Jones & Henry Eng'rs Ltd. v. Town of Orland, 942 F. Supp. 1202, 1209-10 (N.D. Ind. 1996) (finding scope of earlier representation clearly established by *in camera* inspection of lawyer's contemporaneous notes and other portions of client file).

effective check lawyers of low morals and great guile who would be willing on occasion to bend the rule in undetectable ways.

The substantial relationship standard and its implementation through the factual reconstruction test represent one of the many triumphs of pragmatism in the law governing lawyers. While the resulting requirement sets a high standard, it works well in solo practice as well as in multi-office megafirms. Particularly when courts observe the pragmatic concern of the standard and its test with open-eyed vigilance to protect against subsequent misuse of confidential information of former clients, along with protecting the lawyer's core work product through the attack-own-work limitation, the standard achieves a fit and nice balance between the need to protect legitimate client expectations about a lawyer's loyalty and undertaking to keep matters confidential and, at the same time, the need to make legal services as widely available as possible.